THE CHALLENGES FACING THE LEGAL FRAMEWORK GOVERNING FOREIGN INVESTMENTS IN UGANDA

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DECLARATION

I hereby declare that this is my own work to the best of my knowledge and belief. It contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgment has been made in the text.

Candidate Anne Mwihaki Ndundu

Signature .....

Date ..20TH JUNE, 2011..

APPROVAL

This is to certify that this research work on title **THE CHALLENGES FACING THE LEGAL FRAMEWORK GOVERNING FOREIGN INVESTMENTS IN UGANDA** has been done by ANNE MWIHAKI NDUNDU of Reg: LLB/11156/62/DF for the awarding of a degree in Bachelor of Laws in Kampala International University under my supervision

Supervisor Mr. Sserunjogi Nasser

Signature .....

Date 29/06/2011

DEDICATION

This work is dedicated to my dear mother **Eunice Waithira** for her support, patience and understanding during this period of study. For being the strongest woman on earth and teaching me about hard work and courage. For letting me learn from her that courage is not the absence of fear but the ability to overcome that fear. To the world you are one person mum, but to me you are the world.

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LIST OF ACRONYMS

APNAC	African Parliamentarians Network Against Corruption
EAC	East African Community
EIA	Environmental Impact Assessment
EIR	Environmental Impact Review
EIS	Environmental Impact Study
IPR	Intellectual Property Rights
MIGA	Multilateral Investment Guarantee Agency
NRM	National Resistance Movement
NP	Nakivumbo Pronouncement
NYTIL	Nyanza Textiles Industries Limited
OECD	Organization for Economic Co-operation and Development
PSF	Private Sector Foundation
TICAF	Tororo Industrial Chemicals and Fertilizers
TIN	Tax Identification Number
UCI	Uganda Cement Industries
UDC	Uganda Development Corporation
URA	Uganda Revenue Authority
USAID	United States Agency for International Development

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ABSTRACT

With the passing of time and the advent of technology, the world has become a global village. There have been increased needs by states and its citizens to do business in a foreign country. Furthermore, the government of Uganda, like many other third world countries rely on investments from other nationalities to help in achieving their millennium development goals especially that of poverty eradication. This whole endeavor is governed by the international investment law principles that that have come to be accepted by states as customary law on investments. As a result states have an obligation to draft a legal framework in line with the international instruments to facilitate or even make a fair playing ground for business.

This thesis will therefore look at whether the Uganda legal framework relating to foreign investment meets the requirements of international investment law, its achievements and constrains by evaluating the history of Uganda by comparing the past and present governments.

CHAPTER ONE

INTRODUCTION

1.1 Introduction to the study

International investment law is that branch of law that seeks to protect investors in a foreign state against policies that are harmful to them. With the progressive development of technology in the world today, the number of persons going abroad for purposes of business has steadily increased. Consequently an increasing amount of capital has been seeking investment in foreign countries, and the growth of international commerce and intercourse has resulted in the creation of vast commercial and other interests abroad.[1] Uganda has not been an exception to these developments. As a result of this, nations, by common consent have established certain standards by which they must be guided in their treatment of foreign investments[2]. It is these standards that form the basis of international investment law.

Though the rights of foreign investors are not directly derived from international law, but from the domestic law of the state of residence, international investment law imposes upon states certain obligations which they are compelled to fulfill. As such national legislation granting rights and obligations to foreign investors has to comply with the standards established by international investment law whose rules are mainly derived from state practice in addition to customary international law and treaties of commerce[3]. The World Bank has also commended to states in the world guidelines on the treatment of foreign investors. The general standards of

[1] Kronfol Zouhair, Protection of Foreign Investment, A Study in International Law, Leiden: A W Sijthoff, 1972, p.13
[2] Ibid
[3] Ibid. p.4

treatment endorsed by the World Bank include national treatment, non discrimination among foreign investors, fair and equitable treatment, protection and security among others.[4]

Uganda like many other nations in the world has enacted an Investment Code Act and other laws in an effort to make its legal environment more hospitable to foreign investments. This study is geared at finding out whether these laws comply with the standards of international investment law. The government has also gone an extra mile to create the Uganda Investment Authority (UIA), a body that regulates investments in Uganda. This study will also therefore show whether the body has lived to the expectations of the international community.

1.2 Statement of the problem

Since the emergence of the National Resistance Movement (NRM) government in Uganda in 1986, the country has been relatively stable. Consequently many foreign investors have persistently come into the country. As a result of this the government has put in place a regulatory frame work through legislation and other policies to attract foreign investors in a bid boost economic growth. This study is thus about the principles of international investment law and the extent to which they are being observed In Uganda. Do the measures taken by Uganda in a bid to regulate foreign investments conform to the standards established by international investment law? If not what should be done in order to improve compliance with these standards?

1.3 Objectives of the study

(a)To study the principles of international investment law.

[4] R. Antonio Parra, The scope of new investment laws and international instruments, International center for settlement of investment disputes, Washington DC.

(b)To identify the measures that Uganda has taken to regulate foreign investments by analyzing various legislations

(c)To analyze whether the measures taken by Uganda to regulate foreign investments comply with the principles of international investment law.

(d)To find solutions to the challenges Uganda is facing in complying with international standards.

1.4 Hypothesis

Since the numbers of foreign investments in Uganda has been steadily growing since 1986, there is a high likelihood that once the legal frame work governing foreign investments in the country is made to comply with international standards then many more investors will be attracted hence greatly boosting the economy.

1.5 Scope of the study

This paper will focus on the observance of international investment law in Uganda. The study will be done by evaluating the legal framework in Uganda geared towards promoting foreign investment increase. It will briefly cover the situation in Uganda before 1986, but it will mainly focus on the period after.

1.6 Significance of the study

Much as the investment climate in Uganda has steadily been improving since the late 1980s a lot more has to be done in order to enable the country compete favorably with the rest of the international community in regard to attracting foreign investors. For this reason it is very important to carry out studies in International Investment law such that any loopholes in the

Ugandan Legal framework and policy that are slowing the pace at which foreign investors are coming to Uganda can be identified and improved upon.

1.7 Justification of the study

This study will be of great benefit to those interested in improving the investment climate in Uganda. It will also increase awareness of the legal community and the general public on international investment law since this branch of law has not been studied much in the country.

1.8. Methodology

Due to limited time, most of the research will be desktop and Library research. The study will involve an analysis of the various primary and secondary sources of International investment law. The domestic law governing foreign investments will also be analyzed. Great use will also be made of the Uganda investment authority website because it contains a wealth of information about investment in Uganda. .

1.9. Literature review

With its rapid evolution, international law on foreign investment has already generated a large volume of writings, including books and collections of essays, by prominent academics and practitioners. It should be noted from the outset however that because the area of international investment law has not been well developed and studied in Uganda there are hardly any Ugandan writers in the area. Most of the authors are from the developed world.

Surya P. Subedi, International Investment Law, Reconciling Policy and Principle.[5] To this body of knowledge, the book represents a distinct contribution by offering a succinct but incisive appraisal of the emerging principles of international investment law, as elaborated through

[5] Surya P. Subedi, International Investment Law, Reconciling Policy and Principle, Oxford and Portland, Oregon, Hart Publishing , 2008 .

extensive investment treaty practice and arbitration. In this analysis, the author offers an impartial and balanced account of the concerns prompted by the recent developments in the international law on foreign investment, whereby the interests of foreign investors are sometimes protected against the vicissitudes of divergent economic and political regimes in host countries at the expense of other important societal values. The volume begins with a historical overview of the way in which international investment law has evolved in response to changing economic and political conditions. Subedi focuses in Chapter one on the emergence of the international minimum standard and the institution of diplomatic protection for aliens abroad.

The historical overview of the formation of international investment law is continued in Chapter two. It also contains a critical discussion on the definition of some key terms: investor and investment; fair and equitable treatment and its relationship to the customary international minimum standard; full protection and security; most-favored nation treatment; national treatment; and the standard of protection against expropriation. The critical focus of the book finds its reflection in the author's analysis of an alarming trend towards the extensive protection granted to foreign investors by a broad interpretation of investment treatment standards. He is of the view that extensive interpretation of investment treatment standards in favor of foreign investors tends to result in reverse discrimination, where many kinds of protection available to foreign investors may be withheld from domestic investors.

Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law.[6] The present book, written by two of the most eminent scholars in international investment law, while focusing in its core on the substantive principles of investment protection, the rights and obligations contained in investment treaties, and the reading that arbitral tribunals have given to them, it starts out by embedding the discussion into a thorough, yet concise, review of the larger economic, historic, and political framework which is necessary to gain a deeper understanding of international investment law as a field. It continues by analyzing the specificities of interpretation of investment treaties, mentioning in particular the strong influence of precedent and the temporal aspects of application of investment treaties. Subsequently, the threshold elements which open the scope of application of investment treaties are discussed, namely the notions of investor and investment as they are applied by investment tribunals.

The book delves into its main subject: the scope and interpretation of the substantive principles of international investment law. It first touches briefly on the rules on admission and establishment and then proceeds to discuss the requirement that investments have to comply with the host state's law in order to enjoy protection. Chapter 6 then focuses in depth on the provisions concerning expropriation. The authors mention not only the right to expropriate and its restrictions; they equally discuss at length the more difficult issue of determining the domain of indirect expropriations. Chapter 7, in turn, addresses the other substantive standards of treatment which form part of the usual canon of investment treaty protection and regularly appear in investor–state arbitration. It includes, *inter alia*, in-depth discussions of the standards to provide fair and equitable treatment and full protection and security, analyses the scope and function of

[6] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, New York: Oxford University Press, 2008.

umbrella clauses and clauses prohibiting arbitrary and discriminatory treatment, and dissects the provisions on non-discrimination contained in investment treaties. This chapter is complete, concise, and comprehensive and conveys a clear and practical picture of how investment treaties and the rights they grant to investors are implemented in practice.

However, while the authors manage to describe the rather voluminous investment jurisprudence in an accurate and concise fashion, the inevitable pitfall of such an approach is the constant need for both readers and authors to keep up to date with newly appearing arbitral awards.

Stephen M. Schwebel, The overwhelming merits of bilateral investment treaties[7]. This paper begins by looking at the history and emergence of international investment law. The author at this point states that as a result of the growing number of foreign investments, disputes sometimes arose over the treatment of foreign investments in host countries. Such disputes involved issues of discrimination, expropriation, among other factors. Bilateral investment treaties thus emerged as a way of providing solutions to these problems. The paper then moves on to advance the advantages of bilateral investment treaties. The author of this paper however does not at any one time mention the demerits of the BITS and yet such do exist.

M. Sornarajah, International Law on Foreign Investment.[8] Sornarajah's classic text surveys how international law has developed to protect foreign investments by multinational actors and to control any misconduct on their part. It analyses treaty-based methods, examining the effectiveness of bilateral and regional investment treaties. It also considers the reverse flow of investments from emerging industrializing powers such as China and Brazil and explores the

[7] Stephen M. Schwebel, The overwhelming merits of bilateral investment treaties, Suffolk transnational law review symposium, 2009.
[8] M. Sornarajah, International Law on Foreign Investment, Cambridge University Press, 2nd edn. 2004

retreat from market oriented economics to regulatory controls. By offering thought-provoking analysis of not only the law, but related developments in economics and political sciences, Sornarajah gives immediacy and relevance to the discipline.

Organization for economic co-operation and development, International Investment law Understanding concepts and Tracking innovations.[9] This publication provides an unparalleled source of information on four key issues: the definition of investor and investment; the interpretation of umbrella clauses in investment agreements; coverage of environmental, labour and anti-corruption issues; and the interaction between investment and services in selected regional trade agreements. The "Definition of investor and investment" reviews the determinants of the scope of application of international investment treaties in light of recent state practice and jurisprudence. The section on the "Interpretation of the umbrella clauses in investment agreements" sheds light on a controversial provision whose meaning has been disputed recently before international arbitral tribunals.

1.10 Chapter synopsis

This paper will comprise of four chapters.

CHAPTER ONE: This chapter deals with the *introduction.* It consists of the introduction to the study, background to the study, problem statement, synopsis, hypothesis, justification, research methodology and literature review of the study.

[9] Organization For Economic Co-operation and Development (OECD Publishing), 2008, available at www.oecd.org/dataoecd/3/5/40471550.pdf. accessed on 4th March, 2011

CHAPTER TWO: This chapter deals with how the principles on international investment law have been incorporated in the Uganda legal framework on foreign investments and the challenges faced therein.

This chapter looks at:

1. What is international investment law?

2. The Principles of international investment law.

3. The challenges the country is facing in a bid to promote foreign investments

CHAPTER THREE: This chapter deals with *Uganda's experience in the Observance of the principles of international investment law.*

This chapter focuses on the extent to which Uganda has been observing the principles over the years. The chapter further analyzes the measures that Uganda has taken to enforce the principles and how effective they have been in restoring foreign investor confidence.

CHAPTER FOUR: This chapter deals with the overall *recommendations and Conclusion.*

CHAPTER TWO

PRINCIPLES OF INTERNATIONAL INVESTMENT LAW VIS-À-VIS THE LEGAL FRAMEWORK IN UGANDA

2.1 INTRODUCTION

Foreign investors in any given country are mainly attracted by the legislation put in place for this advancement. Each country is bound to give nationals of another country in its territory the benefit of the same laws, the same administration, the same protection and the same redress for injury available for its own citizens and not more or less: provided the protection which the country gives to its own citizens conforms to the established standards of civilization.[10] It is from this basis that the development of the principles of international investment law is embedded. International investment law though originating as a form of customary international law, today it derives its authority and legitimacy from bilateral investment treaties (BITs) and it applies to variety of countries that are signatories Uganda inclusive. Emmerich de Vattel in *Law of Nations* (1758) [11] argued that a state has the right to control and set conditions on the entry of foreigners. In Vattel's view, foreigners' membership in their home state extended to their property, which remained part of the wealth of their home nation. As a result, a state's mistreatment of foreigners or their property was an injury to the foreigners' home state.[12] This view eventually coalesced into the international legal principle.

Therefore, individual countries must endeavor to align their national laws with it if they wish to trade on an equal level with other countries bearing in mind that the world is a global village. It is in this regard that various laws have been implemented in Uganda in a bid to achieve its goal to increase the levels of foreign investment flow in the country. This chapter therefore looks at the four principles that have attained the status of international customary law and makes an

[10] E.Root, Basis of protection to citizens Residing Abroad at pg 518-19
[11] E. Vattel, Law of Nations, J. Chitty, trans. (Philadelphia: T.& J.W. Johnson & Co., 1858), Book 11, Chapter VIII
[12] ibid

overview of the legal and policy framework in Uganda. It further identifies the challenges faced in the legal framework in attracting foreign investors to Uganda.

2.2 The Principles of international investment law

There are many principles of international investment law however this section will focus on those principles which have come to form international customary law. They include:

2.2.1. The international minimum standard of treatment (MST)

According to this principle International law demands without regard to the status of nationals that the treatment of aliens should not fall below the standard of international civilization as the objective goal.[13] As defined by OECD: The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. It continues by comparing this norm of customary international law with the national treatment, another standard of major importance, by saying:

> *While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies.*[14]

Therefore, this principle is to the effect that a state must protect a foreign national and his property. It thus makes states responsible for injury when the protection falls below the

[13] Zouhair A. Kronfol, Protection of foreign investment, a study in international law, Leyden: A. W. Sijthoff, 1972, P.16.
[14] Ibid

minimum standard of reasonableness. States are also responsible if they fail to provide to foreign nationals remedies for injury suffered whether they are inflicted by the state or a private person.

2.2.2 The principle of Fair and equitable treatment

This principle requires that host states treat qualifying foreign investors fairly and equitably and is part of the substantive protection included in nearly every contemporary investment treaty.

In 1967 the OECD Council adopted the Draft Convention on the Protection of Foreign Property. Although it was never opened for signature, it required each Party to at all times ensure fair and equitable treatment to the property of the nationals of the other Parties.[15] International investment law requires states to accord foreigners equality with nationals (national treatment) in almost all respects, including the right of establishment, freedom in relation to fiscal matters, freedom to travel, carry on a business and engage in all occupations, and the ability to exercise civil, judicial and succession rights.[16]

One of the more comprehensive efforts to delineate the standard was made by the ICSID tribunal in ***Waste Management v Mexico***[17] when it stated:

> *"the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency in an administrative process."*.

However, it should be stressed that a judgment of what is fair and equitable cannot be reached in the abstract. It will always depend on the specific circumstances of the particular case.

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[15] Article 1(a).

[16] Work of the International Conference on the Treatment of Foreigners: Report by M. Devèze, President of the Conference, Geneva, 14 Jan. 1930, L.N. Doc. C.10.1930.II [Report by M. Devèze].

[17] *Waste Management No. 2 v. Mexico*, para 98.

The same tribunal in ***Tecmed v Mexico,*** [18] provided the most far-reaching statement of the notion of legitimate expectations a key aspect of the notion of fair and equitable treatment to date:

> *"...this provision of the Agreement, established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."*

2.2.3 The principle of Protection from expropriation

It is a well recognized rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation.[19] Customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.[20]

Expropriation or "wealth deprivation" could take different forms: it could be *direct* where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright physical seizure.[21] Expropriation or deprivation of property could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected.

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[18] Tecmed v Mexico,(ICSID 2003, Para 154)

[19] Catherine Yannaca-Small, Indirect expropriation and the right to regulate in international investment law, OECD Publishing,2005,p.44

[20] Ibid

[21] B. Weston "'Constructive Takings' under International Law: A Modest Foray into the Problem of "Creeping Expropriation", *Virginia Journal of International Law*, 1975, Vol. 16, pp. 103-175 at 112.

In order to determine whether expropriation is arbitrary tribunals follow the following criteria: i) the degree of interference with the property right, ii) the character of governmental measures, *i.e.* the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations. As regards the character of governmental acts, i.e. the purpose and the context of a governmental measure, a very significant factor in characterizing a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognized "social purpose" or the "general welfare "by regulation.

2.2.4. The principle of Full protection and security

In many cases, BIT provisions requiring fair and equitable treatment also make reference to the obligation to provide "full protection and security." This obligation potentially provides broader protection than provided by the non-binding standards found in international human rights agreements, such as the United Nations Declaration on Human Rights Defenders.[22]

At a minimum, the obligation to provide "full protection and security" requires the state to protect the investment's *physical* security. In Asia, a tribunal found Sri Lanka failed to provide full protection and security when its army destroyed the investor's shrimp farm as part of a military operation against Tamil Tiger rebels.[23] The case concerned a state that injured an investment through its own actions. However, the state's obligation to provide full protection and security is even broader, requiring the state to protect investment against injury by private parties.

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[22] Article 12.2 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144, March 8, 1999) provides: "The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."

[23] Agricultural Products Limited v. Republic of Sri Lanka ICSID Case No. ARB/87/, Award, June 27, 1990

The principle of full protection and security also extends to the protection of the investment's *legal* security and the cases decided by arbitral tribunals show that full protection and security is understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view;" in ***Azurix v. Argentine Republic***,[24] for example, the tribunal found that Argentina failed to provide full protection and security by failing to provide a secure investment framework. Similarly, in ***CME Czech Republic B.V. (The Netherlands) v. The Czech Republic***,[25] the tribunal held that "The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."

2.2.5 Conclusion

The principles of international investment law are clearly well developed based on the fact that there is a wealth of case law and treaty provisions in which they have been applied. Many have come to form part of international customary law, though it is not clear whether others have attained that status yet.

2.3 THE LEGAL FRAMEWORK IN UGANDA

2.3.1 INTRODUCTION

The period before 1986 when NRM government under Yoweri Museveni rule took over power was characterized by very low levels of foreign investment in Uganda. The atmosphere was as a result of unimplemented government policies and a weak legal framework and poor

[24] *supra* n. 38 at para. 408
[25] Partial Award, September 13, 2001 at para. 613

administrative mechanisms. However, under the firm leadership of President Yoweri Museveni, Uganda has transformed itself into a politically stable country with a dynamic economy based on free market principles. The environment for foreign investment has drastically changed especially in the private sector. Moreover, the government has privatized government-held enterprises. Regionally, Uganda has become part of a free trade block that includes Tanzania, Burundi, Rwanda and Kenya the member states of East African Community (EAC). This development is also owed to the sound legal framework and strengthening of institutional offices to reflect the changes in the economic world and at the same time reflect the changes in the global world as well as respecting the principles of international investment law. This chapter therefore takes an overview of the current laws of Uganda that are geared towards increasing levels of foreign investment. It in addition examines the effectiveness of these laws in meeting the goal and thereby notes the challenges faced by them.

COMPANIES ACT Cap 110

It's a general rule that a company has to be registered before commencing business and this takes about 5-14 days. The Act[26] provide for records at the Registra of Companies a copy of registration of such containing all the necessary particulars-name of company, memorandum of association(MOA), articles of registration(AOA) (section 4). These record serves as evidence and the registra issues a certificate of registration. The types of companies' existent in Uganda are: private or public, limited or unlimited companies. Foreign investors can directly register a company directly incorporated in Uganda or one incorporated abroad but carries business in

[26] Section 2 Companies Act Cap 110

Uganda. The law however emphasizes that the mere carrying on of business in Uganda through an agent does not guarantee it such place of business.[27]

To register a foreign company carrying on business in Uganda, investors must furnish with the registra a certified copy of the charter, MOA and AOA and these must be translated in the English language, list of directors, secretary name and statement as on subsisting charges even those comprising property outside UG, address of the principal office and an authorized resident person to whom service of a process can be effected on its behalf. A certificate of registration accrues when the prescribed rules are observed. The certificate is conclusive evidence and in effect the company gains legal status meaning that it can hold land in Uganda like one incorporated here and can also sue be sued. The company can also make alterations to any such particulars although within a limited period.[28] The company is required to paint or affix its name outside its offices or place of business in a conspicuous position failure to which a fine is imposed.[29]

LAND AMENDMENT ACT 2010

This law controls the ownership and use of land in Uganda. It is in alignment with the Constitution in some aspects. The Act in section 237 notes that all land in Uganda belongs to its citizens. The government can in prescribed conditions pay compensation in accordance with Article 26 and 237 of constitution for acquiring such land in the public interest.[30] Affected persons have been given recourse to judiciary by grant of right to enforce prompt payment,

[27] Section 369 ibid
[28] Section 372
[29] Section 109
[30] Article 42 constitution

contest amount of compensation. The suit should be instituted against the Attorney General and any service to government be made to his office.

Ugandans can own land either by customary, mailo, freehold or leasehold tenure as provided in the Act section 2 and Article 237 constitution. Each tenure system has certain accruing rules and regulations as to their ownership. Customary tenure is governed by accepted norms of specific persons (community) in a particular area governed by the local customary regulation which determines even the use of such land. Customary land is owned in perpetuity. There is no registration of title and users have to consult the community before any development and this is cumbersome and disadvantageous when a private action is desired.

Freehold tenure system on the other hand is regulated by the constitution and can be owned in perpetuity or on a conditioned period. The owner has full powers of ownership of land which are guaranteed by law through the holding of a certificate of title. Therefore, he can do anything with the land-sell, lease, develop, mortgage or subdivide to others.[31] Therefore, this type of tenure attracts investors though they get leases of 99 years unlike citizens of Uganda to whom it's readily available. Its documentation in the registration also favors investors because of easy accessibility to all thus promoting constitutions granted right of access to information in government possession.

Mailo land tenure also derives from the constitution. It can be owned in perpetuity or through conditioning. This type of tenure emerged as a result of grants given to Buganda local chiefs by the colonial masters for assistance in administration of the colony Uganda. The chiefs later dealt with the mailo as desired through sale or lease and thus powers of ownership were shared. This

[31] Section 3(2) land Amendment Act 2010

type of land though is only available to the citizens and its ownership depends on terms acceptable to the bonafide occupants. It's registered therefore easily accessible in the land registry.

Leasehold land tenure is created through contract or operation of law therefore, the contract provides the terms therein agreed by parties although the law may regulate some conditions and terms on parties. Some essential requirements in such contracts is the inclusion of specific the specific date of commencement and ending of contract, duration of ownership of lease, consideration for such transfer of ownership to owner either in rent, premium or service provision. This is the most favorable and available type of tenure to foreigners. They can also renew their leases since it's not owned in perpetuity. Non-citizens acquire a lease of 99 years which must be registered according to provisions of the Registration of Titles Act.[32]

INVESTMENT CODE ACT CAP. 92

The Act is the law governing investment in Uganda. It facilitated the creation of a lead government agency Uganda Investment Authority (UIA) in 2001 which would assist the foreign and domestic investors. One of the core functions of UIA is to attract Foreign Direct Investment (FDI) into the country as well as promoting domestic investment. The Uganda Investment Authority (UIA) is the statutory agency responsible for promoting and facilitating investment in Uganda and among its mandates is to promote investments in Uganda, advice government on policies conducive to investment and to provide information on investment issues like identifying the key areas of investment, procedure applicable in acquiring investment among others like power to give permits for investor operations. It's notable that the UIA has largely affected an increase in investment flow in the country.

[32] section 40 Land Amendment Act 2010

The Act defines some key terms like as foreign investors & investment. It also provides the requirements of investors before they start operating business in the country.

Firstly, investors must obtain an investment license from the UIA to start a business in Uganda. An investment license is issued within five working days if the application form is properly completed. This licence eases bureaucratic procedure and will take about 1-5 days to process. It is processed free of charge and the license is normally valid for a period not less than five years after the implementation of the project. The Act further advances by putting restrictions on the body not to issue the license unless the requirements are adhered to. An investor has to invest a certain sum and this differs between foreign and national investors. Foreigners sum is $300,000 whereas nationals are $50,000.

Foreign investors other obligations relate to requirements as to training staff, localization, environmental protection among others like: The investment according to UIA must be beneficial to Uganda either in job creation, acquisition of new skills & technology by Ugandan citizens and maybe contribution to foreign exchange earnings. The limitation here is that what is beneficial is not clearly cut out. Foreign investors are also limited on carrying on of business in the crop production or animal production and also cannot own lease land for such purposes – deviation from principle of fair and equitable treatment. The Act further provides that foreign investors have to obtain entry passes / permits, work permits granted according to the immigration Act. Work permits required for all foreign staff. It takes about 2-4 weeks to process

Immigration regulations

It's a necessity when applying for entry permits to first obtain an investment license. However, since the process before such grant is long – foreigners can apply for special pass valid for some

few months thus enabling them stay in Uganda for that period. Investors wishing to stay indefinitely in the country can also apply for Certificates of permanent residence. These two documents are only granted when a foreigner proves he is the country legally by production of a legal travelling document (passport). The passport or permit of entry together with license should always be produced when required by authority for identification. Foreigners can also apply for work permits and their applications are handled by the department of immigration which includes various representations from concerned ministries of the government. The department at most time considers the amount invested and the levels of employment to be created among others before granting. Employment of foreigners and process of application for their work permits is very demanding because proof of why a Ugandan citizen cannot fill the positions and procedure applied in trying to fill it with a national must be adduced (e.g. an advertisement).

The work permits are valid for a short period of time although they are renewable A prescribed fee is imposed on the applicants of the various classes of work permits which are determined by the department that the investment falls under. For example persons involved in the mining, trading or manufacturing industry have to obtain a mining license, trading license and manufacturing license and pay any sum so prescribed by the respective ministry. A limitation evident in the process is that there is a lot of discretionary power left to the immigration officers in respect to application for work permits and licenses. The process itself is very cumbersome.

A major limitation on foreigners applying for work permits is the requirement imposed on them to deposit a prescribed sum to act as security. The amount is an equivalent to a one way air fare to their country of origin. Though it is refundable it's still a notable constraint which further discourages foreigners from investing in Uganda.

INCOME TAX ACT Cap 340

The Uganda constitution imposes an obligation on every citizen or any resident individuals to pay tax. However, they must be registered as a tax payer and receive Tax Identification Number (TIN) which may take a period of 2-3 days to process and which he or she may be required to produce when furnishing of returns Resident individuals are explained in ITA as persons present in Uganda for 183 days or more during a year of income. A resident company is also defined in section 10 as a company either Incorporated in Uganda or whose management and control is exercise in Uganda and is therefore taxed on the income derived in Uganda. Taxes are collected by self-assessment and by withholding tax on payments to residents and non-residents. As an Employer you are obliged to withhold and account for income tax on your employee remuneration and benefits (the PAYE system). You will be charged with penalties and interest for non-compliance and late payment of taxes in Uganda

The Uganda Revenue Authority is the central body mandated to assess, collect specified tax revenue, administer and enforce laws relating to such revenue. This statutory body conducts regular audits and investigations of taxpayers.

The act also gives generous incentives packages attractive to both local and foreign investors. An example is a Capital allowances of 50% on plant and machinery for projects located in Kampala, Entebbe,Namanve, Jinja and Njeru. Outside these areas the deductible allowance is 75% as shown in part IV 6th schedule. Zero rate of tax on imports of plant machinery and equipment is also granted. In addition an initial allowance deduction of 20% is allowed in placing an industrial building in service for the first time. The capital incurred for extension of the same building is allowed deduction as if it was incurred on construction of a separate building (section 28 (4) (5).

A deduction is also allowed for depreciation of such industrial building used to produce income included in his or her gross income to align with the expenditure used in the construction. Deductions are also allowed on costs incurred in improving the industrial building. The Act allows persons deductions for expenditure incurred in repairing of property used in the production of income in a financial year. It further allows a deduction on the depreciation of depreciable assets which are clearly set out in four classes in the 6th schedule besides the percentage allowed.

Start up costs allowance spread over the first 4 years at 25% per annum is allowed to persons who incur expenditure in starting up a business that produces income. Further, In Section 32, 100% allowance on scientific research expenditure and training expenditure incurred for training/tertiary education of less than five years to employees in the business producing is also deductible once from the company's income. These include costs of such research undertaken in order to improve the persons business and includes the cost base, that is, any contribution to such research institution, costs of acquiring land or building, costs for the buying of depreciable intangible assets, expenditure for the ascertainment of the existence, location, extent or quality or a natural deposit.

Section 35 provides for a deduction on acquiring of farm works used in the production of income. Those investors in the agricultural sector get a deduction on acquisition and establishment of horticultural plant, construction of greenhouse give 20% deduction in the year incurred and the next 4 years of use of such.

Section 36 allows deduction for expenses incurred in searching, discovering, testing or winning access to deposits of minerals in Uganda. A welcome achievement since the process is very

expeditious and also cumbersome. Section 38 allows investors to carry forward the assessed losses to the next financial year where total income is exceeded by the total amount of deductions. However, such deductions apply separately to income derived from sources in Uganda and to foreign source income.

There are two tax accountings principles in Uganda i.e. cash or accrual basis. Tax payers can apply to the commissioner for a change of his method of accounting in order to reflect his or her income. The application must be in writing and commissioner may accept or deny the change. Commissioner's notice should also be in writing and state reasons for his decisions. Taxpayers can challenge commissioners decisions by following the procedure laid out in the Tax Appeal Tribunal Act.

The government also in a bid to promote the various industrial sectors gives subsidies which is money advanced to a particular industry in order to increase its productivity e.g. industrial sector. There is also guaranteed repatriation of profits and dividends. The Act further provides for tax credits to resident tax payers for any foreign income tax paid by the tax payers in respect of the foreign source of income not exceeding the Uganda income tax payable by him on such sources. It also exempts resident tax payers from tax on any foreign source employment income where they had paid foreign income tax. The income tax rate payable by non-resident persons is 15% as provided part IV of the 3rd schedule.)

The law also imposes on tax payers a duty to furnish returns in the prescribed form given by commissioner in each year of income not late than four months after the end of that year although the period can be extended. Such returns must be signed by them with an expressing declaration as to their completeness and accuracy, failure to furnish the commissioner then

appoints persons to prepare and furnish the return. Where tax payers' object to such returns and assessments of the commissioners objection decision he can appeal to the high court or to the tax tribunal for a review by parliament for the purpose of settling tax disputes in accordance with Art 152 (3) constitution.

The commissioner has various means of recovering unpaid tax from tax payers. These include: notify taxpayers in writing to make such payments on a specified date, payment by distress on tax payers movable property, recover form tax payers movable property, recover from tax payers resident age holding any assets on his behalf by directing chief registrar on land department that such land/building is security for unpaid tax to the extent of the interest held.

THE NATIONAL ENVIRONMENT ACT Cap 153.

This is one among the countless legislation governing environmental management and protection in Uganda. This act was enacted in 1995 to provide sustainable management of environment. It therefore had a mandate to establish an authority which would act as the supervisory and coordinating body in order to achieve the above purpose. NEMA was thus established in January 1996 as a body corporate to promote implementation of government policies, to review and approve environment impact assessments (EIAs) and environment impact statements (EISs), among others. The body (NEMA) is an all representative one encompassing representations from private sectors, local non-governmental organization, public offices (ministries)[33] who are qualified in the field and extends its coverage to the district level. This body has a wide range of powers and therefore, before embarking on activities relating to environment parties are advised to consult the body. For example project developers as described in the third schedule have to

[33] Second schedule, section 8(3)

submit project briefs to NEMA containing relevant information as to the project which includes the type of investment, location and the impact on environment.

The tools for enforcing environmental law in Uganda include the EIA[34] which every developer has to undertake. Where the body in consultation with his or her feel that his project may have or is likely to have an impact on environment, an EIS has to be done by experts (section 19 (4)

The body NEMA in Section 3 (3) is empowered by NEA to bring an action against any person whose activities or provisions have or are likely to bring a significant impact on the environment. This Act further disperses with the onus to show that the defendant's act/omission has caused or is likely to cause personal loss/injury in support of the right of individuals or groups or third parties to bring actions protecting the environment as provided in constitution act 50 (2).

Environmental Impact Assessment process (EI)

It has 3 phases: screening, environmental impact study (EIS) and decision making

1. screening

It's done to determine whether the proposed project has or doesn't have significant impacts. Where no impacts are noted on the project, a decision to approve and implement the project is made, with the appropriate recommendations to the developer. But if it has impacts, further screening is done to determine if mitigation measures can readily be identified through further environmental impact review (EIR) or environmental impact study (EIS).Mitigation measures are those which a developer may carryout to reduce or minimize the impact to environment caused by project.

[34] (se 19 (3) NEA

2. *Environmental impact study*

Carried out where the project will have a significant impact on the environment. It involves the determination of the scope of work to undertake in assessing the likely environmental impact of the project. It involves discussions with the affected communities, relevant government agencies, private sector, independent exports and the general public and should only be carried out by experts of the fields who must also be approved by NEMA.

3. Decision making

This process involves the review of the environmental finding. If the project is approved a certificate of approval is granted by head of NEMA and the developer is licensed to implement it in accordance with the mitigation measure stipulated in the EIS. If denied approval, the developer is urged to revise the proposed action to eliminate adverse, effects. The involvement of the general of public can be through submitted personal comments or report and if it's a necessity can include a public hearing.

Environmental impact assessment guidelines encourages two systems of monitoring: self monitoring by developer & enforcement monitoring done by NEMA (has legal entity) through its inspectors. The second is always a last result when the other fails the monitoring involves continuous determinations of actual potential efforts of the activity on environment. NEMA is empowered by NEA in section 3(3) to bring an action against any person whose activities / omissions are likely to have a significant impact on environment. The Act further dispenses with the onus to show that the defendants action / omission has caused or is likely to cause personal loss or injury In se. 3 (4) in support of

the constitutional right.[35] Monitoring helps in preventing further environmental degradation.

Environmental audits

This is the systematic and documented evaluation of how well environmental organization management is performing in conserving the environment and its resources. They are done after projects have commenced and often lead to prosecution of offenders or redesigning of the project in order to detect the other environmental damages and it's carried out by NEMA inspectors. An example is the Hima Cement Factory where a complaint by local community that a lot of dust was being generated from the process of cement production NEMA required the owners to install a machine to reduce the dust and an Electro-Static Precipitator was consequently installed to curb the effect of dust on environment.

The procedures required to be followed are clearly and precisely laid out and the close co-ordination of various governmental agencies before licenses are given is very encouraging to investors.

ARBITRATION AND CONCILIATION ACT Cap 4

Arbitration is a mode of settling disputes amicably as an alternative to litigation. This mode of settlement has mostly been welcomed in the trade and commercial sector and this trend has grown both regionally and internationally because of its efficiency in settlement of disputes, speed and affordability as compared to litigation. However, before it can be resulted into, the

[35] Act 50(2)

arbitration clause must be embedded in the contract between the parties or it is agreed upon by the parties, written and signed and specific that it will be their recourse. The clause must be independent of the other terms of the contract such that it is precedent in application even when the main contract is declared null and void. The parties determine the number of arbitrators (section10) and even the procedure to be followed, that is, place of arbitration, language used. When the award granted is objected by either party, he or she may have recourse to the International Centre for Settlement of Investment Disputes (ICSID) as provided in section 42 of the Act. This is a body mandated with the role of settling disputes between states and nationals of other states if the investor requests it because of local remedies are ineffective. National courts are require to treat the award as a decree of that court-as if it had been a judgment of the court because Uganda is a signatory of the ICSID Convention in 18th March 1965.[36]

TRADEMARKS ACT 2010

The Act has cured the defects in the earlier law of 1964 by trying to gradually align the Uganda law with that of international law (other countries) by appreciating the changes in the commerce industry in the world. This law promotes the government quest to promote development as envisaged in the constitution[37] which is to encourage private initiative and self-reliance. This law provides sufficient protection to investors in this industry from infringers. For example it has in addition provided for service marks in addition to trademarks defined as a sign or mark capable of distinguishing goods or services of one undertaking from another. Service marks to be represented graphically-in a way that copies of the same can be clearly seen or documented to

[36] Section 45
[37] 1995 Constitution, Objective ix and xi of the National Objectives and directive Principles

ease accessibility in registry and prevent confusion to consumers.[38] The procedure for the application of registration is also clearly defined and registra's powers which are discretionary clearly spelt out together with the legal requirements as to registration. Registration is not automatic. Act expressly provide for duration of trademark as seven years though the period is renewable after payment of prescribed fees[39] for a period investor is interested in exploiting it. The Act further provides for electronic register of trademarks in section 4 which replaced the traditional one of paper and ink and thereby reduced problems associated with former bulky volumes which were cumbersome to investors. New offences have been introduced by the Act by consolidating these offences with those in the Penal Code Cap 120. These are offence of falsification of entries in the registry or representing a trademark as registered. Persons not directly involved with infringement e.g. printers, those removing a registered mark from registry or manufacture dye in commission of offence. The offences cover a broad scope. Further more penalties are imposed and more remedies are granted to owners.

EMPLOYMENT ACT 2006

The labour market regulations are clear cut and flexible in application and observance. The labor laws specify procedures for hiring and firing employees and provide for the payments accruing on such terminations. Summary dismissal must be justified by proof of gross misconduct of employees characterized by neglect in performing duty and absenteeism.

Employment disputes are handled by the industrial Court which has power to order for re-instatement of improperly dismissed employees with compensation for such wrongful dismissal. The labour laws also provide for employer's duty to provide employees with humane working

[38] Section 1
[39] Section 22, Statutory instrument no.11/1988

conditions, reasonable minimum wages, sick leave and proper medical attendance and the right to form and join a trade union. Wages should be paid promptly and in any case not later than the third of the following month, should be paid in local currency and unauthorized deductions cannot be made from the employee's wages. The only authorized deductions include contributions to the National Social Security Fund which must be paid promptly by the employer to the appropriate authority.

As per law, employees have the right to withdraw labour and to bargain for their conditions of employment. The Occupational Safety and Healthy Act, 2006 provides for the duty of labour officers to inspect workplaces and process worker and management complaint. This has greatly contributed to the reduction of injuries and diseases in the work place. Although the International Labour Organization of which Uganda incorporates with has continuously advocated for investigation and recoding of information about accidents and diseases by employer arising in their enterprise and advised employers to report such occurrences.

2.4. Challenges Uganda is facing in promoting foreign investments

Over the past two decades the Government of Uganda has reversed earlier policy and management failures that were so destructive of the economy and the investment climate. Economic fundamentals have been restored, the exiled business community has been invited back and State commercial misadventures are being corrected through privatization. Overall, these achievements have helped restore investor confidence.[40] However it cannot go without saying that in order to ensure that this revival is sustained and that Uganda realizes its undoubted potential to attract much more FDI there are lots of huddles that have to be jumped. These include firstly discriminatory provisions of the investment code Act, secondly the land laws on

[40]Ibid, page 7.

acquisition of land are also discriminatory against foreigners, thirdly there is bureaucracy in the registration of foreign technology, and lastly corruption.

2.4.1. Discrimination in the Investment Code Act

The Investment Code Act gives no general assurances of "national treatment" to foreign investors and there are several instances, both in the Code and in sectoral legislation, in which they are provided with lesser entitlements than national investors, including the following:

(i)Foreign investors may be subject, as a condition of an investment license[41], to a number of performance obligations which are not imposed on national investors. These obligations may include requirements as to minimum investment size, staff training and localization and, local procurement and environmental protection.[42]

(ii) Foreign investors must invest the equivalent of at least $300,000 in order to qualify through the Investment Code for an entitlement to «externalize funds». The threshold for national investors is the equivalent of $50,000.[43]

(iii) No foreign investor shall carry on the business of crop production, animal production or acquire or be granted or lease land for the purpose of crop production or animal production.[44]

These provisions are clearly in conflict with the principles of fair and equitable treatment, and non-discrimination in international investment law and may have to be amended if Uganda is to improve on its performance.

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[41] Section 10(1) of the Investment Code Act, Cap.92

[42] United Nations conference on Trade and Development, Investment Policy Review Uganda, United Nations Publications, 2000, page 27.Available at http://www.unctad.org/en/docs/iteiipmisc17_en.pdf. Accessed on 4th March 2011

[43] Ibid

[44] Section 10(2) of the Investment Code Cap.92

2.4.2. Discrimination in the acquisition of land

Under the Constitution non-citizens cannot obtain freehold title to land.[45] In 1998, a new Land Act was introduced to address customary and historic rights and to provide a basis for the creation of bankable title to more land. Non-citizens may now obtain leasehold title of up to 99 years. An important test for the new system is whether freehold titles issued prior to the introduction of the Constitution and now held by noncitizens will be smoothly transferred into leasehold titles of adequate duration (that is, for upwards of 99 years).[46]

The fact that foreign investor cannot acquire freehold land and yet a national can also raises means that the ground for the two is not leveled. This too is against the spirit of international investment law.

2.4.3. Registration of technology

Under the Investment Code no agreement relating to technology transfer or the provision of technical services from abroad is "effective" unless it is registered.[47] For this, it must pass a number of criteria concerning its financial terms, training embodied, the continuity of access to know-how, and the avoidance of monopolistic practices. These criteria may have worthy objectives but are too sweeping to be effectively enforced. In any event since FDI typically involves such agreements being made between related parties there can be little sanction involved in not registering them. Besides the bureaucracy involved in registration exercises may discourage the investors.

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[45] Article 237(2)(c) of the constitution of the Republic of Uganda, 1995

[46] United Nations conference on trade and Development, Investment Policy Review Uganda, United Nations Publications, 2000, page 32. Available at http://www.unctad.org/en/docs/iteiipmisc17_en.pdf. Accessed on 4th March 2011

[47] Section 29(1) Investment Code Act Cap.92

2.4.4. Corruption

Corruption is a vice that has been almost accepted in our society. Some people have resigned to fate and either, think that there is nothing they can do to help curb corruption or have accepted it. The transparency international's rankings of corrupt countries continue to show how rampant corruption is in Uganda. Uganda USAID and the Department of justice implemented a two – year and $10.4 million threshold program designed to strengthen the capacity of Uganda's anti-corruption agencies and enhance prosecutorial efforts. To date, the results of the program are yet to be seen.

Corruption is a very complex vice. There is the bribe taking and giving which is corruption and both the giver and taker are equally guilty. There is also the misappropriation of government assets, abuse of office, graft and influence peddling. In recent years, there have been sanctions against the involved officials but while, criminal proceedings have been initiated towards such officials, such cases have been drugged forever in court. Unlike what most people think, foreign investors are not specifically targeted for bribes and payoffs but they are not immune either. The red tape surrounding foreign investors just serves to make them more vulnerable.

The government has tried to help its citizens to curb this vice by introducing anti-corruption loots: The penal code Act (cap 20), The prevention of corruption Act (cap 2) and the anti money laundering Act. Though all this has been done, there is need for an independent body to deal with this vice. The government's efforts in eliminating corruption in its administration have been recognized and encouraged by international agencies. In 1999 a major conference on the general challenge of corruption in African countries was held in Uganda in the City of Kampala resulting in the formation of an organization known as The African Parliamentarians Network Against Corruption (APNAC).[48]. The

[48] APNAC is a network that aims at coordinating and strengthening the capacity of African Parliamentarians to fight corruption and promote good governance

forum acknowledged that strengthening systems of accountability and transparency would greatly reduce and control corruption.

Therefore no matter how much Uganda's policies may favor foreign investors many of them will continue to shy away provided the corruption issue is not adequately dealt with because it does subject their investments to great risks that could cost them dearly.

2.4.5. Transparency of regulatory system

The laws & regulations governing all the regulatory bodies are published in the government gazette. However, each regulatory body administers the laws independently. Government agencies often have hearings, both public and private, where interested parties have on opportunity to comment on draft legislation and regulations. Though these procedures & legal provisions are provided for, most government agencies sidestep them and violate most of the said provisions. The much encouraged public tenders are ignored and completely shutting off the public and living the doors widely opened for the well-to-do well connected businessmen. There is a lot of red tape in the investment business. Potential investors have to jump so many hurdles just to start a business.

2.4.6. Conclusion

Bearing in mind the fact that the world is a global village, the question remains what have we done to ease the process of foreign investment, or and is what we have done enough or is there more we can do? Every time a foreign investor sets base in another country when something could have been done to have them invest in Uganda is a proof that they (other states) are doing something right and we are not. The discussion shows that legislation is not a sufficient remedy to attracting foreign investors. Other factors like the socio-economic, political and cultural climate in the country are extra determinants of the levels of foreign investment it experiences and that all these have to be dealt with in unison for the best desired results to be seen.

CHAPTER THREE

UGANDA'S EXPERIENCE IN THE OBSERVANCE OF THE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW

3.1. Introduction

The policies governing Foreign Investments in Uganda have gone through some kind of evolution right from the early post colonial years to the present. Foreign Direct Investment (FDI) in Uganda can be discussed under four regimes, namely, the post-independence up to 1970, the seventies, the 1980 to 1985 era and 1986 to the present. The initial period saw increasing FDI trends, the second and the third, a declining and near death of FDI and the fourth, a resurrection of the FDI.[49] This chapter will therefore focus on showing firstly how different governments of Uganda have treated foreign investments right from 1962 to the present. It will make an analysis of the extent to which the principles of international investment law have been observed in Uganda over the years. Secondly, the challenges Uganda is facing in a bid to promote foreign investments will also be looked at.

3.2. The post independence period up to 1970

When the Uganda became independent in 1962, the government had to look for sources of funding including foreign Investment for her development programmes. Government attitude towards Foreign Investments was clearly demonstrated in the Uganda Industrial Act 1963 which put emphasis on the promotion of both foreign and local investors. The legal protection for

[49] Marios B. Obwona , Determinants of FDI and their impact on economic growth in Uganda, Economic Policy Research Centre. Available at www3.interscience.wiley.com/journal/118988684/articletext?DOI=10

Foreign Investments against compulsory acquisition by the state and rights to repatriate capital, interest and dividends was provided under the Foreign Investment (Protection) Act 1964.[50]

However, this did not stop the government from slowly moving towards the nationalization of foreign investment in subsequent years. Towards this end, the Uganda Development Corporation (UDC) which was meant to start investments with big capital outlays and then sell them to private investors was given a legal right to control 51 percent in some of the businesses it had started and this included such projects like Tororo Industrial Chemicals and Fertilizers (TICAF), Uganda Cement Industries (UCI) and Nyanza Textiles Industries Limited (NYTIL).[51]

The biggest step towards nationalization, however, came under the 1968 Common Man's Charter (CMC) which was viewed as a socialist stand. The economy was predominantly controlled by a few British- Asians who owned the commercial and industrial sectors of the country, a situation which government saw as unsustainable and therefore requiring change. The CMC was followed by the 1970 Nakivubo Pronouncement (NP) which spelt out strategies to implement the CMC. The NP increased government controlling interest from 51 percent to 60 percent in major private companies and manufacturing firms and excluded private enterprises from external trade. Foreign investors were not happy with this development. The business situation became tense and all indicators pointed towards political change. And indeed, in January 1971, the civilian government was overthrown by the army led by Idi Amin.[52]

[50] Ibid
[51] Ibid
[52] Ibid

It is therefore clear that within this period government policy contravened the principle of protection from expropriation in international investment law. The government was willing to nationalize property without adequate compensation which is against the principle.

3.3. The Amin era: 1971 to 1979

This period was marked by the `Economic War' of 1972, which resulted in the expulsion of the British-Asians, expropriation of the assets and businesses of foreign investors mostly Asians and the eventual collapse of the industrial and commercial sectors. Immediately after the coup, the military government under Idi Amin revoked the *Nakivubo Pronouncement* which provided for 60 percent share-holding and reverted to 49 percent in some industries. But this was followed by the *Economic War* which resulted into the nationalization of industries and other businesses belonging to foreigners. Some businesses were given to Ugandans to manage while others were put under UDC and government ministries. That marked the beginning of more chaos to come.

The investment climate for foreigners in Uganda during this period was quite hostile. For instance the problems of political instability and insecurity, nationalization, the collapse of East African Community, were compounded by the requirement that a foreign investor be naturalized as a Ugandan to do business.[53]

Failure to meet the set rules was considered sabotage and was liable for severe punishment which ranged from executions to deportation. So in effect, foreign investment was outlawed!

The Ugandans who took over lacked capital, expertise and connections to continue as had the foreign investors and the commercial and industrial sectors virtually collapsed.

[53] Ibid

In view of this one can say that the Amin Era was a nightmare in the history of foreign investments in Uganda because almost all the principles of international investment law were violated.

3.4. The period from 1980 to 1985

The military government was overthrown in 1979. Although an elected government came into power in 1980, FDI continued to elude the country, mostly on account of past expropriations of foreign investments. The ratio of FDI to gross fixed capital, which measures the importance of inward FDI to an economy, was negative 0.2 between 1981 and 1985 compared to other LDCs in (Africa) of 2.3 during the same period[54]. In order to correct this bad image, a bill was presented to and passed by the parliament to return the properties of the foreign investors. However, it was not implemented till 1990 by a new government under the National Resistance Movement (NRM).[55]

3.5. The period from 1986 to the present

After decades of violent internal strife, President Yoweri Museveni has established 25 years of relative political stability and economic growth in Uganda. Today Uganda is one of the fastest growing economies in Africa, averaging an annual rate of growth of 6.5 per cent in the 1990s. Domestic investment and FDI into Uganda have increased rapidly. Much of this investment and growth has been driven by the imperative to erase an earlier decade of self-destruction, and the

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[54] Marios B. Obwona, Determinants of FDI and their impact on economic growth in Uganda, Economic Policy Research Centre. Available at www3.interscience.wiley.com/journal/118988684/articletext?DOI=10 Accessed on 4th March 2011

[55] Marios B Obwona and Kenneth Ogosa, FDI flows to Sub-Saharan Africa, Uganda country case study, Economic Policy Research Center and Bank of Uganda. Available at http://www.eprc.or.ug/pdf_files/occasionalpapers/op25.pdf,. accessed on 4th March 2011

economy has only now begun to recover to the levels of production that existed prior to the turbulent 1970s and early 1980s.[56]

The government encourages foreign businesses to set up operations in Uganda, particularly in value-added manufacturing and agro-processing. Toward this end, the GOU created the Uganda Investment Authority (UIA) in 2001 as the lead government agency assisting foreign and domestic investors. A revised Investment Code Act was passed in 2009. It has allowed UIA to become a more effective one-stop shop for investors by granting it new powers to obtain secondary permits for investor operations, to allocate government resources for investment, and to provide government incentives for rural investment.[57]

To reverse the downward trend in FDI inflows, the NRM government undertook steps to provide Uganda as an investment location. These efforts have included, at the macroeconomic level, the liberalization of existing framework, the simplification of administrative procedures applicable to foreign investors, the conclusion of bilateral investment protection and promotion treaties and accession to various multilateral treaties facilitating FDI flows.

A survey of actual and potential foreign investors shows that reform of regulatory and incentive environment has made Uganda more attractive to investors than many African countries. Thus, although Africa's share of FDI flows to developing countries dropped from 11 percent in 1986-1990 to 6 percent in 1991-1993 and down to 4 percent in 1994, the upward trend of investment flow into Uganda is a promising indication of the newfound confidence in a greatly improved political economy.[58]

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[56] United Nations Conference on Trade and Development, Investment Policy Review Uganda, United Nations Publications, 2000. Available at http://www.unctad.org/en/docs/iteiipmisc17_en.pdf. accessed on 4th March,2011

[57] United States Department of State, Investment Climate Statement-Uganda, Bureau of Economic, Energy and Business Affairs, February 2, 2009. Available at http://www.state.gov/e/eeb/rls/othr/ics/2010/138161.htm. accessed on 15th March 2011

[58] Ibid

3.6. STEPS UGANDA HAS UNDERTAKEN TO RESTORE FOREIGN INVESTOR CONFIDENCE

Although Uganda has quite a history of hostility towards foreign investors, a lot has changed over the years. A level playing ground has been established for both foreign and domestic investors. The government has provided enough incentives for both medium and long term foreign investors. The Heritage Foundation's 2010 Index of Economic Freedom listed Uganda's economy at number 63 of 165 countries, and as the fourth freest economy of 46 countries in sub-Saharan Africa, based on factors such as the ease of doing business, openness to trade, property rights, and fiscal and monetary policy.[59]

Though the legislations are quite over due, Ugandan policies, laws, and regulations are generally favorable towards foreign investors. The government is to be applauded on its bid to create greater government accountability, open markets, develop infrastructure, protection of property rights, and build a more attractive environment for foreign investment.

3.6.1. Compensation of expropriated property

Unlike the Idi Amin era when the government expelled British – Asians investors from the Country and expropriated their businesses and assets and nationalized them, the Museveni's Leadership has expressly rebuked these actions and labored to return the businesses to their legal owners and provided compensation through the Departed Asians' Property Custodian Board.[60]

[59] Terry Miller & Kim R. Holmes, The heritage Foundation, 2009 Index of Economic Freedom, The wall Street Journal. Available at http://www.armcanchamber.com/09Index pamphlet.pdf. accessed on 15th March 2011

[60] Expropriated Properties Act Cap 87 of 1983

The 1995 constitution Article 26 guarantees ""prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property." The Constitution guarantees any person who has an interest or right over expropriated property access to a court of law.[61] Article 26 of the Constitution thus reads:

> *(1) Every person has a right to own property either individually or in association with others.*
> *(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—*
> *(a) the taking of possession or acquisition is necessary for public use or in the interest of defense, public safety, public order, public morality or public health; and*
> *(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—*
> *(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and*
> *(ii) a right of access to a court of law by any person who has an interest or right over the property.*

3.6.2. Right to private ownership and establishment

Foreign & domestic private entities have the right to own property and other businesses and can dispose of them at Will. However, the Uganda 1998 Land Act limits foreign ownership of land for agricultural purposes although they are allowed 99 years lease and as a result most investors in agricultural sector erect a plant to process goods but use out-growers. It is also notable that the land registry procedure is tedious, cumbersome and characterized by corruption. These factors have been evident in the international Finance Corporations 2009 Doing Business Survey which proved that clean titles to property are almost impossible to obtain. The World Bank in liaison with USAID (United States Agency for International Development) in a bid to reverse this

[61] United States Department of State, Investment Climate Statement-Uganda, Bureau of Economic, Energy and Business Affairs, February 2,2009 Available at http://www.state.gov/e/eeb/rls/othr/ics/2009/ Accessed on 15th March 2011

situation in Uganda has advanced funds to the private sector foundation (PSF). It's hoped that the attitude of investors especially in the United States will be touched to the positive. These funds will help in educating the officers & increase their skills productivity.

3.6.3. Protection of property rights

Every person has a right to own property and the law of the land grants protection to properties of both national & foreigners.[62] Property is defined to include both tangible & intangible property.[63] As a result government returned expropriated property to the Asians.

More legislation has been implemented to afford more protection to owners of intellectual property under the auspices of Uganda law commission. These laws include the copy right & Neighboring Act, the Patents Act and the Trade marks Act[64]. These laws have extended protection to not only owners of copyright but to authorized persons involved in the production of copyrighted material, to service marks & not just trade marked goods, imposes higher criminal penalties and fines to infringers and who sell counterfeit trademarked goods and also to persons involved in commission of infringement. The enforcement of the (intellectual property rights (IPR) is shared by various governmental regulatory bodies including: Uganda National Bureau of Standards, Uganda Revenue Authority and Uganda National Board of Standards. The result has been institution of various suits and prosecution of infringers. An impediment in this process is that officers of these bodies still require more training to effectively perform their mandate with the sophisticated methods of the counterfeit goods.

Uganda is also a member of the Multilateral Investment Guarantee Agency (MIGA) under which

[62] Article 26, Constitution of UG(1995)
[63] Blacks law dictionary
[64] Laws Affecting Multinational Corporations available at http://www.afribiz.info/content/uganda. Accessed on 20th May 2011

foreign investors can insure their investment in Uganda against a wide range of non-commercial risks. Uganda also has bilateral investment protection arrangements with a number of countries. Additionally, Uganda's constitution and other legal provisions guarantee the right to property by both citizens and foreigners. Uganda has a strong and independent judiciary to cater for the commercial and legal requirements of investors.

3.6.4. Dispute resolution

Due to increasing emergence of conflicts among nations arising from the mistreatment of nationals dealing in international trade in foreign countries, states have implemented legislation to cater for the settlement of disputes and Uganda is included. The Commercial court was established in 1999 to adjudicate the commercial disputes in the country. The Chief Magistrate Courts & Grade Magistrate Courts can also adjudicate commercial disputes through derogation. To reduce the backlog of cases in the courts, mediation process of settlement of disputes was made a mandatory requirement before one approach the courts. This saves time and money and restores the relationship between the involved parties leading to win-win situations thus promoting investment in the country.

Arbitration is another option of settlement of disputes which in Uganda is regulated by the Arbitration and conciliation Act, Cap. 4. An arbitration clause however, must be included in the contract and should be agreed between the parties to refer matters to arbitration. An arbitral award is enforceable by Uganda Courts because it's a signatory of the Newyork Convention of 1958 on recognition of and enforcement of Arbitral Awards. The enforcement is justified on the notion that the local courts should treat the award as if it's a court decree issued by it. Parties can result to the ICSID and CADER organizations for assistance in commercial disputes.

Therefore it is evident that the dispute settlement in Uganda is favorable to foreign investors because there is hardly any discrimination against them in national courts. Besides the fact the law provides for international arbitration provides the investors with even more confidence because they can always have recourse to international courts in case they are not satisfied by the local courts.Uganda is a member and signatory of the following international organisations: The International Centre for Settlement of Investment Disputes (ICSID),The Convention on the Recognition and Enforcement of Foreign Arbitration Awards, The Conventions on the Settlement s of Investments , Disputes between States and Nationals of other States African Trade Insurance Agency (ATI)

3.6.5. Infrastructure

Everybody remembers the 2007/2008 post election chaos which took place in Kenya. Subsequently, the Uganda people felt the blow like the chaos were happening right here in Uganda. The railway was uprooted and the roads were a non – go-zone. This halted business in Uganda and prices of commodities hit the roof.

Considering that Uganda is a landlocked country, more roads should be put into construction to connect Uganda with the outside world. The dilapidated road network increases transportation costs and leaves the entire country vulnerable to bottlenecks and disruptions. New infrastructure developments are highly welcome at this time, and the old roads should be renovated along key trade corridors. The government has renovated the Kenya – Uganda road, including the Northern road from Kenya. The communication services in Uganda are very reliable due to the heavy investment by the private sector. Likewise, private investors laid a fibre-optic cable for internet services along the Eastern Coast of Africa. With the growing population of Uganda the current Uganda's electricity network reaches only 20% of the population, and load shedding all over the

country is common. This is regardless of the fact that Uganda produces enough electricity to serve her own but most of it, we opt to sell.

3.6.6. Incentive packages

The Investment Code of 1991 has offered favorable incentives to investors including duty and tax-free concessions especially on plant and machinery imports and other social amenities sectors like hospitals, schools and hotels, duty drawbacks for export industries, and exemptions from corporate tax, withholding tax and dividend tax, all for specified periods. The annual deductable and depreciation allowances result in investors paying less than 30% corporate tax rate in the early year of their investment. The Code allows a tax holiday for three years for an investment of over US$300,000 and five years for investments over US$500,000. Investments in remote locations however attract an allowance for an additional year. It also allows a repatriation of dividends to provide relief from double taxation. Uganda also allows a fully liberalized foreign exchange regime with no restrictions on movement of capital.

2.7 Conclusion

From the foregoing it is evident that even though Uganda may have had an unfriendly history with foreign investors, presently it has done a great job in implementing the principles of international investment law. Tremendous success has been achieved in creating a level playing field between foreign and local investors which is the very essence of international investment law. This explains why many foreign investors have been flooding the country over the past twenty three years. However some policy changes still need to made especially in the laws governing ownership of land by foreigners in the country because it is not favorable to them. Besides the Investment Code Act still has discriminatory provisions and the levels of corruption are still frightening. It is also clear that the Investment code Act does not have express provisions on the principles of international investment law and thus many of them are just implied.

CHAPTER FOUR

OVERALL CONCLUSION AND RECOMMENDATIONS

4.1 Recommendations

1. There is need to expedite the commercial law reform process. Revision of key pieces of commercial legislation is still outstanding. For example, there is need to update The Investment code Act so as to comply with recent trends of international investment law. The investment code is silent on many of the key principles of international investment law like national treatment, the international minimum standard, fair and equitable treatment among others. Being the primary legislation governing foreign investments in the country, it is imperative that direct provisions on these principles are embedded in the Act. Foreign investor confidence would greatly be boosted if the laws reflected that Uganda does uphold the principles that being promoted by the rest of the world today.

2. There is need to eliminate from the investment Code Act the several provisions which cause foreign investors to be subjected to less favorable conditions than the national investors. Such provisions like section 10(2) which prohits foreign investors from engaging in crop and animal production need to be amended because they are discriminatory against the foreigners. They are clearly in conflict with the principles of fair and equitable treatment, and non-discrimination in international investment law and may have to be amended if Uganda is to improve on its performance by international standards.

3. As regards the land laws, there is also need to amend some provisions so as to create a level playing field between foreign and national investors. The fact that foreign investor cannot

acquire freehold land and yet a national can also raises means that the ground for the two is not leveled. This too is against the spirit of international investment law and needs to be addressed if the investment climate is to improve.

4. Further, the process of acquiring land titles remains cumbersome and costly with an in-efficient and under sourced land registry. The title registration system is poorly administered and maintained, presenting opportunities for fraudulent and corrupt activity and comprising integrity of the title registry. For example, in the recent past, there are increasing reports of records that have been illegally amended and encumbrances removed from titles. Operational systems at the Land Registry, therefore, require comprehensive review and upgrading, to include the computerization of records and information processing, together with secure storage facilities. Government secured funding under the second private sector competitiveness project to modernize the land registry and support the implementation of the Land Sector Strategic Plan (PSSP) in general.

5. The need to address the grave levels of corruption in the public sector is recognized as an important means by which to reduce the cost of doing business and improve on the investment climate. The government, therefore, needs to double its efforts in the fight against corruption. With corruption almost all the principle of international investment law are violated. Widespread corruption damages a business environment that would otherwise provide a fairly level playing field for foreign investors. In the presence of this vice, it becomes difficult to set up investments because simple procedures like the acquisition of licenses become a night mare if bribes have to paid in order to be cleared in the shortest time possible. Foreign investors are also scared away if

they have to compete with other investors who are not paying taxes simply because they have connections with some tax authorities. Generally corruption makes the investment climate a night mare for any foreign investor and needs to be aggressively dealt with if the country is to improve its reputation in as far as the investment climate is concerned.

6. Considerable emphasis has to be placed on the carrying out of commercial justice reforms, in recognition of the fact that an effective commercial justice system builds confidence, (both among the business community and among financiers and facilitates contracting.) The policy objectives of the Commercial Justice Sector Reforms should be to create a supportive legal environment to ensure rapid enforcement and resolution of disputes. Considerable progress needs to made in reducing commercial case backlogs, computerization of court operations, improving the quality of service and improving public sector awareness of commercial laws and services. Generally, there is need to promote efficiency and effectiveness of the commercial courts specifically in settling disputes in matters of company law, insolvency, secured lending and intellectual property. Matters need to be disposed of more expeditiously if the international standards of settling judicial disputes are to be complied with.

7. While there has been recent government strategic interventions to foster investment in some competitive sectors, there is need to refrain from distorting market forces through bailouts of troubled enterprises. Helping a sector or a firm sets a bad precedent and runs against efforts made over past years to improve the allocation of resources by ensuring a level-playing field. Such a practice also discourages foreign investors who know that they do not stand the chance of

getting such support from the government unlike their competitors. Such a measure is thus discriminatory.

8. There is need for the subject of International Investment Law to be taught in Uganda's Universities especially those that have a Bachelor of Laws programme. This subject is not appreciated by many in the legal fraternity of the country because it has not been well developed, let alone being taught. Uganda would therefore make a big step forward if effort is made in developing this branch of law because in the modern world, it is not practical to talk of promoting foreign investments without developing the legal frame work that governs them (International Investment Law). Besides if steps were taken in this direction, it would prompt more research by academics in the field that in turn would be able to advise the government on the institutional and structural changes to be made if foreign investments are to be attracted further.

9. There is need for the government to find solutions to the institutional and structural constraints in its investment strategy. These constraints include:

First Government bureaucracy and red tape, including the lack of close cooperation between government department/agencies involved in the economic planning process and the investment thrust of Uganda.

Secondly, Major infrastructural bottlenecks like Uganda's lack of adequate electricity supply and poor road infrastructure are major impediments for investors, as road blockages, load shedding, and unexpected power outages generate unexpected costs for all businesses. These need to be improved upon if investor confidence is to be boosted.

Thirdly there is need for improvement on the limited links with critical capital-and technology-exporting countries. These links, such as banking, financial and air travel links, can serve as important conduits for the flow of information, people, project ideas and, eventually, investment.

9. From the macroeconomic viewpoint, the key policy implication is that to encourage the investment response to incentive schemes, macroeconomic stability and investor confidence in the sustainability of the policy framework are essential. Thus, the government must correct the unsustainable macroeconomic imbalances - such as large public deficits - because they are a primary cause of macroeconomic instability and uncertainty about future policies. Institutional reforms to ensure policy predictability, effective property rights, and stability of the basic `rules of the game' can contribute significantly to the investment response.

10. Since concerted efforts are being made in the move towards implementing the East African community, there is need for all the member states in the community to come up with a joint plan of how to enforce the principles of international investment law in the region. This is particularly important because with the development of the East African Community, member states need to stop fronting their individual interests and instead focus on the interests of the region.

11. Improving tax administration and ensuring sound financial market development. In competing with other locations around the world for private investment, Uganda is handicapped by the poor ratings of its investment climate. The income tax law is inconsistently interpreted

even within the Uganda Revenue Authority, leading to contradictory rulings, unpredictable value added tax refunds, and corporate tax bills that are inconsistent with the guidelines. Moreover, the staff of the Uganda Revenue Authority have limited technical skills, and appealing tax rulings before the Tax Administration Tribunal is time consuming and ineffective. Investors in Uganda consider the level of taxation the second biggest constraint to doing business and also rank tax administration high.[65] In order to curtail this challenge the government needs to:

- Have the Ministry of Finance, Planning, and Economic Development ensure that tax laws are clear, unambiguous, and consistent with the investment code.
- Keep to a minimum new tax measures that are inconsistent with previous policies.
- Widen the tax base by generating more revenue from smaller businesses and perhaps the informal sector.
- Transform the Uganda Revenue Authority into an efficient institution with a reputation for integrity, an institution that both enforces tax laws and creates an enabling environment for the private sector.
- Have the Uganda Revenue Authority focus on running the value added tax refund system efficiently while reducing fraud.

In sum, even though Uganda has done a remarkable job in attracting foreign investors given the obstacles of history, context and inherent impediments, there is more to be done in order to meet international standards. A continued process of foreign investment liberalization is thus necessary to realize the full potential of foreign investment and allow foreign investment to complement local effort in accelerating the country's development. The government should not

[65] Investment climate assessment, competing in the global economy: An investment climate assessment for Uganda, World Bank, Uganda manufacturing Association Consultancy and information services, August 2004. Available at www.mtti.go.ug/index.php?option=com_docman&task=doc...7. Accessed on 20th May 2011

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