

Research Article

Legal Issues in Defining and Assigning Foreign Investors Obligations Under the Tanzania Investment and Special Economic Zones Authority Act 2025

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Abstract

Tanzania has repealed the law that regulated promotion of foreign investment for the past 25 years. It does so through repealing the Investment Act of 1997 replacing it with the Investment Act of 2022. However, early this year the 2022 legislation is also repealed and replaced by the Tanzania Investment and Special Economic Zones Authority Act (TISEZA) 2025 with the view to guarantee more attraction of foreign and local investment. Notably, foreign investment is vital towards attaining sustainable development goals. Consequently, any law regulating investment issues should be geared towards that end. Tanzania being one among developing countries, is expected promote and regulate foreign investment as a means to guarantee private sector's contribution towards socio-economic development of her population. To achieve this, laws regulating investment should comply with binding and non-binding international laws on aspects such as defining and assigning foreign investors obligations. This paper examines the enacted TISEZA with the view to identify the extent to which it defines and assigns obligations to foreign investors may be relied to achieve sustainable development. Methodologically, the study is qualitative in nature and adopts a doctrinal study where both primary and secondary documents are reviewed, themes are developed to arrive at a logical conclusion. The study found that, the manner in which foreign investors are defined and allocated obligations does not guarantee their fully contribution towards sustainable development in Tanzania.

Keywords

Tanzania, Investment Law, Foreign Investor, Definition, Obligations

1. Introduction

Foreign and domestic private investment has valuable contribution in the socio-economic development of developing countries including Tanzania. Apart from offering employment opportunities to locals, private investment is vital in converting available natural resources into socio-economic development in developing countries. As such, to attain sustainable development, one may hardly ignore the role of the

private sector investment.¹ It is argued that, international investment law may support attainment of sustainable development goals through promotion of foreign investment and by guaranteeing policy space in the developing countries [1,

¹ UN, 'General Resolution No. 66/288, The Future We Want'; African Union and Commission, Agenda 2063: The Africa We Want. (2015).

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Received: 2 July 2025; **Accepted:** 19 July 2025; **Published:** 5 August 2025



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2]. Notably, the manner in which private sector collaborates with other stakeholders in achieving sustainable development is dependent on the law that regulate investment in a particular country.² Internationally, states are sovereign.³ Sovereignty implies that states are free to enact their own investment laws and regulations to regulate and promote foreign and domestic private investment within their jurisdiction. However, notwithstanding state sovereignty, state laws are expected to comply with international laws in order to safeguard foreign investment.

Notably however, Tanzania investment legal framework seems inadequate in defining and allocating foreign investors obligations as a tool to guarantee sustainable development of her population. This is so, despite Tanzania being member states to a number of binding and non-binding international conventions and also recognizes international customary law on issues such as state sovereignty over her natural resources.⁴

This study however, focuses on two key aspects namely, defining and assigning foreign investors obligations. It is shown that, defining foreign investor, assigning investor obligations and protection of investors among other aspects are vital in establishing robust legal framework to regulate international investment [3]. The chosen themes may also be explained in twofold. Firstly, the manner in which the term foreign investor is defined is expected to be distinguished from domestic investors. In particular, the definition offers an opportunity for the legal framework in most developing countries to safeguard say for example locals who may not compete with foreigners in terms of skill and capital. Secondly, the definition of the term foreign investor offers a framework upon which rights and obligations may be assigned to them. Notably, reformed laws expressly providing for obligations to foreign investors in host-state are the cornerstone upon which investors' contribution towards sustainable development in a host-state may be measured [4, 5].

2. Background to the Problem

It has been noted above that the Tanzania Investment Act of 1977 (the Act) regulated investment for a period of about 25 years. It may be argued that, this Act regulated investment in Tanzania during the period which the global community was striving to achieve Millennium Development Goals (MDGs). Despite such reality, the Act was criticized in a number of ways. Firstly, the Act was too general in the sense that it did

not provide for express obligations to investors. Most provisions of the Act were granting rights and incentives as a tool to allure foreign investors in Tanzania.⁵ Many developing countries actually reformed their investment laws with the focus to promote foreign investment through issuing variety of incentives as a means to win more foreign investors. It is reportedly that, despite the fact that some African states are reforming their investment laws, such reforms are not aligned to establishing African based investment framework [6]. Secondly, it has been argued that, foreign investors are business oriented and their focus is on profit maximization not to contribute towards socio-economic development of host-states [7]. Consequently, a general law that is blind of this reality may hardly confer the people in host-state any tangible benefit from foreign investment.

Thirdly, it has been noted that developing states signing Bilateral Investment Treaties (BITs) increase Foreign Direct Investment (FDI) inflow to a particular state [8]. Hence, most developing countries have been signing these treaties. Nonetheless, it has also been argued that, there is no direct evidence that the FDI inflow to the state guarantees contribution to development that outweighs states' costs incurred in negotiation, signing, concluding, monitoring, enforcement and evaluation of such treaties. Furthermore, the adoption of incentivized legal framework approach as a tool to lure foreign investors is said to be misconceived. Foreign investors focus is on availability of resources to exploit, cheap labor and less stringent environmental standards. Taking Tanzania as an example, her natural endowment of resources is a good ground to lure investors to come and invest without necessarily attaching incentives which at times works against her favor. Evidently, foreign investors, if unregulated, tend to misuse granted incentives. To exemplify this, mining companies in Tanzania seem to have made several attempts to import some goods purporting to be exempted from duty as a means to misuse granted incentives to cover excluded goods.⁶

Taking the mining sector as an example, Lange views the Tanzania's investment legal framework as too friendly to guarantee socio-economic development of the people [9]. This seems to have limited Tanzania from deriving tangible benefits from foreign investment despite of her record in attracting such investment. As such, the Tanzania Investment and Special Economic Zone Authority (TISEZA) is mandated to promote FDI in the country. Reportedly, in the year 2023, the TISEZA has recorded substantial increase of more than 120% of projects registered compared to the previous year [10]. Such projects are relevant in offering employment opportunities and transfer of technology to locals.⁷ Despite these records, Tanzania is still a least developing country since her independent to date. Such an economic status signals

² Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area 2021, para 8.30.; UNGA Resolution, 'Addis Ababa Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) A/RES/69/313'.

³ General Assembly Resolution Permanent Sovereignty over natural resources 1962, Art. 1.

⁴ *ibid.*; Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area.; SADC Protocol on Finance and Investment 2006.; Protocol on the establishment of the East African Common Market 2009.; EAC Model Investment Treaty 2016.; SADC Model Bilateral Investment Treaties Template: With commentary 2012.

⁵ Tanzania Investment Act 2002.

⁶ *North Mara Gold Mine Ltd vs Commissioner General (TRA)* [2015] Court of Appeal of Tanzania at Dar es Salaam 78, p. 20.; *Geita Gold Mining Ltd vs Commissioner General (TRA)* [2015] Court of Appeal at Dar es Salaam 141, p. 16

⁷ *ibid.* p. 5.

high unemployment rate and majority of Tanzanians being poor to afford social services such as food, health and education. This is so despite the Tanzania's commitment to binding and non-binding international instruments and states best-practices on defining and assigning obligations to foreign investors in host-states as already noted above.⁸ Notably, however, in the year 2022, Tanzania repealed the 1997 Act and replaced it with the Tanzania Investment Act No. 9 of 2022.⁹ This new law was also repealed and replaced by the TISEZA in the year 2025. Worth to note here is the fact that all provisions on definition of investors and obligations of investors under the new law remain the same as they were under the 2022 Act.¹⁰ This review intends to examine the extent to which this new law has defined and assigned foreign investors obligations.

3. International Framework and Investment Regulation

This part focuses on discussion of the international legal framework on the promotion and regulation of investment. It will be noted in this part that, states are at liberty to not only choose any socio-economic and political orientation but also enact laws and policies to implement the same. In particular, the principle that investments in any host-state is subjected to domestic laws and international principles is also apparent here. On this aspect, Sonarajah states that, states may not argue that MNCs complicity to human rights violation is a domestic issue since it impacts all its value chain [11]. Notably, the discussion is coined around the two key themes, defining and assigning foreign investors obligations.

3.1. International Framework on Defining Foreign Investor

Generally, international law does not regulate the manner in which states will have to define who an investor is. Such a position is subjected to the international principles that recognizes states as sovereign.¹¹ Consequently, states are free to enact laws that will provide guidelines on how investors will be defined to suit their pursuit to attaining socio-economic development. In particular, states are at liberty to plan and apply any socio-economic, political and cultural stance or policy of their choice.¹² Remarkably, the socio-economic policy of any state is vital in determining the nature of laws that regulate international investment. While capitalist mode of socio-economic policy guarantees growth of private sector

investment, socialism on the other limits the potential growth of private sector owing to centralization of all major means of production to the state.

Increasing number of international treaties signed by various states at either global or regional levels seem to tighten the manner in which states have to define foreign investors.¹³ Desires to promote transfer of capital and technologies through international investment seem to compel developing states to sign binding and non-binding agreements on how foreign investors should be defined at international and local levels. To exemplify this, the Southern African Development Community (SADC) defines the term investor to mean, '*a person that has been admitted to make or has made an investment...*'¹⁴ However, this definition seems to have not covered the definition of a foreign investor and therefore attract a number of questions. Furthermore, it is unclear from this definition on the meaning of a person. Does the term person mean and include companies or limited to natural person? Does it separate nationals of states other than SADC member states? Answers to these questions are important in shaping the definition of the term foreign investor under domestic laws of SADC member states who are bound by the SADC frameworks, Tanzania inclusive.

At the East African Community (EAC) level, Tanzania (as a member state) recognizes the principle of free movement of people, goods, services and capital.¹⁵ While free movement of people signals transfer of technology through skilled human resources, free movement of capital signals foreign investment. As such, inadequate human resource is a concern among developing countries. It is therefore not surprising that SADC sub-region recognizes the need to guarantee investors a right of entry of requisite skilled human resources to support the invested capital and or technology among its member states.¹⁶ In contrast, the rules governing free movement of capital at the EAC level dictates that EAC member states define the term foreign investor in a particular way. An investor is defined to mean either a natural or juridical person from the home state that has invested in the host-state.¹⁷ This definition excludes state owned corporations and natural persons with dual citizenship who are originally citizens of the host-state. To achieve similarity in definition of the term foreign investor, the EAC requires its member states not to discriminate nationals of other states on grounds of nationality.¹⁸ Thus, through the Common Market Protocol, the EAC is regarded as a single block where rules on movement of capital are uniformly regulated.

To comply with the EAC Protocol, some of the EAC

⁸ See para 1 above.

⁹ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania 2025.

¹⁰ Sheria ya Uwekezaji Tanzania 2022.

¹¹ General Assembly Resolution Permanent Sovereignty over natural resources. Art. 1.

¹² Charter of Economic Rights and Duties of States 1974 (Resolution 3281 (XXIX)).

¹³ SADC Protocol on Finance and Investment.; Protocol on the establishment of the East African Common Market.; EAC Model Investment Treaty.

¹⁴ SADC Protocol on Finance and Investment. Annex 1, Art. 2.

¹⁵ Protocol on the establishment of the East African Common Market. Art. 2 (4), 4 (2) (a).

¹⁶ SADC Protocol on Finance and Investment. Annex 1, Art. 12

¹⁷ EAC Model Investment Treaty. Art. 2.

¹⁸ Protocol on the establishment of the East African Common Market. Art. 3 (2)(a).

member states have reviewed their laws accordingly. For instance, in Rwanda, the Rwandan Investment Code defines foreign investor to mean,

‘...an individual who is not a Rwandan national or a resident of a Partner State of the East African Community or of a member State of the Common Market for Eastern and Southern Africa or of a member State of any other Common Market Protocol that the Government of Rwanda enters into.’¹⁹

Besides Rwanda, Uganda has taken a similar move in defining foreign investor to mean and include any person who is not a citizen of EAC in case of natural persons. In respect of juridical person, foreign investor has been defined to mean and include companies established in non-EAC member states and or established in Uganda but have majority of its members from non-EAC member states.²⁰

It can be argued here that, the two EAC member states-Rwanda and Uganda have taken cognizant of the EAC Protocol on establishment of Common Market by eliminating potential discriminatory provisions in respect of EAC citizens and companies. Consequently, although states are at liberty to enact their own laws to regulate and or define investors, once they are signatory to international treaties, they are duty bound to comply with them accordingly. The two EAC member states-Uganda and Rwanda have shown the lead where foreign investor is regarded as being foreign to the EAC block but not a particular EAC member state, unlike Kenya whose definition still discriminates other EAC nationals and companies.²¹

3.2. International Framework on Assigning Foreign Investors Obligations

As already noted above, international law generally recognizes the right of states to enact laws to regulate investment within their jurisdiction. Contents of such laws are subjected to the socio-economic, political and cultural orientation of respective country policies. Nonetheless, such laws are expected to meet international standards in regulation of international investment. Consequently, the content of the law of a particular state, notwithstanding being subjected to the choice of respective states, is somewhat influenced by the international principles and standards.

Apart from regional and sub-regional levels, there seems to be no international treaty regulating international investment at a multilateral level [12]. For instance, laws promoting FDI in Bangladesh offers provisions on protection and incentives with no corresponding obligations. Consequently, most developing countries’ investment frameworks and BITs lack balance between the rights and duties of foreign investors at international level. It has thus been argued, the regime's sub-

stantive provisions have to be rebalanced. Currently, the regime protects the rights of investors, without giving them responsibilities. To balance these rights, investment treaties need to include binding and actionable responsibilities for investors [13]. As such, clarity and balance on such aspects guarantees not only investors of their safety but also their contribution towards socio-economic development in host-states.

However, elements of international investment laws may be depicted in various international instruments of varying nature from those which are binding or non-binding. Because of the noted vacuum on binding multilateral investment treaties, this article is based on review of Model Investment Treaties (MITs) at the multilateral and sub-regional levels.²² Notably, MITs by their very nature are not binding because they are soft laws. The idea to review these soft laws was justified by two reasons. Firstly, to date there is no multilateral investment treaty that binds upon states. As such efforts are under way at the WTO level to develop a multilateral agreement on Investment Facilitation for Development [14]. Secondly, provisions of soft laws may be relied by locals in influencing hard law making and expanding the scope of expectations from MNCs conducts and standards, just to mention but a few [15]. It is also argued that, compliance to soft laws by states may create customary international law [16]. Also soft laws are reportedly to be instrumental in allowing state flexibility in adopting fast growing areas of science and technology but also environmental concerns [17]. The unfolding discussion critically presents how investors are assigned obligations with the view to guaranteeing that international investment contribute towards sustainable development of host-states. This part argues that, although most of discussed obligations are from non-binding frameworks, they tend to influence how binding frameworks are drafted.

3.2.1. Investors Obligation to Comply with Host-state Laws

The investors’ duty to abide by the laws of the host-states emanates from the principle of state sovereignty which grants states the power to enact laws of their choice to regulate, among things, investment within their borders. Consequently, investors’ submission to the host-state implies his admission of himself and his investment to the jurisdiction of the respective host-state laws. A considerable number of MITs recognize investors’ duty to comply with the host-state laws.²³ To guarantee developing countries policy space in their investment frameworks, there is a need to expressly provide for

¹⁹ Investment Promotion and Facilitation 2021. s. 2.

²⁰The Investment Code 2019. s. 1.

²¹ Investment Promotion Act 2004. s. 2.

²² Model International Agreement on Investment for Sustainable Development 2005.; SADC Model Bilateral Investment Treaty 2012.; EAC Model Investment Treaty.

²³ Model International Agreement on Investment for Sustainable development 2005. Art. 11.; SADC Model Bilateral Investment Treaty.; EAC Model Investment Treaty. Art. 10.

the principles that safeguard their sovereignty, national security and interest.

However, most developing countries suffer from ineffective legal framework relevant to regulate international investment. As such, most of their legal framework falls below the international standards on a number of issues such as labor, environmental, revenue and human rights protection. There have been growing trends of Bilateral Investment Treaties (BITs) that require FDI to guarantee contribution to socio-economic development [18]. Nonetheless, there seems to be no any multilateral investment framework which oblige MNCs to contribute to the development the host-states. In this respect, case law seems to suggest that, there are at least four characteristics of foreign investment. One of the said characteristics is contribution towards socio-economic development of the host-state.²⁴ However, this decision *Patrick Mitchell vs The Democratic Republic of the Congo* has little impact in the international investment law because it was made by the International Center for Settlement of Investment Disputes (ICSID) tribunal whose decisions do not form precedents. Therefore, international investment law is yet to clear notwithstanding the decision of the ICSID.

Developing countries investment laws ought to have enforceable provisions which would address the socio-economic concerns of respective countries such as unemployment rate; inadequate science and technology; the linkage between science and technology to stimulate industrial development; and strengthening their domestic institutions such as courts of law. For instance, it has repeatedly been reported that most developing countries suffer from budgetary constraints to fund Research and Development (R&D) activities [19]. It is obvious that R&D marks the foundation of advancement in science and technological discoveries which provide solution to modern day challenges. R&D is, therefore, instrumental not only in creating employment opportunities, but also, a reliable tool in the transfer of technology from MNCs to locals in developing countries. Although it is the state that has the primary duty to promote R&D, the private sector especially the MNCs whose capital might exceed the GDP of some developing countries have a stake thereto [20]. In efforts to show how big the MNCs are, Lifafe argues that, they ‘are too big to be regulated nationally’ [21]. Robust legal framework should, therefore, demonstrate on how the private sector should collaborate with the government in addressing R&D issues.

The duty of investors to comply with host-state laws does not only require investors to comply with the existing standards but also impose a duty to meet international standards on respective areas. Multinational Companies (MNCs), as one arm of the private sector, are also regarded as partners in attaining sustainable development in developing countries.²⁵

That being the case, instead of taking advantage of weak laws and standards, MNCs are expected to abide by international standards in all of their operations.

3.2.2. Adoption of Precautionary Approach

The precautionary principles require investors to be cautious of the long and short term potential effects of their investment on a variety of aspects [22]. Most often, precautionary principles are applied at the entry point but they are continuously monitored and audited.²⁶ Currently, there is a global concern over increasing climatic change which bears gross impacts and or seriously damage economies of developing countries. Consequently, grand investments are expected to be assessed in terms of their impacts on the environment. In a situation where the potential impacts of the proposed investment overwhelm the envisaged benefits, host-states are expected to decline from licensing the proposed investment.

It is also worthwhile to note that the EIA is not a once and for all assessment. It is an entry requirement. After the investment is established, there is a need to exercise monitoring of the project with the view to ascertaining its contribution to negative impact(s.) Consequently, carrying out environmental audit during the lifespan of investment projects is expected to be a going concern. This will ensure that the standards agreed at the entry point are adhered to throughout the lifespan of the project.²⁷ However, most African countries have shown to be inclined more to development projects at the expense of environmental protection a fact which subject EIA into a mere rubber stamp [23-26].

Grand investment projects have repetitively been condemned for undermining socio-economic wellbeing of majority of rural communities where investment takes place. Among the serious adverse impacts include pollution and destruction of water resources, land alienation, food insecurity and destruction of houses, just to mention but a few [27, 28]. For such reasons, investors are duty bound to carry out Social Impact Assessment (SIA) prior to establishment of any investment project. The purpose is to ascertain the potential socio-economic interests that may be impacted and strategize on how they may be remedied accordingly.²⁸ Therefore, SIA is, like the case of EIA noted above, expected to be ongoing throughout the life cycle of the investment project.

3.2.3. Avoidance of Corrupt Practices

Investors are required to refrain from both direct and indi-

²⁴ *Patrick Mitchell vs The Democratic Republic of the Congo* (2004) ICSID ARB/99/7. para 27.

²⁵ UN (n 3)., para 39 and 41.; African Union Commission, ‘Agenda 2063: The

Africa We Want’. Para 52 and 72(d).

²⁶ Model International Agreement on Investment for Sustainable Development. Arts. 12 and 14.; SADC Model Bilateral Investment Treaties Templet: With commentary. Arts 13-15.

²⁷ SADC Model Bilateral Investment Treaties Templet: With commentary. Art. 14.4

²⁸ Model International Agreement on Investment for Sustainable Development. Art. 12.; SADC Model Bilateral Investment Treaties Templet: With commentary. Art. 13.

rect corrupt practices in their dealings with government officials when investing in the host-state.²⁹ One of the degrees of indirect corruption involves government officials.³⁰ Investors to refrain from corrupt practices is also continuous in the entire life cycle of the investment project. Internationally, MNCs which are prime in international investment are regarded as legal persons capable of committing crimes like corruption.³¹ States are called to regulate the behavior of MNCs by enacting laws prohibiting and combating corrupt practices.³² The spectrum of corrupt practices is broad and includes a range of acts or omissions. It includes acts which induce government officials to act or forbear in favor of the investor when making decision related to the investment itself. Investors are also required to avoid involving themselves into political activities in the host-state such as financing political campaigns or campaigning for a certain political party or candidate.³³

3.2.4. Upholding Human Rights

Large scale investment projects are globally renowned for their contribution in human rights violations in the areas where they are situated. Among the human rights which are frequently violated are- the right to clean water, the right to life, the right to food, the right to property. Most of the developing countries legal framework do not provide for and protect human rights against violation by MNCs [29]. More often than not their legal frameworks are tilted in favour of MNCs notwithstanding the MNCs being called upon to respect human rights and refrain from attempts and or actual violation of such rights in their investments.³⁴ Since human rights are globally recognized, MNCs are therefore not supposed to take advantage of weaknesses of the host-state's legal framework. They are required to meet international standards. For instance, the SADC Model Investment Treaty states that,

[Investors should not manage investment in a manner] inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.³⁵

Let alone the, the SADC Model Investment Treaty, the World Bank (WB) framework, for example, requires all MNCs involved in large-scale development projects to adhere to and respect human rights of communities in areas where they invest. Among the key principles which is conditional to funding large-scale projects by the WB is consultation and

negotiation with the communities' whose life is dependent on the environmental resources they are found in (such as indigenous communities).³⁶

MNCs are further expected to adopt mechanisms that will remedy any violation of human rights and or other potential grievances arising out of the introduction and or implementation of the investment projects.³⁷ The local communities must therefore be acquainted with such a framework that they may rely on, in addressing any grievances that may arise during the existence of the investment projects.

3.2.5. Transparency and Corporate Governance Standards

Transparency is vital if governments and other stakeholders in international investments are to be accountable. For that reason, MITs require transparency in the international investment.³⁸ Transparency simply refers to a situation where there is no secrets in all the investment transactions between states and MNCs that have a bearing on locals' life. For example, with respect to investment on land, contracts granting MNCs access to land, either for large scale farming or mining activities, affect locals' access to land for food production. As already noted above, large scale investment projects affect an array of human rights. Consequently, it is worthwhile to inform locals of the nature of the decision taken by the government and the nature of the investment and its potential impacts upon them.

With respect to mining activities for example, states may be part to mining activities through joint venture. Under such arrangement, the nature and extent of state interest need to be transparent to members of the public so as to be able to hold the government to account. Not only that, but also, the mining license issued to the MNCs and the mode in which they will operate the mining must be disclosed to members of the public. Moreover, issues related to revenue collected from the investors by the government on behalf of the local population has to be disclosed so as to hold the government has accountable on the monies received.

Besides revenue collection, MNCs are prohibited from such transactions like transfer of pricing which undermines the actual revenue that states and local communities could have gathered from them. For instance, the SADC Model Bilateral Investment Treaty in this regard provides,

'Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.'³⁹

In Tanzania, the case is not different. In *African Barrick*

²⁹ Model International Agreement on Investment for Sustainable development. Art. 13.; EAC Model Investment Treaty. Art. 11.

³⁰ Model International Agreement on Investment for Sustainable development. Art. 13 (A).

³¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. Art. 2.

³² African Union Convention on Preventing and Combating Corruption 2003. Art. 11.

³³ EAC Model Investment Treaty. Art. 11.3.

³⁴ Model International Agreement on Investment for Sustainable development. Art. 14; SADC Model Bilateral Investment Treaty. Art.15.

³⁵ SADC Model Bilateral Investment Treaty. Art. 15.3

³⁶ World Bank, 'Operation Manual -OP. 4.10 Indigenous Peoples'; IFC, 'Performance Standard on Environmental and Social Sustainability'.

³⁷ UN, 'Guiding Principles on Business and Human Rights'.

³⁸ Model International Agreement on Investment for Sustainable development. Art. 15; EAC Model Investment Treaty. Art. 14; SADC Model Bilateral Investment Treaty. Art. 16.

³⁹ SADC Model Bilateral Investment Treaty. Art. 16.2

Gold PLC vs Commissioner General,⁴⁰ it was held that the General Commissioner was justified to invoke section 66 (4) of the Income Tax Act which provide conditions for a resident person for the purpose of taxation.⁴¹ In this case, the African Barrick Gold PLC declared profit and further issuing dividends to its overseas shareholders. Despite the fact that the declared profit was wholly gained from one of its subsidiary company in Tanzania, their records declared loss.⁴²

3.2.6. Implementing Corporate Social Responsibility (CSRs)

There is no hard and fast rule on how the term CSRs is defined. This is even true in the modern day where aspects of CSR are provided in various sectoral laws compelling companies operating in such sectors to implement CSR schemes. Vettori M, for example defines CSRs as acting beyond what laws and or regulations sets as minimum standards to be achieved by companies with the view to attain a certain level of social good [30]. Rafael C., and Anna F., instead of defining what CSRs mean, they provide a list of what could be provided in the CSR provisions as hereunder,

CSR range from simply affirming the importance of internationally agreed-upon CSR instruments, to encouraging signatories to promote CSR standards, to stipulating a mix of voluntary and compulsory actions based on expressly enumerated CSR activities that governments should promote [31].

For the purpose of this paper, CSR is defined to mean and include measures adopted by the company as a means to secure its Social License to Operate (SLO) in the specific sector of its investment. As such, social license is greater than a mere legal license which is granted by the government agency subject to meeting certain minimum requirements. Social license goes beyond mere regulatory provisions and may include- the profile of the company itself in the given sector; how the company treats its employees, creditors, suppliers, environment, creditors, competitors; how it relates with communities in the vicinity of its operations; how it deals with the government, youth, women and disabled; and how the continued pursuit of companies' goals is achieved without affecting social well-being of the surrounding communities.

Internationally, there is no binding treaty on the requirement that MNCs should undertake CSRs. However, CSRs are known for their positive contribution towards socio-economic development in host-states where most MNCs are investing. It is for this reason that the Tomoko Ishikawa suggests that, CSRs should not just be voluntary based initiatives but a legal obligation to MNCs investing in host-states, the breach of which may result into legal consequences like cancellation of licenses [32]. A similar stance is also provided for under the Economic Community of Western African States (ECOWAS)

with respect to MMNCs involved in the mining sector.⁴³ On a similar note, the WTO is currently negotiating the framework on investment facilitation where binding aspects of CSRs will be included. Currently, the principles under MITs, among other things, require MNCs involved in host-states to undertake CSRs as a tool to guaranteeing their contribution towards attaining SDGs. For instance, the IISD Model Investment Agreement for Sustainable Development states that,

Investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.⁴⁴

Notably, the nature and extent of expectations from MNCs on CSRs differs from one company to another, let alone from one sector to another. In addition, there is no closed list of activities that constitute CSRs. The IISD have attempted to provide us with the list of potential items that when carried out by MNCs may constitute CSRs.⁴⁵ Such list includes- environmental safeguards, fair trade practices, good corporate governance, observing labor standards, and corporate ethical behaviors among others.⁴⁶ To make CSRs relevant and guarantee their contribution towards sustainable development of a particular country, they must be provided under the legal framework of the respective host-state in order to make them binding and enforceable.⁴⁷

3.2.7. Investors Liability

Ordinarily, foreign investors and their investments are subjected to the laws of the states in which they invest.⁴⁸ Consequently, if there arises any civil or criminal liability, the laws of the host-states will be relied on to remedy the same. Arguably, such investment is also expected to be regulated by the institutions which are established at the domestic setting of the host-states. Examples of these institutions include those related to granting licenses, permits, monitoring and evaluation and dispute settlement. Although the host-states have dispute settlement institutions, foreign investors tend to prefer international institutions to local institutions. The commonly used institution is the ICSID.⁴⁹ This center deals solely with states and nationals of other states. Consequently, local communities in host-states may not file a suit or any claim in the Centre.⁵⁰ It is also appears that, International Arbitral Tribunals have discretion to accept or otherwise the submissions of third parties who might be arguing in the interest of local communities at the grass root [33].

⁴³ ECOWAS, 'Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector'. Art. 11(2-3)

⁴⁴ Model International Agreement on Investment for Sustainable development. Art. 16 (A).

⁴⁵ *ibid.* See Annex F.

⁴⁶ *ibid.* See Annex F.

⁴⁷ ECOWAS (n 76).

⁴⁸ See para 1 and 3.2.1 above.

⁴⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966.

⁵⁰ *ibid.* Art. 25.

⁴⁰ Tax Appeal No. 16 of 2015.

⁴¹ *Ibid.* 21.

⁴² Tax Appeal (n 104). 17-18; AU/UNECA Report (n) para 2.2.1.

Apart from the fact that the local communities cannot access the ICSID, MNCs also tend to use complex business structures that aims at limiting liabilities that may arise from their engagement with the host-states [34]. Commonly, they tend to use either joint venture or establish a subsidiary company in the host-state with limited resources compared to the holding company which are registered and operate in developing countries [35]. As a result, when liabilities arise, say for example on massive violation of human rights in host-states, the holding companies shield themselves by limiting the liabilities of their subsidiaries dealing with the local communities at the grass root level in the developing countries. Amongst the key principles commonly relied upon in limiting liabilities is forum non-convenience and winding up the subsidiary companies before the aftermath of its negligence affects the locals in the host-states.

To avoid such above noted challenges, international investment requires investors to commit themselves that they are ready to be held accountable for all liabilities arising from their subsidiaries abroad.⁵¹ Since some of MNCs might have closed their offices and or undergone winding-up in the host-states, before their gross impacts to locals are reveal, the holding companies in developed countries are required to foot such liabilities. To achieve this, investors required to commit themselves that, locals in host-states have a right to hold them accountable in their home state in case of liabilities caused by their subsidiary companies. Such an obligation is akin to the United States of America (USA) which has enacted a law that allows aliens to sue a holding company registered in America for liabilities arising out of tort in the host-states within USA.⁵² Besides all, host-states should establish their own strong institutions to hold MNCs and their subsidiaries accountable instead of relying on foreign laws to remedy their impacted communities.

4. Legal issues in the new Tanzania Investment and Special Economic Zones Authority Act 2025

The discussion above presents the international framework on defining and assigning foreign investors obligations. It has been noted from the preceding discussion above that, both binding and non-binding frameworks provide for principles upon which foreign investors may be defined and assigned obligations accordingly. In addition, it has been shown that, the private sector, through foreign investment, is vital if developing countries are to attain sustainable development. This part presents a critical discussion on how foreign investors are defined and assigned obligations under the Tanzanian legal framework. It will be noted in the subsequent discussion that,

if Tanzania is to achieve sustainable development, her investment legal framework must be aligned to the international framework discussed above, in defining and assigning obligations to foreign investors.

4.1. Defining Foreign Investors in Tanzania

It has been noted above that host-states are granted powers and rights to regulate investment issues in their own jurisdictions. Consequently, foreign investors and their investments are subjected to the laws and regulations of particular host-states. Like other host-states, Tanzania also enjoys such a right not only from the exercise of the principle of permanent sovereignty over natural resources but also as provided by the investment law.⁵³ The current law regulating investment in Tanzania defines a foreign investor as hereunder;

‘(a) mtu binafsi ambaye si raia wa Tanzania; (b) kampuni iliyosajiliwa chini ya sheria za nchi yoyote tofauti na Tanzania inayofanya uwekezaji wa moja kwa moja nchini; (c) kampuni iliyosajiliwa chini ya sheria za Tanzania ambapo asilimia hamsini au zaidi ya hisa zinamilikiwa na mtu ambaye si raia wa Tanzania; au (d) ikiwa ni ubia, ni ubia ambao sehemu kubwa ya maslahi inamilikiwa na mtu ambaye si raia wa Tanzania.’⁵⁴

According to the above quotation, a foreign investor is defined as follows-

‘with respect to natural person, a non-citizen of Tanzania; with respect to juridical person, a company incorporated outside Tanzania; or a company incorporated in Tanzania but whose more than 50% of shares are held by a non-citizen of Tanzania; and with respect to partnership, where more than 50% of shares are owned by a non-citizen of Tanzania.

Scrutiny of the above quoted legal provisions shows that the above definition of foreign investors represents a narrow and protective approach contrary to the EAC and Protocol on the Establishment of the East African Common Market. Tanzania being a member state of EAC and a signatory to the Protocol on the Establishment of the East African Common Market, which, among other things, provides for free movement of goods, services, people and capital bears obligation to comply with the protocol. By virtue of this protocol, the EAC is regarded as a single trading or investment block, and therefore, the rules defining a foreign investor ought to be uniform.

Notably, Uganda and Rwanda have taken the lead in adoption of uniform approach in defining foreign investors as citizens and or companies from non-EAC member states. Tanzania’s approach seems to set double standards compared to other EAC member states. That is, a Tanzanian investor enjoys all rights and benefits as a local investor in Rwandan, while a Rwandan investor is regarded a foreign investor in Tanzania. Arguably, the manner in which the term foreign

⁵¹ Model International Agreement on Investment for Sustainable Development. Art. 17; SADC Model Bilateral Investment Treaty. Art. 17.; EAC Model Investment Treaty. Art 13.

⁵² Federal Alien Tort Claims Act 1789.

⁵³ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s 31(1).

⁵⁴ Sheria ya Uwekezaji Tanzania. s. 3.

investor is defined in Tanzania violates the principle of harmonization of rules and procedures under the Protocol on the establishment of EAC Common Market. It also denies EAC investors the rights and privileges offered to local investors in Tanzania.⁵⁵

4.2. Assigning Foreign Investors Obligation

Tanzania's investment law has been criticized for being friendlier to investors than to the host-state. This criticism is premised on the fact that, the law provides for rights with no corresponding obligations to investors.⁵⁶ It may, of course, be said that this criticism was meant for the 1990's investment legislation. Unlike the 1997 Investment Act, the National Investment Promotion Policy 1996 was categorical on some investors' obligations.⁵⁷ However, the wind of the rush by most developing countries to enact laws which incentivize FDI in their jurisdictions, as they believe without favorable incentives they will not be able to attract FDI, resulted into such problematic investment law. Although the Act was enacted under such a belief, it lasted for almost quarter a century with little, if no, amendments. It is therefore, worth to note here that, it is for the first time in Tanzania, a legislation regulating investment to stipulate such investors' obligations as discussed in the subsequent discussion below. Notably, the provisions related to investors obligations under the 2022 Act remained intact even when it was repealed by TISEZA. Therefore, the next the discussion evaluates the extent to which the newly enacted TISEZA complies with the international obligations discussed under item 3 above.⁵⁸

4.2.1. Observing Existing Laws

Tanzania has adopted the international investment law's position by compelling all investors to comply with her laws.⁵⁹ As noted under item 3 above, states have the mandate to choose their socio-economic and political stance and enact laws to achieve the same. Investors and their investments are therefore subjected to the laws of particular states. That being the case, it is the provisions of the law and their enforcement that will contribute towards positive impacts of FDIs in Tanzania.

In particular, investors who are registered by the Tanzania Investment and Special Economic Zones Authority (Authority) are expected to guarantee two major aspects. Firstly, they are expected to create employment opportunities to locals, not only in the lower cadre but also in senior decision making positions of the MNCs. This obligation seems impliedly provided owing to the promulgation of the TISEZA. However, the repealed Investment Act 2022, was categorical that employment of locals depended on the capital invested. Conse-

quently, MNCs are expected to hire locals ranging from 1000-15000 in their investment project.⁶⁰ However, in this aspect, the law seems to be silent on the aspect of gender consideration in the selection of employees employed by MNCs in their investment project. Addressing gender aspects at the time of employment is vital in bridging the gender gap which is wide in developing countries like Tanzania [36]. Perhaps, the silent nature of the Investment Act assumes that, the Tanzanian labor laws will address such a concern through prohibition gender discrimination in employment.⁶¹ Indeed, creation of gender sensitive employment opportunities addresses not only the common problem of underemployment in most developing countries such as Tanzania but also the gender gap. In addition, the absence of clear provisions on the expected output of foreign investor in relation to hiring locals, poses a challenge in evaluating their contribution to assisting Tanzania in attaining SDGs.

Secondly, foreign investors are also required to guarantee transfer of technology to locals from foreign investors.⁶² Although Act is silent on how such transfer may take place, it can be inferred from the employment requirement above. Other laws, for example, the law regulating mining sector in Tanzania are very clear on the need to hire locals and train them.⁶³ Consequently, technological transfer is inferred through training either in our local institutions or foreign ones. Despite the legal requirement on transfer of technology which seems general, in contrast, the TISEZA seems to be silent on MNCs duty to contribute towards funding R&D which is a cornerstone in the advancement of science and technology and increasing employment opportunities. The TISEZA further seems to be silent on the nature and the level of transferred technology to the locals. Indeed, some of other technologies are legally protected, let alone the fact that they are secrets of MNCs competitive edge in a given sector. As such, if the law is not categorical on the nature and level of transferred technology, locals may end up being imparted on very ordinary technologies that may not transform them into skillful human resources to solve the modern challenges in our society.

Particularly on the case of natural resources, the TISEZA compels MNCs to make use of locally available resources.⁶⁴ Such an obligation seems to reiterate the position under the law regulating extraction of natural resources in Tanzania which prohibit exportation of raw resources.⁶⁵ Although such a law might seem to limit investors options, say to cheap resources from other countries, it may be justified as a means to convert our plenty resources into a tangible socio-economic development. Reliance on locally available resources and addition of before exportation, guarantees linkages of extrac-

⁵⁵ *ibid.* s. 2.

⁵⁶ See para 2 above

⁵⁷ Tanzania, 'National Investment Promotion Policy', para 5.

⁵⁸ See para 3.2 above.

⁵⁹ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s 32(a).

⁶⁰ Sheria ya Uwekezaji Tanzania. ss. 23(2)(ii), (4) (c).

⁶¹ Employment and Labour Relations Act 2004.

⁶² Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania.s. 32(c).

⁶³ Mining Act 2018.

⁶⁴ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania.s 32 (e).

⁶⁵ Natural Wealth and Resources (Permanent Sovereignty) Act 2017. s. 9 (1-2)

tive sector and other sectors like manufacturing which will add value to extracted resources. Despite the fact that, TISEZA does not expressly oblige MNCs to make sure they contribute towards socio-economic development of Tanzania, such provisions might be so construed.

4.2.2. Precautionary Approach

The TISEZA seems to be silent on the precautionary approaches towards MNCs investment projects. As noted above, MNCs are required to take precaution in their large-scale investment projects. They should be concerned of potential impacts on the environment and socio-economic wellbeing of the local communities. It would appear that, the new Act seems to imply such a duty when it requires MNCs to safeguard, among others, the environment and consumers.⁶⁶ As such this obligation seems to have been provided under the 1996 investment policy but was not covered under the 1997 legislation regulating investment [37]. However, the Environmental Management Act (EMA) is categorical on such a duty. The Act requires EIA to be carried out before commencement of any large-scale investment.⁶⁷ EIA is aimed at ascertaining the potential impacts of the project to the environment and the surrounding communities. The EMA is express even on the distance at which investment projects should be carried out in relation to environmental resources such as water sources (lakes, rivers and streams for example).⁶⁸

It is however, challenging that the Environmental Management Act seems to weaken its requirement with respect to distance from water sources, where the nature of investment is approved by the Cabinet.⁶⁹ Such a position, subjects the safety of our environment and the well-being of the local communities into the wishes of politicians who may not necessarily comprehend the long term impacts of the projects they may approve. Given the fact that, MNCs are also good at lobbying, no wonder if safeguards may be ignored in favor of MNCs investment projects [38]. As such Pallangyo D, shows that, large-scale anthropogenic activities in Tanzania are always blind of the EIA a fact which jeopardies environmental protection [39].

In addition, climate change concerns are increasing owing to the gross impacts it brings to the environment and local communities. It is shown above that, in Kenya, large-scale investment projects therefore are expected to factor in climate change considerations as a means to mitigate its impacts.⁷⁰ In Tanzania, recent amendment to the EMA brought with it the duty to carry out climate change vulnerability assessment (CCVA). CCVA is mainly aimed at three things. Firstly, it focuses on identification of climate change vulnerability of a particular region. Secondly, it aims at providing reliable data

on the nature and quantity of vulnerability. Thirdly, it aims at development of the adoptive measures to counter the noted vulnerability.⁷¹ Nevertheless, while the CCIA noted above is to be carried out per project, the CCVA is rather regional.

4.2.3. Avoidance of Corrupt Practices

It has been noted under item 3 above that, MNCs are required to refrain from corrupt practices in host-states. The TISEZA seems to be silent on this. Perhaps, it may be implied from the stated duty to comply with the laws in Tanzania.⁷² Majinge T shows that corruption in large-scale investment projects in Tanzania is common [40]. Reportedly, locals who were hired by foreign mining companies in Tanzania colluded with foreign experts in underestimating the value of mineral concentrates in all exported consignments for refinery [41]. Corruption has also been reported in government procurement process where procurement rules have been ignored in favor of politically chosen bidders, a fact that leads to inefficiency in public sector [42]. As such corruption is prohibited in Tanzania.⁷³ Both offerors and recipients of corruption contravene the law against corruption. Once convicted by the court of law, corruption offences carry severe penalty as a means to deter others from indulging into corrupt practices.

In a bid to address grand corruption in large-scale investment projects by MNCs or government projects, Tanzania has established the Corruption and Economic Crimes Division (CECD) of the High Court.⁷⁴ CECD deals with grand corruption ranging from one billion and above.⁷⁵ Also, senior governmental officials are required to declare their wealth at the time of assuming public office and at the time of exit. The purpose of such declarations is to hold them accountable in case of illicit richness or unwarranted increases in richness that raises doubts given their position, salary and other benefits they get. As such, this move intends to address illicit enrichment by governmental officials.⁷⁶

Despite such a law and established institutions, anti-corruption measures in Tanzania seem to be challenged with the very laws establishing anti-corruption institutions. It is provided under the law that, the President, for example, is immune from not only investigation but also prosecution on corruption issues. Besides such immunity, it is the very president who appoints the head of PCCB whose office tenure is enjoyable at the will of president. Furthermore, anti-corruption initiatives in Tanzania are not institutionalized. They depend on individual efforts, a fact which undermines sustainable curbing corruption in, among others, investment projects [43].

4.2.4. Upholding Human Rights

⁶⁶ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s 32 (c).

⁶⁷ Environmental Management Act 2004. s 81.

⁶⁸ Environmental Management Act.

⁶⁹ URT, The Written Laws (Miscellaneous Amendments) Act 2021 [3]. s 6.

⁷⁰ See para 3.2.2 above

⁷¹ The Environmental Management (Amendment) Act 2025. s 3(b).

⁷² Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s 32(a).

⁷³ The Prevention and Combating of Corruption Act 2007.

⁷⁴ The Written Laws (Miscellaneous amendment) Act 2016 s. 8

⁷⁵ The Written Laws (Miscellaneous amendment) Act 2016 s. 8 (3) (a)

⁷⁶ See para 4.3.4 below.

The TISEZA lacks an express provision on the duty of MNCs to observe human rights in their investments. Impliedly, however, the Act requires MNCs to be concerned of the interests of such groups of people like consumers, employees, environmentalists, women and men.⁷⁷ MNCs are required to respect human rights and should avoid being complicity to violation of human rights in areas where they invest. To ensure that no organ or individual violates human rights in Tanzania, the Constitution established the Commission on Human Rights and Good Governance (CHRGG).⁷⁸ Among other things, its mandate is to investigate and prosecute human rights abuse by the government and the private sector.⁷⁹ However, the sitting president may not be investigated or be prosecuted by the Commission.⁸⁰

Apart from the role of the CHRGG, the law requires all public leaders and officials to declare their wealth at the time of assuming office and at the time of exit.⁸¹ Declaration of wealth is vital in assessing illicit enrichment and corrupt practices by public leaders. Above all, the Constitution establishes the judiciary, in particular, the High Court of Tanzania with the jurisdiction to entertain all cases related to violation of human rights in Tanzania.⁸² However, given the immunity vested in the president from being investigated and prosecuted, both existence of the CHRGG, the Secretariat and the judiciary are likely to be ineffective in promotion and protection of human rights in Tanzania.

Despite the fact that the law requires MNCs to respect human rights in Tanzania, several challenges inhibit locals from redress when their rights are violated by MNCs investing in their locality. Reportedly, locals in Mara region who were dependent on River Tigithe for their daily usage were grossly impacted by discharged effluents from Barrick Gold Mines. Notwithstanding registered deaths and serious human health challenges encountered by locals, the investigation report cleared the MNCs of any wrong doing [44]. There were also complaints that security officers from the Williamson Diamond Company in Shunyanga tortured and seriously injured locals adjacent to mine [45]. Nonetheless, all the diamond mined in that respective year accessed international markets irrespective of international obligations to limit rough diamond mined in a human rights compromised situation. Recently, the walls of the dam which stores mineral waste waters in the Williamson Mining Company in Shinyaga broke and destroyed people's homes, farms and water sources [46, 47]. Although it was a single event, a number of human rights like the right to housing, right to adequate food, right to property, right to clean water and sanitation and right to clean and health environment were violated.

4.2.5. Transparency and Corporate Accountability

Investors' duty to operate in a transparent manner and observe good corporate governance standards seem to be implied under the TISEZA. This is implicit in the investor's duty to timely report to the required authorities on any information needed therefrom.⁸³ It is also inferred from the duty to cooperate with the Authority officials in auditing the granted incentives.⁸⁴ Nevertheless, unlike the provision of the new Investment Act, the National Investment Promotion Policy 1996 is categorical, not only on the duty to cooperate in auditing the incentives, but also, in provision of severe penalty in event MNCs misuse such incentives. It is worthwhile also to note that, the duty to furnish information to relevant authority under the TISEZA seems to be too general to bear positive impacts in regulation of investment in Tanzania. The provision does not make it clear on what kind of information; how digested should the information be; what are the relevant authorities; should such information be available for free in MNCs website; when such information should be furnished; and what will happen if such information is not furnished by the investor.

Specifically, if local communities and organs of the governmental such as; the Parliament and Courts are to be held accountable to the private sector, the need for relevant, timely, current, accurate and less complex information is crucial. The National Assembly, for example, is empowered to review all natural resources related contracts and advice the government either to renegotiate or otherwise.⁸⁵ Among the regulated sectors in terms furnishing relevant information is the extractive sector. Under the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015, all MNCs involved in the extractive sector are required to furnish information to the established institution.⁸⁶ The information required includes mining licenses, revenue and levy paid to the government, and compliance with environmental standards.⁸⁷ This information is to be furnished to the established Tanzania Extractive Industry (Transparency and Accountability) Committee (TEITC) in every year.⁸⁸ Failure to provide such information is punishable by severe penalty ranging from 10-150 million TSHS.⁸⁹ However, this law applies to the mining, petroleum and natural gas sector only. Thus, MNCs involved in logging, fishing, agriculture, telecommunication, transport, banking, insurance, tourism and manufacturing, for example, are not covered under this law.

⁸³ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s. 32 (d) and (f)

⁸⁴ *ibid.*

⁸⁵ Natural Wealth and Resource Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017. s. 4.; Natural Wealth and Resources (Permanent Sovereignty) Act. s. 12.

⁸⁶ The Tanzania Extractive Industries (Transparency and Accountability) Act 2015.

⁸⁷ *ibid.*

⁸⁸ *ibid.* s. 4 (1).

⁸⁹ *ibid.* s. 23.

⁷⁷ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s. 32 (c).

⁷⁸ United Republic of Tanzania Constitution 1977. Art. 131.

⁷⁹ The Commission for Human Rights and Good Governance Act 2001. s. 15 (1-2)

⁸⁰ *ibid.* s. 16 (1-2)

⁸¹ The Public Leadership Code of Ethics Act 2002 (398). s. 6(b)(ii).

⁸² United Republic of Tanzania Constitution. Art. 108.

4.2.6. Implementation of Corporate Social Responsibilities (CSRs)

The term CSRs is not expressly mentioned under the TISEZA. This is an anomaly, given the role of the CSRs in the socio-economic well-being of the local communities in developing countries. Notably, the law regulating companies in Tanzania requires registered companies either public or private to be profit driven venture.⁹⁰ Through CSRs, MNCs are required not to consider only profit maximization but also to contribute towards broad-based socio-economic development of the local communities and countries they invested in. In this regard, the TISEZA seems to impliedly provide for CSRs obligation when it requires investors to safeguard interests of consumers, environment, gender and employees.⁹¹ Making CSRs a duty to investors does not only comply with international laws but also helps to uplift local laws to become tools of bringing socio-economic well-being to the locals.⁹²

In Tanzania, CSRs are generally provided for under the Companies Act 2002 which requires directors of the company to act in a manner that guarantees best interest of the company whose affair they manage.⁹³ It is also impliedly provided under the duty to have regard to interests of employees of the company.⁹⁴ Consequently, companies investing on sectors other than extractive are at liberty to implement CSRs as long as it is in the best interest of the company so to do. Indeed, CSRs act as a SLO for most of MNCs. When SLO lacks, MNCs should expect employees and local communities' resistance among other gross impacts. Locals' resistance does not only tarnish the image of the MNCs, but also, affects its good will in dealing with other stakeholders like the government, creditors and the public at large. Consequently, company directors may hardly avoid implementing CSRs in their investment activities if at all they are to guarantee long term benefits and companies' business continuity.

CSRs seem to be more prominent in the extractive sector than in other sectors in Tanzania. Both the Mining Act and Petroleum Act requires MNCs investing in such sub-sectors to undertake CSRs.⁹⁵ Despite recognition of CSRs obligation under the two Act, the two Acts are silent on what constitutes CSRs. It has been noted that, CSRs activities have not been expressly listed. They dependent on the nature of the business that MNCs are involved into and their size as well. Such a legal gap ought to have been filled by this new law regulating investment matters in the modern era where large-scale investment projects are inevitably implemented by MNCs mostly from global north.

4.2.7. Investors Liability

The TISEZA seems to be too general in relation to investors' liability. Given the fact that it is the general law that regulates investment matters in the country, it ought to have been express on investors' liability. As noted under part 3 above, MNCs tend to insulate themselves from potential liability arising out of the acts and or omissions of their subsidiary companies operating in host-states in developing countries. The TISEZA recognizes three major ways through which disputes between investors and the state may be handled. Firstly, MNCs and the government are expected to adopt amicable means of dispute settlement procedures in accordance with the laws of Tanzania. Here, MNCs and the state are expected to either adopt arbitration or mediation to settle disputes. Of course, ordinary courts of law are allowed to mediate the parties before they proceed into litigation in case mediation fails.

Secondly, the state and the MNCs are at liberty to adopt any dispute settlement procedure provided under Bilateral Investment Treaties (BITs) signed by the respective state and MNCs' home state. The other optional mode of dispute settlement is reference to the ICSID, an organ established to handle disputes between states and nationals of other states if the Investment Agreement so allows.⁹⁶ Worth to note here is that, all these procedures are optional to the MNCs. MNCs are not compelled to exhaust local remedies before they resort to international forum such as the ICSID and other avenue provided under the BITs. As such, MNCs are cynical to domestic institutions in developing countries and thus would prefer the international ones to local institutions. It is paradoxical that, they trust domestic institutions that grant them licenses to extract natural resources and carry out business in Tanzania but they do not trust the dispute settlement institutions.

In particular, Tanzania seems to have taken a bold stance on investment in extraction of natural resources (whether renewable or non-renewable) that all disputes settlement will be done at the domestic levels.⁹⁷ In respect of this, the Act states;

Pursuant to Article 27 (1) of the Constitution, permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal.⁹⁸

To make this section operative, all negotiations and agreements related to extraction of natural resources are required to reflect the above position.⁹⁹ It is argued above that, the move by the government was aimed at restoring investors trust to local institutions despite some of the challenges such as; backlog of cases and delays in disposal of cases. Consequently, in reading the TISEZA, one has to take into account the provisions of the laws regulating the extraction of natural resources which outlaw handling disputes in foreign tribunals and jurisdictions. It is, however, questionable if a situation

⁹⁰ The Finance Act 2020.

⁹¹ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania. s 32 (c).

⁹² See para 3.2.6 above.

⁹³ The Companies Act 2002. s. 186.

⁹⁴ *ibid.* s. 182.

⁹⁵ Mining Act 2018 (CAP123). s. 105.; The Petroleum Act 2015. s 222.

⁹⁶ See para 3.2.7 above.

⁹⁷ Natural Wealth and Resources (Permanent Sovereignty) Act. s. 11 (3).

⁹⁸ *ibid.* s. 11 (1)

⁹⁹ *ibid.* s. 11 (2).

arises where locals sustain gross impacts caused by a subsidiary company of MNC which has wound up its activities in Tanzania. Worse still, some of gross impacts of negligent acts of MNCs in the extractive sector, for example, takes long to be noticed.

Generally, this part has identified the extent to which TISEZA assigns obligations to foreign investors. Perhaps, it is a move worth applauding that for the first time the law regulating investment in Tanzania tries to balance both the rights and obligations of investors. However, when such obligations provided at the local setting are gauged against the international investment law standards, Tanzania law seems to be still wanting. Among the deficiencies in the Tanzanian law are; weak domestic laws that investors are required to comply with; absence of overall CSRs obligation to investors; weak laws that undermines precautionary principle; persistence of corrupt practices between MNCs officials and state officials; weak laws and institutions to compel MNCs complicity to human rights violation; and contradictory position on the investors' liability. The next part addressed the prominent legal challenges noted in the discussion of this paper.

5. Distilled Legal Issues Related to Defining and Assigning Obligations to Foreign Investor in Tanzania

The preceding discussion above offers a critical review of the definition and assignment of foreign investors' obligations at both international and domestic settings. Tanzania is taken as a case study owing to the recent developments in her investment law. Possibly, TISEZA came at a right time where the global and local communities are striving to achieve sustainable development. As such, the private sector, such as MNCs are vital in contributing towards achieving sustainable development if well regulated in host-states. Host-states are bound to enact laws which may be relied in unleashing potentials of private sector's contribution towards that end. However, despite such a reality, the newly enacted legislation on investment matters in Tanzania seems to be weak to unleash such potential as hereunder summarized.

5.1. Defining Foreign Investor

The mode and type of the definition of the term foreign investor adopted by Tanzania seems to be narrower and protectionist in design and purpose. It is narrower because, it is less considerate of international principles which ought to have influenced the manner she defines such a term. Tanzania is a member state to EAC and is bound by the Protocol establishing the EAC Common Market which dictates harmonization of laws regulating transfer of capital among EAC member states. Likewise, the adopted definition seems to be protectionist because local investors are protected against potential competition from investment from EAC member

states. Generally, states are allowed to protect infant industries and or local investors against potential competition on capital and skills from foreign states [48]. However, Tanzania's approach seems to be a blanket protectionism instead of sector and or category specific approach of protection.

5.2. Assigning Foreign Investors Obligations

A number of challenges may be ironed out from the discussion concerning assigning obligations to foreign investors. It is worth to note here that the paper relies much on the international model laws owing to absence of any binding multilateral investment treaty. Consequently, states including Tanzania are not bound to comply with their provisions on duties of investors but may be so influenced. Despite such an exception, the following issues have been noted from the above critical discussion of investors' obligations.

5.2.1. Compliance with National Laws

Generally, it has been noted in the discussion of this paper that foreign investors and their investments are subjected to domestic laws of the host-states. The stronger the laws in compelling FDIs contribution to the host-state development, the greater the FDI contribution to socio-economic development in host-states. Notably most of the developing states, including Tanzania, have weak investment laws incapable of compelling FDIs inflow to contribute in the socio-economic development in their jurisdiction. It has been noted above that, R&D is the pillar upon which inventions leading to widening employment opportunities and technological transfer to locals may be attained.¹⁰⁰

However, R&D may not be achieved unless there are concerted efforts of potential stakeholders namely, the government and the private sector investors. In respect of governments, two view-points may be argued. Firstly, the government is expected to enact and enforce laws regulating how stakeholders may contribute towards R&D. Secondly, the government has a duty to invest heavily in R&D through its budgetary allocations. With respect to MNCs, firstly, they are expected to comply with domestic laws including legal aspects of R&D. Secondly, in case local laws, as it is for the TISEZA, fall below international standards on R&D, MNCs are bound to comply with the international framework. MNCs compliance to international standards on R&D indirectly uplifts the local laws and offers benefits to locals. As may be noted below, CSRs have no closed list, hence MNCs can implement R&D as part and parcel of their CSRs.

5.2.2. Adoption of Precautionary Rules

Precautionary rule in the modern era of global climatic change threat is a vital tool to safeguarding mankind and guaranteeing their well-being. Although precautionary rule is

¹⁰⁰ See para 3.2.1 above

domesticated in Tanzania, it may be waived upon approval of strategic projects by the Cabinet.¹⁰¹ Also, the CCVA is not carried out per project but regional assessment instead. These exceptions signal a tilted legal framework towards large-scale investment project over safeguarding the environment.

5.2.3. Avoidance of Corrupt Practices

Although both international and domestic investment frameworks prohibit corruption, incidences of corrupt practices between MNCs and government officials seem to have remained a notable feature in Tanzania.¹⁰² Such a deficiency is rooted in no institutionalization of the anti-corruption initiatives. Consequently, weak institutions hold back efforts to curb corruption in foreign investment, let alone other areas.

5.2.4. Upholding Human Rights

Tanzania has very clear laws relevant to guarantee observance of human rights in investment activities among other areas. Nonetheless, some provisions of such laws exclude other potential class from being investigated or prosecuted. Other challenges related to lack of enforcement and corruption undermine the implementation of human rights. It is thus no wonder that peoples' rights end up being violated in large-scale anthropogenic activities in the name and protection of FDI.¹⁰³

5.2.5. Transparency and Corporate Standards

The obligation on transparency and good corporate governance seems to be loosely provided under the new legislation. Survey of existing laws in Tanzania shows that only the mining and petroleum sub-sector are expressly regulated in respect of transparency and good corporate standards.¹⁰⁴

5.2.6. Implementing CSRs

CSRs, as noted above, offer investment companies a SLO. It has also been noted that, CSRs are not regulated in all private investment firms but save in the extractive sector. Similarly, though the TISEZA regulates general investment issues in Tanzania, it has specifically excluded the extractive sector which has a separate framework.¹⁰⁵ As a result, one may, for example, hardly borrow the CSRs in extractive sector and try to imply them textile investment industry. Globally, MNCs are required to implement CSRs in areas where they invested. Thus, only MNCs in the extractive sector may be held accountable on this. MNCs investing in non-extractive sector such as service oriented investment are not bound to implement CSRs. Although the Companies Act offers such an obligation by obliging companies' directors to guarantee the best interest of companies, yet such a provision does not expressly include CSRs measures. The TISEZA is silent on

CSRs as one among the obligations that foreign investors have to comply with. Arguably, since it is the general law regulating both foreign and local investment in all sectors, the omission of CSRs as one among the investors obligation is an anomaly that needs to be addressed. As may be noted below, CSRs could be an avenue to make MNCs contribute towards socio-economic development of locals in the areas where they invest.

5.2.7. Investors' Liability

It has been noted above that, although Tanzania invites foreign investors, she has restricted litigation of investment related disputes in foreign jurisdictions save for investment in natural resources.¹⁰⁶ All investment disputes are supposed to be dealt with by Tanzania disputes settlement institutions, namely, the judiciary or arbitral organs. Investors seem to be distrustful of the locally established dispute settlement organs. Foreign investors, as noted above, prefer international dispute settlement mechanisms like the ICSID to local institutions. Notably, the TISEZA seems to have offered unfettered guarantee of foreign investors' access to international forum for dispute settlement subject to the existing agreements say for example under the investment agreement or BITs. Although this paper does not intend to limit foreign investors from seeking for remedies when the host-state violates their rights, it calls for the need to exhaust locally available remedies before they resort to international forums. Unfettered access to international dispute settlement organs undermines locally established institutions such as the judiciary. As such, international forums for dispute settlement are distinguished from locally established institutions in the sense that, they rely on conventional principles like precedent. The principle of precedence does not only allow one to predict the decision but also allows growth of jurisprudential in the legal fraternity.

Conclusion

Tanzania's move to repeal and enact a new legislation to regulate investment and special economic zones is commendable owing to the new era where states are striving to attain sustainable development. As such, it brought to an end the era of the 1997 Investment Act which was more favorite to foreign investors than the host-state and local communities by assigning no to foreign investors. In this paper, the new legislation on investment is examined on two key areas, namely; how it defines foreign investors and how it assigns obligations to them. It has been noted in the discussion of this paper that, Tanzania has taken a narrower approach in defining foreign investor which seems to be contradictory to her international commitment to avoid discrimination under the EAC Common Market. With respect to how foreign investors are assigned obligations, it is noted that, the Tanzanian legal framework is yet to reflect the international standards in areas of strong domestic legal framework, adoption of precautionary approach, avoidance of corruption, upholding human rights,

¹⁰¹ See para 4.2.2 above

¹⁰² See para 4.2.3 above

¹⁰³ See para 4.2.4 above

¹⁰⁴ See para 4.2.5 above

¹⁰⁵ Sheria ya Uwekezaji na Maeneo Maalumu ya Kiuchumi Tanzania.s 2(1) (a-b).

¹⁰⁶ See para 4.2.7 above.

transparency and accountability, implementation of CSRs and investors liability. The paper recommends for review of the new enacted investment legislation to address such noted key areas.

Abbreviations

TISEZA	Tanzania Investment and Special Economic Zones Authority Act
MDGs	Millennium Development Goals
BITs	Bilateral Investment Treaties
MNCs	Multinational Corporations
FDI	Foreign Direct Investment
SADC	Southern Africa Development Community
EAC	East African Community
MITs	Model Investment Treaties
ICSID	International Centre for Settlement of Investment Disputes
R&D	Research and Development
GDP	Gross Domestic Product
SIA	Social Impact Assessment
WB	World Bank
CSRs	Corporate Social Responsibilities
SLO	Social License to Operate
WTO	World Trade Organization
SDGs	Sustainable Development Goals
USA	United States of America
EMA	Environmental Management Act.
EIA	Environmental Impact Assessment
CCV	Climate Change Vulnerability
CECD	Corruption and Economic Crime Division
CHRGG	Commission on Human Rights and Good Governance
TEITAC	Tanzania Extractive Industry (Transparency and Accountability) Committee
TSHS	Tanzanian Shillings

Author Contributions

John Ombella: Conceptualization, Data curation, Formal Analysis, Methodology, Resources, Software, Supervision, Writing – original draft, Writing – review & editing

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Funding

Authors would wish to thank Mrs Magreth Briley for her support in financing the article processing fee

Conflicts of Interest

The authors declare no conflicts of interest.

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