CHAPTER 1

Foreign Direct Investment Protection in Africa – Contemporary Legal Aspects between BITS and BRICS

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Property, a creation of law, does not arise from value, although exchangeable – a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference (...).1

Justice Holmes, US Supreme Court

1 Introduction

Many African countries have realised the necessity of improving the continent’s image and offering increased incentive-oriented and institutional support structures to foreign investors. Such “(n)ational efforts to improve the investment climate of African economies further benefit from regional arrangements, such as the East African Community (EAC), the Southern African Development Community (SADC)” amongst others.2

Africa still remains one of the least developed regions in the world. Therefore potential investors have to be prepared to deal with such obstacles as underdeveloped market institutions, a shortage of skilled workers, constraints on business competition and weak governance, which is even more aggravated

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1 EnCana v Ecuador, Award, 11C 91 (2006) at n. 138.
by the geographical fragmentation and the poorly developed infrastructure.\(^3\)

In the worst case, investors even have to be prepared to deal with such things as severe environmental degradation, social disruption, violence and civil war.\(^4\)

Regardless Africa’s relatively weak economic performance, it is endowed with the world’s highest concentrations of natural resources. Natural resource investments are often very capital-intensive with standardized process only creating modest spillovers on local labour and technologies.\(^5\) It must be feared that governments refrain from initiating necessary political and economic reforms like investment in human capital and infrastructure, institutional reforms, structural diversification and technology accumulation, which are crucial for an employment-intensive and inclusive growth.\(^6\) Other negative side effects of the over-reliance on the export of raw materials are the vulnerability to the vitality of the international commodity markets, the possible misallocation of revenue incomes in governmental budgets, corruption practices, environmental degradation and sometimes even violent conflicts.\(^7\)

In light of the aforementioned, Investment Law gains much momentum and is of utmost importance to the development of the African continent. When analysing the formal sources of Investment Law, one must investigate a concurrence of international and domestic Law. Concurrence does not necessarily mean that international and domestic investment law are hierarchically related. Rather on the contrary: They should be understood as being cumulatively applicable, meaning that investment tribunals must “consider domestic and international law concurrently, without setting a hierarchy between these bodies of law”.\(^8\)

International Investment Law is not organised around a multilateral treaty or central organisation like for example the United Nations (UN) or the World Trade Organization (WTO). It is much rather governed by public international law and domestic investment law under an array of bilateral, regional and multilateral treaties (BIDS, RECS, FTAs, etc.). Jurisdiction over International Investment Law is inter alia derived from contracts, treaties and insurance

\(^3\) HG Broadman *Africa’s Silk Road* (2007) 92.


\(^7\) Habiyaremeye (n 4 above) 84.