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1. INTRODUCTION

Over the past decade, African and most developing countries have witnessed an increase in foreign direct investments (FDI). This has been due in part to the globalisation and liberalisation processes that began after the end of the cold war. Globalisation is understood here as the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge and people across borders.[1] Globalisation has been accompanied by the creation of new institutions such as the World Trade Organisation's (WTO) that have joined with existing ones such as the International Monetary Fund (IMF) and the World Bank to work across borders.[2] The WTO, for example, has as cardinal principles, trade liberalisation and non-discrimination. This has made countries to open-up previously closed sectors like state own enterprises (SOE) through privatisation. In order not to miss the globalisation bandwagon, some African countries have put in place pieces of legislation, which have the goal of attracting investors. Others have signed bilateral investment treaties (BITS) with developed countries, which amongst other things, contain provisions on nationalisation, compensation, national treatment and most favoured nation principles (MFN).

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[1] J. Stiglitz: *Globalisation and its discontents*, Penguin Press, (2002) 9

[2] Ibid

In order not to miss out on investors as well as the globalisation bandwagon, Namibia enacted the Foreign Investment Act and the Export Processing Zone (EPZ) Act in 1990 and 1995 respectively. An Export Processing Zone or a Free Trade Zone is an area within a country where tariffs and other local tax regimes don't apply.[3] The aim for this is to lure investors. Investors operating in Export Processing Zones have tax breaks and other incentives.[4]

These 1990 and 1994 pieces of legislation were aimed at providing certain incentives to would-be investors. One of the companies that benefited from these initiatives was Ramatex Textile and Garment Factory, a Malaysian company. The company began its operations in November 2001. Few years after its incorporation in Namibia questions were raised by the media and civil society organisations (CSOs) about the company's commitments towards uplifting the living standards of Namibians as well as contributing to the country's economic development. At the time, the government dismissed these concerns stating that the company had significant bearing on the future course of the Namibian economic growth in terms of employment creation, skills development and foreign exchange. This, however, did not come to fruition as seven years later; Ramatex controversially closed its operations in Namibia.

The aim of this paper is to examine the Ramatex saga in the light of the effective role of national laws in the regulation of foreign direct investments in developing countries and least developing countries (LDCs) in general and African countries in

[3] Wikipedia, available at: http://news.bbc.co.uk/2/hi/8663824.stm (last visited on 6 May 2010)

[4] Ibid

particular. The paper explores the need for effective implementation of domestic laws vis-à-vis foreign direct investments in Africa especially why it should be done. The argument is sometimes made that certain multinational companies from developed countries, especially Shell often fail to respect environmental and other standards in developing countries, standards which they would have respected if and when they operate in developed countries. This paper looks at investment from a developing country to another one and shows whether this pale in comparison to investments from developed to developing countries are the same. My intention in this paper is not to blatantly criticise foreign companies, but to advocate for the effective crafting and implementation of local laws vis-à-vis them. As African countries race to attract foreign companies they must ensure that local laws pertaining to the environment, labour, etc should be well implemented so as to regulate the activities of the foreign corporation. The paper concludes by proffering ways through which such legal scrutiny might be achieved.

2. LEGAL FRAMEWORK: NAMIBIA

A series of international legal regimes and domestic legislation might have prompted investors to come to Africa. At the international level there was the requirement from the World Bank and the International Monetary Fund (IMF) for countries to liberalised their economies as part of the Structural Adjustment Program (SAP).[5] This meant the putting in place of investment laws favourable to foreign investors. At the national level, in the early part of this decade, most African countries

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[5] See: http://www.nationsencyclopedia.com/Africa/Cameroon-FOREIGN-INVESTMENT.html (last visited 6 May 2010)

revamped or enacted new pieces of national investment laws that were very favourable to foreign investors.[6] In addition, at the beginning of this decade, there was the African Growth and Opportunities Act (AGOA), enacted by the US and the World Trade Organisation (WTO) Agreement on Textiles and Clothing (ATC).

The introduction of the African Growth and Opportunity Act (AGOA), providing for duty-free garment imports to the United States (US) from sub-Saharan Africa might have prompted Ramatex, like most Asian transnational corporations to further develop its African interests.[7] Firstly, most of them wanted to take advantage of the cheap labour, general tax incentives and in the case of certain southern African countries like Lesotho, Swaziland and Namibia, their close proximity to Africa's power house, South Africa.[8] Ramatex's interests in Africa might also have been heightened by the existence of the WTO's Agreement on Textiles and Clothing (ATC). The ATC created a quota system, which limited imports of textiles and clothing from developing to developed countries to safeguard industries in developing countries and control the level of market access for developing country imports. In terms of this agreement, imports from countries that had exhausted their quotas were blocked from entering the markets of developed countries. It should be noted that the quota restrictions came to an end in January 2005.

Ramatex Textile and Garment Factory is a Malaysian company operating in several Asian (Cambodia, China and Malaysia) and African (Mauritius and South Africa)

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[6] See for instance the Cameroon Investment Code of 2002, which declared all of Cameroon and Export Processing Zone with benefits given to any enterprise that meets the export criterion

[7] F. Phiri and M. Nduru *Asia Strips Africa of its textile* available at http://www.atimes.com/atimes/Global_Economy/GD26Dj01.html (last visited on 9 April 2010)

[8] Ibid

countries. Before analysing the Ramatex case, it would be instructive to provide an analysis of the legal frameworks - Foreign Investment Act and the Export Processing Zone Act - which provided a conducive atmosphere for Ramatex to operate.

2.1 The Foreign Investment Act of 1990 as amended by Act No. 24 of 1993

The Namibian Foreign Investment Act (NFIA) came into force on 19 December 1990, few months after the country's independence[9]. This Act was subsequently amended in 1993. The Act, which is still in force today, has three parts. Part one deals with administration and principles regarding foreign investment. Part two is concerned with status of investments and rights and obligations of holders on investment certificates while part three deals with miscellaneous provisions. The Act contains cardinal provisions on national treatment, compensation in the event of expropriation, repatriation of profits and a dispute settlement mechanism found in most pieces of investment legislation. It also has new terminologies like status of investment and the award of investment certificates.

National treatment is provided for in Article 2 (2). It states that a foreign national shall not be treated differently from a Namibian in the application of any law governing the establishment and carrying on of any business activity or the taxation of the income or any other aspect of any business activity. Furthermore, no foreign national engaged in a business activity or intending to commence a business activity is required to provide for participation of Government or any Namibian as shareholder or as a partner in such

[9] Namibia had its independence on 21 March 1990.

business.[10] This is a drastic move away from the conventional view that foreign investments should have some sort of local participation. However, the government may make the involvement of Namibians as a condition of any authorisation for the grant of rights over natural resources.[11] The Minister of Trade may by notice specify any business engaged primarily in the production of goods and provision of services, which can be produced or provided by Namibians and with effect from the date of such notice no foreigner shall become engaged in any business so specified.[12]

The Act introduces the concept of certificate of status of investment. Such a certificate is granted only to foreigners whose investments are classified as eligible investments.[13] An eligible investment is defined as an investment or proposed investment whose assets are of a value not less than the amount, which the Minister may determine from time to time by notice in the official Gazette.[14] However, it is not clear what will happen in the event that a proposed investment is not made or better still, it is made, but its magnitude does not entitle it to be called an eligible investment as defined in the Gazette. This will raise important legal questions as it is unclear what sort of right would be accorded to such an investor/investment.

Holders of the certificate of status of investment are entitled to certain benefits. First, the Bank of Namibia shall ensure that there is available for purchase and at the request of a certificate holder, freely convertible foreign currency, which the certificate

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[10] Article 2(3)

[11] Ibid

[12] Article 2(4)

[13] Article 6

[14] Ibid

holder may use without any restriction.[15] Secondly, the certificate shall provide that any dispute between the holder and the government in respect of payment of compensation and/or expropriation shall be settled by an international arbitration.[16]

Article 9 deals with repatriation of profits. According to this article, the Bank of Namibia shall ensure that there is available foreign currency, which the holder of a certificate may use, *inter alia*, for the transfer of profits, payment of company remittances, and payment of dividends to shareholders or stockholders residing out of Namibia. A certificate holder may retain any payment or a proportion of any payment in foreign currency for goods produced by the enterprise or any undertaking carried on by the enterprise, which are exported from Namibia.[17] Mention is not made of how a foreign investor who is not a holder of a certificate of status of investment would repatriate his/her profits. It is submitted here that this might not be sustainable. This may scare small-scale investors as the Minister has arbitrary powers not only to set the conditions for the granting of a certificate of status of investment, but also to issue the said certificate. Another point to note is the fact that the Bank of Namibia has a duty to make available foreign currency to the holder of a certificate. It would be interesting to know what would happen if the Bank refuses to make available foreign currency. One reason would be that it would be liable to the investor as the law expressly states that it has to ensure the availability of foreign currency. However, bearing in mind that central banks are part of the executive and an

[15] Article 8

[16] Article 13

[17] Article 10

attack of any executive institution means an attack on the host government, the investor might want to solve the problem amicably, not least as its interest of repatriating profits would be at risk.

Compensation (arising from expropriation) and dispute settlement are covered by Articles 11 and 13 respectively. Expropriation shall not be carried out on any property and other interests of any enterprise except in accordance with the provisions of Article 16(2)[18] of the Namibian Constitution. In event that such property is expropriated, the government of Namibia shall pay to the holder of a certificate just compensation without undue delay and in freely convertible currency. This is a laudable initiative as the Government of Namibia applies the famous Hull formula.[19] Disputes are to be settled through arbitration in accordance to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), unless by agreement between the minister and the foreign national, holder of a certificate.[20] The arbitration award shall be final and binding.[21] However, no mention is made of ordinary foreign investors who do not possess the certificate of investment status.

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[18] It provides that: "The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

[19] This formula, postulated by the United States then Secretary of State, Hull in the second quarter of the 20th Century, is to the effect that expropriation must be followed by prompt, adequate and effective compensation. For a detailed discussion on this subject, see generally, A. F. Lowenfeld *International Economic Law,* Oxford University Press, (2003). 397 - 405.

[20] Article 13 (2)

[21] Article 13 (3) FI Act

2.2 The Export Processing Zone Act of 1995 as amended by Act 6 of 1996

Before its coming into force, concerns had been raised by the Namibian Government that both local and foreign investment in the first five years of independence had been disappointing. The general view at the time was to look for ways to attract Foreign Direct Investors. This paved the way for the creation of an Export Procession Zone, which provided incentives to lure foreign investments into Namibia.

The Act has ten parts with thirty provisions dealing, *inter alia* with establishment of an EPZ, applications of laws in an EPZ, expropriation, compensation and dispute settlement. An EPZ may be established by the minister of trade in consultation with the minister of finance by notice in the official gazette.[22] Such notice would also determine the location and extent, and define the physical characteristics of an EPZ.[23] An EPZ may consist of a developed, partly developed or undeveloped area of land and may comprise of a single-factory unit or a group of factory units.[24]

The objectives and purposes of an EPZ are provided for in Article 3. According to this Article, these objectives and purposes are: to attract, promote, or increase the manufacture of exports goods; to create or increase industrial employment; to create or expand export earnings; to create or expand industrial investment including foreign investment and lastly, to encourage technology transfer and the development of management and labour skills. These objectives show the strong desirability among the

[22] Article 2 (1) (b) of the EPZ Act

[23] Article 2 (1) (a) of the EPZ Act

[24] Article 2 (2) of the EPZ Act

legislators to make Namibia an economic powerhouse in southern Africa. However, sub paragraph “D” of Article 3 is superfluous. It appears to create a distinction between industrial investment and foreign direct investment as well as create the impression that the latter is a sub-set of the former. This appears somewhat ambiguous as foreign direct investment may take different forms, which may be inclusive, but not limited to investment in the industrial sector.

Every EPZ shall be managed by an EPZ management company appointed by the minister of trade subject to conditions which the Minister may determine and which shall be specified in agreement entered into between the minister and the EPZ management company.[25] Upon appointment, the Minister shall issue a certificate of management to such a company.[26] Such a company shall develop the EPZ and maintain amenities and services such as: the establishment (to the satisfaction of the minister of trade) adequate fencing walls and enclosures to demarcate the EPZ as well as the provision of a sewage system, a drainage system and refuse removal system.[27] The appointment of an EPZ management company may be cancelled or the agreement entered into between an EPZ management company and the Minister of trade amended after a 30 days notice if the company is either wound up, is placed under judicial management or contravenes the conditions to which it was so appointed.[28]

The Act restricts the conduct of any business in retail trade in an EPZ in respect of goods manufactured in or imported into such an EPZ and the removal of any goods

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[25] Article 12 of the EPZ Act

[26] Ibid

[27] Ibid

[28] Ibid

manufactured in an EPZ for any purpose other than the removal to another EPZ or for export to a country other than Namibia.[29] These can only be done with the authorisation of the minister of trade, acting in consultation with the minister of finance.[30]

Some of the most controversial provisions of the Act are found in Part three, which contains Articles 5 – 9. As per Article 5, the sales tax, the additional sales duty and the customs or excise duty payable under the Sales Tax Act, 1992, Additional Sales Duty Act, 1993 and the Customs and Excise Act, 1964 respectively, shall not be levied on companies operating in an EPZ. In the same vein, no instrument executed in or outside the EPZ, which relates to the transfer, lease shall be subject to any duty imposed by the Stamp Duty Act of 1993. Furthermore, no income derived in an EPZ shall be liable to taxation in terms of the provisions of the Income Tax Act, 1981. The provisions of the Foreign Investment Act shall not apply in an EPZ.[31]

When the EPZ was passed in 1995, it stated that the Labour Act of 1992 would not apply in EPZs.[32] This made the EPZ Act to be the subject of widespread criticisms and there was a clarion call from labour rights movements, the media and NGOs for its amendment.[33] By not allowing the Labour Act to be applicable to EPZ, the government left the workers at the mercy of companies that operate within EPZ. It is not quite clear what the motives of these provisions were. They were probably meant to attract investors

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[29] Article 4 of the EPZ Act

[30] Ibid

[31] Articles 8 and 9 of the EPZ Act

[32] See the Preamble to the EPZ Act

[33] Labour Resource and Research Institute, (LARRI) *Ramatex: On The Other Side Of The Fence* (October 2003) 5

as they (investors) would not be subject to the rigours of the local labour law. At the time, the government argued that both local and foreign investment in the first five years of independence had been disappointing and that the EPZ were the only solution to high employment.[34] The then President, Sam Nujoma, described the exclusion of the Labour Act as necessary to allay investors' fear of possible industrial unrest.[35] He further described the non-application of Namibia's Labour Code in the EPZ regime as a delicate compromise, which was necessary to achieve the larger goal of job creation.[36] Critics say the Namibia Government was unwittingly sacrificing its people at the altar of foreign investment.[37] I don't think this view is totally correct. Investors are likely to put their money in places that offer them the best conditions for a favourable return to their investments. Countries understand this and they will try to outdo each other to lure investors to their respective countries. In my opinion, the least the Namibian Government could have done was to have an effective mechanism to investigate issues relating to labor violations. Sadly, this was not the case. Article 8(2), which creates a mechanism to carter for workers contain the voluntary "may" and not the mandatory "shall". It provides that the Minister of Trade may in consultation with the Minister of Labour make regulations relating to employment, conditions health, termination of employment contract, disciplinary action safety and welfare. Thus the creation of such an important mechanism to protect workers was left to the discretion of the Minister. In the event that such a minister did not create such a mechanism, then the workers shall have no other

[34]Ibid

[35] Ibid

[36] Ibid

[37] Ibid

place to seek recourse to. As a result of these shortcomings, Namibia's largest trade union, the National Union of Namibian Workers (NUNW) opposed the exclusion of the labour act and instructed its lawyers to challenge the constitutionality of the EPZ in court.[38] After intense negotiations, a compromise was reached which stipulated that the labour act will apply in EPZs, but that strikes and lock-outs would be outlawed for a period of five years.[39] However, in 2001 the Government accepted that EPZ workers had the right to strike by amending Article 8, which had excluded the application of the Labour Act.[40]

Expropriation, compensation and dispute settlement are couched in Articles 16 and 17, respectively. Generally, no property in an EPZ or any part thereof shall be expropriated except in accordance with local laws.[41] Where expropriation is carried out, the Government shall pay to the owner just compensation without undue delay and in freely convertible currency.[42] In case of dispute relating to the amount or any other matter in connection with the payment of compensation as a result of expropriation or with regard to the validity of an EPZ management certificate, such dispute shall be settled by arbitration, if the holder of the EPZ management certificate had so elected.[43] According to Article 17 (3), any arbitration award is final and binding on the government and on the

[38] Ibid

[39] Ibid

[40] See Export Processing Zone Amendment Act of 11 June 1996

[41] Article 16 (1) of the EPZ Act. These local laws are the Expropriation Ordinance of 1978 and Article 16 (2) of the Namibian Constitution.

[42] Ibid

[43] Article 17

holder of the EPZ management certificate. Where the EPZ certificate does not make mention of arbitration any dispute that arises was to be determined by the competent court in Namibia.[44]

3. BACKGROUND TO THE RAMATEX CASE

The advent of Ramatex's coming into Namibia was heralded by Namibia's Minister of Trade and Industry and the City of Windhoek (capital city of Namibia) Council as a significant investment that would be a milestone in overseeing the establishment of southern Africa's largest textile manufacturing industry.[45] At the time, it announced that it had succeeded in snatching up a project worth 1 billion Namibian Dollars (about 10 million Euros) ahead of South Africa and Madagascar, which had also been considered by the Malaysian company, Ramatex.[46] The Namibian government was hoping that this would be the first step towards building a skill based competitive advantage for Namibia to become a leading center for textile and garment industries in Africa.[47] Drawing in the para-statals providing water and electricity (Namwater and Nampower) as well as the Windhoek municipality, the Ministry put together an incentive package. This package included subsidized water and electricity, a 99-year tax exemption on land use as well as over 100 million Namibian Dollars to prepare the site including earthworks construction and the setting up of electricity, water and sewage infrastructure.

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[44] Ibid

[45] Herbert Jauch *The Ramatex Closure in Namibia: Hard Lessons to be learned* available at www.namibian.com.na/2008/March/columns/08F0362BB6.html. (last visited 31 March 2010)

[46] Ibid

[47] LARRI supra note 31 at 11.

This was justified on the grounds that it would create 10,000-15000 jobs especially for historically disadvantaged people.[48] It was also stated that the project would lead to increased tax revenue as well as the rapid and efficient transfer of required skills.[49] This would in turn lead to small business development, human resources development and industrial linkages.[50] Mentioned was made of the fact that the project would lead to the development of a sophisticated communication and transport network and thus shall open the route for more foreign direct investment into the country.[51]

The Ramatex project was officially launched in Windhoek (capital of Namibia) on the 14 of June 2001 and construction began in August 2001. Garment, dyeing, knitting and spinning factories were built. However, within a few years of its existence, concerns were raised as to its commitment towards Namibia's developments. Instances of human (labour) rights and environmental rights abuses were recorded. In fact, a study carried out the Labour Resource and Research Institute (LaRRI) of Namibia found widespread abuses of workers rights, including forced pregnancy tests for women who applied for jobs; non-payment for workers on sick leave; very low wages and no benefits; insufficient health and safety measures; no compensation in case of accidents; abuse by supervisors and open hostility towards trade unions.[52] Tensions erupted between Ramatex and labour unions leading to strikes in 2002, 2003 and 2006 as a result of the former's

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[48] Ibid

[49] Ibid

[50] Ibid

[51] Ibid

[52] LARRI *Assessment of the Export Processing Zone* (2000) 6

failure to improve the working conditions of workers. Following the 2006 strike, workers wages were slightly increased and housing and transport allowances were introduced.

At the height f its operations in 2004, Ramatex employed about 7000 workers including over 1000 Asian migrant workers mostly from China, the Philippines and Bangladesh.[53] Although the company claimed that these workers were brought in as trainers, most of them were employed as mere production workers with basic salaries of around US$ 300 – US$ 400 per month, which were higher than that of their Namibian counterparts.[54] Some critics held that the import of Asian workers served the company's divide and rule tactics as protests by Namibians, Filipinos and Bangladeshi workers were isolated and found no support from their Chinese counterparts.[55] At the end of 2007, about 4000 workers had been retrenched including 400 Asians. It is fair to say that Ramatex might not have brought in the foreign workers for the mere purposes of divide and rule. Probably, the workers were well trained than their Namibia counterparts. In addition, it might have been expensive to employ Namibians with same education and training as the Asian workers.

In April 2005, Ramatex closed one of its plants (Rhino Garments) leading to the retrenchment of 1000 workers. This happened immediately following the termination of the ATC agreement, which saw many textile factories in Lesotho, South Africa, Mauritius, Madagascar, Kenya and Swaziland closing down. At the time, the Government of Namibia maintained that the termination of the ATC would in no way

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[53] H. Jauch *The Ramatex Closure in Namibia: Hard Lessons to be learned* available at www.namibian.com.na/2008/March/columns/08F0362BB6.html. (last visited 31 March 2010)

[54] Ibid

[55] Ibid

threaten the prosperous existence and further development of the textiles and garments sectors in Namibia.[56] The Namibian government and Ramatex maintained that the factory's closure was a result of the International Textile, Garment and Leather Workers Federation (ITGLWF) writing to buyers to inform them of the poor labour conditions at the factory.[57] This was however, not a true reflection of the situation as the letters from ITGLWF expressly stated that the Federation did not want buyers to boycott products from Ramatex Namibia.[58]

In 2006, following a year of speculation, Ramatex closed its main spinning, knitting and dyeing factories in Namibia, leaving only one of its plants – Flamingo Garments to operate, retrenching some of its workers in the process. Meanwhile 484 Bangladeshi who had been brought in were quietly deported when their atrocious working and living conditions became public knowledge.[59] Some of these workers, whose contracts were terminated after they questioned their employment conditions, brought a legal action against Ramatex in the Windhoek District Labour Courts. The company advanced losses as the main reason for closing this plant. This trend provided clear indication that Ramatex was preparing for closure.

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[56] L. Dentlinger *Namibia and the textile industry – Golden fleece or threadbare hope?* Available at http://www.namibian.com.na/2005/April/national/05AB571E42.html (last visited 31 March 2010).

[57] Ibid

[58] Ibid

[59] J. Grobler *Ramatex raked in millions,* available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=48426&no_cache=1 (last visited 9 April 2010)

The inevitable happened in March 6, 2008 when Ramatex closed its only remaining division, Flamingo Garment leaving 3000 workers jobless. When workers arrived at the factory to report for duty, they were barred from entering the factory. They had not been informed of the impending closure. Ramatex said it had to close the factory as a result of financial losses, which it had been incurring over the years. The company advanced that increased wage bill and seasonal fluctuations made business difficult. It claimed that it had lost approximately 500 million Namibian Dollars (about US$ 850,000) during it last year of operation.[60] This assertion is highly questionable, as Ramatex paid no taxes, received water and electricity at subsidised rates and was exempted from import duties in the U.S.A.[61] After intense negotiations, the Namibia Food and Allied Union (NAFAU) representing the workers agreed compensation packages with Ramatex to the effect that the retrenched workers will receive: two weeks salary for every year they worked; payment for outstanding leave days as well as 70% payment of workers medical bill for the month of April.[62]

4. LEGAL IMPLICATIONS OF RAMATEX'S ACTIVITES AND SUBSEQUENT CLOSURE

The closure of Ramatex had some profound consequences on Namibia. It showed a blatant disrespect of the local laws be it labour, environmental or immigration laws.

[60] Ibid

[61] J. Stiglitz supra note 1

[62] C. Maletsky, *Ramatex agrees on packages*. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=48560&no_cache=1 (last visited on 31 March 2010.

First, it has left about 3000 Namibian working in the industry unemployed. Worst affected were the thousands of young people, mostly female workers who had to endure highly exploitative working conditions for years and in the end were literally dumped in the streets without any significant compensation.[63] Many sub-contractors who had calved a niche for themselves from Ramatex's investments ran out of business. Note should be taken of the fact that these people were not given notices of the imminent closure. In most situations, companies often inform its workers of its intention to close and start negotiating redundancy packages in advance. This was not the case with Ramatex. The company knew of its closure and had been secretly shipping out its equipment on the grounds that it was sending them abroad for maintenance. This was contrary to a press statement of the company in 2005 wherein it had denied that its operation in Namibia would be short-lived.[64] Closely linked to the above, there are many people suffering from diseases, which they caught by working for Ramatex. Medical tests on about 3000 former Ramatex workers confirm at least 46 cases in which working conditions at the textile factories resulted in significant health problems[65]. Most of these people, who have now returned to their villages, would have to take care of their medical bills. This is in contravention to the letter and spirit of the Labour Act wherein the company has to compensate workers injured as a result of occupational diseases.

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[63] J. Stiglitz supra note 1

[64] L. Dentlinger *Namibia and the textile industry – Golden fleece or threadbare hope?,* available at http://www.namibian.com.na/2005/April/national/05AB571E42.html. (last visited on 31 March 2010)

[65] D. Isaacs, *Ramatex fallout goes on: workers in need of medical help,* available at http://allafrica.com/stories/200807160679.html (last visited on 9 April 2010)

Ramatex flouted the immigration laws of Namibia. Namibian immigration laws and regulations as well as the country's Affirmative Action Act of 1998 prescribe that work permits for foreign nationals shall only be issued if the required skills cannot be found locally[66]. In additional, employers are required to employ Namibian understudies to ensure skills transfer. However, this was not followed by Ramatex. It was astonishing that they were allowed to employ productions workers with basic salary over and above those of their Namibian counter parts. Thus Ramatex did not only violate the immigration law of employing foreign nationals for jobs that locals could do, but also practised discrimination as foreign workers performing tasks as their local counterparts earned far more than Namibians

Besides, the heavy incentives that had been given to Ramatex came to nought. As indicated above, Ramatex was exempted from taxes (99% tax exemption on land use) and paid subsidised water and electricity bills. The Government and the City of Windhoek Council had rejected concerns raised by journalists and civil society organisations (CSOs) on the way Ramatex was conducting its business in Namibia. At the time, the government dismissed these concerns as alleged tactics to "scare away investors".[67] In monetary terms, the Namibian government together with the City of Windhoek Council made many losses from these incentives; money which would have been used in other sectors of the economy especially the health and educational sectors.

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[66] H. Jauch and R. Traub-Merz (eds): *The Future Of The Textile And Clothing Industry In Sub-Saharan Africa* Friedrich Elbert Stiftung, Bonn (2006) 220

[67] *Ramatex – Money, Hopes and Livelihoods Down the Drain* Available online at http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=48187&no_cache=1 (last visited on 9 April 2010)

Ramatex left serious environmental problems unattended. The factory did not install the technology to dispose of the waste-water. As a result, Windhoek's water sources were being polluted by waste. In addition, underground water sources were contaminated by toxins from the wet-processing at the plant. Worst of all, the streams stemming from the factory and carrying contaminated water run into the Goreangab Dam, where water is being stored and treated for household and other uses. Ramatex had promised to resolve these issues, but indeed they failed: to install impermeable lines for the waste; floors which were in contact with waste were not lined with special synthetic material and lastly, the factory had an underground network as well as pipes running in the open unlined brickwork trenches.[68] At the height of its operations when these environmental damages became real, a local NGO, Earthlife Africa warned the Namibian government and anticipated Ramatex to consume about 1.5 million litres of water per day (which would be more than half of Windhoek's total water consumption), but the latter failed to take any precautionary measures.[69] In fact, these concerns were met with open hostility by the Namibian government that accused the organisation of being against development and job creation.[70] Instead, the City of Windhoek Council announced near the end of 2006 that it would take over the company's waste management.[71] Ramatex

[68] S. Cappucio, *Labour and Environment: the Ramatex Textile Factory case*. International Textile, Garment and Leather Workers' Federation (ITGLWF). Available online at: http://www.unep.org/labour_environment/TUAssembly/case_studies/Cappucio-ITGLWF.pdf. (last visited on 31 March 2010)

[69] J. Stiglitz, supra note 1

[70] LARRI, supra note 31

[71] Ibid

should have been held fully accountable and forced to rectify the damage at its own costs.[72] Unfortunately, this did not happen.

Notwithstanding the above, investors often have choices or reasons for picking one country and not the other. The reasons are many and varied, but might be greatly influenced by economic considerations. As I mentioned in the beginning of the paper, Ramatex must have been influence by the WTO ATC regime. They probably might not have found it economically sound to continue their operations in the country. On another note, there might have chosen Namibia out of the other Southern African countries because of the favourable investment regime. May be they wouldn't have come there in the first place if there wasn't a favourable investment climate.

5. TOWARDS AN EFFECTIVE LEGAL REGIME FOR FOREIGN DIRECT INVESTMENTS IN SUB-SAHARAN AFRICA

5.1 Why is there a need for an effective legal regime?

It should be noted that most African countries have an investment law in one form or the other. The problem is effective implementation of this regime and adapting some of its provisions to current circumstances.

Violation of local laws by multinational corporations is not new to developing countries.[73] In fact, many instances of corporate evildoing have rightly become infamous,

[72] Ibid

[73] In Papua New Guinea, a large Gold and Copper mine, Ok Tedi, dumped 80,000 tons of contaminated material daily into the Ok Tedi and Fly Rivers over the course of a dozen or so years as it extracted some $6 billion worth of ore. Once the mine was exhausted, the Australian majority share ownership, after

the stuff of legend: Monsanto's development of seeds that produced plans which in turn produced seeds that could not be replanted, thereby forcing farmers to buy new seeds annually and Exxon's massive *Valdez* oil spill and the company's subsequent attempts to avoid paying compensation.[74]

The Ramatex case is a classic example of multinational corporations who take advantage of weak and most often, obsolete pieces of legislation to maximise their profits at the detriment of the host nation. There is thus an urgent need to regulate their businesses through effective implementation of existing local laws. The reasons for these mechanisms are many and varied and will be discussed in the ensuing paragraphs.

An effective implementation of local laws would ensure that such local laws are respected. Ramatex's operations in Namibia were nothing short of controversies. It was characterised by blatant violations and disregard for labour rights, the environment and pieces of local legislation such as the Affirmative Action (Employment) Act of 1999 and the Namibian Constitution. Experiences elsewhere have shown that compromises on social, environmental and labour standards in the name of international competitiveness have led to a race to the bottom[75]. A legal mechanism shall ensure that there is no compromise when local laws, rights, regulations are concerned either they are respected and implemented or the defaulter faces the wrath of penalties prescribed thereof.

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admitting that it had vastly underestimated the environmental impact, just walked away leaving the government, already strapped for funds, with the clean up cost. For more discussions on violations by multinational corporations, see J. Stiglitz, supra note 1.187-210

[74] J. Stiglitz, supra note 1 at P87

[75] Ibid

Closely linked to the above, effective implementation shall ensure that multinational companies are held responsible for *ultra vires* acts. This would make them put their house in order and really think twice before engaging in any act or omission, which shall expose them to liability. As the example of Ramatex demonstrates, this was not the case. It was allowed to hire and fire workers at will, pollute the environment, erect illegal buildings, perpetrate an atmosphere of uncertainty, fear, hatred and discrimination between its workers at will. If the government had headed to the call of stakeholders to bring Ramatex to book, most, if not all of the above problems would have been abated.

5.2 How to ensure an effective implementation of domestic laws

The case of Ramatex shows that there is really an urgent need for effective implementation of the current laws or amending those that are not up-to-date. Such an effective legal regime can be achieved in the following ways:

The saying that "charity begins at home" could be employed here. African countries need to set their houses in order. For instance, they should take a stance on zero-tolerance of corruption. This would mean having a well-functioning justice system with the respect for the rule of law where judges take a no-nonsense stance towards corrupt officials. There should be coordination of activities between the judiciary and the administrative authorities, which is usually lacking in most countries.

There must be some sort of a binding agreement between the host state and the company wishing to carry out the investment. Such an agreement should clearly spell out the rights and obligations of each party as well as situations where such rights and obligations are not exercised in the manner specified by the agreement. There must be clauses dealing with the respect of local laws. Such clauses should incorporate expressly or by reference the provisions of the said local laws as well as the penalties spelt out in cases of their non-observance.

Closely linked to the above, mechanisms must be put in place to ensure compliance. It is not enough to have the laws without having enforcement mechanisms in cases where there are violations. Investment legislation should create supervisory mechanisms to act as watchdogs over foreign investment. Such agency should have as mandate regularly visiting and inspecting the investment sites and regularly meeting with employees. One might be tempted to say such a body might interfere with investors and as such, might scare them. However, unnecessary interference can be prevented by allowing the agency to act only when there is evidence-based allegation regarding violation of local laws.

Furthermore, legal regimes on investment could be made effective by insisting on the respect of local and international laws on corporate social responsibility and other internationally recognised standards. This would mean companies would take into account all stake holders – employees and communities in which they operate, not just shareholders. As such, all stakeholders will have a say in the activities of the company carrying out the investment. Most often, especially in sub-Saharan African countries, civil society organisations (C.S.O) and non-governmental organisations (NGOs) are better informed than their own governments and usually possess a wealth of information than the governments. They could from time to time be consulted to express their views on the respect of labour and environmental rights as well as local laws. During the time of its operations in Namibia, there was a clarion call from CSOs and NGOs for the government to hold Ramatex liable for its blatant violations and disregard for local laws. However, these fell on deaf ears. At one point the Namibian Chamber of Commerce and Industry (NCCI) referred to criticisms from NGOs as unsubstantiated, even though they did not in fact look into the complaints. At another instance, the mayor of the City of Windhoek described the criticisms as anti-developmental forces that would like to see thousands of previously disadvantaged and dehumanised Namibian families continue languishing in poverty. Had it been NGOs were consulted on the issues raised, Ramatex would have been brought to book before its closure.

African countries should have a united approach towards investment. This could take the following forms: harmonisation of laws, having a tribunal to deal with investment cases and periodic meetings to share information of good practices and keeping abreast with international developments on the subject. This would have the following positive effects. First, it would reduce the race for investors. Secondly, it might instead attract investors since there would be the opportunity for conducting business in many countries with similar legal regime. This would greatly reduce transaction cost. There are many regional initiatives in Africa at the moment. In Southern Africa for instance, there is the Southern African Development Community (SADC) Protocol on Finance and Investment. The aim of this protocol is to accelerate growth, employment and investment through increased cooperation, coordination and macroeconomic convergence.

In addition to regional approaches, African countries should adopt best international practices for the regulation of foreign direct investment. On the international level, the World Bank, the United Nations (UN), the WTO, the Organization on

Economic Cooperation and Development (OECC) have been at the forefront of the development of treaties/conventions/guidelines on investment law. At the level of the World Bank, there is the International Convention on the Settlement of Investment Dispute (ICSID) of 1965, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) of 1985 and the 1992 Guidelines on the Treatment of Foreign Direct Investment. ICSID encourages states to refer disputes with foreign investors to an international tribunal - ICSID.[76] This might have been to reassure foreign investors apprehensive of the courts systems and political pressures[77] in host countries of a free and fair trial should dispute arise. According to Article 25 of ICSID, once parties have given consent to ICSID they can't withdraw such consent unilaterally. MIGA aims at guaranteeing the protection of foreign investors against non-commercial risks such as expropriation, nationalization and other political risks.[78] The 1992 Guidelines "covers general principles suggested to guide governmental behaviour toward foreign investors; it does not include rules of good conduct on the part of foreign investors".[79]

With regard to the UN, one of its agencies the United Nation High Commission on Human Rights (UNHCR), in 2003 developed the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. [80] The Norms state that multinational corporations have legal obligation to respect and to ensure the protection of human rights. In this respect, they have to they have to

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[76] S. Subedi *International Investment Law* Oxford University Press (2008) 32

[77] Gas Natural SDG v. The Argentine Republic, ICSID Case No ARB/03/10 of 17 June 2005, para. 29

[78] S. Subedi supra note 76

[79] Ibid, citing the Report containing the Guidelines

[80] UN Doc E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003 of ECOSOC

ensure equal opportunity and non discriminatory treatment, the right to security of persons, rights of workers, respect for national sovereignty, consumer protection and environmental protection. The sad thing though is that these are draft proposals that have no legal standing. The primary responsibilities of protecting human rights lies with host states.

At the level of the WTO, there is the Trade-Related Investment Measures (TRIMS). It prohibits WTO Member countries from taking measures that negatively impact on the national treatment rule and quantitative restrictions.[81] Lastly, there is also the Multilateral Agreement on Investment (MAI) developed by the Organization of Economic Cooperation and Development (OECD) countries, but have since not seen the light of day as a result of differences in opinion.[82] Being part of international treaties is one of the ways States manifest their existence on the international stage. However, most of the international treaties mentioned above are mostly concern with investor protection. The UNHCR' Norms are not legally binding.

6. CONCLUSION

This paper has highlighted the problems created by the absence of proper regulation of foreign direct investments in Africa. In discussing these problems, the activities of Ramatex, a multinational company in Namibia has been used as an example. The paper holds that though countries need to craft packages favourable enough to attract

[81] See WTO Legal Text, available online at http://www.wto.org/english/docs_e/legal_e/index_t_e.htm (last visited 6 May 2010).

[82] S. Subedi, supra note 76

investors, they have the duty, both explicit and implicit to effectively regulate the activities of foreign companies operating in their territories. This would mean putting in place robust legal mechanisms in the form of enacting appropriate pieces of legislation as well employing competent people to implement the pieces of legislation. In this process, there should be the involvement of the local community and the NGOs. As the discussion of Ramatex case shows, Namibia at worst failed to put in place such regime and at best failed to implement local laws. African countries need foreign investment and this author acknowledges the creation of free trade zones and favourable investment climates. However, host states must ensure compliance of local laws by the foreign investors. Having a regional approach to regulating foreign direct investment might be relevant.