Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach

By:

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September, 11, 2020

Introduction

In his recent post entitled “Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms” John Nyanje suggests African states should continue with the investor-state arbitration system as the preferred method for resolving investment disputes. After all, he argues that for African states to become develop the capacity to export outside Africa, they need ISDS give investors assurance that their rights will be enforced. In doing

so, he emphasizes the need of African states pondering ISDS reforms from a "neutral viewpoint" without blindly adopting the idea of "total or radical paradigm shift" as advocated by some of the African states in the context of UNCITRAL process of reforming the existing ISDS mechanism. Specifying the necessity of adopting a pragmatic approach on the issue of ISDS reforms, John argues that perceptions, rather than verified facts, as the reason for several African states having an "anti-arbitration" mindset. Against this backdrop, this post seeks to reflect upon the Tanzania's perception of international arbitration demonstrating how those perceptions are shaping the country's contemporary approach toward ISDS mechanism. In doing so, this post analyzes Tanzania's recent legislative reforms in the mining sector, while considering the suggestion that African states should regard ISDS mechanism as the preferred method for resolving investment disputes.

Why Tanzania?

Tanzania, one of the most popular foreign investment destinations in Africa, recently enacted legislation to increase state control over economic activities pertaining to natural resources, particularly in mining operations. These measures were aimed at addressing the deficiencies in the country's natural resource governance which has long been a subject of criticism for failing to ensure the national development and well-being of the Tanzanian people. The reforms affect the legal and institutional framework governing the mining industry, and have resulted in Tanzania being placed at the top of the resource nationalism index in the first quarter of 2019. In doing so, the country has predominantly relied on the principle of permanent sovereignty over natural resources emphasizing the primacy of domestic mechanisms in settling investment disputes arising from natural resource contracts. The legislation enacted to this effect, on one hand, recalls the campaign driven by the newly independent and developing countries to regain control over natural resources from the grip of former colonial powers by increasing domestic control over foreign investments. On the other hand, they shed light on the current backlash against investor-state arbitration system, which is gaining momentum in the African continent as reforms of ISDS mechanism are underway. Recent legislative reforms of Tanzania, therefore, provide a case study of how states' perception of international arbitration shapes their approach towards the existing ISDS mechanism.

Prohibiting International Adjudication of Investment Disputes arising from the Natural Resources Contracts

In 2017, Tanzania enacted two important pieces of legislation; the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017. They signify the country's strong belief in the role that can be played by natural resources in its national development. The Permanent Sovereignty Act stipulates the Tanzanian peoples' inalienable ownership of all natural wealth and resources, and proclaims their permanent sovereignty thereof. It obligates the Tanzanian government to exercise ownership and control over natural wealth and resources in a manner that safeguards the interests of the Tanzanian people and the Republic when entering into contracts relating to extraction, exploitation or acquisition, and use of natural wealth and resources. Premised on the existing international system of sovereign rights to resources, the Act prohibits permanent sovereignty over natural wealth and resources from being the subject of proceedings in any foreign court or tribunal, while requiring disputes arising from natural resource contracts to be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.

Likewise, the Review and Re-Negotiation of Unconscionable Terms Act affirms Tanzania's permanent sovereignty over all natural wealth and resources. It further emphasizes the country's responsibility to safeguard the interests of the Tanzanian people and the Republic when entering into contracts. Premised on these rights and responsibilities, the Act mandates the review of all contracts relating to extraction, exploitation, acquisition, and use of natural wealth and resources for the purpose of rectifying or expunging any unconscionable terms. An investment contract shall accordingly be deemed as unconscionable if it contains any provision or requirement, inter alia, which subjects the state to the jurisdiction of foreign laws and fora. This provision provides the flexibility to consider an agreement that refers investment disputes to international adjudication as an unconscionable agreement that must as a result be renegotiated. Refusal or failure to do so would render the applicable investor state dispute settlement clause ineffectual under Tanzanian Law. Such clauses will further be treated as having been expunged.

In the same way, the Public-Private Partnership (Amendment) Act enacted in 2018 prohibits international arbitration with respect to PPP agreements, particularly those projects relating to natural resources. The Act, accordingly, states that any dispute arising during the course of the PPP agreement "shall in case of mediation or arbitration be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws". Accordingly, Tanzania's recent legislative reforms demonstrate a clear attempt to affirm its ownership of natural wealth and resources, fortifying state control thereof, and are premised on the existing legal system of sovereign rights to natural resources. They have upheld the country's inherent right to legislate and adjudicate property rights, while insisting on its right to decide on the terms of foreign investment contracts in the natural resources sector.

Bringing Natural Resource Contracts into the Purview of Tanzanian Legal System

The recognition of the permanent sovereignty over natural wealth and resources is the basis upon which Tanzania has prohibited ISDS or proceedings in any foreign court. This prohibition is further accompanied by the requirement that investment disputes arising from natural resource contracts should be adjudicated by judicial bodies or other organs established in the United Republic, in accordance with the laws of Tanzania. As already noted, this prohibition is explicitly premised on the principle of permanent sovereignty over natural resources and the Charter of Economic Rights and Duties of States. The relevant General Assembly resolutions are placed alongside the new Acts as annexures. Invocation of UN General Assembly resolutions 1803 (XVII) of 1962 and resolution 3281 (XXIX) of 1974 necessarily recalls the campaign driven by the newly independent and developing countries, during the immediate post-colonial period, to regain control over natural resources from the grip of former colonial powers together with the private individuals and companies from the metropole. In passing these resolutions, developing countries sough to establish a new international economic order (NIEO).

The NIEO campaign, in general, emphasized the authority of the host state's laws and regulations over foreign investment in natural resources including the disputes arising from investment contracts. The Charter of Economic Rights and Duties of States is vital in this respect since it made no reference to

international law subjecting natural resources contracts and disputes arising from them entirely to local law and regulations. This may be the reason why Tanzania relied on NIEO Resolutions as justifications for keeping natural resource contracts within the purview of the Tanzanian legal system. Needless to say, this approach aligns with the NIEO, epitomized by General Assembly Resolutions, especially the Charter of Economic Rights and Duties of States. It further aligns with the National Economic Control (NEC) approach epitomized by the Calvo Doctrine, which gives emphasis to local remedies in resolving investment disputes and rejects international adjudication on the basis that authority for the settlement of investment disputes predominantly lies with the host state.

Bringing natural resource contracts into the purview of Tanzanian legal system can be particularly observed through the "Regime Bias Approach" adopted by the scholars of the Third World Approaches to International Law (TWAIL) network. The Tanzanian reforms were partially triggered by the loss of faith in international arbitration bodies. According to the Tanzanian government, those international arbitration forums are formed to protect the interests of investors over the interests of developing countries. Of course, this articulation reflects the common perception of TWAIL scholars on international dispute resolution, who argue ISDS as a subtle method of marginalizing the interests of Third World countries in the international economic system replicating pre-colonial and colonial attitudes of Western exploitation of Third World countries. From the TWAIL perspective, international dispute resolution mechanisms operate to safeguard the economic interests of western industrialized countries and the capitalist oriented international economic system and thus, rules of investment are usually applied and interpreted in a manner which detrimental to the interests of developing host countries. The 'regime bias' in international adjudication of investment disputes has been thus expounded as a basis for developing Third World countries to refuse the ISDS mechanism as the preferred method of settling investment disputes.

Conclusion

As an essential outcome of strengthening the state control over natural wealth and resources, Tanzania has brought natural resource contracts into the purview of its domestic legal system. In doing so, some countries have

exercised their sovereign rights to natural resources as the basis for denouncing international adjudication of investment claims based on such contracts. Indeed, biases perceived by Tanzania concerning international arbitration fora have played a great role in bringing natural recourse contracts into the purview of Tanzanian legal system. The goal of the reforms is to mitigate such partialities through using domestic dispute resolution mechanisms. In practice, it has resulted in compelling foreign investors to have recourse to Tanzanian judicial bodies or other organs to resolve contract based investment claims leaving them with little or no latitude in negotiating the forum for dispute settlement. This is because Tanzanian law imposes specific terms with which natural resource contracts must comply in order to safeguard autonomy and jurisdictional authority over natural resources. Needless to say, this is a game-changing shift in the country's mining sector, which necessarily triggers foreign investors' apprehension of supposed prejudices by Tanzanian adjudication fora to which they have to recourse to settle contract based investment disputes.

The situation seems to be getting more acute due the country's inclination to extend the refusal of international arbitration of investment disputes beyond natural resource contracts. To be precise, Tanzania has made significant inroads into being an active participant in the discussions about the fate of investment treaty arbitration by terminatingthe country's BIT with the Netherlands and expressing its plans to withdraw from multilateral arbitration and investment guarantee bodies so as to effectively implement its new laws on natural resource governance. In addition, some arbitration awards against Tanzania (e.g. Standard Chartered Bank v. The United Republic of Tanzania) has intensified disquiet among civil society groups which oppose international arbitration fora such as ICSID, urging the Tanzanian government, inter alia, to depart and reject the international investment arbitration system in its entirety. Hence, obviously Tanzania's perception of adverse impact of international arbitration on the premise that as a dispute settlement forum it lacks neutrality and therefore constitutes a threat to her sovereign rights to natural resources as well as its regulatory authority over foreign investment, in general. Tanzania's reforms show that the claim made by Nyanje in the opening post of this symposium that African states should regard ISDS mechanism as the preferred method for resolving investment disputes is not only very contested,

but that there are legitimate grounds for those contestations.

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* The author would like to thank Professor James Thuo Gathii for his insightful comments on an earlier draft of this essay and helpful editorial comments on this draft.

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