Understanding Tanzania's Termination of Its BIT with the Netherlands in Context

By:

James Thuo Gathii

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Tanzania's decision to terminate its Bilateral Investment Treaty (BIT) with the Netherlands continues a trend to exit BITs and to reform the rules of international investment law that is currently ongoing in many parts of the world. That treaty was set to expire today, April 1, 2019. In the EU, member states are discontinuing intra-European BITs following the Achmea judgment of the European Court of Justice. However, it is in Latin America where the denunciation of the ICSID Convention more than a decade ago initiated an era of retreat from investment treaties. Last year, UNCTAD reported that investment treaty making in the world had reached a turning point with fewest number of new investment treaties signed in 2017 since 1983 when an upward trend had commenced. Tanzania has a legacy of scrutinizing rules of international law for their consistency with its interests. That was the basis of the Nyerere doctrine of state succession of the 1960s.

In 2017, Tanzania passed new legislation (The Wealth and Resources Contracts (Review and No. 6 Re-Negotiation of Unconscionable Terms) Act, 2017) that opened the door to reviewing and re-negotiating unconscionable terms in its contracts and agreements. Under that law, unconscionability was defined to mean terms that: (a) aim at restricting the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity; (b) are restricting the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania; (c) are inequitable and onerous to the state; (d) restricts periodic review of arrangement or agreement which purports to last for life time; (e) securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor; (f) are restricting the right of the State to regulate activities of transnational corporations within the country and to take measures to ensure that such activities comply with the laws of the land; (g) are depriving the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country; (h) are by nature empowering transnational corporations to intervene in the internal affairs of Tanzania; (i) are subjecting the State to the jurisdiction of foreign laws and fora; (j) expressly or implicitly are undermining the effectiveness of State measures to protect the environment or the use of environment friendly technology; (k) aim at doing any other act the effect of which undermines or is injurious to welfare of the People or economic prosperity of the Nation."

Reforming domestic law is critical to ensuring countries capture the benefits of their natural resources wealth. In addition, it is increasingly being recognized in investment treaty reform processes as well as in investor-state dispute settlement proceedings that investor compliance with domestic law is a prerequisite to entertaining investor claims against states. Tanzania's reforms are therefore consistent with its goals of ensuring that rules of international investment law are not used to deform its national laws as John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah as well as Julian Arato have insightfully exposed this risk. For these reasons, it is highly unlikely to deter investors in the natural resources sector in Africa. After all, the largest amounts of foreign direct investment in Africa are in war torn resource rich countries on the continent. Thus countries that are resource rich like Tanzania

that put the reform governance of their natural resources sector are likely to benefit even more and attract even more investors, and in particular hopefully domestic investors.

Referring to Tanzania's efforts as resource nationalism therefore misses the point. This is because Tanzania's reform of its natural resources sector has been multifaceted. For example, Tanzania has also aimed at rooting out corruption as a way of maximizing revenues from its natural resources. It has also included efforts to protect its environment. These efforts have been most visible under President Magufuli.For example in April 2018, President Magufuli inaugurated the construction of a 15-mile wall around the country's tanzanite mines to prevent smuggling. The wall has only one entrance that is secured by the army. The wholesale export of Tanzanite which is one of Tanzania's main exports is now is now carried out through the control the Tanzanian Central Bank. The wall is part of a larger set of reforms that includes the Mining Commission in accordance with the Mining Act. The main goal of the Mining Commission is to "advise government on all matters relating to the administration of the mineral sector, focusing on monitoring and auditing of mining operations to maximise government revenue." As of November 2018, it was reported that the Tanzania had increased revenues from sales of tanzanite, which was largely attributable to securing of the mineral by a wall and the increased security at airport and border points. The mineral sector economy is estimated to increase by 10% by 2025. Tanzania aimed to generate $136.6 million from mining this fiscal year, and to continue increasing the GDP, in 2018 contributing to 4.8% of the country's GDP.

In early 2019, President Magufuli ordered a review of mining sector taxes. That order arose from his concern about getting a good balance between tax levels that would leverage Tanzania's natural resources to earn revenue, on the one hand, and attracting investors, on the other. He also gave a 30-day ultimatum to authorities to install CCTV cameras within the Minerani tanzanite mine, and ordered the registration of all gemstone dealers with a view to curbing smuggling and thereby increasing mining revenue. These efforts recognize the close relationship between illicit financial flows from Africa and tax evasion, on the one hand, and natural resource smuggling and corruption, on the other.

Further, in January 2019, the Tanzanian government fined the Acacia Mining, a company owned by Canadian Barrick Gold, the world's largest gold company, $300 million Tanzanian shillings, ($ 130,000), for breach of environmental regulations at one of the company's mines.

Finally, it is important to note that civil society groups have been at the forefront in persuading the Tanzanian government to reconsider renewing its BIT with the Netherlands. The East African Strategic Group on Influencing Multi and Bilateral Trade and Investment Negotiations, a coalition of 10 organizations, was involved in this effort. This coalition teamed up with a Dutch NGO both ENDS creating a transnational coalition that supported termination of the BIT on both the Tanzanian and Netherlands sides. As the indefatigable Jane Nalunga, country director of SEATINI Uganda argued in favor of termination of the agreement, future agreements should be designed to benefit the people of the country signing the agreement and its development goals. From that perspective, agreements that only benefit investors like the Tanzania-Netherlands BIT ought to be a relic of the past.

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