THE LEGISLATION WHICH DOMESTICATES THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN TANZANIA MINING INDUSTRY: THEIR COMPLIANCE WITH PROVISIONS OF NATIONAL LEGISLATION, BILATERAL INVESTMENT TREATIES AND MULTILATERAL TREATIES

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INTRODUCTION AND GENERAL OVERVIEW

Since independence to the year 2017, stakeholders in the mining industry in Tanzania have been of the view that mineral extraction and revenues have made very little positive impact on the lives of most Tanzanians.[i] This happened despite the fact that the country had major breakthrough in the industry. This is because in 2007, Tanzania was among the African countries with good exporting records of gold and diamonds.[ii] All these successes were only seen on papers, but the real situation was that Tanzanians and their country remained poor and did not see the benefits of their minerals.[iii] Overtime Tanzania government conducted investigations in the industry to find the best way to gain maximum benefits from the industry. These investigations were conducted in the form of presidential commissions.[iv] The most notable presidential commission is the one of 2008 famously known as Bomani Commission.[v] This commission report revealed that, the contribution of mining industry to the country was unsatisfactory this is because the industry experienced a number of problems. The problems included revenues from the industry were not collected well, environmental degradation, conflicts between mineworkers and investors and weaknesses in the legal system. These were observed to be major problems facing the industry. In spite of the identification of the problems and recommendations offered by the commission, problems in the mining industry continued to exist. This pushed the fifth phase government of Tanzania to form a presidential committee to investigate into the issues facing the industry. The committee came with a report which

discovered a number of irregularities such as corrupt practices, unfair dealings in the investment legal regime, tax evasions and others.[vi] Apart from presidential commission and committees, investigations and reports, different stakeholders, academicians and activists observed indicators of problems in the mining industry.[vii] All these people were of the view that the investment legal regime was weak and needed reformations. It is contended by Magogo[viii] that the investment legal regime favoured much the investors than the country and its citizens. This is because; tax regimes were not good because they encouraged tax holidays, tax exemptions, royalties, charges, fees and foreign dispute resolutions, and investment contracts favoured much investors than the country and it citizens.[ix]

In order to eliminate these challenges in the mining industry, the government of Tanzania took an honourable and bold initiative to domesticate the principle of PSNR.[x] The government did this by enacting the Natural Wealth and Resources (Permanent Sovereignty) Act,[xi] and the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act.[xii] These two pieces of legislation domesticate the United Nations General Assembly (UNGA) Resolution 1803 (XVII), (1962) on Permanent Sovereignty over Natural Resource (PSNR).[xiii] Tanzania has been a signatory to this resolution since 1962. The resolution provides for equal benefits in the exploitation of natural resources between investors and the host states.[xiv]

However, a number of investment stakeholders have criticized the two pieces of legislation, which domesticate the principle of PSNR.[xv] These stakeholders are of the view that some provisions of the two pieces of legislation, which domesticate the principle of PSNR, are not compliant with the provisions of other domestic legislation, Bilateral Investment Treaties (BITs) and Multilateral Treaties that Tanzania is the state party to.[xvi]

This paper highlights the legislation,[xvii] which domesticates the principle of PSNR in Tanzania mining industry. It appraises the compliance of the two pieces of legislation which domesticate the principle of PSNR with provisions of other national legislation, BITs, and Multilateral treaties that Tanzania is a state party to.

It calls for the government of Tanzania to amend some provisions of the two pieces of legislation,[xviii] some BITs that do not feature the principle of PSNR. This should be done so as to have a uniform investment legal regime in the country's mining industry, for the benefits of both the host state and the investors' especially foreign investors.

ANALYSIS OF THE LEGISLATION DOMESTICATE THE PRINCIPLE OF PSNR

1. ***Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (Cap. 449) and its Regulations, 2020, Gn No. 58 Of 31/1/2020***

Introduction

The legislation[xix] focuses on providing for the protection of the natural wealth and resources of Tanzania, in this case mineral resources. The legislation requires these resources to be used for the benefit of the economy of the country and its citizen. The legislation derives this authority from article 8 (1), article 9 (c), (f) and (i) of the constitution of Tanzania.[xx] This article requires that the interests of the people of Tanzania to be a primary objective in the use of natural wealth and resources. Further the articles require that, the national wealth and inheritance should be preserved and used for the general good and stop their mismanagement.

On the issue of securing the interests of the people over natural resources, the legislation grants the people of Tanzania ownership of the natural resources.[xxi] It asserts that the natural wealth and resources shall be managed by the president on behalf of the people.[xxii] And further these natural resources of the country are inalienable in any manner.[xxiii]

The recognition of citizens' ownership of natural wealth and resources is one of the essential requirements of the principle of PSNR. This recognition is important in the management of natural wealth and resources, especially in the mining industry. This is because it will attract development of the people. This is so since the people of Tanzania will have powers over the use and control of their resources. These powers of the citizens of Tanzania have enabled them to question any arrangements or agreements in these resources. This control of the people over the natural resources can be performed in different ways such as, by the use of their representatives, in the National Assembly or directly by the citizens themselves.[xxiv] This provision was introduced because in recent years Tanzania experienced exploitation of natural resources which was not favourable to the people. This was portrayed by the Bomani Commission which investigated on the benefits derived from mining sector in Tanzania.[xxv]

On the other aspect the legislation prohibits exploitation of natural wealth and resources except for the benefits of the people.[xxvi] The provision makes it unlawful for any arrangements or agreement in natural wealth and resources, which does not protect the interest of Tanzania and its people.[xxvii] Further the provision makes it mandatory to the government, organs and persons

exercising executive, legislative and judicial functions to protect the benefits of the people in exploitation of natural wealth and resources.[xxviii] This is to be done by taking cognizance of, observe and apply the provisions of the legislation, which is line with article 9 (c) and (i) of the Constitution.[xxix]

In realizing the roles played government organs in securing the interests of the people in the country. The legislation makes it mandatory for these organs to promote the interest of the people in the exploitation of natural resources. This provision is very important in regulating the president who is entrusted with the management of all the natural wealth and resources of the country. The provision also is important to other public leaders and servants, especially those who play an active role in the management of the natural resources of the country.

Again section 6 (3) of the legislation[xxx] directs the judicial organ personnel to abide by the interests of the people in performing their duties. This provision main intention of its making was to secure the natural resources of Tanzania. But from the face of it, it seems to violate the independence of the judiciary. This is due to the fact that the judiciary is expected to act fairly to parties that present their cases before it. The independence of the Judiciary is very important since the law requires that matters pertaining to dispute resolution in the mining industry, to be governed by these judicial organs of the country and not otherwise. Therefore it is very essential for the judiciary to abide by the interests of both the people and the investors in performing its duties.[xxxi] This will lead to main intention of the principle of PSNR, which is safeguarding equitable interests of both the investor and the country hosting the investment.[xxxii]

Guarantee of returns from the natural resources sector is another requirement established under section 7 of the legislation.[xxxiii] Under this provision, the investor is required to invest some proceeds obtained from the mining industry. These proceeds may take different forms, such forms include; sponsoring of development activities like building, health centres, water projects and others, also may take form of Corporate Social Responsibility.[xxxiv]

The use of domestic banks and financial institutions in keeping proceeds obtained from the natural wealth and resources. This is a requirement of section 10 of the law. Further the Act[xxxv] makes an exception that the investor may keep such proceeds in foreign banks only when the distributed profits are repatriated in accordance with the laws of Tanzania.[xxxvi]

The two provisions, thus section 7 and section 10 of the legislation are not compliant with section 21 of the Investment Act.[xxxvii] This is because section 21 of the Act[xxxviii] guarantees free transfer of capital, profits, and dividends acquired from investment abroad.

The two sections, 7 and 10 of the legislation,[xxxix] are again not compliant with articles 6 and 6 of the BIT between Tanzania and UK of 1994, and BIT between the China and Tanzania of 2013, respectively. Under these BITs unrestricted transfer of funds and returns from investment are guaranteed.

Restricting free transfer of funds and returns from investment creates unfavourable environment in the investment of the country. Investors being businesspersons sometimes depend on loans from international financial institutions and banks. In addition, investors need to invest more in other countries, where they can leap more profits. Therefore, restricting them a right to free transfer of the money and requiring them to put the money in national banks, creates chances of failure to meet requirements of being loaned money.[xl] Since most banks require their customers to have active operating accounts in their banks before and after loaning them.[xli] This restriction will also affect investors who already have loans in foreign banks to face difficulties in repaying them, by implementing this provision. This term may scare away current and those investors intending to invest in the country.

On the other hand, the legislation[xlii] establishes the requirement of granting the government or citizens of the Tanzania stakes in the businesses that are found in the natural resources sector.[xliii] These stakes will be granted by companies that deal with extraction, exploitation or acquisition and use of natural wealth and resources, in this case mining industry.[xliv] The stakes are vital in the development of the country, as they will guarantee profits to the country. Further, the country will be involved in the day-to-day operations of the companies. This will enable them to know different issues like the net profits gained by the companies, unlike previously when they did not have the power to engage in the affairs of these companies. Not knowing the affairs of the companies led the country to lose a lot of taxes and revenues, since the companies had a tendency of giving false information on their profits, while the companies declared huge profits in the world market.[xlv]

The legislation[xlvi] under section 9 restricts export of raw resources outside the country. The same section requires that, the investor to commit himself to establish beneficiation facilities in the country. This means that there will be no need of transferring mineral sands abroad and other raw resources for beneficiation. This will enable the country to sell end product of its natural resources especially minerals. This will increase the value of these resources, unlike the previous arrangements in the mining industry where raw resources like mineral sand were transported abroad for beneficiation. This process was disadvantageous to the country because

it was discovered that it involved fraudulent acts like false reports on the amount of minerals in the transported sand. This was a result of presidential committee reports on mineral sands conducted on 2017.[xlvii] Whereby the committee discovered that, investigations conducted in Gold alone in containers containing mineral concentrates and ores for metallic minerals to be transported abroad, there were high concentrates of gold within the containers that were investigated. They found 28 kg of gold in a container of 20 tons of mineral concentrates and ores for metallic minerals. Therefore in 277 Containers investigated there were an average of 7.8 tons of gold valued TZS billion 676 (USD 307, 292, 720).[xlviii] In higher estimation of a single container of 20 tons gold concentrates was estimated around 47.5 kg, in the container. Therefore, the amount of gold in 277 containers would be 13, 157.5 kg which was estimated to the value of TZS 1,146,860,330,000 (USD 521,300,150).[xlix] Therefore the gold value in 277 containers of mineral concentrates and ores for metallic minerals in the Dar es Salaam Port valued TZS billion 676 and billion 1, 147. But the investor's report and Tanzania Mineral Audit Agency (TMAA) report showed very low estimations and amounts of money. The reports showed an average of 4 kg of gold in a single container, so in 277 containers investigated there would be 1.1 tons of gold which valued around TZS 97.5 billion (USD 44,320, 000).[l] The committee concluded that the country was losing a lot of revenues due to corrupt practices.

Prohibition of proceedings in foreign courts is another requirement-imposed requirement by this legislation.[li] This is provided for under section 11 of the legislation.[lii] This prohibition is relating to disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources. This right of states to settle disputes exclusively upon the basis of national laws is embedded in the principle of PSNR. The provision is not compliant with the guarantees in the BITs that, Tanzania has signed with different countries and international treaties which Tanzania is a state party to, like the International Centre for Settlement of Investment Disputes (ICSID) Convention of 1966.

These BITs and international treaties guarantee a right to foreign dispute resolution fora, good examples are articles 11 and 9 of BIT between Tanzania UK of 1994, and BIT between Germany and Tanzania of 1965. Also, such rights are guaranteed under the ICSID Convention of 1966.

This restriction on foreign dispute forum is one of the important rights established by the principle of PSNR.[liii] This principle is very important because it gives the host country a chance to settle investment disputes in its judicial system. This practice is cost effective because it does

not employ international lawyers and adjudicators who are highly paid.[liv] Also this system of domestic courts and laws provides for a proper hierarchy and system of different courts where the parties may appeal to.[lv] Unlike the international adjudication which is portrayed by different writers that the system is impartial as it intends to favour investors only. In addition, the system is said to not guarantee processes of transparency, has not appellate system to rectify errors.[lvi] Their decisions violate national laws of states involved in the case by giving decisions which are inconsistent with the national laws. This system of arbitration has also disregarded decisions made by countries in defending the basic needs of its people like health a good example is the case between Biwater Guff and Tanzania, where Tanzania terminated a contract with a company which failed to managed with waste management in the city of Dar es Salaam, something which could have endangered the health of the people of Tanzania. [lvii]

Despite this discussion of the foreign dispute resolution fora, still the legislation is likely to affect both the flow and sustainability of foreign investments in the country. This is due to the fact that investments in the mining industry sometimes require investors to loan money from international financial organizations. This money is needed in order to buy and increase facilities to a mining company. Investors pursue these loans by using their investment agreement as collateral. International financial organizations lenders give such loans to investors by considering some important terms in these contracts, such terms in most cases include a dispute resolution clause. The lenders are more interested in an agreement with such a provision because foreign dispute resolution forum, assures that, the agreement is easily enforceable, unlike if the dispute resolution was the one of host state dispute resolution forum.[lviii] Since it is a belief that host state dispute resolution forum is likely to favour the host state government in case of a dispute between the investor and the host state. And this can best prove by the provision of section 6 (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017,[lix] which requires the judicial organs of the country to abide by the provisions the legislation and the interests of the people of Tanzania.

The legislation finally under section 12 provides for a requirement of review of arrangements or agreements on natural wealth and resources on issues of extraction, exploitation or acquisition and use of natural wealth and resource by the National Assembly. Under this provision all arrangements and agreements entered before and enactment of the legislation[lx] are subject to renegotiations for unconscionable terms. This requirement established by the law is not compliant with BITs like article 5 of the BIT between China and Tanzania of 2013, and

others. These BITs provide for a principle to a fair and equitable treatment of investors. This principle is violated since fair and equitable treatment of investors avers on ensuring stability, predictability, consistency, protection of legitimate expectations and confidence of investors, administrative of due process, transparency, reasonableness and proportionality in investment agreements.[lxi] This principle is violated by this provision because it creates unstable environment in the investment's agreements. This is basically because the investment agreement may be reviewed and renegotiated at any time the National Assembly finds it to have unfair terms. More to that, the fair to renegotiate or reach an agreement on the term deemed unfair lenders such a term ineffective and hence rectified or expunged without the investors consenting.[lxii]

Again, this section conflicts with article 26 of the Vienna Convention on the Law of Treaties.[lxiii] This article provides for a principle of pact sunt servanda, whereby this principle is a Latin maxim meaning, all agreements must be kept and are binding. This principle provides that every treaty is binding upon the parties and they must be executed in good faith.[lxiv]

The legislation has provided for a number of important issues which intend to promote the host country's economy. But these efforts to promote the economy have also affected to some extent the business of the investors especially foreign investors. For that reason, it is fair to conclude that some provisions of the legislation are not compliant with provisions other national legislation, some BITs and international legal treaties.

The legislation also has regulations called, the Natural Wealth and Resources (Permanent Sovereignty) (Code of Conduct for Investors in Natural Wealth and Resources) Regulations,[lxv] these regulations are made under section 13 of Act No. 5 of 2017.

The regulations provide for basically three important issues. The first issue is the code of conduct of investors in natural wealth and resources. This is rooted in the values that safeguard current and future generations in the protection and utilization of natural wealth and resources as required by the Constitution of Tanzania.[lxvi] The second issue is the minimum procedure for inspection, supervising and assessment of investment in natural wealth and resources and things that are incidental or conducive to the effective implementation of the Act.[lxvii] And the third issue is that the regulations provides for guidance to entities, consultants, suppliers, contractors, investors, partners and agents, and their workers, who perform day to day activities in the sector.[lxviii]

The objectives of the regulations are to guarantee that arrangements or agreements on natural wealth and resources, and other matters which are concerned with the industry are carried out in a way dependable with the highest just principles at all times, and within the requirements of the Constitution of Tanzania of 1977, and all applicable national policies and legislation.[lxix] Investors in natural wealth and resources are required to comply with all appropriate guidelines, laws, regulations, and other binding instruments and decisions based upon such instruments.[lxx] The code of conduct and ethics is enshrined under regulation 6, where by every entity, consultant, supplier, contractor, investor, partner and agent including employees who the regulations applies, is required to work in good faith, transparent and in the general interest and welfare of the people of Tanzania, and to report to government any conduct that is likely to deny the people Tanzania benefit accruing from the prospecting, exploration, or utilization of natural wealth and resources.[lxxi] This regulation creates responsibility to the investors and the people concerned in the exploitation of natural wealth and resources. This responsibility is important in protecting the interests of the people of Tanzania in the exploitation of natural wealth resources especially in the mining industry.

Again corruption or economic and organized crime practices by investors and the people involved in the natural wealth and resources sector are restricted under regulation 7 (1).[lxxii] Acts that amount to such crimes are; giving, offering, requesting, or receiving advantages in any form, or an attempt directly or indirectly, to obtain an advantage not otherwise obtained, or only obtained at a later point in time.[lxxiii] While "advantage" means the provision of cash, objects, credits, discounts, travel accommodation, or services.[lxxiv]

The timing of this regulation was very good as the country had been experiencing these crimes in its mining industry.[lxxv] The regulations providing clearly on these crimes makes the mining industry safe from such acts. This is because the regulations have provided to what amounts to such crimes, something which has simplified prosecution of such crimes.

As seen previously, this regulation has come to cure the loopholes which were used by the investor, unfaithful public servants and leaders to leap out the benefits of the industry for their personal gains. This was as it was observed in the two reports of the presidential committees established by the president of Tanzania investigating in the matters of the industry.[lxxvi]

In order to show compliance of these regulations' investors in natural wealth and resources are required to sign a declaration in the form attached to this Code of Conduct. The declaration shall be displayed in a conspicuous investor's legal entity. It is the author views that the main

intention of displaying such declaration not tell the general public that the investor has assented to the provisions of the laws but also reminds the investor and his employees to uphold the provision of the laws for the development of both the investor and the country.

Apart from that, the regulations also direct; respect of basic rights as set out in the Constitution of Tanzania,[lxxvii] non-discrimination in terms of gender, sex, tribe, religion, marital status, union membership, or political belief and affiliation,[lxxviii] workers' rights,[lxxix] child rights,[lxxx] environmental impact and best practice by the investors.[lxxxi] When these rights are respected, they will create safe haven for the employees in the sector. Also, the respect of these rights will increase a good relationship between the investor and his employees, which will to high production rate hence beneficial to the country. The timing of these regulations was after observation of poor relationships between the investor and his employees by the Bomani Commission and other stakeholders.[lxxxii]

On the other aspect investors are subjected to audit and monitoring compliance.[lxxxiii] This will be done in form of on-site spot visits which will be done without notice.[lxxxiv]This on spot visits will be made without notice. This is done so as to surprise the investor on his place of employment. The main intention of this method is to make the investor abide by the laws and regulations of the country at all time.[lxxxv]

Another imposed term involves a penalty for non-compliance of the provisions of the regulations leading to serious violations or repetitive violations. Under this regulation if appropriate corrective actions have not been taken within a reasonable time frame, the government may terminate its business relationship with the investor. And upon such termination the investor will not be entitled to any compensation or any other remedies.[lxxxvi]

The regulations have come to cure the defects that were used by unfaithful investors and government officers in the industry. This is due to the fact that the regulations have criminalized some acts that were done by unfaithful government officials and investors. These acts being criminalized, they afford protection of the natural resources of the country.

2. ***Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017 (Cap 450) and its Regulations, 2020, Gn No. 57 Of 31/1/2020***

The objective of this legislation is to make sure that the arrangements and agreements in natural resources especially in the mining industry which contains provision that jeopardizes the interests of the people are rectified or expunged.

This rectification is done by way of review which will be done by the National Assembly of Tanzania. This is in accordance with section 4 of the legislation.[lxxxvii] The review includes both previously concluded arrangements and agreements on natural wealth and resources before the enactment of the law and the ones entered into after the law.[lxxxviii] This section also conflicts with the principle of pact sunt servanda which is provided for under article 26 of the Vienna Convention on Law of Treaties.[lxxxix] And again the provision conflicts with the principle of fair and equitable treatment which requires stability, predictability, consistency, protection of legitimate expectations and confidence of investors, administrative of due process, transparency, reasonableness and proportionality in investment agreements.[xc] This principle is guaranteed in the BITs that Tanzania has signed with other countries like the agreement between China and Tanzania of 2013. This makes this legislation not compliant with this provision of BITs.

On another hand the legislation directs that the principle PSNR should be regarded when agreements in natural resources are concluded. This is to ensure fair and equitable treatment of both parties to an agreement.[xci] And in such agreements the interests of the people should be taken into account.

This is a good move by Tanzania as it will ensure equitable benefits in the exploitation of natural resources in the country. This is because this provision assures the protection of both the benefits of the people of Tanzania and the investors.

The legislation has overriding effect over any other law governing administration and management of natural wealth and resources.[xcii] This makes this legislation the main legislation pertaining to these issues.

The legislation also has its regulations, which are called; the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations, 2020. The regulations are made by the minister responsible as provided for under section 8 of the Natural

Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017.[xciii] The regulations provide for the following.

Fair dealing, honesty and utmost good faith from the parties making arrangements or agreements are called for by the regulations under regulation 3. And the regulation further provides that all arrangements or agreements that the National Assembly determines to have unconscionable term(s) should be re-negotiated and expunged from the agreement.[xciv]

The regulation again requires coordination, monitoring and management of arrangements or agreements to be made by the President. But such powers of the president are delegated to the Minister responsible as per regulation 4 (2).[xcv] In the performance of such duties the minister shall establish and maintain, an observatory system to enable effective consultation, coordination and cooperation with other ministries, government departments, and agencies or any other public or private institution or body established pursuant to any written law dealing with natural wealth and resources.[xcvi]

The regulations also provide for procedures for re-negotiations, and such a procedure is as follows.

i. Notice for renegotiation, the Minister of constitutional affairs upon receipt of the extract of the resolution from the National Assembly is required to notify the Minister responsible for entry into any natural wealth and resource arrangement or agreement within seven days of him receiving such a resolution.[xcvii] And direct him to start renegotiations with the other party to the arrangement or agreement. The notice shall be in NWR Form - N.3 as prescribed in the Third Schedule to the Regulations.[xcviii]

ii. The Minister responsible for entry into any natural wealth and resource arrangement or agreement shall issue a notice of renegotiation of arrangement or agreement to the other party through NWR Form - N.4 as prescribed in the third schedule to the regulations.[xcix]

iii. Appointment of negotiation team, this will be done by the Minister responsible for entry into any natural wealth and resource arrangement or agreement in consultation with the Attorney General.[c] The appointment shall have regard of skills, experience, ethics, and knowledge relevant to the subject matter of re-negotiation.[ci] The re-negotiation team shall, in performing its functions, abide to the re-negotiation guidelines developed by the Ministry responsible. The template is shown in NWR Form - N7 as prescribed in the fourth schedule.[cii]

iv. The re-negotiation process, once the parties have received directives to re-negotiate. They shall within 90 days develop a schedule of renegotiation and share among themselves.[ciii] Extension of such time may be increased to period of not more than thirty days upon mutual agreements of parties. The extension shall be through NWR Form-5 as provided for under schedule three of the regulations.[civ]

v. After completion of renegotiation process the parties shall sign a renegotiation summary through NWR Form - N.6 as prescribed in the Third Schedule.[cv] And the costs for re-negotiation shall be borne by the Ministry responsible for the agreement which was the subject matter of the renegotiation.[cvi]

vi. Reporting the completion of the negotiations, when the renegotiations have been completed and the draft report prepared by the renegotiation team, the draft report shall be submitted to the Permanent Secretary responsible for arrangement or agreement for purposes of organizing the stakeholders meeting to discuss the draft report.[cvii] Once the draft report is adopted by the stakeholders meeting, the Permanent Secretary responsible for such arrangement or agreement shall submit the draft report to the Minister responsible for the arrangement or agreement for concurrence.[cviii] Then a final report will be prepared and submitted to the Minister who shall submit it to the Cabinet in accordance with applicable Procedures.[cix] When Cabinet procedures have been exhausted, the President shall issue a Certificate, and then the Minister shall submit the report of the outcome of renegotiation to the National Assembly within 30 days from the date of signing of renegotiation report.[cx]

The regulations are basically providing for the parameters of negotiations and code of conduct for members of the government negotiation team[cxi]

OBSERVATION AND CONCLUSION

As previously noted, the two pieces of legislation, which domesticate the principle of PSNR,[cxii] were enacted to cure defects that existed in the investment legal regime in the country. This is because the previous investment legal regime favoured mostly foreign investors than the host state and its citizens in the earnings obtained from natural resources. The introduction of the principle of PSNR in Tanzania is good move to safeguarding, proper exploitation and preserving of the natural wealth and resources of the country. This is because this principle

aims at creating equitable balance in the profits obtained from the exploitation of such natural wealth and resources, between the investor and the host state.

This study observed that that some provisions of the legislation which domesticate the principle of PSNR does not comply with the provisions of other national legislation like the Investment Act,[cxiii] BITs that Tanzania has signed with other countries and Multilateral Treaties. In order to ensure compliance with the provisions of the legislation, which domesticate the principle of PSNR with the national legislation, BITs and Multilateral Treaties, the following should be done.

On the issue of the legislation conflicting with the provisions of other national legislation, it is advised that the country should amend section 7 and 10 of the Natural Wealth and Resources (Permanent Sovereignty) Act[cxiv] to comply with section 21 of the Investment Act.[cxv] As we have observed free transfer of capital, profits and dividends acquired from investments abroad and keeping money in foreign banks ton be important for sustainability of foreign investment in the country. This is important especially in the aspect of getting loans and repaying them by investors. However, the country should focus on benefitting from the shares, taxes and revenues which they get from these companies. This is because the investor is business person therefore must have a right to spend his money in whatever manner he desires.

On the issue of the legislation which domesticates the principle of PSNR not complying with existing BITs, the study suggests that the country should review its BITs with other countries so as to meet the requirement of the two pieces of legislation. But however on the issue of retention of funds and free transfer of transfer of capital, profits and dividends acquired from investments abroad, investors should be allowed to do so.

Again on the provision that restricts foreign dispute settlement[cxvi] the section needs to be amended. This section is not compliant with different BITs and the International Treaties like the ICSID Convention as seen previously. Again the restriction poses challenges to investors in matters like getting loans from abroad banks and financial institutions. The study suggests that foreign dispute resolution fora should be allowed but subject to exhaustion of local remedies, rather restricting it in totality.

Again on the argument of the legislation violating the Vienna Convention on Law of Treaties especially article 26 which provides for the international principle of pact sunt servanda. The study discovered that previous illegal practices conducted by the investors and un faithful government employees amounts to change of circumstances in the investment agreements.[cxvii]

These practices are like the tax evasions, environmental degradations in mining areas,[cxviii] corruptions, bribery, fraud and economic crimes against the host state government. These illegal practices are presumed to have made the representatives of a country to sign unfair arrangements or agreements, which benefited the investors than the host state and their citizens. All these actions fall under the exception of the principle of pact sunt servanda known as clausula rebus sic stantibus.[cxix] This is because the circumstances led the country to lose a lot of revenues as seen above. These are the reasons that forced the country to domesticate the principle of PSNR. It is therefore fair to treat these unfair dealings in the mining industry as fundamental changes. This grants the right to Tanzania to review its previously concluded arrangements or agreements in the mining industry.

Generally, the study assures that all investors' current and those intending to invest in Tanzania, that the investment legal regime is good. The current challenges are transitional since the country is trying to create an investment environment that is favourable to both the investor and the country.

ENDNOTES

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