STATE SOVEREIGNTY VIS-A-VIS SETTLEMENT OF INVESTMENT DISPUTES

Written by ***George Michael Kalenda***

LL.B, Tumaini University-Makumira, Post-Graduate Diploma in Legal Practice (The Law School of Tanzania), LL.M (St. Augustine University of Tanzania) and State-Attorney from Office of the Solicitor-General of Tanzania, Tanzania

ABSTRACT

The Tanzanian government acknowledged the fact that foreign direct investment is a driver for economic development which gears towards the achievement of the government's goal of transformation of the country's economy of industrialization. This is possible only if among other things, foreign investment is encouraged by having in place, a legal and institutional framework that foreign investors are comfortable with because they believe its neutral, stable, predictable and independent of national political influence that applies rules of international law.

On the other hand, the government has enacted and amended the laws that limits and discourage ISDS through International Arbitration and it is assumed that this reform brings about conflict of laws between those that allows and those that discourage International Arbitration vis-a-vis State's obligations under international law which can be described as the exercise of State Sovereignty in Settlement of Investment Disputes.

INTRODUCTION

The term sovereignty is defined as the supreme, absolute and uncontrollable power by which an independent state is governed and from which all specific political powers are derived. It also means the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.[i] The term is also used as a synonym for the term independence,[ii] where independence is defined as the right to exercise freely the full range of power a state has.

Sovereignty is an aggregated concept that varies according to historical and social circumstances. It is made up of the following key elements, namely, autonomy, control and legitimacy. In this context autonomy means independence in policy making and action, control means the ability to produce an effect and legitimacy means the recognized right to make rules.[iii]

Before independence,[iv] natural resources were exploited by foreign corporations. The relationship between the host state and foreign investors was a matter of national law of the host state,[v] and to a small extent customary international law in regard to minimum standards of treatment for foreigners. This arises out of general international law on state responsibility, where a state owes another state an obligation to protect nationals of the other state within its territory.[vi] During the decolonization process, new independent states raised their concerns, inter alia having control over their natural resources that were exploited during the colonial period. Hence control over natural resources and even expropriation by host states due to sovereignty of the host states. Today, foreign investment is subject to extensive principle of international law.[vii]

Since independence, Tanzania has relied on international trade and foreign investment for integration into the global economy for the purpose of promotion of economic development.[viii] So it goes without the say that, Tanzania recognizes Foreign Direct Investment (FDI) among others, as a driver to economic development. FDI is made possible through international agreements with foreign governments, multinational companies and international institutions. These agreements come with terms and conditions, one being on dispute settlement mechanism.[ix]

Tanzania has legal commitments and obligations to fulfil under International Investment Agreements (IIA). International Investment Agreements include both Bilateral and Multilateral Investment Treaties (BIT's and MIT's), Free Trade Agreements (FTA's) and other economic cooperation which incorporating investment provisions.[x] For instance, Tanzania is a member of the Multilateral Investment Guarantee Agency (MIGA), and a signatory to the International Centre for Settlement of Investment Disputes (ICSID) since 1992.

Tanzania has concluded several International Investment Agreements (IIA's) through Bilateral Investment Treaties (BIT's) and Chapter of Free Trade Area (FTA) commitment at regional level namely; The Kigali Declaration signed under the agreement establishing the African Continental Free Trade Area (AFCTA) and its obligations under East African Community and South African Development Corporation.

But again, in international investment law in settling investment disputes under *state v. state disputes* on diplomatic protection falls under traditional international law. Investors did not have direct access to international remedies to pursue claims against foreign states for violation of their rights.[xi] They depended on diplomatic protection by their home states. A state exercising diplomatic protection espouses the claim of its national against another state and pursues it in its own name.[xii]

In 1868 there was a doctrine advanced by the Argentine diplomat and legal scholar *Carlos Calvo* in his *International Law of Europe and America in Theory and Practice*. It affirmed that rules governing the jurisdiction of a country over aliens and collection of indemnities should apply equally to all nations, regardless of size. It further stated that, foreigners who held property in Latin America states and who had claims against the governments of such states should apply to the courts within such nations for redress instead of seeking diplomatic intervention.

Calvo developed a clause which was used in a contract between the government of a Latin American states and an alien stipulates that the latter agrees unconditionally to the adjudication within the states concerned of any dispute between the contracting parties.

The afore stated doctrine by the Argentine advanced in 1868 was what had been used by the fifth regime of the United Republic of Tanzania which was under the leadership of the late President Dr. John Joseph Pombe Magufuli who advocated for the settlement of investment

disputes by the domestic courts and not by the international tribunals through the laws enacted in 2017 and amended 2018, 2020.

THE LEGAL FRAME WORK ON INVESTMENT

The Legal framework on investment is a set of rules that regulate investment and it ranges from domestic law to international law. For local investment the law applicable is always domestic law, whereas for foreign investment both domestic and international law is applicable. Investment law generally regulates a number of issues namely; admission and establishment of investment, national treatment, guarantees environmental issues, labour matters and dispute settlement.[xiii]

As already pointed out, in 1963 Tanganyika enacted a law on investment to provide statutory guarantee to foreign investors.[xiv] Later in the year 1990, the market-oriented investment code was introduced, that is the National Investment (Promotion and Protection) Act[xv] that was applicable to both local and foreign investors. The Act opened up some sectors of the economy and paved way to the establishment of investment promotion center that has a role to encourage and manage both foreign and domestic investment.[xvi]

In 1996 the government launched a new investment policy that resulted to the Tanzania Investment Act of 1997. This Act and many other that will be analyzed below, including The Constitution of the United Republic of Tanzania makes the legal framework of investment generally, state sovereignty and settlement of investment disputes in particular.

The Constitution of the United Republic of Tanzania of 1977

The Constitution being the supreme law of the land and from which all other laws on investment find relevance and guidance from as it will be shown in the discussion below, has the following provisions in regard to investment and dispute settlement. The Constitution recognizes the right of individuals to acquire and own property and it further establishes the judiciary as an independent arm of the government.

It states that, every person is entitled to own property, and has a right to the protection of his property held in accordance with the law. And that it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.[xvii]

The constitution establishes the judiciary as the only authority with final decision in dispensation of justice in the United Republic of Tanzania. In so doing it shall observe the following principles; impartiality to all without due regard to one's social or economic status, not to delay dispensation of justice without reasonable ground, to award reasonable compensation to victims of wrong doings committed by other persons, and in accordance with the relevant law enacted by the Parliament, to promote and enhance dispute resolution among persons involved in the disputes, to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.[xviii]

The constitution emphasizes that in exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land.[xix]

The Tanzania Investment Act, 1997 [R.E. 2015]

This is the major legislation on investment in Tanzania. It was enacted to make provisions for investment and for favorable conditions for investors and other related matters.[xx] The Act establishes the Tanzania Investment Centre, an agency of the government on investment and related matters,[xxi] with an objective to coordinate, encourage, promote, facilitate and advice the government on investment and other related matters.[xxii]

The center has a function of initiating and supporting measures that will enhance the investment climate in the country for both local and foreign investors, disseminate analyzed information about investment opportunities, assist investors to obtain necessary permits, licenses, approval, consent, authorization, registration and other related matters to enable them set up and operate an investment.[xxiii] The Centre also issue certificate of incentives upon application by an investor.[xxiv] The Act further provides for benefits and guarantees. Which basically aims at

protection of investment as articulated by BIT's and MIT's including guarantee of expropriation.[xxv]

On dispute settlement, the Act provides that, when a dispute between a foreign investor and the center or the government arises, efforts shall be made to settle the dispute through amicable settlement. If that fails, the dispute, through a mutual agreement may be settled in accordance with Tanzania's arbitration laws for investors, or through arbitration procedures under International Centre for Settlement of Investment Disputes, (ICSID) or in accordance with any BIT or MIT of which Tanzania and the Investor's state are contacting parties.[xxvi]

The Arbitration Act, 2020

The National Assembly of Tanzania passed a new Arbitration Act in the year 2020 which came into operation on the 18th of January 2021. It applies to Mainland Tanzania. In addition to this Act, four supplementary regulations were approved On 5 January 2021 and published on 29th January 2021 these are; (i) The Arbitration (Rules of Procedure) Regulations, 2021 (ii) Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021 (iii) Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021 and (iv) The Tanzania Arbitration Centre (Management and Operations) Regulations, 2021.[xxvii]

The Act provide for conduct relating to domestic arbitration, international arbitration and enforcement of foreign arbitral awards, repeal of the Arbitration Act and to provide for conduct relating to domestic arbitration, international arbitration and enforcement of foreign arbitral awards and or matters relating to or incidental thereto.[xxviii] In relation to international arbitration, the court with jurisdiction is the High Court in the exercise of its ordinary original civil jurisdiction.[xxix] And the Act is Applicable only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Act only if it is in writing.[xxx]

Section 77 of the Act establishes a center to be known as the Tanzania Arbitration Centre, which will perform the tasks of an arbitration institution.

The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

In its preamble, the Act re-affirms provisions of the Constitution of the United Republic of Tanzania, on the principles of democracy and social justice[xxxi] and that the constitution requires government activities to be conducted in a manner that ensures natural wealth and heritage is harnessed, protected against exploitation, preserved and applied for a common good and for the development of the nation.[xxxii]

It further recognizes the observance of Human rights as required by United Nations Universal Declaration of Human Rights,[xxxiii] which Tanzania is a signatory. Further, Tanzania is a sovereign state, with permanent sovereignty over natural resources, hence protected under international law, in any arrangement or agreement in respect to natural wealth and resources.

With this spirit, the Act further, prohibits proceedings in foreign courts.[xxxiv]It draws reference from the constitution[xxxv] that permanent sovereignty over natural resources shall not be subject to proceedings in any court or tribunal. It follows that, any dispute arising from an investment agreement or arrangement on extraction, exploitation or acquisition of natural wealth and resources shall be adjudicated in domestic courts.[xxxvi]

The Natural Wealth and Natural Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017

Like the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017, This Act also is guided by the principles of Permanent Sovereignty over natural resources and that Tanzania has a sovereign right to exercise the same as articulated by the United Nations General Assembly Resolution 1803(XVII) of 14th December 1962 of which the United Republic of Tanzania is a signatory. And to provisions of the constitution that requires all activities of the Government to be conducted in such a manner that the national wealth and heritage are harnessed, preserved and applied for the common good and to prevent exploitation and that the national wealth and heritage places emphasis on the common good of the People and the United Republic of Tanzania.[xxxvii]

The Act calls for review and re-negotiation of all any term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of

which jeopardizes or is like to jeopardize the interests of the People of the United Republic.[xxxviii] The Act has no provisions on dispute settlement. However, these review and re-negotiations could include dispute settlement clauses in investment agreements.

The Public Private Partnership (Amendment) Act, 2018

This Act amends the Public Private Partnership Act, No. 19 of 2010 as amended in 2013 and 2014. The amendments have the following impacts on investment and investment dispute settlement. That, the Natural Wealth laws which allows parliament the right to review the Public Private Partnership Agreement at a later point and to modify it if there are deemed to be any unconscionable terms; deletion and replacement of section 20 which now provides that any review or amendment by the parties to the PPP agreement must be consented by the PPP Steering Committee and vetted by the Attorney General.[xxxix]

The Act repeal and replacement of section 22 now provide 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. Therefore, no international arbitration will be permitted in PPP Agreements. This is to ensure the government is not subject to international arbitration forums.[xl]

Addition of Section 25A which makes provision for PPP projects relating to natural wealth and resources to recognize the provisions under the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017 (collectively the Natural Wealth laws). These provisions include only local arbitration under Tanzanian law will be recognized as well as the right for parliament to review any agreements in relation to, but not limited to, natural wealth and resources.[xli]

CONCLUSION

Practising State sovereignty will bring about some misunderstanding basically in the dispute settlement because of the stress put on the use of local courts as stated in the above explained

legislations especially the ones which were enacted and amended in 2017, 2018 and 2020 respectively. In order for the practice of state sovereignty to hold water the state has to do some initiatives which are; -

Exhaustion of Local Remedies

Exhaustion of local remedies is a well-founded principle under international law as an admissibility of a claim criteria in most international courts and tribunals. This is not a principle under international investment law. Further, it is not a pre-condition in most of the BIT's Tanzania has signed with an exception of Tanzania – China BIT of the year 2013. The BIT introduces new patterns to extraordinary details of Investor – State Dispute Settlement and a limited recourse to international arbitration. It favors adjudication of investment disputes by national courts.[xlii]

The purpose of the principle is to balance between sovereignty of a state and requirements under international law. In investment disputes, diplomatic protection is another way through which a party can initiate international proceedings but only when local remedies have been exhausted. This principle is an objection of admissibility at the disposal claimant's state which can be invoked at the beginning of the proceedings. The rule is applicable if the essence of the claim has been brought before the tribunals having jurisdiction and pursued as far as permitted by local law and procedures, and without success.

This is an advantage to both an investor and the host state. If the national court in any way did not do justice to the investor, he still has an option to seek justice in an international forum. The government is therefore advised to learn from this BIT between it and China, as the review and renegotiation of BIT and it must be a point to consider as it is a win-win situation for both parties.

Avoidance of Multiplicity of Laws on Investment

It was observed that there are multiple laws in Tanzania that regulate the investment industry. Ranging from BIT's to domestic laws. It is not a disputed fact that there is a need to regulate and control the investment sector so that, the country can reap benefit on behalf of its citizens and further develop. And this can be very well achieved by having in place laws. However,

having multiple legislations on the same matter has an effect of bringing about overlapping of the law.

It is a finding of this article that, the government has enacted and amended the laws that limits and discourage ISDS through international arbitration namely, the Natural Wealth and Resources (Permanent Sovereignty Act of 2017, the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act of 2017, the Public Private Partnership (Amendment) Act of 2018, and the Arbitration Act of 2020. While the major law on investment that is the Investment Act recognizes dispute settlement through international arbitration and that the country is a signatory to ICSID Convention and a number of BIT's that has a dispute settlement clause which recognizes international arbitration. It was found that these reforms bring about conflict of laws between those that allows and those that discourage international arbitration *vis-a-vis* state's obligations under international law hence this article recommend that, the country should avoid multiplicity of laws on the same area.

Harmonization of Laws on Investment

Harmonization of the law has been the practice to cure a defect where two laws are in conflict. Considering the fact that, Tanzania is a signatory to a number of BIT's, MIT's and regional investment pacts. To be on the safe side and avoid future claims under the agreements what should be done is harmonization of the investment laws.

For instance, the East African Community has adopted the approximation approach of harmonization of Community law at national level, where partner states, must have in place a national law to align with community law for easier interpretation of this law at the national level. This is so because partner states choose to embrace their sovereignty over obligation that rises out of state's commitment in the community. This can be the solution to future claims that may be brought about by conflict of laws between national law *vis-a-vis* BIT's, MIT's, and regional investment pacts.

Establish and Strengthen Investor-State Dispute Management Systems

Tanzania has in place an institution set by the law to arbitrate investment disputes. That is the Tanzania Arbitration Centre that has a role of settling investment disputes. It is hoped that it, together the Tanzania Institute of Arbitrators forms a strong investor-state dispute management

system can enable the country to efficiently and effectively resolve potential disputes. Peru and Colombia are some of the Latin American countries that have adopted and utilized such a system.

After experiencing its first international investment dispute, Peru established the State Coordination and Response System for International Investment Disputes (SICRECI) to prevent and resolve investment disputes. The SICRECI alerts on investment disputes and coordinates a timely response to investment disputes. It is composed of a coordinator, special commission and other public entities that have entered into agreements with foreign investors. In case of an investment dispute, the state is represented by a special commission that includes four permanent members from the ministry of economy and finance (MEF), Ministry of Foreign Affairs, Ministry of Justice and Pro-Investors, and Peru's Private Investment Promotion Agency. The MEF leads the Commission which analyses the feasibility of investor claims, negotiate with investors, determine the need for outside counsel, and acts as a decision maker in the arbitration proceeding.

Colombia is another good example. In 2013, Colombia set up the High-Level Government Body (HLGB) to prevent and manage investment disputes. The HLGB is composed of members of the Board of Advisors of the National Agency of Legal Defence of the State, i.e. the Minister of Justice and Law, Minister of Finance, Minister of Foreign Affairs, Minister of Trade, Industry and Tourism, the Legal Secretary of the office of the president and two external advisors. Supported by the Inter-Institutional Support Group, the HLGB coordinates and recommends measures for preventing and managing investment disputes. The Director of Foreign Investment and Service of the Ministry of Trade and Industry leads the negotiation of IIAs and the defense of the state and any out of court settlement, in case of investor-state disputes.

Adopting a similar mechanism would enable Tanzania to prevent and otherwise effectively manage investment disputes. A lead agency can coordinate an information sharing structure where different governmental agencies are informed of the state's obligation, notified of BIT's that are approaching their termination periods, and alerted about investor grievances. It could also be the focal point to receive and address governmental agencies' inquiries on whether certain actions could bring a legal consequence to the state or not.

A lead agency would also be vital in managing disputes. Once it receives complaints from an investor, the agency can take the necessary action to resolve the grievances before the investor commences an arbitration against the state. Even if an amicable solution is unlikely, creating a lead agency would enable a state to better organized and coordinated in defending itself.

Observance of State Sovereignty

As discussed above, the enactment of the Public Partnership Act was proceeded by the enactment of the Natural Wealth and Resources (Permanent Sovereignty Act, 2017. The Act, affirmed the country's ownership of natural wealth and resources, fortifying state's control on the existing legal system of sovereign rights over natural resources. Which upholds the country's inherent right to legislate and adjudicate including the right to decide on the terms of foreign investment contracts.

The state, while exercising its sovereignty it must consider economic development and that it is not an island. At one point it depends on contribution brought about by FDI towards economic development hence legislate and adjudicate in a manner that all stakeholders' interests are considered. Hence not only prohibit international arbitration completely but give room upon agreement when a party is aggrieved by the decision of a national court then he has a room in an international forum. It should consider the principle of complementarity and exhaustion of local remedies being very well enshrined principles of international law.

ENDNOTES

[i] Available at http://legal–dictionary.the freedictionary.com – Accessed on 30/12/2021.
[ii] CRAWFORD, James (2008), *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press. p. 76.
[iii] MATTLI, Walter (2000), *Sovereignty Bargains in Regional Integration*, p. 150 – See http://www.jstor.org - Accessed on 30/12 2021.
[iv] The Tanganyika Independence of 09th December 1961.
[v] DIXON, Martin (*et al.*) (2016), *Cases and Materials on International Law*, 6th Edition, Oxford, Oxford University Press, p.511.
[vi] In the case of Neer Claim (United States v. Mexico) RIAA 60 (1926), Mexico – United States General Claims Commission. See also, Hackworth G.H (Ed) (1943) vol 5, Washington Government Printing House.
[vii] DIXON Supra.
[viii] SUED, Amne (2020), *The Need for Africa Focused Arbitration and Reform of the Tanzania's Arbitration Act*, available at www. Iisd.org – Accessed on 20th February 2021.
[ix] Ibid.

[x] United Nations Conference on Trade and Development (2008), *International Investment Rule-Making: Stocking, Challenges and the way forward*, New York and Geneva, United Nations p.19.
[xi] DOLZER, Rudolf & SCHREUER, Christopher (2008), *Principles of International Investment Law*, Oxford, Oxford University Press, p.211.
[xii] The International Law Commission has adopted Draft Articles on Diplomatic Protection in 2006. See Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10). The General Assembly took note of the draft article in Resolution 61/35.
[xiii] https://www.abyssinialaw.com/study-on-line/item/486-definition-and-nature-of-investment-law-Accessed on 09/09/2021 at 01:24 Hours.
[xiv] Foreign Investment (Protection) Act No. 40 0f 1963.
[xv] No. 10 of 1990.
[xvi] TINDIMANYIRE, M.D (2014), *The Efficacy of Mining Laws on Promoting Social Economic Development in Tanzania; An Analysis of Foreign Direct Investment*, LL.M Dissertation, St. Augustine University of Tanzania at p.17.
[xvii] Article 24 of the Constitution.
[xviii] Article 107 A of the Constitution.
[xix] Article 107 B of the Constitution.
[xx] Preamble of the Act.
[xxi] Section 4 of the Act.
[xxii] Section 5 of the Act.
[xxiii] Section 6 of the Act.
[xxiv] Section 17 of the Act.
[xxv] Section 22 of the Act.
[xxvi] Section 22 of the Act
[xxvii]Available at http://arbitrationblog.kluwerarbitration.com/2021/04/21/the-first-year-of-tanzanias-2020-arbitration-act/ - Accessed on 30/09/2021, 18:57 Hours.
[xxviii] Preamble of the Act.
[xxix] Section 2 of the Act.
[xxx] Section 8 (1) of the Act.
[xxxi] Articles 8(1) and 9(f) of the Constitution.
[xxxii] Articles 9(c) and (i) of the Constitution.
[xxxiii] Articles 17 and 21 of the Declaration.
[xxxiv] Section 11(1) of the Act.
[xxxv] Article 27(1) of the Constitution.
[xxxvi] Section 11(2) of the Act.
[xxxvii] Article 9 (c) and (i) of the Constitution.
[xxxviii] Part I and II of the Act.
[xxxix] Section 13 of the Act.
[xl] Section 14 of the Act.
[xli] Section 16 of the Act.
[xlii] Article 13(2) of the BIT.