

ANALYSIS OF THE AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT BETWEEN THE UNITED REPUBLIC OF TANZANIA & THE KINGDOM OF THE NETHERLANDS

WHY THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA SHOULD CONSIDER REVIEW OF THIS AGREEMENT

Facts about Bilateral Investment Treaties (BITs)

Recent decades have seen many African governments sign multiple BITs with other countries (normally with European countries and the U.S). Conversely, several other governments¹ have woken up to their implications and are either terminating them or seeking major changes to them.

Bilateral investment treaties (BITs) are treaties between two countries or regional economic communities regarding promotion and protection of investments made by investors from respective countries in each other's territory. Under these treaties foreign investors enjoy exceptional legal rights, including the exclusive access to arbitral procedures against the State, without corresponding responsibilities.

Many governments have been convinced that BITs are a good thing for a country's development because they encourage foreign companies to invest in their countries, and in so doing, contribute to economic growth and job creation. BITs offer companies special protection by committing host governments to various provisions such as National Treatment, Most Favoured Nation Treatment, Fair and Equitable Treatment and Investor to State Dispute Settlement (ISDS) which allows them to sue governments for financial compensation when certain provisions of the treaty are violated. It has thus been assumed that BITs provide companies with the financial confidence to invest in countries that they might not have otherwise invested in.

In reality, evidence indicates that investment agreements rarely determine whether a company invests in a country or not². The availability of raw materials, the quality of roads and transport links, and the proximity to markets are amongst the more important factors. Indeed some countries that have attracted huge amounts of foreign investment such as Brazil have never signed *any* BITs. A study used by the Dutch government to illustrate the alleged benefits of BITs to attract foreign direct investment concluded that "*this is not the case for low and lower middle income countries located in Latin America and Sub-Saharan Africa*".³

CSO Concerns regarding the approaching expiry of the Tanzania-Netherlands BIT

1. BIT termination

The special case of the BIT between the Tanzania and Netherlands is that it differs strongly from all other BITs that Tanzania has signed when it comes to termination of the treaty. While all BITs to which Tanzania is party can be terminated at any time after an initial period of 10 year, this is not the case for the BIT with the Netherlands.

¹ Bolivia, Ecuador, Venezuela, South Africa, and Indonesia have terminated several IIAs. See Traidcraft 2015: 'International Investment Agreements Under Scrutiny', chapter 4

² See for example Aisbett (2009), Poulsen (2010), and Yackee (2010); UNCTAD 2014: Trade and Development Report 2014: Global governance and policy space for development, New York/Geneva, p. 159

³ A. Lejour and M. Salfi, "The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment", CPB Discussion Paper 298, 16 January 2015: <https://www.cpb.nl/en/publication/the-regional-impact-of-bilateral-investment-treaties-on-foreign-direct-investment>

The BIT with the Netherlands provides for its automatic extension for another 10 year period if no letter of termination has been sent at least 6 month before the expiration of the current 10 year period⁴. This in effect means that termination of the treaty by either parties (Tanzania or Netherlands) would be impossible during the next decade.

The current deadline for treaty termination is “before 1 October 2018”. The last working day before this deadline is 28 September 2018.

2. Provisions for Investor-State Dispute Settlement (ISDS)

This provision allows foreign investors who believe that the treaty obligations have been violated by the host state, to sue the state directly before an international arbitral tribunal, which are usually composed by three arbitrators that are appointed on a case-by-case basis. The growing number of investor claims against sovereign states challenging a wide array of public policy decisions and regulatory measures has evoked deep concerns about the potential costs associated with such treaties.

As of July 2018, the investor-state dispute settlement mechanism has been used in 855 known cases⁵. On average, investors are awarded US\$522 million⁶ for compensations and legal and arbitration costs exceed US\$8 million⁷. Such cases are often a result of severe financial crises; public regulatory measures or reforms such as regulations of harmful chemicals, environment laws, and mineral laws; or insecurity resulting into loss to the investor, among others. Hence, there is a growing concern that BITs may deter governments and legislators to introduce or implement new public policy out of fear for the legal response by foreign investors.

A number of countries have been revising their BITs program since the early 2000s. Countries like Bolivia, Ecuador, Venezuela, and Nicaragua have all rolled back their BIT commitments. South Africa has replaced its BITs regime with a new domestic legislation that aims to protect investor rights while safeguarding policy space to allow the government to regulate in the public interest. In Asia, several countries are taking steps to protect themselves from costly investor-state arbitration⁸.

3. The Definition of Investment

In defining investment, Tanzania should adopt an “enterprise” based definition of investment where an enterprise is defined as one having “real and substantial” business operations should be adopted. The investor should be a natural person(s) or enterprise conducting real and substantial business operations in the host country.

The enterprise definition of investment reduces the risk of attracting footloose and opportunistic foreign investment that often targets windfall profits and thereafter shift to new locations. Such investment normally

⁴ Article 14.2 of the Dutch BIT with Tanzania reads as follows: “Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.”

⁵ Investment Policy Hub, Investment Dispute Settlement. <http://investmentpolicyhub.unctad.org/ISDS>.

⁶ UNCTAD, Special update on investor–state dispute settlement: facts and figures, IIA Issue Note n. 3, 2017, http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf.

⁷ OECD, Investor-State Dispute Settlement. Public Consultation: 16 May – 23 July 2012, p.19.

⁸ For example as well India as Indonesia already terminated their BITs with the Netherlands

has minimal positive effect onto the domestic economy of the host country because it does not create long term linkages with local production sectors. The proposed definition increases the likelihood of attracting long term investment which has a higher probability of supporting of host country development aspirations by benefiting its citizens.

It is also important to ensure the country's policy space, as provided for under international frameworks such as the TRIPS Flexibilities under the WTO TRIPS agreement should be safeguarded.

4. Treatment of investors

The inclusion of Fair and Equitable treatment under this Article presents significant risks and uncertainties that could arise from its broad interpretations. This provision is highly contentious due to the lack of certainty as to what constitutes "fair" and "equitable" treatment. These terms have been a subject of very expansive interpretations in arbitral decisions; and have been regularly invoked by claimants in investor-State dispute settlement (ISDS) proceedings, with a considerable rate of success (UNCTAD, 2014).

Similarly, the treaty should exclude the provision on Most Favored Nation from the Treaty because it allows for the multilateralization of a basically bilateral treaty. It also increases the risk of legal challenge based on unrelated treaty signed with a third party.

The government of URT should explicitly set exceptions to National Treatment and agree on this list of exclusions. Although the treaty provides exceptions for "infant" industries in URT to be given "limited" incentives. It is not clear what constitutes "limited" or "infant".

5. Inclusion of indirect expropriation under the provision of Expropriation and Compensation

Legitimate state regulatory activity in the public interest including state measures should not be considered expropriation as is the investment agreement currently provides. The Tanzania-Netherlands BIT however recognizes that where a state acts in a way that is detrimental to a foreign private investment, then this may also be classified as expropriation, even if the investor retains its property rights over the investment.

Given that challenges may arise in exhaustively distinguishing government measures that will constitute expropriation, then, it is imperative to include that whether a measure or a series of measures have an effect equivalent to expropriation should be dealt with on a case-by-case basis and on fact-based inquiry.

6. Agreement does not balance between the rights and obligations of investors; and the right of the state to regulate

Creating attractive conditions for investors through liberalization, protection, promotion, and facilitation is consistent with the demands of the overall regulatory framework. This includes maintaining a balance between the rights and obligations of the investor and the state in line with the principles of sustainable development.

The government of Tanzania and that of the Netherlands in Cooperating should also retain the right to regulate investments, and enforce pre-establishment rights in a predictable and transparent manner. This entails maintaining sufficient policy space to regulate for the public good and providing a stimulus effect for investors.

7. Agreement is not coherent with legal reforms that the country has recently adopted

The new Mining Acts crafted by the government of Tanzania as it seeks to change the exploitation of natural resources in the country's mining sector if implemented may raise disputes between the state and foreign investors. The three laws, the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017; the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; and the Written Laws (Miscellaneous Amendments) Act, 2017 seek to among other things ensure that Tanzania's natural resources are exploited to benefit the citizens; and ensure revenue sharing between Tanzania and the foreign investors. This however could be considered as constituting indirect expropriation of Dutch companies in the mining sector as provided for under this agreement.

8. Reform process in the East African Community

The EAC in 2015 adopted the EAC Model Investment Treaty. The Model Investment Treaty was developed to be a guiding document for the EAC partner states in negotiating investment treaties with third parties. The model treaty upon its adoption is supposed to be implemented by all the partner states. It should be noted that the current agreement between Tanzania and the Netherlands is not coherent with some of the provisions of the model investment treaty.

It is therefore imperative that Tanzania embarks on a process to review/ terminate its current agreement with the Netherlands to allow for a new agreement to be negotiated in line with the pro development provisions of the EAC model Investment Treaty.

9. Ongoing reforms in the European Union

The EU Commission held an online public consultation on investment protection in the proposed trade deal between the EU and US, which ran from March to July 2014. Almost 150,000 organizations and individuals participated in a public consultation. According to EU's own reporting, 97% were in disagreement about the controversial Investor - State Dispute Settlement (ISDS) mechanism to be part of the trade deal.

This thus triggered an EU reform process.

10. Reform efforts in the Netherlands

In 2014 the Dutch Government undertook a review of its current model for Bilateral Investment Treaties. This happened in the context of the intended conclusion of an investment chapter in TTIP in which several areas that have to be reformed were identified⁹. Consequently, the Netherlands embarked on a process to develop a new model BIT. This thus provides an important opportunity for the United Republic of Tanzania to once again negotiate a new investment cooperation agreement in the context of Tanzania's development interests.

⁹ Kamerbrief over resultaten van onderzoek naar ISDS in TTIP, <https://www.rijksoverheid.nl/documenten/kamerstukken/2014/06/25/kamerbrief-aan-tweede-kamer-over-resultaten-onderzoek-naar-isds-in-ttip>