CAN INVESTOR-STATE DEALS BE A PANACEA FOR ADDRESSING THE EAST AFRICAN COMMUNITY PARTNER STATES' FISCAL DEFICITS?

EAC CIVIL SOCIETY STATEMENT

As the East African Community (EAC) partner states draw out their national budgets for the financial year 2019/20, it's clear that the ends are not meeting. In fact, current projections estimate that the budget deficits in countries like Kenya, Rwanda, Tanzania and Uganda for the financial year 2019/20 will be 4.7%, 4.8%, 3.8% and 6% respectively. These national budget deficits reveal an inability of these countries to domestically finance their development prospects; and hence the pressure on these countries to individually and collectively pursue alternative ways to raise the much needed investment capital cannot be over emphasized.

Some of the most notable ways have been the negotiation and signing of *investor-state* deals such as Bilateral Investment Treaties (BITs) and more recently, the Public Private Partnerships (PPPs) contracts, albeit with limited citizens' knowledge and engagement. Using these contracts/ treaties, investors are guaranteed protection for their investments; while the states are guaranteed investment inflows. While the aim of the contracts/ treaties is to create certainty for both the state and the Foreign Direct Investors (FDIs) establishing in the country, the contracts/ treaties that are being signed by our governments have ended up creating uncertainty for the former and certainty for the latter.

For example, the recent suit against the Republic of Rwanda for $96 million before the International Centre for Settlement of Investment Disputes (ICSID) is a setback not only to Rwanda's mining sector, which has lately gone through a series of reforms aimed at attracting large-scale investors and increasing revenues from mineral exports but also to the country's fiscal plans. This is because on top of the compensation that the US is seeking, they also want the ICSID to make a formal declaration that Rwanda violated their BIT and other international law obligations. The US also wants Rwanda to pay all costs of the trial and their attorneys' fees, estimated to be over $1 million. The Rwanda government must thus devise means to dig into its already narrow and shallow resource basket to finance this suit.

Rwanda is not the only country within the region that has been subjected to international arbitration. The United Republic of Tanzania in 2018 was ordered to pay $148 million to Standard Chartered Bank, a case that had been before the ICSID since 2001 for a breach of a contract by its energy utility agency, Tanzania Electric Supply Company (TANESCO). Although the Republic of Kenya won the recent investment arbitration in Cortec Mining v. Kenya, the claim brought by a trio of mining companies under ICSID tribunal on the basis that the mining licenses which was issued had not been obtained lawfully due to the claimants' failure to obtain the required environmental impact assessments, the Kenya government had to bear a number of costs related to this case.

Besides BITs, there is also a growing populace for Public Private Partnerships (PPPs) contracts, as alternative means to guarantee our states investment inflows. PPPs are a form of blended finance involving a mix of both public and private sector capital in support of development. They have been viewed as an important way to help raise investment finance to complement public investment in infrastructure projects which have been deemed necessary for the realization of the Sustainable Socioeconomic Development in the region. In fact, within the last decade, the value of PPPs has grown rapidly especially in developing and poor countries to embrace the investment financing model. UNCTAD reveals that investments through PPPs increased in 2014 to US$104bn and in 2015 to US$118bn, although falling in 2016 to US$70 billion and rising again in 2017. PPPs unlike BITs are contracts specific to public investment projects.

However, despite PPPs being viewed as more efficient forms of public investment, if not well designed, they can cost the host country almost double the amount they would have otherwise incurred if the investment contract was directly awarded to the public sector and not to a private entity. These costs include costs of capital, profit expectations by the private partners and transaction costs given that PPPs involve the negotiation of complex contracts. A good example of this anomaly can be linked to the UMEME concession in Uganda's energy sector. Despite its anticipated benefits, Uganda experienced high costs of electricity over and above what citizens had previously paid. UMEME was accused of over stating losses and yet claiming compensation. Attempts to terminate the contract met with threats which were linked to the kind of contract the Government had signed. According to the contract, if it was terminated, the government would have to pay an interest of 20% per annum of any outstanding portion of the buyout amount should 91 days elapse after the termination date until it clears the money in full. The contract also protected UMEME in case it was indebted to, say its Ugandan shareholders by the time of terminating the agreement, noting that the government would either have to pay off or cancel the debts. In another section, the contract removed the immunity of the government from claiming UMEME's assets in case the company brought any legal proceedings against it.

The costs of PPPs do not only result from the direct liabilities as stated in the contractual arrangements, but also from the indirect-contingent liabilities. These could include financial obligations whose timing and magnitude depends on the occurrence of some uncertain future events outside the control of the government. Events such as a fall in the exchange rate of the host state's currency, or if the demand for the requested service or facility falls below a specified level, or during economic crises which could result into a reduction in the demand for a certain service or product being supplied by the PPP project. In fact, recent PPP policy reforms in Kenya has sought to withdraw financial and risk guarantees. Such guarantees include loan repayments, guaranteed rates of return, minimum income streams, guaranteed currency exchange rates and guaranteed compensation, should new legislation affect an investment's profitability, which are offered to firms to make the PPPs look bankable. The Kenya government realized that private investors rely on these guarantees to secure funding because they act as insurance for lenders in the event of unseen eventualities. They have abused the government support measures exposing taxpayers to potential losses of millions of dollar.

It is on this basis that as the civil society working group on trade, investment and fiscal related issues including economic rights advocates, trade unionists, human rights defenders, environmentalists and women rights activists within the EAC, call upon the individual EAC partner states' governments, the EAC Secretariat and the East African Legislative Assembly to count the gains and losses of investor-state contracts/ treaties and take more informed steps that will ensure that our region's development aspirations are not undermined at the expense of increasing investment inflows.

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