WHY TANZANIA SHOULD SEND THE DUTCH GOVERNMENT A LETTER IN THE NEXT TWO DAYS.

By Burghard Ilge and Sander Hehanussa, Both ENDS, Amsterdam, 26 Sep 2018

In 2001 Tanzania and the Netherlands signed a treaty only known to a few; a so-called Bilateral Investment Treaty aimed "to extend and intensify the economic relations between them and to stimulate the flow of capital and technology and the economic development of the Contracting Parties". But signing the treaty was in fact mainly a symbolic act which since then has had little if any effect in this respect. In fact, a report by the Netherlands Bureau for Economic Policy Analysis found that BITs have no positive effect on investment in low and lower middle income countries located in Latin America and Sub-Saharan Africa, including Tanzania.

Bilateral Investment Treaties (also known as BITs), and in particular the type of treaties the Dutch negotiated at that time, have now become highly controversial.

The key element of these BITs is that a foreign investor (a Tanzanian Investor in the Netherlands or a Dutch investor in Tanzania) is given additional rights concerning their investment, which are not available for national investors. If, for example, the Tanzanian government should "take any measures depriving, directly or indirectly, investors of their investments" Tanzanian investors would be obliged to get their rights under Tanzanian law in Tanzanian courts. However, under the Dutch- Tanzania BIT this does not apply for investors from the Netherlands investing in Tanzania. Under this BIT, the Dutch investors get a privileged position: they would not be obliged to seek their right under Tanzanian law, but would be allowed to use the Bilateral Investment Treaty and sue the Tanzanian government directly. For this, a somewhat questionable arbitration process called *Investor to State Dispute Settlement* -in brief ISDS- would be started under the rules of the International Centre for Settlement of Investment Disputes (ICSID)

The scope of the Dutch BIT with Tanzania is extensive and the meaning of "depriving investors of their investments" can be interpreted in many ways. In Article 1 of the treaty it is stated that the term investments "means every kind of asset" and this includes not only -as one would expect - "movable and immovable property" or "claims to money", but also "any performance having an economic value". This means that Dutch investors could even sue Tanzania if they can show that a measure taken by Tanzania has caused a loss of their brand value or any other "intangible assets".

Of course all which has been said here about the privileged rights of Dutch investors in the Netherlands also applies to Tanzanian investors doing business in the Netherlands. In fact not only real Dutch companies can make use of such privileges in Tanzania, actually any foreign company can do so, as long as they have "a legal presence" in the Netherlands from where they invest in Tanzania. This also includes such artificial legal constructions like the so called "letter box offices" which are frequently used by foreign companies to avoid paying taxes in their home state. Many bilateral investment treaties between other countries have followed the Dutch model and it therefore is not surprising that more and more countries are cancelling or revising them.

The situation for the Bilateral Investment Treaty between the Netherlands and Tanzania merits special attention.

All BITs have a special article which regulates the termination of the treaty; but the Dutch agreement with Tanzania is special. While the Dutch BIT with Nigeria, like most other BITs, can be cancelled at any time, terminating half a year after its cancellation, this is not the case for the Dutch BIT with Tanzania.

For this particular BIT a deadline was set; if Tanzania does not cancel the treaty before the 1st of October 2018, the treaty will automatically be extended until April 2029 and will continue not only to protect current "investment" but also any future investment that might be made until that date.

In addition, the BIT with Tanzania will not stop after it has been cancelled, due to the so called "survival clause" found in Article 14.3 of the BIT with Tanzania and the Netherlands:

"*In respect of investments made before the date of the termination of the present Agreement the foregoing Articles shall continue to be effective for a further period of fifteen years from that date."*

This means that even if either parliament would decide today to cancel this agreement, they could still be sued based on this treaty in the next 15 years. And if both sides miss the 1 October deadline we would be stuck with this treaty - which nobody really wants or needs - until the first of April 2044. No matter how we vote in the future, no matter what any of our future governments might want, the rights granted to foreign investors in this treaty would be enforceable under international law until this date.

But since awareness in the Netherlands about the problem with BITs is only rising slowly, it is expected that there will be no intervention from the Dutch side before the 1st of October.

All hope now rests with the government of Tanzania.

Recently amendments to legislation covering Public Private Partnerships (PPPs) have been tabled in the Tanzania's parliament seeking to ensure that all disputes arising from government contracts with private entities are conclusively dealt with by Tanzanian courts and not via Investor-to-State-Dispute-Settlement (ISDS) mechanisms at international arbitration bodies. This is good news but one hopes that Tanzania is aware that taking ISDS out of contracts on its own will be insufficient: if the contract is covered by a BIT -such as the one with the Netherlands- that would also give the investor the right to file ISDS cases about any contract related conflicts.

So let's cross our fingers and hope that such a letter arrives in The Hague in time.

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