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Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT

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In September 2018, Tanzania took the international arbitration community by surprise when it issued its notice of its intent to terminate the Agreement on Encouragement and Reciprocal Protection of Investments between Tanzania and the Netherlands which was set to expire on 1 April 2019 (Netherlands BIT). Article 14 (2) of the Netherlands BIT provides that if either party did not terminate the treaty within six months of the expiration date, the bilateral investment treaty would automatically renew for an additional ten years, that is, to 2029.

The Case for Termination and the New ICSID Case

The rationale behind the termination is that the provisions of the Netherlands BIT were seen as limiting the government's ability to regulate investments in the public's interest. The treaty was viewed as incoherent with the legal reforms that Tanzania had recently adopted. The provisions of the Netherlands BIT prevented Tanzania from entering into agreements with a third party that would be more favourable as doing so may attract claims at the ICSID. Ultimately, Tanzania wished to ensure all investment related policies favour both its development and its people.

This is not an uncommon view of investment treaties particularly in weighing the benefit they bring to lesser developed countries. The effectiveness of bilateral investment treaties inducing foreign direct investment (FDI) has often been debated. Studies have shown that there is little to no correlation between a country's BITs and FDI flow. For example, a 2014 analysis undertaken by the United Nations Conference on Trade and Development (UNCTAD) covering 146 economies over 27 years found no evidence that BITs foster increased bilateral FDI. It is not all too surprising that Tanzania opted to terminate the Dutch bilateral investment treaty.

Generally, bilateral investment treaties, being treaties under public international law, are subject to the Vienna Convention on the Law of Treaties (VCLT). Article 54 of the VCLT provides that a party can terminate a bilateral investment treaty either unilaterally under the provisions of the treaty or mutually at any time during the period of the treaty. Tanzania opted to unilaterally terminate the Netherlands BIT under the provisions of the treaty and by sending a notice shortly before the time period to terminate would expire under the treaty.

Six months following the termination of the BIT with Netherlands, Ayoub-Farid Michel Saab,

Chairman of FBME Bank and a Dutch national has filed an ICSID claim against Tanzania under the Netherlands BIT. The dispute apparently relates to FBME Bank. This bank was previously the subject of an ICC dispute which Saab and his brother filed against Cyprus. Earlier this year an arbitration award was issued in favour of Cyprus with a dissenting arbitrator.

The FBME Bank has been surrounded by controversy. In 2014, the US Treasury's Financial Crimes Enforcement Network (FinCEN) accused FBME of facilitating money laundering and financing terrorism and organised crime. In 2017, Tanzania's central bank shut down and liquidated FBME's operations in the country.

The ICSID case against Tanzania was filed on 16 April 2019. It remains to be seen if Mr Saab will triumph in his claim.

The Status of the Netherlands BIT Post Termination

Although Tanzania terminated the bilateral investment treaty with the Netherlands, pursuant to Article 3 of the treaty, investors can file disputes against Tanzania in relation to investments made prior to the date of termination for a period of fifteen years. Article 3 of the Netherlands BIT states,

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.

It is not uncommon for BITs to contain sunset clauses such as the above. In 2012, South Africa sought to terminate its bilateral investment treaty with Belgium for a similar reason to Tanzania's – the risk that the BITs outweighed their benefit to the country. The provisions of the South Africa-Belgium BIT also provided for the treaty to apply to existing investments for 10 years. Such sunset clauses particularly apply in cases of unilateral termination of the BIT such as in Tanzania's case as opposed to mutual termination of the BIT where the parties may agree for the sunset clause not to apply or to limit its exposure.

What of Tanzania's other BITs?

At the time of this ground breaking development, the African arbitration community queried what this would mean for investment arbitration in Tanzania, whether it would follow in the footsteps of South Africa and if this was the tip of the iceberg to follow. That is, would Tanzania seek to terminate other BITs in place. This was particularly of concern in the wake of certain controversial legislative reforms– international arbitration was no longer permitted in disputes in relation to Tanzania's natural resources and international arbitration was prohibited in public private partnerships. As of this date, Tanzania has 12 BITs in force and 8 signed but not yet in force. It has ongoing disputes under two of its BITs, as recorded by the investment policy hub, where Tanzania is the respondent. These include:

1. **Sunlodges Ltd (BVI), 2. Sunlodges (T) Limited (Tanzania) v the United Republic of Tanzania (2018).** Filed under the Italy and Tanzania BIT of 2001, the dispute involves claims arising out of the Government's alleged seizure of the Claimants' cattle farming land in order to build a cement works and a power station. The investment arbitration is filed under the

UNCITRAL Rules with the Permanent Court of Arbitration administering the dispute. The claim amount is circa USD 30 million. The seat of arbitration is Sweden. The case is still ongoing.

2. Agro EcoEnergy Tanzania Limited, Bagamoyo EcoEnergy Limited, EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania (2017). Filed under the Sweden and Tanzania BIT of 1999, the dispute involves claims arising out of the cancellation by the Government, in 2016, of the claimants' sugar cane and ethanol project on the grounds that it would have adverse impact on local wildlife. The dispute is filed under the ICSID Rules and is administered by ICSID. The case is still ongoing.

The relationship between bilateral investment treaties and foreign direct investment (FDI) is questionable to say the least. In 2010,when South Africa decided to terminate 20 BITs its FDI stock increased 10 percent since that time, from 1.8 trillion rand to 2.0 trillion rand. It remains to be seen the route Tanzania will take with its remaining BITs. A word of caution would be that Tanzania renegotiate its sunset clauses under its treaties when seeking to terminate to reduce the impact of the treaties on existing investments. Meanwhile, it remains to be seen if Mr Saab will be successful in his most recent claim against Tanzania.

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