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THE RIGHT TO REGULATE IN NATURAL WEALTH AND RESOURCES IN TANZANIA: CHALLENGES AND PROSPECTS

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Abstract:
This article examines the right to regulate in Tanzania amidst legal reforms in natural wealth and resources done in 2017. The right to regulate seeks to balance investor's economic interests in investment protection with host states' interests in pursuing public policy objectives such as environmental protection and human rights (distributive justice). Achieving this delicate balance, however, is quite tricky. Whilst these reforms elevated the right to regulate to new lights, they equally exposed Tanzania to new investment arbitration claims. This article has reviewed related literature, statutes and case laws and observed that regulatory measures taken in pursuance of these reforms may be at odds with investment treaty standards and commitments entered by Tanzania in investment treaties. The article reveals that majority of bilateral investment treaties entered by Tanzania do not contain provisions recognizing or implicating right of states to regulate. In essence, this contradicts legal reforms done in 2017. It is, therefore, recommended that Tanzania should review investment treaties so that they also reflect the right of states to regulate. By complementing efforts done under domestic investment laws, this will help to safeguard the right of state to regulate.

Keywords:
Right to Regulate, Natural Wealth and Resources, Tanzania, Challenge, Prospects

1. Introduction
The right of states to regulate (RTR) means the right to take regulatory measures in a bid to ensure development is aligned with legitimate objectives of the state such as environmental and human rights protection as well as social and economic objectives. (SADC, 2012) Such legitimate public policy goals include protection of public health, environment, competition, human rights and social values like engagement with local communities before economic projects are embarked. These regulatory measures of the state can emanate from legislative, administrative or judicial actions. (Korzun, 2016). In this study, the right to regulate should interchangeably be understood to mean police power doctrine, regulatory space, right to legislate and regulatory freedom. (Ugale and Martinkute, 2022)

This right, exercised in accordance with customary international law, recognizes "inherent sovereignty of states to regulate investor activities in the interests of local communities." (Zhu, 2017). Todate, this right has received its formal recognition yet under Comprehensive Economic and Trade Agreement (CETA) between Canada, and the European Union countries. While this right does not aim to eliminate altogether the standards of investor protection, it only seeks balance divergent interests of investors, local communities as well as host states. As such, it seeks to end the view that investment treaties are single-minded instruments bent purely to promote investor rights while overlooking other public welfare objectives. (Zarra, 2017). Thus, within this perspective, RTR takes an enlarged meaning to include needs of ensuring not only distributive justice but also economic justice. This largely entails ensuring host states and local communities benefit from investments made in natural resources. (Morossini, 2018 :2).

Notably, trade in natural resources has great potential for economic development prospects of recipient countries in terms of generating capital, foreign exchange, transfer of technology, and employment. (De Gregorio, 2003 : 1-3)

Conversely, natural resource industries raise challenges in terms of potential to cause environmental damage or human rights impacts where natural resources are over-exploited or poorly exploited. (Zaman, 2012) In practice, since investment activities take place in host countries (recipient countries), local communities are impacted the most. (Mayne, 1999). Thus, divergent interests between exporters and importers of natural resources have been at the center of the need to regulate natural resources. As a result, this has shaped a rethink of trading relations between host states and investors. (OECD, 2011) Importantly, RTR is among the policies meant to maximize benefits while minimizing potential adverse effects of natural resource trade.

This articles seeks to analyse recent policy initiatives aimed at enhancing the regulation of natural resources in Tanzania. Such initiatives illustrate the growing realization by policymakers of the need to take legitimate regulatory measures into account when assessing investment and trade relations between states and investors. Following this introduction, part one illustrates the methods of the study. This part also gives an historical setting of the socio-economic and environmental problems in the natural resources sector. These problems prompted the natural wealth and resources' reforms of 2017; which are also covered under this part. Part three proceeds to assess the challenges of safeguarding the right to regulate in Tanzania amidst legal reforms of 2017. Part four assesses the prospects of such reforms while part five concludes the study.

2. Methodology

This article is mainly a doctrinal legal research. It has been conducted by reviewing statutes ; treaties ; related literature reviews and case laws including arbitral awards. Main domestic statutes in question include the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; [herein after referred to as The Permanent Sovereignty Act], the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017; [hereinafter referred to as the Review Act], the Written Laws (Miscellaneous Amendments) Act 2017 and the amended Mining Act and its regulations. These statutes constitute domestic investment laws in Tanzania. Analysis of such statutes was complemented by analysis of relevant investment treaties in force which Tanzania has entered into with other countries. These treaties were accessed from UNCTAD Investment Policy Hub. The aim of reviewing these statutes and investment treaties was to ascertain the extent to which such laws or treaties recognize and embody provisions implicating right of states to regulate. To clearly illustrate the legal implications, challenges and prospects of RTR amidst reforms of 2017, a body of case laws and arbitral awards has been resorted to. These awards, were accessed via the International Centre for Settlement of Investment Disputes (ICSID) law database, ital law, Kluwer arbitration, Westlaw and iisd/awards. The arbitral awards include those in which Tanzania has been involved or subjected into international arbitration. Those arbitral awards offer interpretation about the scope and effect of right to regulate. Importantly, a combination of these sources has shed light into the legal position of right to regulate in Tanzania, including its challenges and prospects.

2.1 Historical Context

Tanzania is rich in minerals, petroleum and natural gas deposits ranking fourth in Africa in terms of diversity and richness of such natural resources. Presence of vast mineral resources raises the potential to achieve economic prosperity and sustainable development. (Andilile et al, 2019) However, the impact of natural resources in transforming social and economic development in Tanzania has always been a far cry. Even though trade and investment impact from natural resource industry has potential to transform the economy and sustainable development prospects at large, everything boils down to and depends on, the nature of management and governance framework, particularly, the design of the legal framework. (Bishoge et al, 2018 : 16) In that regard, domestic law assumes an important role of trying to balance competing twin goals of promoting or increasing transnational trade and investment while spontaneously pursuing public welfare goals in natural resource industries effectively. In trying to achieve this delicate balance, there is a pressing need for recipient-developing countries to have sound legal principles that can regulate investment activities in a way that can encourage positive impacts (economic development) while mitigating and managing negative impacts in terms of environment or human rights. (Mayne, 1999)

Structural reforms of 1990's in Tanzania, pioneered by World Bank, meant to galvanize the mining sector. These reforms were contained in the Africa Strategy for Mining Technical Paper of 1992. The reforms ushered in neo-liberal ideology which is about liberalisation of economy and promotion of private investment. (Society for

International Development, 2009) However, while these reforms saw increased levels of exploration and mining activities, there were dissatisfactions over the impact of the reforms in Tanzania. Such reforms are touted to have overly-liberalized the legal regime at the expense of public interests. For instance, the Mineral Sector Development Programme and the 1992 report discouraged use of local content strategically for employment generation. As such, the subsequent Mining Act of 1997 had no references regarding local content. In contrast, generous incentives to investors were offered. These include exemptions from a wide range of taxes like Value Added Tax or duty exemptions, 5 year tax holiday, favourable concessions, 100 percent transferability of profits, 100 percent foreign ownership, and from environmental impact assessment. Similarly, The Tanzania Investment Act of 1997 was also hugely pro-investor at the expense of public interest goals. (Society for International Development, 2009)

As a result, this dispensation is argued to have caused low social and economic contribution of the sector to Gross Domestic Product. This led the government to revise its mineral policy in 2009 and it culminated in the amended Mining Act of 2010. The revised Mining Act of 2010 sought to secure more benefits to local community. In particular, it had new provisions around local content, benefication and increased participation of Tanzanians, linkage of investments with local community through Corporate Social Responsibility (CSR) programs. (Institute for Human Rights and Business, 2016) Apart from shoring up extractive resource management, increased conditions were also put relating to plan for relocation, resettlement and compensation of local communities. (Institute for Human Rights and Business, 2016) However, despite the Act reinstating local content requirements plus other changes, progress in these areas was still nonetheless unsatisfactory. There were still persistent complaints about the industry. Local communities still held the belief that investments are not of benefit to the country, due to transferring of resources elsewhere but having limited social and economic impact in the country. These complaints were met by adoption of Corporate Social Responsibility initiatives in Mining Companies. (Kinyondo and Villanger, 2017)

Lessons learnt from the mining sector were implemented in the Natural Gas Policy of 2013 and subsequent legislations concerning oil and gas. For example, informed by the Gas Policy, the 2015 Petroleum Act was enacted to regulate the petroleum sector. Further three new Acts were passed in 2015. These include The Petroleum Act, the Oil and Gas Revenue Management Act and the Tanzania Extractive Industries (Transparency and Accountability) Act. New local content rules, CSR initiatives, new safety and environmental principles were all taken into account in these new Acts. (Andilile, et al, 2019) However, these changes were still deemed insufficient. There were still dissatisfactions over the contribution of the mineral sector to social and economic wellbeing of communities. It is argued that, while previous legislations in mining sector were enacted in response to investors' concerns, legal reforms in the natural wealth and resources from 2015, especially in 2017 were done in response to "the need to protect public interests, including participation ownership, governance and of the management of expectations." (Ovadia, 2019) Hence, out of the need to ensure that mining investments benefit Tanzanian communities more, Tanzania overhauled its laws in 2017 through enactment of the Permanent Sovereignty Act, the Review Act and the Written Laws (Miscellaneous Amendments) Act 2017. The overall aim of passing these laws was to protect interests of Tanzanian citizens by increasing government control or regulatory power over investment contracts and mining. Collectively, the new Acts sought to promote and safeguard the interests of the people. (Andilile, et al, 2019)

2.2 The Right to Regulate under Natural Wealth and Resources' reforms of 2017

Significant reforms concerning natural wealth and resources, especially mining, were made in 2017 when three new acts were enacted, namely, the Permanent Sovereignty Act, the Review Act, and the Written Laws (Miscellaneous Amendments) Act of 2017. These reforms not only embody domestic regulation of natural resources but they also have legal provisions implicating right of states to regulate. (Masamba, 2017)

2.2.1 Recognition of the Principle of Permanent Sovereignty over Natural Resources

The 2017 reforms have been premised on principle of permanent sovereignty over natural resources. This principle is recognized under preambles of both the Permanent Sovereignty Act and the Review Act. These two Acts recall the United Nations (UN) General Assembly Resolution 1803 (XVII) of December 14, 1962 which specifically recognises RTR in accordance with national legislation and international law. In addition, Resolution 2158 (XXI) together with The Charter of Economic Rights and Duties of States premised the scope of RTR on local laws and

regulations, and on national objectives and priorities. Therefore, by recalling these United Nations resolutions, Tanzania has premised or domesticated the right to regulate on Permanent Sovereignty Act and the Review Act.
According to the Sovereignty Act, the right to permanent sovereignty resides in the people but the president holds in trust the natural resources on behalf of the people. Under these general powers to protect rights of citizens or secure benefits of the people, the president is empowered to impose environmental regulatory measures or pass legislations which seek to impose human rights obligations to private actors to respect human rights in exploitation or management of natural resources.

2.2.2 Review of State-Investor Contracts
In pursuance of permanent sovereignty, it is prohibited to enter into agreements concerning natural wealth and resources without seeking approval of national assembly and securing interests of citizens. In this regard, the parliament as a legislative organ of the government is empowered to review all agreements relating to extraction and exploitation of minerals such as mineral development agreements. Conversely, this role of check and balance was previously absent whereby a minister responsible for mining could enter into agreements under confidential and indeed suspect circumstances. (Suedi, 2018) Currently, though, the minister has been stripped of powers to enter into Mineral Development Agreements. Conclusively, the net effect of these provisions is said to secure interests of citizens through public participation, transparency; accountability; identifying terms contrary to best interests of people and alleviating irregularities which are inimical to the interests of local community and the state at large when entering into mineral development agreements.

2.2.3 Renegotiation of "unconscionable terms"
Part II of the Review Act contains a rebuttable presumption that all agreements concerning natural wealth and resources are concluded in good faith and have interests of the people in heart. Thus, in asserting permanent sovereignty, the Review Act empowers parliament to review and renegotiate all agreements that contain unconscionable terms. Such "unconscionable terms" have been defined to mean terms inconsistent with "good conscience" and terms that are inimical to the interests of the people if implemented. As such, provisions that can be deemed unconscionable include those the limit the right of states to regulate foreign investment, exercise full permanent sovereignty, restricting periodic review of contracts, depriving citizens economic benefit and provisions undermining environmental protection measures. In effect, such unconscionable terms are subject of review by parliament. In reviewing such contracts, the parliament can remedy contracts that are "prejudicial to state interests or interests of the people."
Similarly, the minister has been stripped of powers to enter into Mineral Development Agreements. All prior Mineral Development Agreements that might have been entered into by the Minister remain in force but are now subject to the provisions of the Review Act. This means that where such terms of the agreement are deemed unconscionable then they are subject for review. Thus, it is argued that this new dispensation aims at preventing corruption and secrecy in negotiating and entering into natural resource contracts. Overall, this enhanced transparency is aimed to promote sustainable development in mining through having contracts whose legal terms and conditions are more transparent. In effect, this ensures not only that local people benefit more from the presence of mines but also that mining investments contribute more to Growth Domestic Product (GDP) economic well-being. (Ombella, 2018).

2.2.4 Prohibition of Stabilization Clauses
The Miscellaneous Amendments Act prohibited the use of stabilization provisions in Mineral Development Agreements. These include provisions that have the effect of freezing of laws or chipping away of state sovereignty for the life time of mine. Instead, acceptable stabilization clauses are only those that are "specific, time-bound, based on an economic equilibrium equation and make room for occasional renegotiation. " The overall aim of these legal provisions is to insulate the government from lawsuits if and when it passes legislative measures promoting public interests like healthy environment or water but which incidentally affect mining companies.

2.2.5 Explicit Human Right and Environmental Provisions
Even though new legislative reforms do not contain an explicit and stand-alone right to regulate, there are explicit human right and environmental provisions which nonetheless implicate right to regulate. For instance, The Natural

Wealth and Resources (Permanent Sovereignty) (Code of Conduct for investors in Natural Wealth and Resources) Regulations of 2020 is conscious that:
due care shall be exercised by an investor to avoid being complicit in basic rights violations committed by third parties or affiliate of the investor, and where there is reasonable suspicion that a third party or affiliate of the investor is committing basic rights violations, the investor shall endeavour to promptly address the situation and report to government authorities.
Further, the Natural Wealth and Resources regulations have included provisions requiring investors to respect human rights and to comply with domestic policies and laws. The regulations further prohibit conducts such as corruption or economic and organised crimes, conflict of interest and adverse impacts on environment. In that regard, the regulation on code of conduct for investors is conscious of the need of states to protect legitimate public interests.
Another local mechanisms in which the law safeguards right to regulate is by requiring an applicant seeking grant of prospecting license to submit a statement of integrity pledge. A statement of integrity pledge seeks to commit holder of propsective licence not to cause "losses, injuries or damages to environment, communities, individuals and properties that may be occasioned in the course of carrying out mining operations and/or activities" Therefore, these domestic initiatives constitute part of a rethinking of host state policies meant to regulate foreign investment and ensure that investment benefits citizens.

2.2.6 Limiting Access to International Arbitration

The preceding features of the reforms have mainly been about substantive provisions of safeguarding RTR. Apart from these substantive requirements, the 2017 reforms also changed procedural framework relating to access to international arbitration. In this regard, The "Permanent Sovereignty Act" discourages foreign investors from resorting to international arbitration as an investment dispute resolution mechanism. Foreign investors in natural resources are banned from instituting arbitration proceedings before any foreign court or tribunal. These foreign courts or tribunals have been interpreted to mean judicial bodies not necessarily established in Tanzania. The legal effect of these provisions could be interpreted as changing the arbitration seat to Tanzania. It is argued that if Mineral Development Agreements signed by Tanzania and investors provide for Tanzanian law as the law governing the dispute then arbitration will be conducted in Tanzania as its seat and the law applicable will be Tanzanian law. In this instance, foreign investment disputes with local seat clauses fall within the procedural requirements of these provisions in the sense that a tribunal sitting in Tanzania is not a foreign court and is not applying foreign law. (Luttrell, 2018). The overall aim of employing this legal mechanism is to safeguard regulatory powers of the state by shielding the state from exposure to investment claims aimed at challenging regulatory measures of the state.

3. Challenges of Safeguarding Right to Regulate

Notably, Tanzania has made conspicuous and deliberate efforts in trying to insert provisions implicating right to regulate under natural wealth and resources legislations. However, safegurading the right is far from certain. As this coming section shows, there are still challenges going forward.

3.1 Inconsistency between Domestic Laws and Bits

The main legal issue in safeguarding right to regulate in Tanzania is inconsistency between Tanzania's domestic investment laws and provisions of Bilateral Investment Treaties (BITs). Bits which are still in force in Tanzania include those with ; Germany (signed in 1965), United Kingdom (signed in 1994), Denmark (signed in 1999), Finland (signed in 2001), Italy (signed in 2001), Switzerland (signed in 2004), Mauritius (signed in 2009), China (signed in 2013), and Canada (signed in 2013). (UNCTAD, 2023) Out of all these Bits, it is only Bits with Canada and China that contain progressive features implicating right of states to regulate and thereby preserve regulatory space. As such, it can safely be concluded that the rest of Bits are overly-protective of investor interests than state's interest or right to regulate.

3.1.1 Inconsistency regarding Substantive Standards

Generally, Tanzanian Bits do not contain a stand-alone general right to regulate which categorically empowers state to take regulatory measures to protect environment or human rights. Such kind of provisions would have removed

ambiguity as to the extent to which parties may use the RTR as a principle to justify measures that may erode economic value of investment. (Giannakopoulos, 2017) In contrast, however, Bits with Canada and China contain some provisions implicating right of states to regulate. For instance, article 10 of China-Tanzania BIT states that contracting parties "should not relax domestic, health, safety or environmental measures just so as to encourage investment." This article also empowers host state to adopt regulatory measures necessary to protect the environment. RTR is also recognized under article 15 of Canada-Tanzania BIT on health, safety labour and environmental measures. This article contains similar wording to that of China-Tanzania BIT by discouraging measures which seem to relax environmental standards. On top of these provisions, these Bits also contain not only standalone general exception clauses but also contain carve-out options/exception clauses under individual substantive standards. By carving out some limitations or exceptions to investment standards, the state promotes legitimate purposes within the right to regulate principle. Short of these provisions, states can be sued for taking these regulatory measures when such measures reduce economic value of investments. (Chi, 2018 :59-61).

Therefore, while domestic laws have provisions implicating RTR, some of Tanzanian Bits are silent on RTR. Such Bits are not in sync with domestic investment laws. Given the propensity of Bits to constrain policy space, the Bit network in Tanzania is a hindrance to the implementation of domestic natural resource reforms. As such, Tanzania may end up facing claims by foreign investors based on provisions of Bits. This is especially so given that the Bit regime is a system used by foreign investors to seek protection against normal and legitimate regulatory change. Legitimate regulatory measures such as non-renewal of environmental permits, revocation of licenses can therefore be challenged under international arbitration. (Sornarajah, 2015) Indeed, Tanzania has faced or is still facing investor claims following natural welath and resources' reforms of 2017.

For example, following the Mining (Mineral Rights) Regulations of 2018, all retention licences issued prior to 10 January 2018 were cancelled/revoked. Even though retention licences are nolonger issuable under mining law, right holders of prospecting licences can still apply for mining licences in their stead. (Fin & Law, 2020) Nonetheless, implementation of such measures could potentially expose Tanzania to investor claims for violations of investment treaty standards. Indeed, after cancellation of such licences, the Mining Commission advertised new tenders in respect of areas previously covered under the very retention licences. This was allegedy done without making it mandatory to compensate previous owners of retention licences. Consequently, Ntaka Nickel Holdings Ltd located in Nachingwea sued Tanzania in the case of Nachingwea and others v. Tanzania for breach of expropriation clause and fair and equitable clause under United Kingdom- Tanzania Bilateral Investment Treaty. (Indiana resources, 2020) Cancellation of such retention licences is also subject of another lawsuit in Winshear v. Tanzania. In this case, the investor claims such regulatory measures amounted to expropriation of its SMP gold project. The dispute is based on Tanzania-Canada BIT of 2013. This dispute is still pending. Another case pending in court is that of Montero Mining v. Tanzania.

Apart from these cases, another case concerns EcoEnergy Africa v. Tanzania. In this case, Eco Energy invested on land to grow sugarcane and process sugar for exports as well as produce ethanol in Bagamoyo. Concerns over this project were raised in January 2015 when a Tanzanian parliamentary special committee on land, natural resources and environment reported that 3,000 hectares of the project land were allocated within the national park. Further, local activists disputed the relocation of land and compensation for farmers. Local activitsts opposed the project on grounds of land-grab by specifically alleging forced eviction owing to the fact that the investor failed to obtain free and informed consent of communities and that communities were not fairly and properly compensated. The project stalled due to these disputes. Finally, the government revoked the land lease in a bid to protect a wildlife sanctuary and concerns over human rights impact on local communities. Dissatisfied with this move, the investor brought an investment claim against Tanzania, the claim is based on Sweden-Tanzania Bit (1999).

In Sunlodges v Tanzania case, the government is alleged to have seized investor's land which was used for cattle farming activities. The objective of this measure was to build power station and a cement works. The claim was based on Italy-Tanzania Bit (2001) which incidentally does not contain provisions implicating RTR. Tanzania was found liable. In Ayoub-Farid Michael Saab v. Tanzania , the Bank of Tanzania revoked banking business license of a commercial bank co-owned by the investor, Federal Bank of Middle East, after United States Financial Crimes Enforcement Network accused the bank of international money laundering and financial terrorism and other financial crimes. The case has since been discontinued. By taking these regulatory measures, Tanzania was challenged by foreign investors for violating investment protection standards. These cases evidence that Tanzania can still face

investor arbitration lawsuits on the basis of provisions of her Bits. It is therefore important that Tanzania Bits should be in sync with domestic investment laws.

Tanzanian BITs also contain certain provisions which are known as "umbrella clauses." These clauses "oblige the host State to observe any obligation it may have entered into with regard to investments of nationals or companies of the other State." (Dolzer, 2005) For example, Article 2(2) of the UK-Tanzania BIT contains an umbrella clause. Usually, these specific undertakings are in the form of investor-state contracts or Mineral Development Agreements (MDAs). Tanzania has signed MDAs with both Barrick Gold at North Mara Gold Mine and Anglo-Gold Ashanti. These were signed in 1999. Tanzania has signed four other MDAs with other gold mine operators. A key feature in all these agreements is stabilisation clauses. (Muganyizi, 2012 : 12)

Where an arbitral tribunal regards the legal effect of breach of umbrella clauses to automatically mean a breach of the BIT itself, such as in SGS v. Philippines, then Tanzania's regulatory measures aimed to protect host states' and local community rights are exposed to international arbitration. Through this line of thinking, even where Tanzania regards stabilisation clauses signed with a British investor as expunged, the legal effect of umbrella clauses in Tanzania-UK BIT has it that Tanzania will still be regarded to have violated provisions of a Mineral Development Agreement which contains a stabilisation clause. As such, it is possible that "unilateral change of existing contracts may be lawful under domestic law and yet still give rise to international responsibility under international investment protection treaties." (Luttrell, 2018). Consequently, where Mineral Development Agreements contain stabilisation clauses, Tanzania could be exposed to investor claims for breach of investor-state contracts despite the fact that such clause are prohibited under domestic laws.

3.1.2 Inconsistency regarding Investment Disputes Settlement Provisions

The provisions of the "Permanent Sovereignty Act" and Review Act contradict provisions of Bilateral Investment Treaties which subject investment disputes to international arbitration under International Convention on Settlement of Investment Disputes (ICSID). Tanzania is a party to the ICSID Convention since 17 June 1992. It follows therefore, that where a Mineral Development Agreement contains a mixed clause calling for application of local law and "principles of international law" then an investor can have leeway to file claims for damages by invoking provisions of Bilateral Investment Treaties (BITs), which, in this case, are part of "international law." Accordingly, Tanzania cannot be successful in insulating herself from international arbitration. This is mainly based on the principle that "no state party can rely on its own legislation to limit the scope of its international obligations." (Luttrell, 2018).Where investors rely on this legal argument, Tanzania can still face lawsuits under an "arbitral tribunal constituted under an applicable BIT." (Luttrell, 2018). A good example is the fact that Tanzania is still facing lawsuits over cancellation of retention licenses.

Therefore, if Tanzania chose this approach so as to safeguard her regulatory space, then this will boil down to how it implements the new laws. The manner of implementation will shed some light on the effectiveness of this new approach. The fact that Tanzania has amended section 11 of Sovereignty Act to read, "judicial bodies or other organs in Tanzania but not necessarily established in Tanzania" seems to lend credence to the preference of African focused international arbitration or dispute resolution. This opens room for Mauritius and South African rules of international arbitration. Preference for African Centres of Arbitration is festered on the belief that "centres founded and located conveniently within Africa acknowledge current levels of socioeconomic development of African states." (Suedi, 2020).This is something international arbitration centres may fail to do.

However, Tanzania's dispute with Barrick Gold resulted into a settlement agreement and establishment of a new company called Twiga Minerals. One of the terms of the agreement is that, for future disputes, the parties will use UNCITRAL Conciliation Rules and/or UNCITRAL Arbitration Rules. Further, according to the resolutions, the seat of arbitration proceedings will not be Tanzania, other East African Community member states, Canada, the United Kingdom or the United States. This appears to be contrary to what the Sovereignty Act provides. Suedi reckons that, "this may set precedent for other companies with Mining Development Agreements pre-dating the Act to request similar terms from the government." (Suedi, 2020) Conclusively, the legal position will become clearer as developments in this area unfold.

3.2 Inconsistency of Interpretation Approaches by Arbitral Tribunals

In investment claims, including those that Tanzania is currently facing, the difficulty lies in striking a balance between normal regulatory activity of host state and the need to preserve stability or economic value for investors. The line between political risk and business risk is always blurred. Measures pursuant to RTR have been challenged and adjudged as violations of investment treaty standards. The way in which arbitration tribunals decide investment disputes tend to further blur this line. Some cases have others have focused on deprivation of economic value of investment as a sole/single determinant factor in assessing liability of states and thereby award compensation to investors regardless of bonafide reasons of state behind regulatory measures. (Schacherer, 2016) This line of jurisprudence is led by the Santa Elena award, where it was stated that :

expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.

However, another line of jurisprudence considers police powers doctrine as relevant criteria in assessing liability of states for regulatory measures. For example, in Chemtura v. Canada, the use of pesticide called lindane was banned by Canada. This, however, negatively affected the Claimant's business. In assessing the claim, arbitrators stated that "irrespective of the existence of a contractual deprivation, the state took measures within its mandate, in a non-discriminatory manner, motivated by the awareness of the dangers presented by lindane for human health and environment." In similar vein, Glamis, Saluka and Marvin Feldman recognized the RTR doctrine. In effect, these cases advance the legal position that governments should be absolved from liability if they act in pursuance of bonafide public interests like "protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like." Indeed, one of the most progressive approaches was taken by the Methanex Corp. v. United States. In this case, the tribunal adopted the traditional police powers carve-out on regulatory measures by holding that, if "done in a non-discriminatory way, for a public purpose and in accordance with due process, should not be deemed to be expropriatory in the first place and hence compensable unless the host state government had made specific commitments that it would not take such regulatory measures."

In that regard, due to these contrasting approaches, it is difficult to tell exactly when states will be challenged for unfair action or legitimate regulation. This is especially concerning due to the fact that there is neither application of doctrine of precedent nor appeal mechanisms in investment arbitrations. As such, cases with similar facts can be decided differently. For instance, Lauder v. Czech Republic and CME v. Czech Republic had similar issues emanating from same set of facts but tribunals reached two different conclusions as to whether Czech Republic was liable. CME found liability while Lauder found no liability. Similarly, The Bilcon award took note of the need to uphold right of states to regulate for environmental purposes including conducting Environmental Impact Assessment so as to balance economic development and environmental integrity. Nonetheless, broader public policy concerns were not taken into account in assessment of legitimate expectation. This signifies that there are unpredictable interpretative outcomes by arbitral tribunals. Accordingly, RTR is thrown into uncertainty as it is difficult to differentiate exactly when right of states to regulate will be given due consideration or not.

4. Prospects

Host states can take heart from the fact that new wave of recent cases is beginning to recognize and uphold RTR so long as such regulatory measures are bonafide, non-discriminatory and proportional to state goals. More importantly, provisions implicating right of states to regulate are beginning to have some influence in investment arbitrations. Indeed, the Al-Tamimi v. Oman case, based on the Oman – United States Free Trade Agreement, contained an environmental policy reservation provision under Article 10.10 of the treaty. The treaty also contained a stand-alone environmental clause under chapter 17. The tribunal resorted to both language of treaty implicating RTR and domestic environmental regulation. It was held that since the conduct of Oman was to enforce national regulations to protect the environment, the impugned conduct was held to be in good faith, bonafide and non-discriminatory. (Schacherer, 2016) The case of Bear Creek v Peru also illustrates the importance for investors to conduct public participation and outreach with local community. This should be done in order to ensure local community's opinions and perspectives are taken into account in the investment project.

Under recent cases, the award in Philip Morris v. Uruguay is very progressive in that it recognized the RTR based on principle of a wide margin of appreciation for states. The tribunal was of the view that where a regulatory measure attempts to address public concerns such as health and the measure is reasonable or is taken in good faith, then that is sufficient to shield a state from treaty responsibility. The tribunal held that such normal and legitimate regulatory measures should not be regarded as violation of legitimate expectation provided there is no violation of commitment specifically assumed by the state. As such, the tribunal affirmed the police power doctrine. (Schacherer, 2016 :43) In particular, it was stated that, "manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed and certainly no commitment of any kind were given by Uruguay to the claimants." However, it has been cautioned that, "it is not clear whether the same approach would be taken with respect to other areas of public health or environmental protection, where the scientific evidence and consensus are not as clear and where no international legal frameworks like the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC) exist." (Schacherer, 2016)

5. Conclusion

This study has examined the legal position of RTR in Tanzania amidst legal reforms of 2017 concerning natural resources. The review of these domestic investment laws reveals many statutory provisions implicating RTR such as recognition of doctrine of permanent sovereignty over natural resources, review of state-investor contracts by national assembly, renegotiation of contracts on grounds of unconscionable terms, prohibition of stabilization clauses and express inclusion of human rights and environmental provisions. However, a further review of investment treaties entered into by Tanzania and analysis of arbitral awards reveals that implementantion of these regulatory reforms might be at odds with investment treaties by Tanzania. In particular, these reforms might be at odds with some of the restrictive interpretation approaches adopted by arbitral tribunals towards RTR. This study, therefore, shows that majority of investment treaties entered by Tanzania are not in sync with domestic investment laws in regards to having provisions implicating RTR. This exposes Tanzania to international arbitration of investment disputes. It is, therefore, recommended that in order to safeguard RTR, Tanzania should review its investment treaties so that they are in line with domestic investment laws. This is especially important given that some arbitral awards such as Philip Morris award and Al-Tamimi award are beginning to recognize and take RTR into account in their assessment of investment treaties.

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