Evaluating Tanzania's ICSID Representation: The verdict[1]

"One thorn of experience is worth a whole wilderness of warning" – James Rusell Lowell.

Like several other states, Tanzania finds itself immersed in Investor State Dispute Settlement (ISDS) cases. As per the Attorney General office case statistics, up to December 2018, there were 12 international arbitration cases (11 of which are against the government or state organ and 1 case Tanzania claiming from a debtor)[i] and the case load has continued to grow with new claims lodged up until 2021[ii].

The statistics show that there has been a growing pool of developing countries that have been successful in mastering their legal strategies in defending domestic interests from investor claims before international arbitral tribunals in investor-state dispute settlement (ISDS) mechanisms.[iii] According to Prof. Emilia Onyema[iv], there is better engagement of African states as they are actively participating in cases against though they are still predominantly represented by foreign law firms. She adds that this is common due to the lack of knowledge of international investment law in African law firms.

The lessons from their experiences may be of particular benefit in the wake of the recently released ICSID Award on 14 July 2023 against Tanzania in favour of *Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited, and Nachingwea Nickel Limited v. United Republic of Tanzania, ICSID Case No. ARB/20/38*[v]. This arbitration was instituted through the BIT between UK and Tanzania and conducted under the 2006 ICSID Arbitration Rules. The dispute is in respect of the nickel mine project and arising from the cancellation of the retention licenses afforded by repeal of sections 37 and 38 of the Mining Act 2010 and impact on Regulation 21 of Mining (Mineral Rights) Regulations 2010 resulting to rights over all area subjected to this type of license have reverted to the Government. The Tribunal awarded $109.5 million that includes interest already accrued to the claimants plus $3.859 million as costs of arbitration (a portion to a third-party funder – Litigation Management Limited). The amounts are to be paid within 120 days of the Award.

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Tanzania and the ICSID Convention

Most bilateral international treaties (BITs) use ICSID for state-investor disputes, so being part of it is a necessary step to subscribe to new investment treaties. Tanzania signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention) on 17 June 1992. The most interesting fact about being able to bring a claim against an investor before ICSID is that the system offers immediate recognition and ultimately enforcement of its awards in 160 national jurisdictions, increasing the state's possibility of claiming against an investor far beyond its borders. What this means is that once final, an ICSID award will be recognized and enforced in Tanzania as if it is a final judgment of a Tanzanian court.

Under the ICSID Convention, Tanzania made a reciprocity reservation in the first sentence of Article I (3) of the Convention, i.e., applying the Convention in Tanzania only to the recognition and enforcement of awards made in the territory of another Contracting State. This provision will apply to an ICSID award for or against Tanzania or a foreign government. This provision is the key to the ICSID system for enforcing arbitration awards[vi].

Article 54 provides that: "Each Contracting State *shall recognize* an award rendered pursuant to this Convention as binding *and enforce* the pe- cuniary obligations imposed by that award within its territo- ries *as if it were a final judgment of a court in that State*. (emphases added)". In any of the consented states, the treaty obligation is clear-cut: to enforce ICSID awards under Article 54. Non-enforcement would place the State in breach of its Article 54 obligations and seriously undermine the operation and legitimacy of the investor-state dispute settlement framework established by the Convention. The Convention establishes a self-contained system, and no national court or tribunal can override it. An ICSID award is reviewable by an ICSID ad-hoc committee, but not by national courts. The annulment (appellate stage) is heard by an Ad-hoc Committee within the ICSID structure.

The only route to set aside an ICSID Award is under the annulment grounds enumerated in Article 52 and it resemble the judicial review of an arbitration award under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention). If a disputing party is not a member of ICSID, then arbitral awards are still enforceable under the New York Convention if the host state is a party to the Convention.

However, the process for an ICSID Award is entirely different from a foreign arbitral award that falls under the NY Convention.

At this juncture, the fear is that there are several other matters pending conclusion at the ICSID with the same fate at hand. The following provides a brief overview of two (2) pending ICSID cases:

1. *Winshear Gold Corp. v. United Republic of Tanzania* (ICSID Case No. ARB/20/25) which held its hearing in February 2023 and pending post -hearing procedures; and
2. *Montero Mining and Exploration Ltd v. United Republic of Tanzania,* ICSID Case No. ARB/21/6 (Pending) (treaty dispute) BIT Tanzania - Canada pursuant to the 2013 ICSID Convention - Arbitration Rule. In June 2023, the Claimant filed its reply on the merits and hence this matter is still pending at the ICSID.

Under the auspices of the Permanent Court of Arbitration (PCA) there is the pending case of *Mr. Finn Von Würden Petersen v. The Government of the United Republic of Tanzania*[vii], conducted under the UNCITRAL Arbitration Rules (as adopted in 1976) and Tanzania is being fully represented by the Office of the Solicitor General. In another case administered by the PCA, *Sunlodges Ltd (BVI), 2. Sunlodges (T) Limited (Tanzania) v. The United Republic of Tanzania* secured an award on 20 December 2019 against Tanzania and resulted to its recognition and enforcement by an Ontario Court of Justice in January 2021 for attachment of the aircraft in Canada[viii]. Here it can be seen that Tanzania consented to the relief sought in the Application by Sunlodges Limited and the only issues remaining were *quantum* and costs, and hearing the undertaking of the Applicants to discontinue the proceedings in Quebec after the amounts due under the Arbitral Award are received. This shows the exposure Tanzania has in terms of the internationality of an ICSID Award being enforceable in any of the 156 states that have consented to it.

Lessons from Representation of the African States in ICSID cases

(1) <u>Egypt</u>

Egypt is considered among the top 10 signatories of BITs. According to the ICSID cases database, up to March 2020, 34 cases were filed against Egypt (i.e. 4.6% of the total registered cases at ICSID), out of which, 26 cases were concluded by ICSID tribunals, with 15 awards rendered by ICSID tribunals. Notably, only 13, out of 22 cases filed after 2011, were directly

or indirectly involved with the ramifications of the Egyptian revolution[ix]. It is noteworthy that "*Only three cases or 12% of the cases have been settled in favor of Egypt*[x]".

In a 2015 Amendment (Egypt Presidential Decree No.17/2015 art.108) a Ministerial Committee for Investment Contracts Disputes was established. This committee is responsible for the settlement of disputes arising from investment contracts to which the state, or a public or private entity affiliated therewith, is a party, and the committee has considerable powers and discretion to settle those disputes[xi]. The Ministerial Committee overlooks the procurement of the state representation team and consultants. Notably, Egypt prevailed in the case of *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15) and was represented by a Paris based law firm and the Egypt state Lawsuits Authority[xii].

Despite these efforts, Safa'a Ashour observes that "the reason for the increase in arbitration cases against Egypt is the general neglect of applying appropriate procedures and resources upon concluding contracts with a foreign investor. This is confounded by the lack of government transparency and the bureaucratic nature of the Egyptian governmental administrative system and processes[xiii]"

(2) <u>Kenya</u>

Kenya has so far won 2 ICSID arbitrations. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29)[xiv] the investor-state arbitral tribunal dismissed the case and ordered the companies to pay costs of around $3.5 million to the government, compared with the $6.5 million it was seeking. In March 2021, the Appellate Ad-hoc Committee upheld the Award. In this case, the representation of the State included not only the Solicitor General and State Counsel but was a joint effort of a diverse team from both international and domestic law practices.

The 2020 Award rendered in *WalAm Energy LLC v. The Republic of Kenya* (ICSID Case No. ARB/15/7) was another win for Kenya which had well-thought out defences (i.e. Government acting within its legal powers and Revocation of the licence was in good faith, reasonable and proportional)[xv], the Tribunal dismissed all claims and ordered WalAm to pay the respondent USD 648,857.75 for the respondent's portion of the arbitration costs and the sums of EUR 3,586,039.28 and USD 252,262.82 to cover 75% of the respondent's legal fees and expenses. In these arbitral proceedings, the State was represented by a local and foreign counsel. In the

appeal level, the Attorney General represented Kenya along with an individual foreign counsel – Michael Sullivan (not a foreign law firm). This works to minimize costs and reduce bureaucracy that may result from have big-foreign law firms undertake the role.

(3) Nigeria

In an award dated 06 October 2020 (Award), the arbitral tribunal in *Interocean v Nigeria*[xvi] (Tribunal) dismissed Interocean's claims and awarded costs in Nigeria's favour. Here the State representation was externalized with lead firm being local Nigerian firm – Emmanuel Chambers, supported by two foreign counsel's firms (Rameau International Law and assisted by Volterra Fietta).

Naturally, the investment treaty programme in Nigeria is governed by the Nigerian Investment Promotion Commission of which their main objective is to encourage, promote and co-ordinate investments in the Nigerian economy. The Ministry of Justice, headed by the Attorney General of the Federation manages investment treaty arbitrations on behalf of the country[xvii].

(4) Cameroon

In 2022, Cameroon defeated an ICSID claim worth nearly US$1 billion in the case of *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2[xviii]. The state was represented by an external law firm (Clyde & Co) and the Cameroonian Ministry of Economy, Planning and Regional Development.

Lessons on Representation from the Latin America region

(5) Republic of Peru

In Peru, the rising number of international investment claims against the State prompted the government to establish a national institutional framework designed for preventing and facing the investment disputes. The establishment of this system has allowed the State to be prepared to prevent and manage its defense in the event that it faced a case before an international forum. Furthermore, it has shown that centralizing the handling and management of arbitrations, coupled with a good coordination within the public sector, can make the difference in having an effective defense of the interests of the State[xix]. As a result, there was positive outcome of most of the claims levied against Peru.

(6) Argentina

In the case of Argentina[xx] which faced a floodgate of claims registered between 1997-2012, all investors who sued Argentina had obtained 100 percent of their claims, the total amount that the country should have had to bear would have been at around 80 billion dollars. Lavopa states that "Ar- gentinian crisis resulted from a combination of both exog- enous and endogenous causes, and included, among the latter, Government actions and omissions which would have allegedly had a "substantial" impact on the origins and development of the crisis, such as "excessive public spending", "inefficient tax collection", "delays in respond- ing to the early signs of the crisis", "insufficient efforts at developing an export market, and internal political dis- sension" and "problems inhibiting effective policy making".

The Argentinians have succeeded to dismiss some of the Awards entered against it in annulment proceedings of *Enron Corpn. and Ponderosa Assets, LP v. The Argentine Republic,* ICSID Case No. ARB/01/3[xxi] (also known as Enron Creditors Recovery Corpn. and Ponderosa Assets, LP v. The Argentine Republic) and also overturning overturned the $128 million award granted *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16)[xxii]. In both cases, the State was represented by the legal counsel and Solicitor General office.

Tanzania's Record of Settlements at the ICSID

Tanzania has a record of settlements prior to an Award being rendered in ICSID proceedings.

From the breakdown of Tanzania's relationship with Barrick subsidiary Acacia Mining. The Barrick case settled amicable negotiations with Tanzania and the arbitration never took form. UK-TZ BIT. Canadian mining company Barrick Gold agreed to pay US$300 million and accept new concession terms to settle a dispute between its UK subsidiary and Tanzania which had led to two UNCITRAL arbitrations, the threat of an investment treaty claim and criminal proceedings. The settlement is dated 20 Oct 2019.

Another example is the discontinuance of the proceedings pursuant to ICSID Arbitration Rule 43 (1) in the case of *Paul D. Hinks, Symbion Power Tanzania Limited and Richard N. Westbury v. United Republic of Tanzania* (ICSID Case No. ARB/19/17)[xxiii].

The other case which was concluded in the same light is the case of *Ayoub-Farid Michel Saab v. United Republic of Tanzania*, ICSID Case No. ARB/19/8. However, from the recent decision

of *Attorney General vs Ayoub-Farid Michel Saab* (Misc. Commercial Application 119 of 2022) [2023] TZHCComD 52 by Nangela J, the High Court granted the Applicant (Attorney General) filing and registration of the ICSID Award[xxiv] out of time which conveys that the Appellant failed to lodge the Award on a timely basis, providing time for Respondent investor to comply to the ICSID Tribunal's Orders. This reflects a level of lack of or poor post-award management mechanisms in place to ensure Awards are realised by the state timely.

Tanzania's intention to initiate "annulment" proceedings and refusal to enforce.

The recent ICSID Award rendered against Tanzania in the *Nachingwea case* is final and binding and can be recognized and enforced in any ICSID Member State (Article 53 of the ICSID 2022 Rules). Tanzania plans to fight the Award by way of appeal[xxv], however there is no appeal against such Award, but there are limited post-award remedies available under the Convention such as under the grounds established in Article 52. The annulment is different from an appeal mainly because it does not review the merits of the case and its outcome does not modify the decision of the Tribunal. An empirical study on annulment of ICSID Awards done by the British Institute of International and Comparative Law and Baker Botts in 2021 observed that "*Applicants have only succeeded in approximately 12% of* annulment *requests. To date, only 6 ICSID awards* have been *annulled* in *full"*[xxvi]. Essentially, even if the Award is dismissed the party is free to reinstitute the same case again. Considering the low chances of annulling an ICSID Award, many States will therefore be forced to look beyond the ICSID annulment procedure if they wish to delay or resist enforcement of an ICSID award. Advisably, an analysis of the Award would inform as to whether the State can successfully obtain a favourable outcome before an ad-hoc committee under the ICSID Rules.

<u>Recommendations</u>

According to Carlos José Valderrama [xxvii] *"favourable awards are highly valuable; they emphasise how responsive and respectful a state is regarding certain standards of investment protection and can become evidence of its good performance in protecting foreign investors in its territory. Awards can (and should) be used, by states, as favourable "precedents" when facing new disputes".*

The following can be considered to avoid adverse ISDS Awards, to promote policy consistency and investment retention in Tanzania.

A. Designate lead state Agency – and setting up a Dispute Prevention and Management Agency (DPMA)[xxviii].

(i) Ensuring treaty compliance. Some ISDS cases are indeed triggered by a lack of bureaucratic capacity, mismanagement, and coordination failures.

(ii) Monitoring and communication (e.g. identifying investor-state grievances at risk of withdrawals and cancellations, including through "early alert" and "single window" mechanisms; identifying sensitive or strategic sectors and issues of concerns through continuous communication with investors).

(iii) Powers and mandate to pursue settlement of investment claims. The Committee to play a key role in early negotiations of potential investor claims [Egypt model]. The DPMA model can also be studied in countries such as Brazil and Korea.

(iv) Management of ISDS cases - Ensure process efficiency and develop policies for the management of international arbitration to which the state is party to.

(v) To develop case strategy and defences in collaboration with the Solicitor General /State Counsels, relevant Government Agency and identified Lead Counsel[xxix]. Due to the frequent renewal of public appointments and changes in ministry priorities and creates potential miscommunications with investors and other stakeholders.

(vi) Post-dispute measures (coordinating the payment of awards, apportionment of adverse awards of compensation and legal costs between different agencies of government; proposing reforms and other changes to the state's law and policy framework to address the root causes of disputes and reduce exposure to claims in the future)[xxx].

B. Leverage from a pool of external legal representations and support: Selecting counsel is a critically important part of the investment treaty dispute process. Great care and planning should be taken to identify and develop a pool of qualified candidates, establish the proper criteria (and their appropriate weight) and then select the most appropriate lawyer, or team of lawyers, for the entire dispute resolution process[xxxi]. From 2015 Tanzania took a different approach on its legal representation at all international arbitrations due to the mismanagement and high costs of legal representation to the government was exposed to. Post-2015 Tanzania was only represented by the office of the Attorney General and a unit within the Solicitor General's office was created dedicated to arbitration. This is a welcomed approach however, it would be useful to implement a more institutionalised, permanent system to allow the state to consolidate its position and arguments when an

investment dispute arises. The ICSID practice notes provide that a State may hire outside counsel to represent it in an arbitration. It is advisable for there to be developed policies and guidelines in selection of local and foreign external counsel or specialized arbitration and ADR firms that can work to support the Solicitor General's office and form the Case Management team. The selection of external counsel is recommended so as to ensure that the highest interests of the states are defended by the most fitting counsel in the area until the necessary internal capacity is built. Engaging external counsel also makes sense in obtaining an objective assessment of the dispute[xxxii]. Therefore, there needs to be created a pool of other support functions required, such as, experts (quantum and legal). To ensure efficiency and management of fees associated with the representation, the oversight can be assigned to the DPMA (above).

C. Renegotiation of BITs – There has been several calls for the country to develop and adoption a model BIT for Tanzania (aligning to it national policy on investment). This is important as these cases reveal how investment treaties might be used by foreign investors successfully or not to challenge the executive, legislative or judicial actions of host states. Furthermore, treaty templates should reflect national policy priorities enshrined in the body of national investment-related laws and regulations. To reduce the liability resulting from the old, less-balanced investment treaties that remain in force the current BITs should undergo a vigorous review, compliance assessment and analysis so as initiate negotiation of the BIT's currently in place. A great model to borrow leaf from is the the *Africa Arbitration Academy Model BIT for African States* and other examples of very recent models includes the Dutch [xxxiii], Egypt, Canada, Peru and Indian BIT Model[xxxiv].

D. Technical assistance and Capacity building: this requires the State to ensure that legal representation has prior experience in representing states under the ICSID Rules applicable and with subject matter of dispute. There is need to invest and build knowledge and capacity in the field so as our counsels can go against the grounded experiences of their counterparts. In observing the *Winshear Hearing*[xxxv], the procedural hiccups seem to be nascent on Tanzania's part, maybe due to the fact the team is fragmented and too large to sync and align for smooth coordination. It is a prevailing fact the Counsels are not experienced in representing any party in such proceedings.

Conclusion

In view of the foregoing discussion, the rapidly evolving complexity of international investment rules requires that Tanzania is abreast of these developments in terms of policy direction and resource capacity. The negotiation of new, more balanced international investment agreements (IIAs) is an important and necessary step, but it is far from sufficient to deal with these challenges.

The approach to representation should be developed prior to any dispute and at the outset the State must understand and manage the inevitable limits on the State's authority, capacity and resources that may hinder its ability to succeed in defending the claims. From the small sample reviewed above from the experiences of Kenya, Nigeria, and Egypt there is an advantage to leverage from experienced counsels in handling of investor-state disputes in specific subject matter expertise. The same experience seems to be echoed in other developing countries facing the reality of ICSID negative Awards, Argentina, Peru**,** and Ecuador. This approach will also assist developing national counsels. Offering this kind of full, direct legal representation to national counsels to act as Lead Counsel would provide developing nations with a true low-cost alternative to hiring one of the major international firms.

As proposed, consulting highly specialized experts in advising the strategies and defences of these cases is of paramount importance. Tanzania still needs to utilize to an extent foreign representation to leverage from practical experiences in international investment claims defences for the state. Such external lawyers would work with the lead national firm (consortium model) to assist the state attorneys in representing the state, hence forging a stronger front. Suggestibly, Tanzania can adopt a mixed model of legal defence which can result in short- and long-term benefits, only when it is genuinely and patiently approached by both external and in-house counsel as a source of capacity building for the Attorney General's team and could relieve the state and afford it administrative efficiencies stemming from increased institutional capacity in managing investment disputes.

Lastly, efforts should be channelled towards creating a specialized unit or department within the investment wing of the government, to cultivate policies and guidelines that can assist prevention and resolution of investor claims against the government. Due to need for more transparency (growing use of Third-Party Funding) in ISDS systems it is high -time that Tanzania formulates an airtight risk-approach framework for managing investor claims.

Endnotes

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