AN APPRAISAL FROM THE INVESTOR-STATE DISPUTE SETTLEMENT PERSPECTIVES: A SURVEY FROM TANZANIAN EXPOSURE TO INTERNATIONAL ARBITRATION

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ABSTRACT

Dispute Settlement is a mechanism embodied in most investment treaties in Tanzania which provide rights to foreign investors who wish to invest in the Tanzanian economy to seek redress for damages arising out of alleged breaches by Tanzania as host State of investment-related obligations[i]*. Investor-state arbitration may regularly call for reconciliation of public international law doctrines with the private legal principles of contract law. This hybrid source of rights is generating new questions and in particular global challenges relating to the quality of awards and jurisdictional issues*[ii]*. However, Tanzania has been exposed to the international tribunal and the Country has not been effective in the negotiation, conclusion and enforcement of the related bilateral investment treaties. This article serves as appraisal instrument on the investor-state dispute settlement mechanism through confirmatory research.*

INTRODUCTION

The main procedure addressing the quality of arbitral awards for challenging an award is the procedure to review or set aside the final award. The review, which is different for ICSID Convention and non-ICSID Convention awards, is constructed on limited grounds and does

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not have an expansive probable scope as an appeal.

The quality of awards is assured by the independent "scrutiny" of draft awards, prior to be final, which is a unique feature of the International Court of Arbitration. It does not correspond to a review but constitutes an additional stratum of quality control. It currently applies only to disputes brought under the International Chamber of Commerce, which include also a limited number of investment disputes.

Review of arbitral awards is designed to preserve the interests of the Parties. Where a defeated Party is dissatisfied with the arbitral Tribunal's award, it may seek to set it aside. The possibilities of challenging the award differ according to the system of arbitration chosen by the Parties, institutional or *ad hoc*.

The ICSID Convention mechanism is self-contained, providing for internal control which includes provisions on the interpretation, revision and annulment of awards. These provisions allow either Party to request a review of the award of an ICSID Tribunal when: (a) the dispute concerns the meaning or scope of the award (interpretation of awards by the same or a new tribunal; (2) new facts have emerged which may affect the award decisively and were unknown to the tribunal and to the party seeking to introduce these facts; the latter's ignorance was not due to negligence (revision of awards by the same or a new tribunal. The new elements must be ones of fact and not law and the facts must be of such a nature that they would have led to a different decision had they been known to the tribunal[iii].

Either party can request for the annulment of the award by a separate *ad hoc Committee*[iv]. The *ad hoc Committee* can only annul the decision of the Tribunal under one or more of the following narrow grounds: − the Tribunal was not properly constituted; − the Tribunal has manifestly exceeded its powers; − there was corruption on the part of a member of the Tribunal; − there has been a serious departure from a fundamental rule of procedure; or − the award has failed to state the reasons on which it is based.

Eight requests for annulment had been registered with ICSID until 2004.[v] These requests involved Klöckner v. Cameroon (twice),[vi] Amco v. Indonesia (twice),[vii] MINE v. Guinea[viii] SPP v. Egypt[ix], Wena Hotels v. Egypt, Vivendi v.Argentina[x]. In 2004 and 2005, eight new

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annulment requests were registered. Annulment of an arbitral award can also lead to submission of the dispute to a new Tribunal. For example, Vivendi has been resubmitted to a new tribunal. Wena Hotels is subject to a request for interpretation

Based on the best practice, where arbitration is not steered under the ICSID Convention, awards or their enforcement can be challenged under the commercial arbitration framework established by the Tanzanian national law and other relevant treaties. Therefore, the Tanzanian domestic law at the place of arbitration controls the losing party's request to set aside the award, or as the case may be, to refuse enforcement. National arbitration laws prescribe various grounds on which arbitration awards can be challenged. Most modern arbitration statutes provide a limited list of grounds for review and many follow the 1985 UNCITRAL Model Law[xi] which generally track the list of grounds for non-enforcement of awards contained in Article V of the New York Convention: 1) incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement; 2) lack of appropriate notice to a party or incapability to present its case; 3) inclusion in the award of matters outside the scope of submission; 4) irregularities in the composition of the tribunal or the arbitral procedure; 5) non-arbitrability of the subject matter and 6) violation of domestic public policy. In practice, the most common grounds found by the courts as a reason for set-aside or non-enforcement, are that arbitrators had decided issues outside the scope of their authority or that the award violates public policy.[xii]

In most countries, the grounds for ejecting arbitral awards are compulsory: the parties cannot contract around them. In some countries however, the grounds for ejecting international arbitration awards are default rules, at least for arbitrations relating to the foreign parties.[xiii]

However, an award set aside or vacated at the place of arbitration could be enforceable under other jurisdictions. Because the New York Convention exception to enforcement based on set aside or vacate at the place of arbitration is worded permissively, some courts have enforced awards that were set aside in foreign courts.[xiv] While most countries have employed legislation that limits the grounds on which an award may be set aside, the prospect remains in some cases to revive the merits of the case, either by application of a broad arbitration statute or broad interpretation of a narrow one.[xv]

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THE INVESTOR STATE DISPUTES SETTLEMENT AS BENEFICIAL FOR INVESTORS

One of the advantages of investment arbitration for foreign investors are that investor-State disputes are resolved by means of mechanisms governed by international standards and procedures and do not rely on standards of the host State and the domestic courts. The finality of an arbitration award is binding and not subject to appeal on the merits, has generally been seen as an advantage over judicial settlement. There is a view, however, that though finality is one of the main advantages of international arbitration – for the savings it brings in costs and time – it may sometime come at the risk of having to live with flawed or inconsistent awards on the same or very similar questions or facts.[xvi].

Although ISDS is invoked as a catch-all term, there are a wide variety of differences in scope and process. ISDS provisions are intended to avoid state-to-state conflict, protect citizens abroad, and signal to potential investors that the rule of law will be respected. Without ISDS provisions, to enforce its rights, an investor would normally need to seek the intervention of the government of its home state. As of April 1998 only 14 BIT-related cases had been brought before ICSID, and only two awards and two other settlements had been issued[xvii].

The ICSID as the first multilateral instrument for stronger investor protection and for resolving disputes was established by the members of the World Bank in 1965, with the primary resolution of providing conciliation and arbitration facilities to resolve international investment disputes. This marked a remarkable shift from power politics and at times gunboat diplomacy towards settling and resolving disputes through mediation and arbitration[xviii]. ICSID arbitration is generally available whenever the host-state and the investor's home state are parties to the ICSID Convention and the host-state has consented to ICSID arbitration, either in the BIT itself or by separately consenting[xix].

The Dispute Settlement principle more specifically *Investor-State Dispute Settlement* (ISDS) offers investors recourse to international arbitration to settle investment disputes with the host state. For example, 1998 Energy Charter Treaty, that grants investors the right to call for arbitration in the event they believe that a government has violated such an agreement[xx].

In Tanzania, a successful party who is desirous of executing foreign awards is required to

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request the arbitral tribunal to file the foreign award, or cause it to be filed in court in the high court either by action or as if it were a court decree[xxi]. In case of *investor-state disputes*, BITs usually grant access to the domestic legal system, and sometimes prescribe that investor need to exhaust all domestic remedies before resorting to international arbitration[xxii]. Over the years, however, developed countries have sought to grant their investors direct access to international arbitration[xxiii]. In contemporary BITs, one no longer finds a full exhaustion clause; if there is an obligation to turn to the national courts first, this is normally linked to a maximum period. If after that period the dispute is still fragmentary, it shall be brought to an international arbitral tribunal[xxiv].

In the same vein, under the ICSID convention ("the Convention"), from the early 1960s there exist the *"safety valves"* to help host countries like Tanzania to retain some control of the resolution of investment disputes. The four *safety valves* are: (1) the exhaustion of local remedies before submitting the dispute to the ICSID.[xxv] (2) The use of the domestic law as the governing law at the preference of developing countries while developed nations wanted to use international law. However, the ICSID reached a compromise by permitting the contracting parties to choose the governing law by agreement. In the absence of any agreement, the law of the host country was to be applied, along with any rules of international law as may be applicable.[xxvi]

Developing countries considerably transformed their posture by the end of the 1980s accepting the highly protective dispute settlement provisions in their BITs[xxvii] due to the perception that being a party to the ICSID Convention was a method of increasing mutual confidence, which in turn increased the inflow of capital into the developing country[xxviii].

Under Section 23 of the Tanzania Investment Act,[xxix] all disputes between the Investor and the Tanzania Investment Center are entitled to be amicably settled through negotiations; in that, Section 23 (1) of the Tanzania Investment Act does not stipulate any minimum time period for negotiations in an amicable settlement forum. The obligation under Section 23 (1)[xxx] is cramped to the application of "*all efforts*" by the parties.

In the *Biwater Gauff v. Tanzania*[xxxi], BGT argued that Article 3(2) of the BIT allows it to rely on the dispute settlement provisions in Section 23 (2) of the Tanzania Investment Act[xxxii], to the extent that they are more favourable than the equivalent provisions of the BIT, BGT relied

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on *Maffezini v. Spain*[xxxiii]. It recognized that the ICSID Tribunal in *Plama Vs Bulgaria*[xxxiv] among others has reached an opposite conclusion.

Under TIC Act, 1997[xxxv] if negotiations between the investor and the Center has not been settled shall be submitted in accordance with the Arbitration Laws of Tanzania for investors, and in accordance with the Rules of procedures for arbitration of ICSID[xxxvi]. Each Party must be either an ICSID Convention Contracting State or a national of another Contracting State, and their dispute must be a legal dispute arising directly out of an investment under both the ICSID Convention and the investment treaty in question, see the Case of Gas *Natural SDG, S.A. vs. The Argentine Republic*.[xxxvii] *Investor – state arbitration* which is an adjudicative system in public international law, supposed to be grounded upon public international law values[xxxviii]

Most BITs stipulate governing law where the deliberations of territoriality lead to application of the host state's laws save that parties can declare an enormous array of other sources of law applicable. Conversely, the choice of tribunal occasionally influences the applicable law, as for example the ICC and the Stockholm Arbitration Institute[xxxix] have their own rules concerning applicable law. Clear choice of law is important, as it improves legal certainty.[xl].

The choice of law may cause substantial practical challenges when the tribunal is incapable to find any guidance on a particular issue in the agreement itself. In such case, it may resort to the second sentence of Article 42(1)[xli] which at first sentence denotes the "rules of law" rather than "systems of law".

Similarly, the principle of autonomy of the parties established by the ICSID Convention denotes the freedom of the parties to choose the applicable law by agreement to decide on the substantive law that the tribunal should apply to settle their dispute.[xlii]. Nevertheless, in reality, the chosen law is often the law of the host state[xliii]. In *Wena Hotels Ltd v Arab Republic of Egypt*[xliv] and *LG&E v Argentine Republic*[xlv] confirm this observation which gave full effect to the choice of law rule under Article 42(1) while the Arbitral tribunal had decided that the law applicable to the dispute was primarily the BIT of 1976 between *Egypt-United Kingdom (IPPA)* and that beyond the BIT.[xlvi]

In the *Biwater Gauff (Tanzania) Ltd vs. The United republic of Tanzania*[xlvii] BGT submitted that, there would be a denial of justice if BGT were required to go to the Tanzanian courts

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pursuant to the BIT's requirement to pursue resolution "through local remedies or otherwise". On the Republic's case, the quoted text does not require litigation before the Tanzanian courts, so long as appropriate efforts are made to resolve the dispute otherwise.

However, recently, Tanzania has impliedly introverted from international arbitrations by amending various laws[xlviii] relating to the investment thereby giving the sovereign to local courts where the exhaustion of local remedies will be performed. This means, BITs will not be able to guarantee faster, effective and efficient proceedings in absence of competence of the local courts. This rule on exhaustion of local remedies is well established in general international law[xlix].

CONCLUSION

Denial of justice and due process through improper administration of civil and criminal justice to the investor may exist if investors go to the Tanzanian courts pursuant to the BIT's requirement to pursue resolution "through local remedies or otherwise especially when there is undue delay, incompetent courts or if investors are aggrieved by decision of the courts. This will consequently deprive investors to come to invest in Tanzania. (Biwater Gauff (Tanzania) Ltd vs. The republic) (Standard Chartered Bank vs. United Republic of Tanzania). It should be noted however that, although the ICSID Convention system prevents domestic courts from reviewing any of its decisions, recourse to any other kind of arbitration gives a prominent role to national courts which may have a local bias or be subject to the influence of the host government.

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[ii] Ibid (fn 1)

[iii] C. Schreuer "The ICSID Convention: A Commentary", Cambridge University Press, ICSID, 2001.: Article 50 of the Convention: Article 51 of the ICSID Convention

[iv] Article 52 of the ICSID Convention

[v] See, IAI Arbitration Series No 1, "Annulment of ICSID Awards" (E. Gaillard and Y. Banifatemi eds. 2004).

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[vi] The ad hoc Committee annulled the Award on the grounds that the Tribunal had failed in its duty to state the reasons for the award. The dispute was retransmitted to a second Tribunal which rendered a new Award; both Parties asked for its annulment but the second ad hoc Committee rejected the requests for annulment. Klöckner v. Cameroon, Award, 21 October 1983, 2 ICSID Reports 9. Klöckner v. Cameroon, Decisions on Annulment, 3 May 1985, 2 ICSID Reports 95. The second award and the decision of the ad hoc committee were unpublished. See C. Schreuer op. cit. n. 2 pp. 897-98.

[vii] See Amco v. Indonesia, decision on Annulment, 16 May 1986, 1 ICSID Reports 509. The case was retransmitted to a new Tribunal which decided first on Jurisdiction (10 May 1988, 1 ICSID reports 543) and then on the merits (Award, 5 June 1990, 1 ICSID reports 569). Both Parties requested annulment of the second Award which was rejected by a second ad hoc committee (unpublished decision). See C. Schreuer op. cit. n. 2 pp. 900.

[viii] See MINE v. Guinea, decision on Annulment, 22 December 1989, 4 ICSID reports 79. After MINE retransmitted the damages question for decision by a new tribunal, the parties reached a settlement by agreement. See C. Schreuer op. cit. n. 2 pp. 901

[ix] The ad hoc Committee rejected all three bases for annulment advanced by Egypt: manifest excess of powers, serious departure from a fundamental rule of procedure and the award failed to state the reasons on which it is based. See 41 ILM 933 (2002) and E. Gaillard, op. cit. n. 3.

[x] The ad hoc Committee annulled the tribunal's award on the basis of manifest excess of powers. See E. Gaillard, "Vivendi and Bilateral Investment Treaty Arbitration", New York law Journal, 6 February, 2003.

[xi] 1985 UNCITRAL Model Law on International Commercial Arbitration

[xii] See N. Rubins "Judicial Review of Investment Arbitration Awards" NAFTA Investment Law and Arbitration, Todd Weiler, Editor p. 363. Rubins states that "…non-arbitrability of the subject matter and procedural irregularity are grounds for challenge that have yet to appear prominently in cases related to investment arbitration awards but which could find increasing currency should challenges become more common"

[xiii] For example, the Swiss international arbitration law provides: "where none of the parties has its domicile, its habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed…", Swiss Private International Law Act, Art. 192(1) (December 18, 1987)

[xiv] For instance, France does not consider set aside abroad when deciding to grant or refuse recognition and enforcement of a foreign arbitral award; this approach emphasises the parties' agreement by focusing on the arbitration award; Article 1502 of the New Code of Civil Procedure. An illustration of this is the case Hilmarton Limited v. Omnium de Traitement et de Valorisation, Decision No 484, French Cour de cassation, First Civil Chamber (1994). A similar approach was taken by the US District Court for the District of Columbia in the case Chromalloy Aeroservices Inc v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C.) 1996.

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[xvi] The High Level Meeting in February 1998, one delegation proposed the establishment of an appeal mechanism in the MAI for both State-State and investor-State dispute settlement. In informal consultations, delegations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law – particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs that might be engendered by adding an appeal and departing for investor-State arbitration from the traditional philosophy of fast, inexpensive and final one step arbitration. As an alternative, it was proposed and accepted that the MAI dispute settlement mechanism would initially remain drafted as final and binding, but it would be made subject to review of practical experience in five years from signature of the MAI. If, as a result of that review, the Contracting Parties considered it advisable to introduce an appeals body, this could be done by amending the Agreement. "Selected Issues on Dispute Settlement" (Note by the Chairman) DAFFE/MAI(98)12, 13 March 1998.

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[xxix] The Tanzania Investment Act , No. 7 of 1997

[xxx] Section 23 (1) of the Tanzania Investment Act, No. 7 of 1997 "Where a dispute arises between a foreign investor and the [Tanzanian Investment] Centre or the URT in respect of a business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement".

[xxxi] Biwater Gauff (Tanzania) Ltd Vs The United republic of Tanzania ICSID Case No ARB/05/22 (2005))

[xxxii] Ibid (fn 30)

[xxxiii] Emilio Augustin Maffezini Vs. Kingdom of Spain (ICSID Case No ARB/97/7), Award of 13 November 2000, 5 ICSID Rep. 219 (2002), Para. 82 [hereinafter Maffezini v. Spain]

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