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COMMENTS ON THE TANZANIA INVESTMENT BILL 2022.

I. INTRODUCTION

Who we are.

iResolve™ extends its comments on the draft Tanzania Investment Bill. *iResolve*™ (www.iresolve.co.tz) is a boutique Arbitration & Corporate Law Studio established in 2014 by Advocate, Madeline Kimei. The practice mainly provides for arbitration, alternative dispute resolution and alternative legal support services.

The views expressed in this submission are ours alone, and do not necessarily reflect the views of our clients.

Overview/Submission in Brief.

1. The rationale to reform Tanzania's investment regime is to ensure that we can continue to attract the productive, sustainable, and inclusive investment we need to boost economic growth.
2. Though Tanzania's overall ranking in the World Bank's ease of doing business report has improved to 141 (2020), it still ranks poorly - 71 (2020)- when it comes to enforcement of contracts[1].
3. We have one main interests in this Bill, the settlement of international investment disputes. iResolve submits that the Investment Bill be improved to further meet its objectives and align with the Constitution. iResolve's submissions in summation are that (you may skip to the general comments):
   i. *Need to assess the current framework for resolution of investment disputes and updating of the National Investment Policy to include innovative schemes of Alternative Dispute Resolution (ADR) in resolving investor-state disputes.*
   ii. *Adoption of a model BIT for Tanzania (aligning to it national policy on investment)*
   iii. *Reforming the Arbitration Act, Cap 15 R.E. 2020 to be aligned with the Investment Bill 2022*
   iv. *Usage of International Investor-State Mediation*
   v. *Creation of Specialized bench to tackle the issue of lack of established infrastructures for the resolution of disputes that investors can rely on.*

[1] https://archive.doingbusiness.org/en/data/exploretopics/enforcing-contracts

vi. Expanding TICs role to issues of complaints/conflict management.

vii. Setting up a Dispute Prevention and Management Agency (DPMA).

II. *ISDS (Investor-State-Dispute-Settlement) System*

4. ISDS an international arbitration procedure that is intended to be an impartial, law-based approach to resolving conflicts between countries and foreign investors. These mechanisms provide a means for foreign investors to settle disputes with host governments through a third party outside of either country's formal judicial system. ISDS provisions are designed to protect foreign investors from direct or indirect expropriation of their investments. From a country's point of view, an ISDS scheme offers a number of advantages: it provides a mechanism to resolve investment conflicts without creating country to country conflict; it protects a country's citizens who invest abroad; and it provides foreign investors in a country with reassurance that the country will respect the rule of law in relation to their investments.
5. From a foreign investor's point of view, ISDS is a more reliable mechanism for resolving disputes than the alternatives: taking action in the legal system of the host country, which may not have laws to permit such an action or may give certain institutions immunity; or seeking the diplomatic assistance of the investor's home country, which relies on the willingness of the home country to provide such assistance.
6. ISDS is now widespread and well established. The world's first ISDS institution, the International Centre for Settlement of Investment Disputes (ICSID) was established in 1966. ICSID was established by an international convention to which Tanzania is a signatory since 17 June 1992 and operates under the auspices of the World Bank known as the Washington Convention, and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards since 11 January 1965[2]. Section 83 of the Tanzania 2020 Arbitration Act sets forth, although not verbatim, the regime for recognition and enforcement of the New York Convention awards.
7. Tanzania has also adopted the United Nations Commission on International Trade Law (UNCITRAL) model law for international commercial arbitration and the Convention on Multilateral Investment Guarantee Agency (MIGA).
8. Tanzania is a party to regional treaties such as the EAC, and is subject to the EACJ, which maintains an Arbitration Panel (EACJ Arbitration Rules, 2012); and the Southern African Development Community (SADC), of which the AFSA Southern African Development Community (SADC) Division launched an inaugural SADC Panel of International Commercial Arbitrators on 11 December 2020. The SADC Panel of International Commercial Arbitrators was nominated by the fifteen SADC Bar

[2] URT was also signatory to the 1927 Geneva Convention on the Execution of Arbitral Awards.

Associations based on globally competitive criterion. The Panel will be accessible to the SADC Member States. Tanzania is not a party to the OHADA Treaty.

BITs entered by Tanzania

9. Tanzania has signed a total of 20 BITs with countries amongst which half have entered into force. There is only 12 enforceable BITs and there are 8 BITs which have been signed by Tanzania but are yet to be enforced. Tanzania has been a party to the 1965 ICSID Convention since 17 June 1992. Tanzania has signed some twenty BITs. There are eleven BITs in force include those with: Canada (in force on 9 December 2013); China (in force on 17 April 2014); Denmark (in force on 21 October 2005); Finland (in force on 30 October 2002); Germany (in force on 12 July 1968); Italy (in force on 25 April 2003); Mauritius (in force on 2 March 2013); Sweden (in force on 1 March 2002); Switzerland (in force on 16 September 1965 and replaced on 6 April 2006); Turkey (in force on 3 January 2017); and the UK (in force on 2 August 1996). Tanzania has also six signed BITs with Egypt (signed on 30 April 1997); Jordan (signed on 8 October 2009); Korea (signed on 18 December 1998); Kuwait (signed on 17 November 2013); Oman (signed on 16 October 2012); South Africa (signed on 22 September 2005); and Zimbabwe (signed on 3 July 2003), which are not yet in force. The Tanzania-Netherlands BIT was signed on 31 July 2001 and came into force on 1 April 2004; however, on 30 September 2018, Tanzania issued notice of its intention to terminate, so that the BIT expired on 1 April 2019.

Increase in Investor-state disputes against Tanzania

10. Tanzania is entangled in more than 12 such international arbitration cases - the most against any country. Tanzania has been a party to the following investment treaty arbitrations:

    1) *Montero Mining and Exploration Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/21/6) (pending) (treaty dispute).
    2) *Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v. United Republic of Tanzania* (ICSID Case No. ARB/20/38) (pending) (treaty dispute).
    3) *Winshear Gold Corp. v. United Republic of Tanzania* (ICSID Case No. ARB/20/25) (pending) (treaty dispute).
    4) *Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania* (ICSID Case No. ARB/19/17) (pending) (treaty dispute).
    5) *Ayoub-Farid Michel Saab v. United Republic of Tanzania*, ICSID Case No. ARB/19/8 (pending) (treaty dispute).
    6) *Sunlodges Ltd (BVI), 2. Sunlodges (T) Limited (Tanzania) v. The United Republic of Tanzania* (PCA Case Number 2018-09), UNCITRAL Arbitration Rules 1976, Seat: Sweden (pending) (treaty dispute).
    7) *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33) (pending) (treaty dispute).

8) *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/15/41) (Final Award of 11 October 2019) (contract dispute).
9) *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20) (Final Award of 12 September 2016; Decision on annulment issued on 22 August 2018) (contract dispute).
10) *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12) (Final award rendered on 2 November 2012; Annulment proceedings suspended on 12 March 2013 after parties' agreement) (treaty dispute).
11) *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) (Final Award of 24 July 2008) (treaty dispute).
12) *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8) (Final Award of 12 July 2001, interpretation proceedings initiated in 2008, matter discontinued on 19 August 2010 upon request of respondent) (contract dispute).

11. There are also new cases on the pipeline such as the UK real estate developer is reportedly preparing to launch an ICSID claim against Tanzania after its lease for a US$1.6 billion island resort project was terminated – by a registered entity tagged as Pennyroyal. This could result to a full-blown arbitration against Tanzania exposing the country to huge provisional financial stakes.

III. *General Comments*

12. In our view, the current bill requires an innovative approach to ensure treaty compliance and avoidance, prevention and management of disputes. The idea is to attract and promote foreign investment, but a major issue for investors is enforcement of contracts and speedy dispute resolution. The Tanzania Investment Act, 1997 contains provisions (section 23) for the negotiation and settlement of disputes among Tanzanian and foreign enterprises, TIC and central government. Where the preferred amicable settlement via negotiation between the parties is not achieved, the parties may then seek agreement through the arbitration laws of Tanzania, through the International Centre for the Settlement of Investment Disputes, or within appropriate bilateral or multilateral treaties.
13. A report issued on *Investment Policy Review of Tanzania* by UNCTAD, 2002 highlighted that "*There are some ambiguities in the present legislation in relation to the settlement of disputes, but more importantly, there appears to be no defined statutory mechanism through which investors can ensure that progress is made in addressing concerns and disputes of investors that are less serious than full disputes. The dispute provisions within the 2015 revised edition of the Act need to be both strengthened and incorporated into the relevant commercial contract law of Tanzania*"[3].

[3] https://unctad.org/system/files/official-document/iteipcmisc9_en.pdf at page 37.

14. New forms of resolving investor-state disputes should enhance governance structures to allow State officials to take responsibility for effective dispute resolution and should be grounded in an assessment-based process design.

i) Initial Needs Assessment & ADR Policy embedded in the National Investment Policy

15. It is a high call for a deep dive study of the investment disputes prone to Tanzania and the frameworks currently in place to management and resolve disputes.
16. The ADR mechanisms should be noted in the National Investment Promotion Policy, which currently is outdated (1996) and fails to take into account the dynamism in trade and future of foreign investments. It is my general thought that there should be parallel work to develop a high-level policy framework for foreign investment attraction.
17. The initial needs assessment will in turn assist to develop an ADR policy for the country. The current regulatory infrastructure is fragmented and needs harmonisation.

ii) Bilateral Investment Treaty Model for Tanzania

18. Tanzania does not make use of a model BIT. However, as a Member State of the South African Development Community, the EAC, and the African Union, it can make use of the SADC Model BIT, EAC Model BIT, and the Pan African Investment Code when negotiating.
19. It is our recommendation that instead of terminating BITs, the Country should be looking to adopt a model BIT well suited for Tanzania through minimization of the key risks identified by the State. We advise the relevant authority to review the *Africa Arbitration Academy Model BIT for African States*. Ms. Kimei took part in the development of the model and would recommend it for your consideration[4]. Having a robust BIT will further compliment the new investment regime being proposed.

iii) Arbitration Act, CAP 15 R.E. 2020

Enforcement of ICSID Awards

20. At the outset, this is not an exhaustive presentation of the areas requiring reform in CAP 15. With specific focus to support the proposed Bill, it should be put to your attention that the current Arbitration Act does not give special status to arbitrations held under the Convention on the Settlement of Investment Disputes between the States of Nationals and other States.

[4] https://www.africaarbitrationacademy.org/wp-content/uploads/2022/07/AAA-Model-Bilateral-Investment-Treaty-for-African-States-202-2.pdf

21. 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. The ICSID award is reviewable by an ICSID tribunal, but not by national courts. Once final, an ICSID award will be recognized and enforced in Tanzania as if it is a final judgment of a Tanzanian court.
22. Therefore, there are three main aspects of the Convention which require Tanzanian legislation. First, we must provide for the enforcement in this country of any arbitral awards made under the Convention. It was not possible to apply the Arbitration Act 2020 to proceedings under the Convention, because that Act subjects the conduct of arbitration proceedings in Tanzania to certain legal rules and to the control of Tanzanian courts in some respects. The proceedings under the Convention, on the other hand, will be governed by the provisions of the Convention itself and the rules made under it. It would be inconsistent with the Convention to make the Arbitration Act Cap 15 R.E. 2020 Act apply.

Accreditation system overhaul to preserve party autonomy in appointment of arbitrator/neutrals that can resolve their dispute

23. Another critical issue is the need to preserve the cardinal principle of party autonomy in international arbitration. This is minimized by the requirement under Section 93 of the 2020 Arbitration Act for arbitrators to seek accreditation and imposes criminal liability for practice without accreditation in accordance with the system under amended Civil Procedure Code, CAP 33. Regulation 3 of G.N. 147 of 2021 puts in place an accreditation panel composed of seven members for purposes of approving applications for accreditation of conciliators, negotiators, mediators, arbitrators and arbitral institutions. This has impact of foreign arbitrators adjudicating cases which the seat of arbitration is Tanzania due to the aspect of such proceedings being held to be in breach of law / against public policy which requires them to be arbitrated. The scheme established for accreditation is welcomed by the ADR community however, there is need to explore means to enable it to stand alone from any governmental supervision. It is my opinion that accreditations should be done by institutions which are capable to assess a candidate's ability to perform as a neutral (either a mediator, arbitrator or conciliator). These institutions may include the Tanzania Institute of Arbitrators or Tanzania International Arbitration Centre.

iv) Use of International/ Investor-State Commercial Mediation

24. The other key recommendation to give this legislation its teeth, Mediation is an intensely discussed topic as a possibly promising venue for investor–State dispute settlement (ISDS) and conflict prevention. Given that mediation can be used within 'cooling-off' (amicable settlement) periods in International Investment Agreements (IIAs), this article takes stock of those as well as explicit mediation rules which are on the rise in new IIAs.
25. Mediation's core values of self-determination and party participation have been its traditional and essential selling points. The central ideology and distinguishing feature of mediation is its voluntariness, as reflected in mediation rhetoric that focuses on empowerment and recognition. Mediation also offers protection from exposure in public forums. Confidentiality, an almost sacred canon in the mediation process. Finally, the mediation preference can be attributed to its compliance effects, cost efficiency, and therapeutic benefits.
26. There have been significant developments of which Tanzania may consider this option for resolution of investor state disputes. The most notable is the coming into force of the Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) in September 2020. The convention provides a uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international, commercial disputes—akin to the framework that the 1958 New York Convention provides for arbitral awards. As of date, 55 states are signatories to the convention and 10 states have ratified it. African states noted include Ghana, Congo, Democratic Republic of Congo, Gabon, Mauritius, Nigeria, Rwanda, Uganda, and Sierra Leone.
27. By analogy, international commercial mediation may gain ascendancy as a Dispute Resolution Mechanism in one of three ways: first, gradual acceptance through industry custom and usage among international commercial parties; second, development of a "*global juris consultorium*" among the international commercial bar, arbitrators, jurists, and academics; and third, timely accession, ratification, and implementation of the UNCITRAL Model Law into domestic legal systems.
28. My recommendation is that Tanzania looks into signing the Singapore Convention in order to give mediation its teeth.

v) Creation of specialist bench/ fast-track specialized courts to settle investment disputes

29. Since the extractives industry legislation has provision calls for exhaustion of local remedies prior to institution of any proceedings, it is my opinion that there could be an advantage to also setting up fast-track courts to settle disputes between investors and the government. As reflected in my paper, Good or Bad Deal (2017) - it is my view

that greater emphasis should be placed on host state legal reform (overhaul of the outdated arbitration laws) and, to the extent necessary, capacity-building within the system of the administration of justice, rather than on international investment arbitration[5].

30. The specialist bench could be provided mandate to oversee these investment disputes and or be allocated arbitration related matters so as to achieve swifter and more efficient outcomes.

vi) Tanzania Investment Centre's (TIAC) role in complaints/dispute prevention and management

31. It is clear from the draft legislation that TIC will not have any additional mandate relating to investment disputes. However, it is our opinion that the there be a designation of a lead agency to "track and take timely action to prevent, manage and resolve disputes"[6].
32. It is noted that the listed aftercare services at TIC have excluded the need to focus on specific problems or grievances raised by investors. It is my suggestion that an internal policy be developed for purposes of managing complaints and grievances. The justification for this is to allow for preventative measures which catch disputes before they escalate into larger conflagrations that leave both the investor and the host state at impasse.
33. TIC should have a key role in preventing, management and resolution of complaints/disputes. This system should be designed with aim to light out any creeping issue with investors at the initial stages of any erupting conflict to avoid situations of impasse.

vii) Proposal for an Investment Dispute Prevention and Management Agency (DPMA)

34. The establishment of an agency to prevent and manage investment disputes is often perceived as a way for countries to attract investment while managing the risks associated with disputes—but little is known about the design, operation, or effectiveness of such agencies. The DPMA model policy can be studied and countries such as Brazil and Korea[7] who have implemented.

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[5] GOOD OR BAD DEAL: *The Rise in Investment Treaty Disputes – The Case for Tanzania* – by Madeline C. Kimei – available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248898

[6] *Global Action Menu for Investment Facilitation* (UNCTAD, 2016, p. 8

[7] South Korea's Office of the Foreign Investment Ombudsman (OFIO)

35. I would welcome the opportunity to discuss this submission and the views on any element of Tanzania's Investment framework for the resolution of investor-state disputes in greater detail.

VI. Specific Comments

Section	2022 Bill	Comment & Recommendation
Part I Section 2 (2)		The thresholds indicated should be reflected in Tanzanian Shillings and provided that it is on its USD equivalent.
Section 3	Should include definition of an "investment dispute"	The current bill provides no definition of "dispute". We suggest the following definition for an investment dispute: *"Investment dispute" means a dispute between an investor and the State over an investment in Tanzania or the interpretation of this Act in relation to an investment*
Section 8	*8.-(1) Kituo kitaanzisha mfumo unganishi wa kielektroniki kwa ajili ya uwezeshaji na uhamasishaji wa uwekezaji.* *(2) Mfumo unganishi utakaoanzishwa kwa mujibu wa kifungu hiki utaunganisha mamlaka zote muhimu zinazohusika na utoaji wa leseni, vibali, idhini na ridhaa anazohitaji mwekezaji.*	We recommend this online system to have online dispute resolution (ODR) capabilities to handle complaints/dispute of foreign or local investors may be able to channel, track and manage any dispute that may arise from their investments in Tanzania. Advisably, a dispute system designer who will take into account all angles of disputes by prior due diligence/assessment of the current environment.
Part V Section 32 Rufaa na mapitio	***32***.*-(1) Mtu ambaye hataridhika na uamuzi uliotolewa na Kituo chini ya Sheria hii anaweza kukata rufaa kwa Waziri.* *(2) Mwekezaji ambaye hataridhika na uamuzi wa Kamati ya Taifa ya Uwekezaji kuhusu uidhinishaji wa vivutio anaweza kuwasilisha maombi kwa Kamati hiyo ili iweze kupitia tena uamuzi wake.* *(3) Utaratibu wa kukata rufaa au kuwasilisha maombi ya mapitio utaainishwa kwenye kanuni.*	See above comment to have a DPMA Agency for purposes of disputes. Some investors may not find the National Investment Committee to be independent and impartial in dealing with the dispute at this primary level hence finding themselves having no avenue to resolve but to resort to final means which is triggering section 33.
	32 (1) If a dispute arises between an investor and the Center or the Government regarding a commercial institution, all efforts will be made to resolve the dispute through discussion to reach a solution.	

	(2) An investor who is not satisfied with the decision of the National Investment Committee regarding the approval of incentives can submit an application to the Committee so that it can review its decision. *(3) The procedure for appealing or submitting a request for review shall be specified in the regulations.*	
Part V. *Section 33* *Utatuzi wa migogoro*	***33**.-(1) Endapo mgogoro utatokea kati ya mwekezaji na Kituo au Serikali kuhusu taasisi ya kibiashara, juhudi zote zitafanywa ili kutatua mgogoro huo kwa njia ya majadiliano ili kufikia suluhu.* *(2) Mgogoro kati ya mwekezaji na Kituo au Serikali kuhusu taasisi ya kibiashara ambao utashindwa kusuluhishwa kwa majadiliano unaweza kuwasilishwa katika vyombo vya usuluhishi kwa kuzingatia mojawapo ya njia zifuatazo kama zitakavyokubaliwa na pande zote-* *(a) kwa mujibu wa sheria za usuluhishi za Tanzania;* *(b) kwa mujibu wa kanuni za utaratibu wa usuluhishi wa Kituo cha Kimataifa cha Usuluhishi wa Migogoro ya Uwekezaji; au* *(c) ndani ya makubaliano yoyote baina ya nchi mbili au zaidi kuhusu kinga ya uwekezaji yaliyofanywa na Serikali ya Jamhuri ya Muungano na Serikali ya nchi anayotokea mwekezaji.*	• This section is a reproduction of Section 23 of the Tanzania Investment Act [Cap 38, R.E. 2015]. It is our proposal that there be adopted as a multi-tier dispute resolution clause which will provide for a 3-step dispute resolution process, negotiations, mediation and as a last resort, arbitration. • "Kituo" should be replaced for broad application in this aspect or there by an addition of the following wording: "*any organ of State or Government"* ….an investor could have an action against other organs of the state like Centre, • The following provision should be considered. "*Section 33 (2) does not preclude an investor from approaching any competent, independent tribunal or statutory body for the resolution of a dispute relating to an investment.* • The following wording could be considered for those situations the State wishes to adopt a model which diverts from what is contained in this Bill. The wording could be: "*The investment approval granted to the investor may specify the arbitration mode in the case of a dispute relating to the investment and the specification shall constitute the consent of the Centre or respect agents, and the investor to submit to the specified mode of arbitration".*

	33.-(1) If a dispute arises between an investor and the Center or the Government regarding a commercial institution, all efforts will be made to resolve the dispute through discussion to reach a solution. *(2) A dispute between an investor and the Center or the Government regarding a commercial institution that fails to be resolved through negotiation may be submitted to arbitration bodies based on one of the following methods as agreed upon by all parties-* *(a) in accordance with the arbitration laws of Tanzania.* *(b) in accordance with the rules of the arbitration procedure of the International Center for Arbitration of Investment Disputes; or* *(c) within any agreement between two or more countries regarding the protection of investments made by the Government of the United Republic and the Government of the country from which the investor originates.*	• The provision has no time bars as to the grace period of negotiations ("cooling off") and or specific time lapse for escalation of a dispute to arbitration. • To explore the need of "Consent or Right to Arbitration" for ICSID specific matters -to submit matters to arbitration or other forums as may have been agreed between the Parties. Without having this requirement, I see the major risk of having premature cases being lodged at ICSID and parties pursuing parallel methods being i.e., the negotiations and threatened arbitration notices being lodged. This provision appears to have been derived from the general principle evolved from ICSID jurisprudence that an arbitration clause in an investment dispute is a standing offer to arbitrate on behalf of the State which the investor may or may not accept. • **Inclusion of submission of a dispute under the ICSID Mediation Rules 2022.**

IV. CONCLUSION

In conclusion, iResolve commends the legislature on the draft Investment Bill. However, in order to ensure the investment Bill meets its objectives as set out in the Bill, there is need to review and rework the issue of settlement of disputes as has been proposed above.

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