Tanzania Hit by Second ICSID Dispute Related to Mining Retention Licenses

By:

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A request for the institution of arbitration proceedings against the United Republic of Tanzania ("Respondent") was registered by the International Centre for Settlement of Investment Disputes (ICSID) Secretary General on October 5, 2020.[1] This request was made by Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) ("Claimants").[2] The claimants invoked the 1994 Bilateral Investment Treaty (BIT) between United Kingdom of Great Britain and Northern Ireland, on the one hand, and Tanzania, on the other.[3]

The dispute arising of a mining concession comes on the heels of another ICSID claim filed this summer by Canadian Winshear Gold, related to a gold mine concession.[4] In addition, Tanzania is defending an electric power generation,

[5] an agribusiness,[6] and a banking dispute at ICSID.[7]

Tanzania has enacted an important set of “multifaceted reforms” in the mining sector,[8] with the adoption of the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017, the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) and the Public-Private Partnership (Amendment) Act enacted in 2018. The legislations prohibit international adjudication of the disputes,[9] provisions that Tanzania could raise regarding licensing agreements in the pending ICSID cases.

Indiana Resources Limited, (“Indiana”), is the majority shareholder in Ntaka Nickel Holdings Ltd (“NNHL”) and Nachingwea UK Ltd (“NUK”) as well as the manager of the joint venture for the Ntaka Hill Nickel Project (“the project”). [10] The project concerned the development of the mineral nickel sulphide in South East Tanzania. Nickel sulphide is an emerging mineral, regaining attention due to its use in the production of batteries and stainless steel.

It was reported that the claim arose from the cancelling of several retention licenses by Tanzania. Those cancellations are alleged to have impacted Winshear Gold as well.[11] A retention license is defined as “an optional license between the exploration and mining stages.[12] It gives the licensee (license holder) tenure over the land before progressing to a mining license”.[13] Indiana alleged that it invested USD 60 million in the nickel exploration phase. The Ntaka Hill Nickel Project was awaiting Tanzania’s green light for the mining stage up until August 2019 when the license was cancelled. [14]

Indiana is claiming a breach of obligations under the BIT including expropriation without “prompt, adequate and effective compensation.” Additionally, the claimant is set to argue a Fair and Equitable Treatment (“FET”) violation. As a result, the claimants have already quantified damages in excess of US$95,000,000.[15]

The status of the proceedings is pending, and it is noteworthy that before the request for arbitration was filed by the Claimants, a six-month notice period was given to the Respondents within which there was no correspondence from them.[16]

Indiana is represented by Lalive in London, which is already representing Winshear in the other ICSID case, while Tanzania is represented by the Office of the Attorney General of Tanzania.

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[1] *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.

[2] Indiana Resources Limited, *Press Release on Request for Arbitration*, 30 September 2020, accessible at : https://jusmundi.com/en/document/ther/en-nachingwea-u-k-limited-uk-ntaka-nickel-holdings-limited-uk-and-nachingwea-nickel-limited-tanzania-v-united-republic-of-tanzania-indiana-resources-limiteds-press-release-on-request-for-arbitration-wednesday-30th-september-2020.

[3] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments ("UK-Tanzania BIT").

[4] *Winshear Gold Corp. v. United Republic of Tanzania*, ICSID Case No. ARB/20/25.

[5] *Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania*, ICSID Case No. ARB/19/17.

[6] *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania*, ICSID Case No. ARB/17/33.

[7] *Ayoub-Farid Michel Saab v. United Republic of Tanzania*, ICSID Case No. ARB/19/8.

[8] J. GATHII (2020) Understanding Tanzania's Termination of Its BIT with the Netherlands in Context, Afronomicslaw Blog, accessible at : /2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context/.

[9] D. PATHIRANA (2019) Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach, Afronomicslaw Blog, accessible at :

/2020/09/11/sovereign-rights-to-natural-resources-as-a-basis-for-denouncing-international-adjudication-of-investment-disputes-a-reflection-on-the-tanzanian-approach/.

[10] Bloomberg, *Mining Companies Threaten Action Against Tanzania Over New Law*, January 17, 2020, accessible at : https://www.miningweekly.com/article/mining-companies-threaten-action-against-tanzania-over-new-law-2020-01-17/rep_id:3650.

[11] *Ibid*, Bloomberg article reporting: “Winshear Gold Corp delivered similar notices over four retention licenses for its SMP Gold project, according to a separate statement”.

[12] Earth Resources, *Apply for a Retention License*, 12 August, 2020, accessible at:- https://earthresources.vic.gov.au/licensing-approvals/mineral-licences/retention-licence#:~:text=A%20retention%20licence%20is%20an,progressing%20to%20a%20minin

[13] *Ibid*.

[14] Indiana Press Release, 14 August 2020, accessible at : https://indianaresources.com.au/wp-content/uploads/2019/09/190814-Ntaka-Hill-Nickel-Project-Update-V3.pdf.

[15] Indiana Resources Limited, *Press Release on Request for Arbitration*, 30 September 2020, accessible at : https://jusmundi.com/en/document/ther/en-nachingwea-u-k-limited-uk-ntaka-nickel-holdings-limited-uk-and-nachingwea-nickel-limited-tanzania-v-united-republic-of-tanzania-indiana-resources-limiteds-press-release-on-request-for-arbitration-wednesday-30th-september-2020.

[16] Indiana Resources, *USD4.65 Million Litigation Funding Secured*, August 6, 2020, accessible at : https://indianaresources.com.au/wp-content/uploads/2020/08/20200806-IDA-USD4.65-million-Litigation-Funding-Secured.pdf.

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