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Standard Chartered Bank (Hong Kong) v. TANESCO: The Tribunal's Power to Reconsider Its Previous Decisions

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Foreword

A recent award rendered in the case of *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (TANESCO) (ARB/10/20, Award, 12 September 2016) (hereinafter: "SCB HK v. TANESCO") seems to put an end to a dispute which had sparked lately relating to an arbitral tribunal's power to revise or reconsider its previous interim decisions in ICSID arbitration.

The tribunal in *SCB HK v. TANESCO* decided unanimously that it can exercise a power to reconsider its earlier Decision on jurisdiction and liability, thus becoming the first ever ICSID tribunal to do so. It reasoned, *inter alia,* that:

> "In exercising a power to reopen a decision, a tribunal should be guided by, although not bound by, the limitations on reopening that apply to awards. Whatever the power the tribunal has to reconsider a decision that power must at least extend to the grounds for reopening an award in Article 51…" (Award, para. 322)

Facts

The factual background of the case is very complex involving numerous court proceedings in various jurisdictions. For present purposes, it may be briefly stated that the case relates to the 2001-2003 loan restructuring of the Independent Power Tanzania Limited ("IPTL"), the latter being in charge of constructing and operating an electricity generating facility in Tanzania.

Initial Dispute and the 1st ICSID Proceedings

In 1995, IPTL and TANESCO, an entity wholly owned by the Republic of Tanzania and designated as an agency pursuant to Article 25(1) of the ICSID Convention, concluded a power purchase agreement ("PPA").

In 1998 however, a dispute arose between the parties to the PPA which resulted in TANESCO initiating ICSID proceedings claiming that IPTL has failed to comply with the financial model (debt/equity ratio) for the project leading to a higher tariff and overcharges.

The 1st ICSID tribunal acknowledged that IPTL had imprudently incurred costs and the tariff was recalculated.

Debt Restructuring and SCB HK's Involvement

In 2004, following a renewed invoice dispute, TANESCO refused to make capacity payments and instead began to deposit the sums due under the PPA into an escrow account. IPTL, for its part, took to restructure its debt. The refinancing was effectuated without the knowledge of TANESCO. The Respondent's position is that the new loan exceeded the amounts authorized by the 1st ICSID tribunal.

In 2005, SCB HK acquired IPTL's loan and in 2010, further to IPTL's default, SCB HK exercised its step-in rights and initiated ICSID proceedings claiming that all contractual rights of IPTL under the PPA are vested in it as the lender-assignee. TANESCO countered that the claimant's debt acquisition was invalid under local law since the security assignment was not registered with the Tanzanian trade register.

The 2nd ICSID Tribunal's Decision

In its Decision on jurisdiction and liability dated 12 February 2014, the tribunal found that the assignment was valid. The tribunal however provided only declaratory relief refusing to order TANESCO to pay the claimed sums to SCB HK rather than to IPTL, essentially, for the following reasons: (1) in light of the winding up proceedings with regard to IPTL, which had in the meantime been initiated by VIP Engineering and Marketing Ltd, IPTL's minority shareholder, the possibility for the appointment of a liquidator was still open, therefore, the tribunal did not wish to interfere with the jurisdiction of Tanzanian courts which were in a better position to determine the priority among IPTL's creditors; (2) the existence of the escrow account and the funds held therein provided at least some protection to SCB HK's rights.

Developments on the Ground

Following the Decision, it transpired that with the support of TANESCO and the Government of Tanzania ("GoT") all shares in IPTL had been transferred to Pan Africa Power Solutions (T) Ltd ("PAP"), a Tanzanian company. It remains unknown when and how Mechmar, the majority shareholder in IPTL, had transferred its shares to PAP. What is known is that after all affairs of IPTL had passed to PAP, TANESCO has agreed to settle the dispute regarding the outstanding payments and GoT released the funds from the escrow account and paid them to PAP which used part of the money to pay for the purchase of IPTL's shares.

Reconsideration

Given that at the time of the tribunal's Decision it was not known to either the claimant or the tribunal that TANESCO and IPTL had reached a settlement and that the escrow account funds have been released, SCB HK sought reconsideration of the Decision on jurisdiction and liability in light of those developments which affected the claimant's situation.

After discussing the question whether a tribunal has a power to revisit its previous decisions and agreeing that it does since in this case important information had been withheld or misrepresented by the Respondent, the tribunal decided that it should reconsider its previous Decision.

Indeed, the tribunal noted that in the Decision it had provided a mere declaratory relief so as not to interfere with the local courts' authority and in order to leave open the possibility of a liquidator being appointed for IPTL since it is for the liquidator and the courts to determine the question of priority among IPTL's creditors. But now that the dispute between TANESCO and IPTL has been settled there was no likelihood for the appointment of a liquidator and what is more the situation of SCB HK has been rendered worse since the funds from the escrow account have been released in favour of PAP.

The tribunal, therefore, decided that it must grant the relief originally sought by the claimant and that in addition to making a declaration of the amount owed by TANESCO to SCB HK, it will also order the payment of that amount. The tribunal also recalculated the tariff applicable to the PPA.

A Note on the Tribunal's Power to Reconsider Its Pre-Award Decisions

Following Prof. Georges Abi-Saab's landmark dissent in *ConocoPhillips v. Venezuela* (ARB/07/30, Decision on respondent's request for reconsideration, 10 March 2014), the question of the tribunal's power to reopen its previous decisions was brought to the forefront.

The main argument of those denying that such a possibility exists has been that interim decisions are intended to be *res judicata* and thus not subject to review separately from the final award.

This argument is unsubstantiated for two main reasons:

1) arbitral awards rendered under the ICSID Convention are also intended to be final and binding but nevertheless they are subject to post-award remedies such as interpretation, revision, or annulment;
2) it has been claimed that under the ICSID Convention only awards are subject to remedies such as interpretation, revision, or annulment to the exclusion of interim decisions, but as seen in *Waste Management II*, this contention does not hold true since the tribunal there recognized that:

> "…it had the power, while still exercising its functions and prior to the closure of the proceedings, to give any necessary interpretation of any of its decisions, to make any necessary supplementary decision, and to correct any error in the translation of a decision." (emphasis added) (Waste Management, Inc. v. United Mexican States, ARB(AF)/00/3, Award, 30 April 2004, para. 17)

Prof. Schreuer has similarly commented that:

> "Art. 51 is designed specifically for situations in which the tribunal has terminated its activity. A tribunal that is still in session can always revise its preliminary decisions informally." (Christoph Schreuer, The ICSID Convention: A Commentary (CUP: 2009) at p. 880)

Importantly, even in *Perenco Ecuador Limited v. Ecuador* the tribunal acknowledged that "only in exceptional circumstances would it be open for the Tribunal to reconsider its prior reasoned decisions." (emphasis added) (ARB/08/6, Decision on Ecuador's reconsideration motion, 10 April 2015, paras. 3, 6)

It is also worth mentioning that in reconsidering their decisions arbitral tribunals must be guided by the standard contained in Article 51 of the ICSID Convention and not that contained in Article 52 thereof concerning annulment since, as noted by Prof. Andreas Bucher, it was never intended for the same tribunal to determine, e.g., whether it has made an excess of powers in its own decisions. (*ConocoPhillips v. Venezuela ARB/07/30*, Dissenting Opinion in relation to the Application for Reconsideration of part of the Decision on the Merits, 9 February 2016)

In sum, tribunals may and in cases such as *SCB HK v. TANESCO* should use the power to reconsider their decisions guided by Article 51 of the ICSID Convention, namely where a fact has been discovered of such a nature as to decisively affect the decision of the tribunal and the concerned party's ignorance of that fact is not due to negligence, probably excepting cases in which the fact relates to a belated jurisdictional objection. (See Award, para. 323) Such a fact must have existed at the time of the decision. (Cf. Schreuer, *supra* p. 884, marginal para. 19) It remains, however, still unclear whether a tribunal may reconsider its decisions on its own motion in case of error of law. (See *Waste Management, Inc. v. United Mexican States*, *supra*, para. 17; Prof. Georges Abi-Saab's D.O., *supra*, para. 62)

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