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International Arbitration Case Law
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Award Name and Date: Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO) (ICSID Case No. ARB/10/20) – Decision on Annulment – 22 August 2018

Case Report by: Izak C. Rosenfeld**, Editor: Ignacio Torterola***

Summary: TANESCO brought an application in writing for the annulment of an award for, among other things, US$148.4M ordered against it, arising out of a dispute between the Standard Charted Bank (Hong Kong) Limited ('SCB HK'), as Claimant, and TANESCO, as Respondent. The dispute was based on a Power Purchase Agreement ('PPA') between TANESCO and Independent Power Tanzania Limited ('IPTL'), whereby IPTL had assigned its rights to the SCB HK in this matter. SCB HK was seeking a declaration and order for unpaid sums under the PPA. TANESCO brought an application in writing for the annulment of the award of the ICSID tribunal on three grounds as set forth in Article 52(1) of the ICSID Convention, specifically claiming that (i) the tribunal manifestly exceeded its powers, (ii) there has been a serious departure from a fundamental rule of procedure, and (iii) the award failed to state the reasons on which it was based. TANESCO's application was centrally based on the principal that the ICSID tribunal's decision on jurisdiction and liability could not be reconsidered under the ICSID Convention. TANESCO also requested, under Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings, a stay of the enforcement of the award until the annulment application was decided. Ultimately, the *ad hoc* Committee did not find the arguments in favour of annulment to be convincing, and therefore dismissed the annulment application.

Main Issues: Will a tribunal be permitted to reconsider its decision as a result of evidence being withheld; what is the basis for a tribunal's reconsideration of a 'decision' versus an 'award'; to what extent may a tribunal supplement its own reasoning when reconsidering a decision; how severely flawed must a tribunal's award be, for an *ad hoc* committee to order an annulment.

***Ad hoc* Committee:** Mr Claus von Wobeser (President), Dr Christoph Schreuer (Arbitrator), Ms Bertha Cooper-Rousseau (Arbitrator).

Claimant's Counsel: Mr Iain Maxwell, Mr Aaron McDonald, Mr Harry Ormsby, Mr Gavin Creelman (Herbert Smith Freehills LLP, London, UK); Mr Matthew Weiniger QC (Linklaters LLP, London, UK).

Respondents' Counsel: Mr Richard K. Rweyongeza (R.K. Rweyongeza & Co Advocates, Dar Es Salaam, Tanzania); Mr Beredy Malegasi (Crax Law Partners, Dar Es Salaam,

Tanzania); Mr David Hesse, Ms Devika Khanna, Mr Tom Roberts, Mr Paul Baker, Ms Nefeli Lamprou (Clyde & Co, London, UK).

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Digest:

1. Relevant Facts and Procedural Details

Tanzania Electric Supply Company Limited ('TANESCO') brought an application in writing for the annulment of the award of the ICSID tribunal (the 'Tribunal'), rendered September 12, 2016 (the 'Award'). The Award was rendered following a hearing of the dispute between Standard Charted Bank (Hong Kong) Limited ('SCB HK'), as Claimant, and TANESCO, as Respondent. The dispute was based on a Power Purchase Agreement, dated May 26, 1995 (the 'PPA') entered into by TANESCO and Independent Power Tanzania Limited ('IPTL') (¶ 1).

SCB HK, in its capacity as assignee of IPTL's rights under the PPA, commenced its claim against TANESCO seeking a declaration that TANESCO owed it US$258.7M in outstanding payments, and an order for payment of US$138M to discharge its loan, or in the alternative, an order for payment of the amounts due under the PPA (¶ 3). The relationship between SCB HK and IPTL was governed by a Loan Facility Agreement, dated June 28, 1997 (the 'Facility Agreement') (¶ 4).

The Award stated the following:

(i) the Tribunal had jurisdiction to reopen its Decision on Jurisdiction, and, in addition to making a declaration of the amount owing to SCB HK by TANESCO, it would also make an order for the payment of this amount;

(ii) the tariff should be determined on the basis of an Internal Rate of Return ('IRR') of 22.31% applied to a shareholder loan. Therefore, the amount owed by TANESCO under the PPA as of September 30, 2015 was US$148.4 million;

(iii) the interest rate on the amount owing under the PPA was to be simple three-month LIBOR plus 4%;

(iv) TANESCO is to be ordered to pay to SCB HK US$148.4 million with simple interest at three-month LIBOR plus 4% from September 30, 2015 until the date of the Award, with interest to continue at the same rate until full payment received;

(v) all other claims are dismissed; and

(vi) each Party is to bear its own legal fees and expenses and the costs of the arbitration in equal shares (¶ 5).

TANESCO filed an application in writing on January 6, 2017, seeking annulment pursuant to Article 52 of the ICSID Convention (¶ 7), and requesting a stay of enforcement of the Award under Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings (¶ 8), until the annulment application was decided. The enforcement of the Award was provisionally stayed.

The *ad hoc* Committee (the 'Committee') was constituted on February 10, 2017 (¶ 10).

The first session was held jointly with the Parties on 30 March 2017, and the Parties agreed that the decision on the stay would be rendered separately from the first procedural order (¶ 27). On 12 April 2017, the Committee issued its decision granting the stay (¶ 20), requiring TANESCO to provide, within 30 days, an unconditional and irrevocable bank guarantee or security bond for the full amount of the Award (¶ 21).

On 25 May 2017, following an opposed request for an extension by TANESCO, and as a result of TANESCO's failure to prove that it had initiated the necessary actions to obtain the required guarantee, the Committee confirmed the termination of the stay (¶ 23).

The hearing on the Annulment was heard over two days, on 27 and 28 November 2017 (¶ 28). On 21 May 2018, the Committee declared the Annulment Proceeding closed pursuant to ICSID Arbitration Rule 38 (¶ 33).

2. Positions of the Parties

The Parties' submissions on each ground for annulment (and every sub-element therein) were considered by the Committee throughout its lengthy reasoning, and addressed at each of the pertinent sections of its analysis. Therefore, the Parties' positions regarding the overall principle and scope of annulment, as a remedy, are explored briefly here, while the particular arguments and submissions of each party are discussed in the relevant sections of the Committee's analysis, in Part 3 below.

2.1 TANESCO's Position

TANESCO brought the application in writing for the annulment of the Award on three grounds as set forth in Article 52(1) of the ICSID Convention, specifically claiming that (i) the tribunal manifestly exceeded its powers, (ii) there has been a serious departure from a fundamental rule of procedure, and (iii) the award failed to state the reasons on which it was based (¶ 7).

TANESCO submitted that, although it is not the role of an *ad hoc* committee to substitute its own views on the merits in place of those of a tribunal, an *ad hoc* committee should not be

precluded from scrutinising the failings of a tribunal which fall squarely within Article 52 of the ICSID Convention – this is precisely what TANESCO is seeking in this Annulment Proceeding (¶ 40).

2.2 SCB HK's Position

Agreeing with TANESCO's submission that an annulment is a remedy of limited scope, SCB HK argued that the Committee must be careful not to reverse the Award on the merits, or carry out a substantive review while applying the Article 52 grounds for annulment (¶¶ 46-47).

SCB HK further argued that, even if the Committee was to find that one or more grounds for annulment was made out by TANESCO, the Committee is not required to annul the Award, and instead has the discretion to annul the Award, or any part thereof, as prescribed by Article 52(3) of the ICSID Convention (¶ 51).

3. The *Ad Hoc* Committees' Analysis

3.1 Scope of the Annulment Proceedings

The *ad hoc* Committee concluded that the scope of an annulment is limited, as an annulment proceeding is not concerned with the tribunal's considerations of the arguments and evidence submitted by the parties or the conclusion that it reached on such considerations, but instead, an annulment focuses on whether that such consideration took place on a "fair and equitable basis", and that the findings of the tribunal were based in the submitted evidence and arguments, and were not arbitrary (¶ 61).

The Committee noted, therefore, that its authority to rule on the annulment would not allow a review of the substantive findings made by the Tribunal. Instead, the Committee held that it would only be allowed to determine which of the Tribunal's decisions affected the Award in such a way as to amount to a ground for annulment (¶ 63).

The Committee further noted that it would not be able to issue a ruling regarding the substance of the dispute, in light of Article 52(6) of the ICSID Convention, which provides that, if the Award is annulled, the dispute shall be submitted to a new tribunal, at the request of either party (¶ 63).

3.2 Reconsideration of the Tribunal's Decision on Jurisdiction, as a Preliminary Matter

The Committee agreed with the Tribunal that reconsideration, being the power to reopen prior decisions before issuing a final award, is not explicitly allowed or disallowed in the ICSID Convention or in the ICSID Arbitration Rules (¶ 150). The *ad hoc* Committee found that there are a number of areas in which tribunals have been allowed to engage in such reconsideration, namely that of procedural and provisional measures (¶ 151).

The Committee went on to evaluate the balance between a tribunal's power to decide "any question of procedure" under Article 44 of the ICSID Convention and the broader power under Article 41 to determine its own competence (¶ 152), as well as the differing opinions

presented in the infamous case of *ConocoPhillips v. Venezuela*[1] (¶ 154). On this point, the Committee concluded that the implication of Rule 41(2) of the ICSID Arbitration Rules allows a tribunal to consider jurisdictional objections after already rendering an interlocutory decision on jurisdiction (¶ 153). The Committee agreed with SCB HK's submissions on this issue, finding that there is no "blanket prohibition" on the reconsideration of decisions prior to an award (¶ 160). The Committee found that this conclusion is supported by the reasoning of the tribunal in *Pac Rim v. El Salvador*[2] (¶ 169).

The Committee then considered a tribunal's revision rights under Article 51 of the ICSID Convention (¶ 161), highlighting that Article 51 is only to be treated as a 'guide' as to the nature of whether a revision is justified (¶ 164). In this regard, the Committee noted that the Tribunal's consideration of whether revision was justified under the four limb test contained within Article 51(1) of the ICSID Convention was a factual finding, and therefore should not be reviewed (¶ 166). The Committee, therefore, accepted the Tribunal's finding that it had reached its Decision on Jurisdiction without knowledge of material facts that were deliberately withheld by TANESCO, that its decision would have been different had it known of those facts, and that SCB HK's ignorance of those facts was not as a result of negligence (¶ 165).

3.3 Grounds for Annulment

The *ad hoc* Committee decided to address only the three specific grounds for annulment that were relied upon by TANESCO, namely: a) manifest excess of power, b) serious departure from a fundamental rule of procedure, and c) failure to state reasons (¶ 174).

3.3.1 Manifest Excess of Power

The Committee first set out the standard by which an excess of power, in the context of jurisdiction, becomes "manifest" – it must be obvious, self-evident, and discernible without deeper analysis, that the tribunal did not have jurisdiction (¶ 211).

The Committee noted that, pursuant to Article 25(1) of the ICSID Convention, that in order to establish a tribunal's jurisdiction, there must be: "(i) a legal dispute; (ii) arising directly out of an investment; (iii) between a Contracting State; (iv) and a national of another Contracting State; (v) which the parties to the dispute consent in writing to submit to the Centre" (¶ 212).

Viewing the Tribunal's Decision on Jurisdiction, the Committee found that the Tribunal had considered all five elements, and had reached its Decision on the basis of its evaluation of the parties' arguments, the evidence presented, and Article 25(1) (¶ 221). Therefore, considering that, since the jurisdictional question was not "obvious", and that a decision on jurisdiction cannot be manifestly in excess of powers if "reasonable minds" may differ as to whether the tribunal does in fact have jurisdiction, the Committee did not find a manifest excess of power in the Tribunal's exercise of jurisdiction (¶ 222).

The Committee also considered TANESCO's submissions that the Tribunal's failure to apply Tanzanian law in relation to the validity of the assignment of the PPA was a manifest excess

[1] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 ('*ConocoPhillips v. Venezuela*').
[2] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No ARB/09/12, Award, October 14, 2016 ('*Pac Rim v. El Salvador*').

of power (¶¶ 284-285). However, the Committee was unconvinced by TANESCO's submissions on this issue, and instead found that the Tribunal had in fact applied Tanzanian law to decide the issue of the assignment under the PPA, and therefore the Tribunal had not exercised any manifest excess of powers (¶ 302).

Finally, the Committee evaluated the issue of the Tribunal's reconsideration of its Decision on Jurisdiction as a potential manifest excess of power (¶ 316), and referred back to its analysis on the Tribunal's power to reconsider the Decision on Jurisdiction (¶ 317), as discussed above at 3.2. The Committee determined that, because "reasonable minds" differ as to a Tribunal's power to reconsider a prior decision, the Tribunal's exercise of its power to reconsider cannot constitute a "manifest" excess of powers (¶ 323).

3.3.2 Serious Departure from a Fundamental Rule of Procedure

The Committee considered the ground of "serious departure from a fundamental rule of procedure", and noted that previous *ad hoc* committees have said that the departure from a rule must be serious, and the rule itself must be fundamental (¶ 387). In this context, the Committee found that the act of reconsideration is not a *per se* departure from rules of procedure (¶ 390).

Noting that TANESCO only alleged matters concerning the equal treatment of the parties, in regards to the Tribunal concluding that it had the power to reconsider, the Committee examined whether the Tribunal violated the parties' right to be heard, therefore committing a serious departure from a fundamental rule of procedure (¶ 392). Having heard the parties' submissions on this point, the Committee held that the Tribunal not only appropriately determined its power to reconsider, as explored previously, but the Tribunal also conducted a fair process which allowed the parties due opportunity to argue their positions (¶ 440).

The Committee also reviewed whether the Tribunal had properly allocated the burden of proof on the issue of SCB HK's knowledge of the relevant facts that justified the Tribunal's reconsideration of its decision (¶¶ 450-461). On this point, the Committee found that the burden was properly allocated to TANESCO, as it was TANESCO that was raising allegations as to SCB HK's knowledge of the facts (¶ 461). Ultimately, in light of the foregoing, the Committee determined that there was no "serious departure from a fundamental rule of procedure" (¶ 462).

3.3.3 Failure to State Reasons on which the Award is Based

The final ground for annulment argued by TANESCO, that of the failure to state reasons on which the Award is based, was considered by the Committee in seven (7) parts, labelled (a) through (g) (¶ 602).

(a) standard of the "failure to state reasons" ground

The Committee began by establishing the standard – that annulment will only occur on the basis of the "failure to state reasons" ground if, either, the Tribunal's failure to state reasons left the Decision lacking in rationale on a point that was necessary to the Decision, or if the Tribunal stated contradictory reasons that completely cancelled each other out, leaving the Award with "a total absence of reasons" (¶ 611). In reaching this conclusion, the Committee

relied on ICSID jurisprudence, in the form of *MINE v. Guinea*,[3] *Vivendi I*,[4] *Joseph C. Lemire v. Ukraine*,[5] *Soufraki v. UAE*,[6] and *Rumeli v. Kazakhstan*[7] (¶¶ 605-610).

Having established the standard for annulment, the Committee then considered the parties' submissions as to the various allegations that the Tribunal had failed to state reasons.

(b) the Tribunal's failure to state reasons on which the Award is based by holding on purely formalistic grounds that SCB HK had made an investment within Article 25(1) of the Convention

The Committee considered whether the Tribunal had met the above-stated standard in its evaluation of whether SCB HK had in fact satisfied the investment requirement in order to bring the dispute before the Tribunal in the first place (¶¶ 617-618). Indeed, the Committee found that the Tribunal had considered the investment requirement, and had even provided justifications for how the investment requirement was met (¶ 619). Further, the Committee found no contradictory reasons, and therefore did not view this aspect of the Tribunal's decision as having met the standard for annulment under the "failure to state reasons" ground (¶ 621).

(c) the Tribunal's failure to take into account additional and decisive evidence regarding the Parties' interest in the Escrow Account

Contrary to the submissions of TANESCO on this point, the Committee found that the Tribunal had quite clearly referred to the evidence in question, and had even explained the impact of the evidence over its decision (¶¶ 625-627). Therefore, the Committee did not view this aspect of the Tribunal's decision as having met the standard for annulment under the "failure to state reasons" ground (¶ 630).

(d) the Tribunal's failure to take into account the evidence presented by TANESCO on the continuing existence of the tariff dispute

On this point, the Committee found that although the Tribunal had perhaps failed to explain why it had reached its conclusion on TANESCO's settlement of the tariff dispute, this explanation was not essential to its determination on reconsideration (¶ 639). Therefore, the Committee did not view this aspect of the Tribunal's decision as having met the standard for annulment under the "failure to state reasons" ground (¶ 639).

(e) the Tribunal's failure to take into account contradictory evidence concerning SCB HK's knowledge of the status of the Escrow Account

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[3] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, December 14, 1989 ('*MINE v. Guinea*').
[4] *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 ('*Vivendi I*').
[5] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, July 8, 2013 ('*Joseph C. Lemire v. Ukraine*').
[6] *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 (Annulment Proceeding), Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, June 5, 2007 ('*Soufraki v. UAE*').
[7] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010 ('*Rumeli v. Kazakhstan*').

Here, the Committee found that the Tribunal had expressly addressed the question of SCB HK's knowledge over the escrow account, and had provided the reasoning for its determination that SCB HK had no knowledge of the status of the escrow account (¶ 643). Therefore, the Committee did not find that the Tribunal had failed to state the reasons for its decision (¶ 653).

(f) the Tribunal's reversal of its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement

The Committee considered TANESCO's submission on this point: that the Tribunal had premised its reconsideration of jurisdiction over the Facility Agreement on two previously established legal bases – (i) the existence of the settlement agreement between TANESCO and IPTL, and (ii) the status of the Escrow account – but failed to address other independent legal bases, and therefore failed to state reasons for the Award (¶¶ 654). The Committee ultimately disagreed (¶ 655).

Firstly, the Committee determined that the Tribunal had based its Decision on three other independent legal bases: (i) the potential appointment of a liquidator, (ii) the fact that the amounts being claimed by SCB HK for the discharge of IPTL's debts had not been put to the methods of proof normally undertaken prior to an order for payment, and (iii) the Tribunal's lack of jurisdiction to consider the Facility Agreement (¶ 663).

Having established the legal bases for the Committee's Decision, the Committee then considered whether these bases, or "reasons", were addressed when the Tribunal reconsidered its Decision (¶ 664). The Committee held that the Tribunal's statement that its reconsideration was based on (i) the existence of the Settlement Agreement, and (ii) the status of the Escrow Account, was not "completely independent" of the above reasons, such as the potential appointment of a liquidator, as these other legal bases originally led the Tribunal to limit its jurisdiction in the first place (¶ 668).

Although the Committee did find that, in the Award, the Tribunal did not address the lack of proof of the amount to be ordered, or its jurisdiction under the Facility Agreement, the Committee did not find the decision on these matters to be "essentially lacking in rationale" such that the Parties were deprived of the ability to follow the Tribunal's reasoning (¶ 670).

Therefore, the Committee determined that the Tribunal had not failed to state reasons for its reconsideration of its decision not to order payment under the Facility Agreement, and thus there was no ground for annulment in this context (¶ 671).

(g) the Tribunal's holding that the tariff must be calculated on the basis of an IRR of 22.31% which directly contradicted its earlier finding that this rate cannot apply

On this final part of the potential arguments for annulment under the ground of the failure to state reasons on which the Award is based, the Committee considered whether there was a contradictory determination by the Tribunal with regard to tariff rates, and found that no such contradictory reasoning was present in the Award (¶¶ 672-674).

In reaching its finding on this point, the Committee noted that the Tribunal had considered the possibility of using an IRR of 22.31%, but the Tribunal had stated that such a rate was initially inappropriate as "it had been calculated on the basis of paid up equity and not on the

basis of a shareholder loan" (¶ 681). Therefore, the Committee held that, because the Tribunal had considered the possibility of using the IRR of 22.31%, the fact that the Tribunal ultimately adjusted its conclusion on the tariff rate in order to find a balance between the inconsistent approaches of the parties in their arguments on the IRR (¶ 685) was not sufficient to form contradictory reasons in the Award, or that this contradiction would constitute a failure to state reasons (¶ 686).

4. Costs

Considering that neither the ICSID Convention nor the ICSID Arbitration Rules provide for any default costs allocation (¶ 755), the Committee evaluated the alternate approaches to costs taken by prior cases, finding that many Committees have ordered that either "each party should bear its own costs" or "costs follow the event" (¶ 756). As a result, the Committee decided that TANESCO would bear the entire costs, fees, and expenses of the Annulment Proceeding, but both parties would bear their own legal costs (¶ 757).