School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania (ICSID Case No. ARB/15/41) – Award – 11 October 2019

Case Report by: Patricia Zghibarta** Editor Ignacio Torterola***

Summary: The Claimant (Standard Chartered Bank (Hong Kong) Limited) brought an action against the United Republic of Tanzania pursuant to the Implementation Agreement between the Government of the United Republic of Tanzania and Independent Power Tanzania Limited. The Claimant alleged that the Respondent breached Articles 15 and 16 of the Implementation Agreements and, as a result, claimed that it was entitled to terminate the Implementation Agreement. The Tribunal found that Claimant was entitled to compensation pursuant to termination under the Implementation Agreement and awarded damages for the breaches of the Implementation Agreement carried out by Respondent.

Main Issues: expropriation, discrimination, failure to provide security, termination of agreement

Tribunal: Professor Lawrence Boo (President), Justice David Unterhalter SC (Arbitrator) and Dr Kamal Hossain (Arbitrator)

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

Respondent's Counsel: Dr Adelardus Kilangi, Dr Clement Mashamba (Attorney General's Chambers, Dar es Salaam), Mr Beredy Malegesi (Crax Law Partners, Dar es Salaam), Mr Richard Karumuna Rweyongeza (R.K. Rweyongeza & Co. Advocates, Dar es Salaam), Mr Galileo Pozzoli, Mr Mark Handley, Professor Tullio Treves, Ms. Luciana Ricart, Ms Irene Petrelli, Mr Renato Treves, Mr Valerio Salvatori (Curtis, Mallet-Prevost, Colt & Mosle LLP, London)

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Digest:

1. Relevant Facts

Standard Chartered Bank (Hong Kong) Limited ('SCB HK' or the 'Claimant') is a corporation registered under the laws of Hong Kong. The Respondent is the United Republic of Tanzania ('Tanzania' or the 'Respondent') (¶¶ 2-3). The underlying dispute arose out of the Implementation Agreement concluded between the Respondent and Independent Power Tanzania Limited ('IPTL').

IPTL is a company incorporated in Tanzania in 1994 as a joint venture between Mechmar Corporation (Malaysia) Berhad ('Mechmar'), a Malaysian company holding 70% of the shares, and VIP Engineering and Marketing Limited ('VIP'), a Tanzanian Company holding 30% of the company's shares. The main object of the company was to build, construct and operate a power plant for 20 years, on the basis of a Memorandum signed between Mechmar and the Tanzanian Ministry of Water Energy and Minerals (¶¶ 6-7).

In 1995, IPTL signed a Power Purchase Agreement ('PPA'), governed by Tanzanian Law and containing an ICSID arbitration clause, with Tanzania Electric Supply Company ('TANESCO'), under which it committed to construct, operate and maintain a facility for the generation, sale and delivery of electricity ('Facility') to TANESCO for an initial term of 20 years (¶ 9).

IPTL also signed an Implementation Agreement with the Government of Tanzania. The latter gave a series of undertakings to IPTL, including not to expropriate or discriminate, and granted IPTL exclusive rights of construction, ownership, operation and maintenance *inter alia*. The Agreement is governed by Tanzanian Law and includes an ICSID arbitration clause. In addition, Tanzania undertook to pay to IPTL any sums owed by TANESCO under the PPA should TANESCO failed to pay (¶¶ 10-11).

In 1997, IPTL obtained the majority of the required funds to design, build and operate the Facility from a loan provided by a consortium of Malaysian banks, assigning all its rights, titles and interest in and to the PPA and the Implementation Agreement to the banks' nominated Security Agent through a Security Deed (¶ 13). At the same time, Mechmar and VIP concluded a Shareholder Support Deed, undertaking *inter alia* not to sell or transfer shareholder's funds and not to take any action in relation to the winding up, liquidation or dissolution of IPTL. They also charged their shares to the Security Agent, undertaking not to exercise any rights in relation to the shares should an "Event of Default" occur. (¶¶14-15).

A year later, TANESCO initiated an ICSID arbitration against IPTL claiming it was entitled to terminate the PPA as a result of breaches by IPTL and requested a tariff adjustment. The Tribunal confirmed the validity of the PPA, found that some costs of the facility construction could not be recovered from tariff changes, and issued a financial model, which was to guide the parties on the method to calculate tariff payments under the PPA (¶¶19-20).

The construction costs which could not be recovered from the change of tariff later formed the basis of a dispute between VIP and Mechmar. VIP filed a petition with the Tanzanian courts

to wind up the IPTL, which the latter sought to stay and dismiss. Mechmar commenced LCIA arbitration proceedings. The LCIA Tribunal ordered the winding up petition to be discontinued by VIP. The High Court of Tanzania rejected Mechmar's application to enforce the LCIA Award (¶ 21).

In 2005, the Claimant acquired a loan and related security from the lender of ITPL, which succeeded the Malaysian banks – Danaharta Managers (L) Ltd) (¶¶16-18).

In 2008, IPTL sought to obtain an interpretation of the ICSID Award issued in 2001 but the proceedings were discontinued two years later. The Claimant sought to intervene in the proceedings but was unsuccessful. The Claimant submitted that this was caused by TANESCO and Respondent's actions, namely agreeing to purchase Mechmar's shares in exchange for latter's withdrawal from the proceedings. The Claimant filed two petitions to appoint an administrator to IPTL. The first was unsuccessful and the second was later withdrawn (¶ 24).

In 2010, the Claimant sough to recover sums from TANESCO under the PPA through ICSID proceedings. The Tribunal ordered TANESCO to pay to the Claimant USD 148.4 million plus interest. TANESCO's attempt to seek annulment of the Award was unsuccessful (¶¶ 27-28).

The same year, the Claimant succeeded in obtaining interim relief through Malaysian courts to prevent Mechmar from selling its shares in IPTL. Nevertheless, a month after the interlocutory injunction was issued, Mechmar informed the Claimant that the shares were sold to Piper Link Investments Ltd ('Piper Link'), which is incorporated in BVI (¶ 29). Proceedings then commenced in BVI, leading to an *ex parte* order that obliged Piper Link not to transfer or dispose of the Mechmar shares pending trial (¶ 30).

In 2011, the High Court of Tanzania ordered the winding up of IPTL and appointed a liquidator. The Claimant provided a proof of debt to the Liquidator. The Tanzanian Court of Appeal set aside the winding up order and appointed the initial liquidator as provisional liquidator (¶¶ 32-34).

In 2013, Utamwa J ordered the entire control of the Facility to be transferred from VIP to Pan Africa Power Solutions (T) Limited ('PAP'), which bought the 30% of share VIP held in ITPL (¶ 37).

Several months later, the Claimant obtained from the High Court of England and Wales the confirmation of the validity of Claimant's loan to IPTL and its security over the loan (¶¶ 41-42).

In 2013, PAP transferred Mechmar's 70 % of shares and VIP's 30 % of shares to itself and registered this with the Business Registrations and Licensing Agency of Tanzania (¶ 43). Later that year, the funds from the Escrow Account were transferred to PAP (¶ 46). The Account was formed on the basis of an Agreement between the Respondent, IPTL and the Bank of Tanzania and was to be paid into by the Respondent as fulfillment of the obligation to provide security (¶ 22). At the same time, the loan owed to the Claimant remained outstanding (¶ 48).

The Claimant brought an action for relief against the Respondent pursuant to the Implementation Agreement alleging Tanzania had breached, *inter alia,* Articles 15.3, 16.1 and 16.2 of the Implementation Agreement (expropriation, discrimination and failure to provide security), and that it was entitled to terminate the Agreement (¶¶ 49-50).

2. Procedural History

Claimant filed a Request for Arbitration on 15 September 2015, which was registered by ICSID on 30 September 2015. The Tribunal was constituted on 19 May 2016. It was composed of Prof Lawrence Boo Geok Seng, a national of Singapore, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Sir Stanley Burton, a national of the United Kingdom, appointed by the Claimant; and Dr Kamal Hossain, a national of Bangladesh, appointed by the Respondent. The Respondent filed its proposal for the disqualification of Sir Stanley Burton on the grounds that his appointment was inconsistent with the arbitration clause contained in Article 21.2 of the Implementation Agreement on 29 June 2016. The Tribunal consented to the resignation of Sir Stanley Burton, in accordance with ICSID Arbitration Rule 8(2) on 7 July 2016**.** The Claimant appointed Justice David Unterhalter SC, a national of South Africa, on 8 July 2016. The first session of the Tribunal was set for 5 August 2016. On 3 August 2016, the Tribunal rejected Respondent's request for adjournment. The Tribunal held its first session at the IDRC in London in absence of the counsel for the Respondent. (¶ II).

On 15 August 2016, the Respondent submitted an application for bifurcation. On 23 September 2016, the Tribunal held the hearing on bifurcation in London at the IDRC. On 11 October 2016, the Tribunal issued its decision not to bifurcate the proceedings. The Claimant filed its Memorial on the Merits on 16 December 2016. The Respondent filed its Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits on 26 June 2017. The Claimant filed its Counter-Memorial on Jurisdiction and Reply on the Merits on 10 November 2017. On 4 January 2018 the Tribunal granted the Respondent's requested time extension for filing its Rejoinder on Merits and Reply on Jurisdiction. The Respondent submitted the Rejoinder on 23 May 2018. The Claimant filed its Rejoinder on Jurisdiction on 2 July 2018. The President held a pre-hearing organizational meeting with the Parties by telephone conference on 4 July 2018. The Hearing on Jurisdiction and Merits was held, at the IDRC in London on 16-23 July 2018. (¶ II).

3. Jurisdiction

3.1 Respondent's Position

The Respondent raised the following main objections with regard to jurisdiction.

- First, it argued that the IPLT did not obtain Respondent's "prior written consent" or "prior written approval" to the assignments of IPLT's rights, which was a requirement under Articles 15.1 and 15.2 of the Implementation Agreement (¶ 58).
- Secondly, the Respondent considered that the Claimant did not comply with the requirements set out under Tanzanian Law and, as a result, could not be a valid statutory assignee (¶ 107).
- Finally, the Respondent argued that the Tribunal lacks jurisdiction *ratione personae* and *ratione materiae* under Article 25 of the ICSID Convention (¶ 176). In addition, the Respondent submitted that the Tribunal's lack of jurisdiction was reinforced by the fact that the Implementation Agreement refers to ICC as an alternative arbitral forum (¶ 247).

3.2. Claimant's Position

The Claimants' position regarding the objections to the Tribunal's jurisdiction:

- As to the first objection, the Claimant argued that a distinction must be made between Article 15.1, which prohibits assignment, and Article 15.2, which is an undertaking not to assign. The Claimant submitted that the countersigning of the Notice of Assignment to the Security Agent in 1997 by the Government of Tanzania constitutes an estoppel or a waiver of the requirement for prior written consent (¶ 68).
- The Claimant contested Respondent's construction of the Security Deed, as per the requirements of the *Judicature Act 1873.* In addition, the Claimant argued that the assignment of the Implementation Agreement did not require registration as per Section 79(2) of the *Companies Ordinance 1921*. The acquisition of the loan from Danaharta by SCB HK was also not in breach of Section 172 of the *Companies Ordinance 1921,* because the transfer fell outside the prohibition set out in Section 172 (¶ 165).
- As to the alleged lack of jurisdiction *ratione personae*, the Claimant submitted that it is a national of the People's Republic of China and brought the claim as an assignee of IPLT's rights under the Implementation Agreement (¶179). Further on, the Claimant rejected Respondent's position that the Tribunal should apply the *Salini Test* in determining whether the dispute arose out of an "Investment" and that a loan does constitute an investment under Article 25 of the ICSID Convention (¶¶ 188-189).

4. Liability

4.1. Claimant's Position

The Claimant argued that Respondent's actions were in breach of Article 16 of the Implementation Agreement, which provides protection form expropriation and discrimination, as well as failed to provide security under Article 15.3 of the Implementation Agreement. Further on, the Claimant submitted that it is entitled to claim compensation under Row 2 of the Schedule 2 of the Implementation Agreement without transferring the facility to the Respondent.

4.1.1 Expropriation claim under Article 16 of the Implementation Agreement

SCB HK based its claim on Article 16.1 of the Implementation Agreement, which prohibits the Government of Tanzania from certain actions, including expropriation or acquiring the Facility or the Company, and Article 16.2, which provides that neither the Government of Tanzania nor "TANESCO or any Governmental Authority" will "expropriate, compulsory acquire, nationalize, or otherwise compulsory procure any Ordinary Share Capital or asset of the Company" (¶¶ 254-255).

The Claimant submitted that the Tribunal should consider the term "expropriation" under the Implementation Agreement, as it brought the claim under that Agreement and not under domestic legislation (¶ 257). The meaning of the term should be based on international investment law (¶ 256), does not necessarily result in a benefit for the State, and may take place through acts performed by the judiciary (¶ 259), distinguishing expropriation from the denial of justice standard (¶ 260). The Claimant based its claim on the contractual provisions of the Implementation Agreement, which provide that the Respondent undertakes not to expropriate the share capital or asset of the IPLT, not on the provisions of a BIT.

4.1.2 Discrimination claim under Article 16.1 of the Implementation Agreement

The Claimant submitted that the Respondent favored Pan African Power Solutions (T) Limited and VIP Engineering and Marketing Limited, which are Tanzanian entities, over Mechmar, which is the IPTL majority shareholder, and the Claimant, as IPTL's lender and secured creditor. At the same time, the Respondent was claimed to have discriminated IPTL when it was controlled by foreign entities as compared to when it came under Tanzanian control. The Claimant argued that the Respondent's actions affected the Claimant's interests under the Security Package (¶¶ 382-383).

4.1.3 Failure to provide security under Article 15.3 of the Implementation Agreement

The Claimant argued that the Power Purchase Agreement from 1995 between IPTL and TANESCO required the latter to reinstate the full amount of security in case it was drawn within 30 days. If TANESCO failed to do that, it was Respondent's responsibility. The Claimant submitted that the Respondent failed to provide security and breached Article 15.3 of the Implementation Agreement, after not paying at the request of the Claimant (¶¶ 443-444).

4.1.4 Termination of the Agreement

The Claimant argued that Respondent's actions amounted to "Events of Default" under Article 19.1 of the Implementation Agreement. As a result, the Claimant was entitled to terminate the Agreement (¶¶ 449-451).

4.2 Respondent's position

4.2.1 Expropriation claim under Article 16 of the Implementation Agreement

The Responded submitted that Article 16.2 of the Implementation Agreement should be interpreted in light of Tanzanian law, which limits the notion of "expropriation" to "lawful expropriation" only and does not acknowledge judicial expropriation, contrary to Claimants argument (¶ 262). The Respondent argued that a direct taking of the Facility or an acquisition of shares by the Government of Tanzania should have taken place in order to amount to expropriation, none of which occurred (¶ 266). The Respondent disagreed with Claimant's proposition that international law is applicable and submitted that ignoring Tanzanian law would be a ground for annulment (¶ 268).

4.2.2 Discrimination claim under Article 16.1 of the Implementation Agreement

The Respondent argued that only IPTL and not the Claimant is entitled to bring a claim under Article 16.1 of the Implementation Agreement, that alleged discrimination must take place between companies with similar projects. Further on, discriminatory behavior should result in Government's actions not in any Governmental authority, there is no discriminatory intent or evidence that the alleged acts resulted in material and adverse effects on IPTL (¶ 384).

4.2.3 Failure to provide security under Article 15.3 of the Implementation Agreement

The Respondent submitted that there was no obligation to reinstate the money into the Escrow Account because the funds were withdrawn under Article 6.8 of the Power Purchase

Agreement and not Article 6.6. Even if Claimant's allegation was true, the Claimant would be entitled only to a declaratory judgment (¶¶ 445-446).

4.2.4 Termination of the Agreement

The Respondent argued that the Claimant cannot ask for termination as it is not a party to the Implementation Agreement, Respondent's acts do not constitute "Event of Default", that the Claimant did not perform the necessary steps to terminate the Implementation Agreement, such as notice provisions. Even if the Claimant satisfied such requirement, the Respondent submitted that the Claimant had to transfer the Facility to the Respondent (¶¶ 452).

5. Tribunal's analysis

5.1. Jurisdiction

The Tribunal held the following:

- With regard to the first objection, the signing of the Notice of Assignment by the Ministry of Water, Energy and Minerals, a subsequent letter from the Ministry of Finance addressed to IPTL, and a Diplomatic note from the Tanzanian Ministry of Foreign Affairs to the Malaysian Ministry of Foreign Affairs constituted a clear consent to the assignment (¶¶ 96-97) and a waiver of any lack of prior written consent (¶ 99).
- The Tribunal rejected Respondent's view that the assignment was not absolute but one by way of charge, which means the assignment complied with Section 25(6) of the *Judicature Act 1873* (¶¶ 120-125), and that notice was not given by the Security Agent in a formal Notice of Assignment of the Implementation Agreement (¶ 128). It further found that no requirement for registration of the assignment applied and that there was no breach of Section 172 of the *Companies Ordinance 1921* (¶¶ 170-171). As a result, SCB HK could pursue the claim against the Respondent in its own name (¶ 175).
- The Tribunal found unquestionable the fact that the Claimant is a "National of another Contracting State" under the ICSID Convention, as it is a Chinese entity, entitled to bring a claim in its own name (¶¶ 182-184). Further on, it was satisfied that the Claimant was exposed to the investment risk by acquiring the loan (¶ 230), made a substantial contribution to the Project and the Respondent (¶ 235), did not intend a transitory holding of the loan portfolio (¶¶ 238-239), and satisfied the element of contribution to economic development of the Respondent (¶246). The Tribunal also rejected Respondent's assertion that the provision pertaining to the ICC in the Implementation Agreement supports the argument that the Tribunal lacks jurisdiction (¶ 250).

5.2 Expropriation claim under Article 16 of the Implementation Agreement

The Tribunal found that Article 16 of the Implementation Agreement is consistent with Tanzanian law (¶ 274). Further on, the Tribunal noted that the meaning of the term "expropriation" in Article 16 of the Implementation Agreement was a general one and embedded both direct and indirect expropriation (¶ 275). The Tribunal agreed with the Claimant that there was no requirement that the Respondent benefit directly from the expropriation and that it would suffice for the Claimant to show that Respondent's actions had a substantial impact on Claimant's enjoyment of rights or that the Claimant could not control or access the economic use of the investment it had made (¶ 277).

The Tribunal rejected Respondent's argument that judicial expropriation is outside the realms of Tanzanian legislation (¶ 278). While mere erroneous judgments may not amount to expropriation, the decision which allow other branches of the State to deprive an investor of its property/property rights can amount to expropriation. Finally, expropriation may occur even if there is no denial of justice (¶ 279).

The Tribunal also agreed with the Claimant that its claim arouse out of the Implementation Agreement, which prohibits expropriation or acquisition of the Facility or IPTL. Claimants rights were not merely security rights but rather property rights (¶ 283).

Having examined each of the steps that the Claimant suggested had individually or collectively violated the prohibition against expropriation, the Tribunal found the following:

- The actions and inactions of the Tanzanian courts regarding Claimant's attempt to revive the first ICSID Award through Interpretation Proceedings did not lead to expropriation (¶ 320).
- The transaction of sale of Mechmar's IPTL shares (amounting to 70% of IPTL shares) did not involve the Respondent and do not breach Article 16 of the Implementation Agreement (¶ 342).
- The order issued by Utamwa J on Winding up Petition brought by VIP (holding 30% shares of IPTL) against IPTL was qualified by the Tribunal as "an egregious error amounting to abject failure of justice", which deprived SCB HK of its right to control IPTL and its interest in the investment (¶¶ 352-353).
- The release of the Escrow Account, performed with Respondent's knowledge in an attempt to withdraw from guarantees offered to the IPTL, deprived the Claimant and of its right to control the IPTL and the economic benefits of its investment (¶380).

As a result, the Respondent breached Article 16.2 of the Implementation Agreement (¶380).

5.3 Discrimination claim under Article 16.1 of the Implementation Agreement

The Tribunal found that the Claimant, in its capacity of assignee and lender, was entitled to seek protection from discrimination under Article 16.1 of the Implementation Agreement (¶ 390). The Tribunal also highlighted that other Tribunals have not considered intent as an essential element of discrimination (¶407) nor it is required under Article 16.1 of the Implementation Agreement (¶408). The Tribunal found the Respondent ignored the interests of IPTL in favor of Pan African Power Solutions (T) Limited by "aiding and abetting the release of the funds in the Escrow Account" to the latter. As a result, the Respondent's actions were qualified as discriminatory and with an adverse effect on the enjoyment of Claimant's rights (¶441).

5.4 Claim under Article 15.3 of the Implementation Agreement: failure to provide security

Based on Tribunal's previous findings that the release of the Escrow Account amounted to expropriation and discriminatory action, the Tribunal found the Respondent in breach of Article 15.3 of the Implementation Agreement as well (¶448).

5.5 Termination

The Tribunal noted that it would suffice for the Claimant to show that an "Event of Default" occurred to have the right to terminate the Implementation Agreement (¶463). The Tribunal also rejected Respondent's arguments and concluded that the Claimant followed all the procedural steps in the process of termination of the Implementation Agreement (¶464). The Tribunal found that the Respondent's failure to reinstate the money withdrawn from the Escrow Account and TANESCO's failure to make payments and to observe the Power Purchase Agreement between IPTL and TANESCO are material breaches of the Implementation Agreement and are to be considered as "Event of Default". As a result, the Claimant was entitled to terminate the Implementation Agreement (¶¶ 465-466).

6. Costs

The Tribunal ordered the United Republic of Tanzania to bear its own legal costs and expenses and made no order on the reimbursement of the advances made by Standard Chartered Bank (Hong Kong) Limited towards the cost of ICSID and the fees and expenses of the Tribunal (¶ 543).