

ICSID TRIBUNAL RECONSIDERS AWARD AFTER MISLEADING BY PARTY

Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited (TANESCO) ICSID Case No. ARB/10/20

Introduction

In a decision dated 12 September 2016, an ICSID Tribunal reconsidered the decision it had made earlier in the case on the basis that the Respondent had misled the Tribunal as to material facts at the time of making the earlier award.

Background

The dispute between the parties arose out of a Power Purchase Agreement dated May 26, 1995 (the “PPA”), entered into by Tanzania Electric Supply Company Limited (“TANESCO”, an entity wholly owned by the United Republic of Tanzania), the Respondent in the proceedings, and Independent Power Tanzania Limited (“IPTL”). The Claimant was Standard Chartered Bank (Hong Kong) Limited.

The Claimant brought its claim in its capacity of Security Agent as assignee of IPTL’s rights, further to the occurrence of an event of default under IPTL’s loan. The Claimant requested, inter alia, a declaration that TANESCO owed it outstanding payments under the PPA in the sum of US\$ 258.7 million or alternatively a declaration that TANESCO owed it a sum sufficient to discharge the Claimant’s loan to IPTL in full, and an order to pay US\$ 138 million to discharge its loan or alternatively to pay the amount under the PPA.

In its Decision on Jurisdiction and Liability of February 12, 2014, the Tribunal determined that it did have jurisdiction over the Parties and the dispute, but lacked jurisdiction over the relationship between SCB HK and IPTL which arose under a separate Facility Agreement. As to liability, the Tribunal ordered the parties to attempt to agree on the tariff recalculation, the amount recoverable for bonus and the amount recoverable for payments made to IPTL’s Provisional Liquidator; however, the parties were unable to agree.

Following the submission of further documents by the parties, on 21 May 2015 the Respondent introduced a request for a preliminary ruling on the issue of reconsideration of the Tribunal’s jurisdiction – this request was reiterated on 2 July 2015, and rejected by the Tribunal on 3 July 2015 on the basis that it would be addressed at the hearing in August 2015.

The Claimant’s position was that the Tribunal should reconsider its conclusions on jurisdiction and confirm that the Tribunal had jurisdiction to make an order for payment in favour of SCB HK, on the basis that the Decision was influenced by TANESCO’s fraudulent misrepresentation to the Tribunal and/or does not have res judicata effect in any event. The Respondent objected to the Tribunal’s Decision being reopened because it was final regarding the issues decided therein and thus res judicata, and even if such power was available, it was not triggered by the reasons asserted by the Claimant.

Decision

The Tribunal (Prof. Donald McRae (President), Prof. Zachary Douglas QC and Prof. Brigitte Stern) found that it had jurisdiction to reopen its Decision of February 12, 2014 (that it would not make an order for payment of any amount owed by TANESCO to the Claimant) and decided that in addition to making a declaration of the amount owing by TANESCO to the Claimant, it will also make an order for payment of that amount. It also made further findings as to recalculation of the tariff under the PPA, and other declarations.

At the outset, the Tribunal noted that there was nothing in either the ICSID Convention or the Arbitration Rules dealing explicitly with the question of reconsideration of a decision. While Articles 51 and 52 dealt with reconsideration of awards (the former relates to the revision of an award in the light of “the discovery of some fact of such a nature as to decisively affect the award” and the latter to an application for the annulment of an award), there were no equivalent provisions for decisions. There was little arbitral jurisprudence on this question.

The starting point for the Tribunal was the relationship under the ICSID Convention and Arbitration Rules between a decision of a tribunal and an award of a tribunal and whether a decision partakes of at least one characteristic of an award – that it is *res judicata*. The Tribunal stated that it was too broad to say that all decisions of ICSID tribunals were *res judicata*, and that saying a decision was binding on the parties was not the same thing as saying it was *res judicata*.

Although there was no specific power to reconsider under the Convention, the question was whether in the absence of a specific power the right of the tribunal to determine its own competence was limited. Exercising such a power in limited circumstances (to be guided by the limitations on reopening that apply to awards) would have practical advantages, not least on efficiency grounds.

In the present case, the allegation was that the Tribunal reached its decision without knowledge of material facts which had been deliberately withheld by one of the Parties, and that with the knowledge of those facts the Tribunal might have reached a different decision. In the view of the Tribunal, such an allegation if proved would justify reopening its decision – as a matter of fact, the Tribunal found that it had been misled and reconsidered its award.

1st November 2016