

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

STANDARD CHARTERED BANK (HONG KONG) LIMITED

v.

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED

ICSID Case No. ARB/10/20

ANNULMENT PROCEEDING

DECISION ON APPLICANT'S REQUEST FOR A CONTINUED
STAY ON ENFORCEMENT OF THE AWARD

Members of the *ad hoc* Committee

Claus von Wobeser, President

Christoph Schreuer, Member

Bertha Cooper-Rousseau, Member

Secretary of the *ad hoc* Committee

Aurélia Antonietti

Date of dispatch to Parties: 12 April 2017

Table of Contents

I. Procedural Background..... 1

II. The Position of the Parties on the Stay Request..... 3

A. Applicant 3

B. Respondent on Annulment..... 7

III. The Committee’s Analysis..... 15

IV. Decision..... 27

I. PROCEDURAL BACKGROUND

1. On 6 January 2017, Tanzania Electric Supply Company Limited (the “**Applicant**,” “**Respondent**” or “**TANESCO**”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**”) an application for annulment (the “**Application**”) of the award rendered on 12 September 2016 in *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)* (ICSID Case No. ARB/10/20) (the “**Award**”). The Application was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”).
2. Under Article 52(5) of the ICSID Convention and Rule 54(2) of the Arbitration Rules, the Application contained a request for a stay on enforcement of the Award (“**Stay Request**”), concerning the amount of US\$148.4 million and interest in favor of Standard Chartered Bank (Hong Kong) Limited (the “**Respondent on Annulment**,” “**SCB HK**” or “**Claimant**”).¹
3. On 13 January 2017, the Secretary-General registered the Application and provisionally granted the stay on enforcement of the Award.
4. On 10 February 2017, in accordance with Arbitration Rule 52(2), the Secretary-General notified the “**Parties**” (together the Applicant and the Respondent on Annulment) that an *ad hoc* Committee (the “**Committee**”) had been constituted, composed of Claus von Wobeser (Mexican) as President, Christoph Schreuer (Austrian) and Bertha Cooper-Rousseau (Bahamian) as Members. The

¹ The Tribunal ordered as follows at section E. 9.:

“E. Order for Payment.

9. The Tribunal orders that TANESCO pay to SCB HK the amount of US\$148.4 million with simple interest at three month LIBOR plus 4% from September 30, 2015 until the date of this Award. Interest shall continue at the same rate until full payment is received.”

annulment proceeding was deemed to have begun on such date. The Parties were also informed that Aurélia Antonietti, Senior Legal Adviser, ICSID, would serve as Secretary of the Committee.

5. On 25 February 2017, the Committee asked the Parties to indicate whether they would agree to a procedure whereby: (i) the 30-day deadline (set for 13 March 2017) under Rule 54(2) be extended for an additional period of 30 days in order for the Committee to rule on the continuance of the stay; (ii) the stay would remain in effect within that extended period; (iii) the Parties would file one round of submissions conferring among themselves to determine the dates for them; and (iv) the First Session would be held in London on 29 March 2017 to discuss both procedural aspects and the continuation of the stay.
6. On 28 February 2017, the ICSID Secretariat transmitted to the Committee the communications whereby the Parties reached an agreement on the timetable for the proceeding, as follows: on 10 March 2017, TANESCO to file its submission in support of the continuation of the stay; on 21 March 2017, SCB HK to file its response; and on 29 March 2017 an in-person Hearing to take place in London. The Parties further agreed that the 30-day deadline be extended for an additional period of 30 days in order for the Committee to rule on the continuance of the stay, the stay remaining in effect within this period.
7. On 3 March 2017, upon the Committee’s proposal and with the agreement of the Parties, an in-person Hearing (the “**First Session**”) was rescheduled for 30 March 2017.
8. On 10 March 2017, the Applicant filed its Submission in Support of a continuation of the provisional stay (“**Stay Submission**”) and Annexes 27-42.
9. On 21 March 2017, SCB HK filed its Reply to the Applicant’s Stay Submission (“**Stay Reply**”), including exhibits LE-1 to LE-12 and Exhibits-001 to 060.

10. The First Session took place on 30 March 2017. The Parties and the Committee Members discussed the draft Procedural Order No. 1 and the Stay Submission and Reply. The Parties agreed that the decision on the Stay Request would be rendered separately to Procedural Order No. 1.
11. On 3 April 2017, TANESCO informed the Committee that it had appointed Clyde & Co as co-counsel, although they had already appeared as counsel for TANESCO at the First Session.
12. On 3 April 2017, the Committee issued Procedural Order No. 1.

II. THE POSITION OF THE PARTIES ON THE STAY REQUEST

A. APPLICANT

13. The Applicant requests the continuation of the stay on enforcement of the Award until a decision is rendered by the Committee on the Application. TANESCO claims that “*continuation of the provisional stay on enforcement has become standard practice in ICSID annulment proceedings.*”²
14. The Applicant brings forward the following arguments: (i) the balance of both Parties’ interests supports the maintenance of the stay; (ii) a lift of a stay would expose TANESCO to an irreparable harm deriving from double payment; (iii) a lift of the stay could also entail unjustified multiple recovery for SCB HK; and (iv) the existence of serious grounds for annulment also clearly supports the maintenance of the stay. The Committee will briefly address each of these arguments below.
15. First, the Applicant contends that the balance of both Parties’ interests supports the maintenance of the stay. The Applicant argues that in deciding on whether

² Stay Application, para 11.

to maintain or terminate the stay on enforcement of an award, an *ad hoc* committee should take into consideration adverse economic consequences on either party and the balance of both parties' interests.³

16. The Applicant argues that SCB HK cannot show any prejudice if the Committee decides to continue the stay pending the outcome of the annulment proceedings, because if SCB HK is correct then interest would have been accruing on the Award.
17. The Applicant argues that if SCB HK is incorrect, and the stay is lifted, the company will pursue the enforcement proceedings of the Award which it has already commenced before the High Court of Tanzania and possibly in other jurisdictions, and TANESCO will suffer great and irreparable harm. In addition, the Applicant argues that the fact that enforcement proceedings in Tanzania have been stayed as recently as 27 February 2017 by consent of all parties to those proceedings (including SCB HK) pending the determination of the Application before the Committee, and confirmed in an Order of Munisi J, further supports TANESCO's position on the continuance of the stay on enforcement of the Award under the ICSID Convention. The Applicant argues that having agreed to the stay in the Tanzanian courts, there is no basis for SCB HK to insist that the stay on enforcement of the Award be lifted by the Committee.⁴

³ Stay Submission, para 8, FN 9: "**Annex-27**, *MINE v. Government of Guinea*, ICSID Case No. ARB/84/4 (Annulment Proceeding), Interim Order No. 1, *Guinea's Application for Stay on Enforcement of the Award*, dated 12 August 1988, 5(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 129 (Spring 1990), ¶ 28 ('Having reviewed the circumstances of the case, the Committee is of the view that termination of the stay at this time would impose hardships on Guinea whose interests would be severely affected.');

Annex-28, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay on Enforcement of the Award, dated 7 October 2008, ¶ 26 ('Article 52(5) . . . is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.'). See also **Annex-29**, *Victor Pey Casado and Foundation 'Presidente Allende' v. Republic of Chile*, ICSID Case No. ARB/98/2 (Annulment Proceeding), Decision on the Republic of Chile's Application for a Stay on Enforcement of the Award, dated 5 May 2010, ¶ 28."

⁴ Stay Submission, para 10.

18. The Applicant further argues that should the Committee confirm the Award, there is no element that would suggest a default by TANESCO in its payment obligations.
19. In addition, the Applicant argues that if the stay is lifted, TANESCO would be exposed to a risk of double payment, potentially jeopardizing the supply of electricity by Independent Power Tanzania Limited (“IPTL”) under the Power Purchase Agreement dated 26 May 1995 (the “PPA”) with TANESCO. In fact, TANESCO states that should “*the Capacity Payment*” payable pursuant to clause 5.1(a) of the PPA be paid into court, as requested by SCB HK in local enforcement proceedings, the same could not be paid to IPTL, which is currently performing its obligations under the PPA. Furthermore, it argues that TANESCO could still be forced to litigate enforcement proceedings in Tanzania and elsewhere while the Application is pending and SCB HK could obtain multiple recovery.⁵
20. Second, the Applicant states that a lift of the stay would expose TANESCO to an irreparable harm. If SCB HK is allowed to enforce the Award ordering TANESCO to pay tariffs, TANESCO would be exposed to a risk of double payment, since: (i) it has already paid tariffs totaling more than US\$120 million to IPTL; (ii) it has been and still is paying additional tariffs under the PPA to IPTL from October 2013 onwards to date; (iii) any additional payments diverted from IPTL would cause irreparable harm, leaving millions of Tanzanian residents without electricity; and (iv) SCB HK would recover sums exceeding from four to twelve times the amount of its original alleged investment.⁶

⁵ Stay Submission, para 13.

⁶ Stay submission, para 19.

21. Third, the Applicant argues that a lift of the stay would also entail unjustified multiple recovery for SCB HK. TANESCO refers to two proceedings which currently risk SCB HK being granted undue multiple recovery.
22. The first case referred to by the Applicant is before the High Court of England and Wales, in which SCB HK claims sums under the Loan Facility Agreement (dated 28 June 1997) against IPTL and current and previous shareholders. On 16 November 2016, Mr. Justice Flaux, rendered his judgment (the “**Flaux J Judgment**”) in favor of SCB HK, awarding US\$168,800,063.87.⁷ The Applicant states that on 9 February 2017, Mr. Justice Sehel registered the Flaux J Judgment and ordered that IPTL pay the sum to SCB HK.⁸ The Applicant further argues that should this Committee allow SCB HK to pursue enforcement of the Award, SCB HK would have the opportunity to recover the amount of the Flaux Judgment plus the sum allegedly due for tariffs which were meant to repay the debt under the Loan Facility Agreement under the Award.
23. The second set of proceedings, referred to by the Applicant, is the ICSID arbitration initiated against the United Republic of Tanzania, as the purported assignee of IPTL under the Implementation Agreement dated 8 June 1995 signed with IPTL. The Applicant argues that the claims are ultimately linked to the tariffs under the PPA and that SCB HK is claiming an additional amount of US\$616,475,658 in that proceeding.⁹
24. Fourth, the Applicant argues that the existence of serious grounds for annulment also clearly supports the maintenance of the stay and that other committees have established that a request for continuation of a stay can be denied only if it is obvious that the application is “*without any basis under the*

⁷ Stay Submission para 21, Annex 17.

⁸ Stay Submission para 21, Annex 39.

⁹ Stay Submission, para 24, Annex 38.

[ICSID] Convention” and is purely “dilatatory” in nature, which is not the case in this proceeding.¹⁰

B. RESPONDENT ON ANNULMENT

25. The Respondent on Annulment opposes the Stay Request, stating mainly the following arguments: (i) TANESCO has no automatic right to a continuation of the stay; (ii) termination of the stay on enforcement would not cause severe prejudice to TANESCO; (iii) SCB HK would suffer severe prejudice if the provisional stay on enforcement remains in place; (iv) if the stay is continued, it should be made conditional upon the provision of security; (v) there is no risk of multiple recovery by SCB HK and no risk of non-recoupment from SCB HK in the event that the award is annulled; and (vi) the merits of TANESCO’s application for annulment are irrelevant to the question of whether a stay should be granted. In addition, SCB HK gives a brief background to the dispute to provide context to its submissions.
26. First, the Respondent on Annulment opposes TANESCO’s assertions that, absent unusual circumstances, the granting of a stay on enforcement pending the outcome of the annulment proceedings has “*become almost automatic*,” arguing that such statement is inconsistent with the provisions of the ICSID Convention (Article 52(5)), Arbitration Rules (Rule 54(4)) and established ICSID jurisprudence, which confirm that there is no presumption in favor of a continuation of the provisional stay on enforcement.¹¹ As a result, SCB HK sustains that TANESCO has no automatic right to a continuation of the provisional stay on enforcement, and must prove that circumstances exist which require the stay to be maintained until the final decision on annulment is rendered, which in its view TANESCO has failed to do.

¹⁰ Stay Submission, para 28, FN 56.

¹¹ Stay Reply, paras 10-17.

27. The Respondent on Annulment argues that SCB HK consented to the stay in the Tanzanian courts because, with enforcement of the Award stayed provisionally pursuant to Article 52(5) of the ICSID Convention, it was not possible for SCB HK to pursue its enforcement and conservatory measures applications in the Tanzanian courts. However, if the stay is lifted by the Committee, SCB HK will seek to lift the stay in Tanzania.¹²
28. Second, the Respondent on Annulment argues that termination of the stay on enforcement would not cause severe prejudice to TANESCO for the following reasons.
29. The Respondent on Annulment argues that TANESCO is seeking to rely upon its own wrongs in order to persuade the Committee to continue the stay on enforcement of the Award for the following reasons: (i) TANESCO was told repeatedly by SCB HK, and ultimately by the ICISD Tribunal which rendered the Award in relation to disputes under the PPA (the “**PPA Tribunal**”), that payment to anyone other than SCB HK would not discharge TANESCO’s obligation to pay SCB HK under the PPA and thus could not be used to reduce the amount that TANESCO owes SCB HK; and (ii) TANESCO was aware from 2013 onwards that Pan Africa Power Solutions (T) Limited (“**PAP**”) had usurped SCB HK’s interest in IPTL. Nonetheless, it procured the release of the funds in the “**Escrow Account**” (into which TANESCO and the Government of Tanzania (“**GoT**”) made payments due under the PPA) and made further payments to PAP-controlled IPTL.
30. SCB HK explains that TANESCO’s characterization of the harm it will suffer is confused and contradictory because TANESCO’s position in its Stay Submission on whether it would be able to pay the Award, and the impact that payment of the Award would have on it, is unclear. On the one hand,

¹² Stay Reply, para 17.

TANESCO states that “*there is no evidence that TANESCO would not have the means of paying the Award, should the Committee not annul it.*”¹³ On the other, TANESCO states that if the stay on enforcement is lifted: “*TANESCO would be put under considerable financial stress, which would risk undermining its ability to fulfill its obligations vis-à-vis IPTL and its other contractual counterparties with the possible consequence that IPTL would no longer be in a position to supply electricity to TANESCO under the PPA, therefore leaving millions of Tanzanian residents without electricity.*”¹⁴

31. The Respondent on Annulment argues that, in any event, the inability to pay is not a circumstance justifying a stay any more than it would justify non-payment of any award. It further argues that “[*t*]he relevant test for hardship was set out by the Committee in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea: whether termination of the stay (or the granting of security) would have catastrophic, immediate and irreversible consequences for the award debtor's ability to conduct its affairs.*”¹⁵ The Respondent on Annulment argues that TANESCO has provided no evidence that payment of the Award would result in the inability of TANESCO to fulfil its obligations or affect the provision of electricity to the citizens of Tanzania.¹⁶

32. Third, the Respondent on Annulment argues that SCB HK would suffer severe prejudice if the provisional stay on enforcement remains in place, as it has not received any payments of the sums due to it for the last ten years, whether pursuant to the Loan Facility Agreement or the PPA.

33. SCB HK argues that not only will TANESCO seek to delay payment of the Award, there is also a substantial risk that TANESCO will not comply with the Award, causing SCB HK to suffer severe prejudice. SCB HK argues that its

¹³ Stay Reply, para 105.

¹⁴ Stay Reply, para 105.

¹⁵ Stay Reply, para 114.

¹⁶ Stay Reply, para 114.

belief is well-founded because of TANESCO's previous actions to delay and prevent resolution of the various disputes in relation to the power plant at Tegeta, Dar es Salaam, Tanzania.¹⁷

34. The Respondent on Annulment notes that numerous committees have held that the risk of noncompliance by an applicant on annulment with the award is a relevant circumstance in deciding whether to continue the stay on enforcement, or to order security.¹⁸
35. It is SCB HK's case that the risk of non-compliance by TANESCO justifies the lifting of the stay, referring to the reasoning by the committee in *OI European Group B.V. v. Bolivarian Republic of Venezuela*: “the risk of noncompliance by the Applicant with the Award is a relevant circumstance in deciding on the Applicant's request for the continuation of the stay on enforcement.”¹⁹
36. The Respondent on Annulment argues that, in the present case, there is a clear and substantial risk that TANESCO will not comply with the Award in the event that it is not annulled. This party further argues that TANESCO's conduct shows it has no regard for the ICSID process, and cannot be trusted to comply with the Award voluntarily or promptly if the Annulment Application is rejected. The Respondent on Annulment argues that TANESCO has: (i) conspired with PAP and the GoT to dissipate the Escrow Account, held at the Bank of Tanzania, which should have provided security against payment of the Award; (ii) misled the PPA Tribunal; (iii) is seeking through the Application and Stay Request to avoid its obligations to SCB HK as determined in the Award; (iv) made every effort over the last seven years to delay the resolution of this dispute; and that (v) following the Award, TANESCO sought to resist

¹⁷ Stay Reply, paras 121-151.

¹⁸ Stay Reply, para 152, FN 145.

¹⁹ Stay Reply, para 153, FN 146.

recognition and enforcement in the Tanzanian Courts, before filing the Application.²⁰

37. Fourth, the Respondent on Annulment argues that if the stay is continued, it should be made conditional upon provision of security.²¹ SCB HK argues that annulment committees have consistently found that if there is an objective risk that the applicant on annulment will not honor its commitments, security may be appropriate to provide assurance that they will comply with the award if it is ultimately upheld. Further, this party states that the Committee should follow the approach advocated by the committee in *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, where the key test applied was: whether there is “sufficient doubt” that the applicant on annulment will comply with the award. It is SCB HK's case that the test of “sufficient doubt” has been satisfied in the present case.²²
38. The Respondent on Annulment argues that “asset stripping” has already occurred through the raiding of the Escrow Account and that TANESCO was complicit in such act. This party further explains that it is unclear from the Stay Submission whether TANESCO will be able to pay the Award. The Respondent on Annulment argues that there is in fact a clear and substantial risk that TANESCO will not comply with the Award in the event that it is not annulled and that TANESCO's actions show that it cannot be trusted to respect or comply with the Award. SCB HK's position is that, given TANESCO's previous conduct, the approach taken by the committee in *Repsol YPF Ecuador, S.A. v. Petroecuador* is appropriate: “the practice of requiring a bond was correct in order to prevent a party from applying for an annulment for the purposes of delaying or extending the enforcement date for the arbitral award.”²³

²⁰ Stay Reply, paras 121-151.

²¹ Stay Reply, paras 159-167.

²² Stay Reply, paras 155-169.

²³ Stay Reply, para 166, FN 153.

39. The Respondent on Annulment argues that if the Committee decides that the provisional stay on enforcement may be continued, it should subject it to the condition that TANESCO provides security. In arguing this point, SCB HK explains that given the way in which the previous security (the Escrow Account) was dissipated with the complicity of TANESCO, GoT, and the Bank of Tanzania, any such security should be held outside Tanzania. SCB HK requests that in such circumstances: *“the continuation of the stay should be conditional upon the provision by TANESCO of an unconditional and irrevocable bank guarantee or security bond for the full amount of the Award rendered against it, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond. The unconditional and irrevocable bank guarantee or security bond should be issued by a first-tier reputable international credit institution (outside of Tanzania and with no principal establishment or branch in Tanzania) and to be immediately payable to or cashable by SCB HK upon the issuance of a decision by the Committee rejecting annulment, or if the annulment proceedings are withdrawn or discontinued.”*²⁴
40. SCB HK argues that the money deposited by TANESCO and GoT in the Escrow Account should have been available as security for the amounts due to SCB HK pursuant to the PPA and that the provision of security will merely restore SCB HK to the position which should still be in place had the Escrow Account not been dissipated. SCB HK argues this point by explaining that although previous annulment committees have taken differing views in relation to the issue of betterment, the preferable view is that: (i) the granting of security in the form of a guarantee does not constitute betterment if it can be considered that the award debtor will voluntarily comply with its obligations under Article 53 of the ICSID Convention to abide by and comply with the terms of the award; and (ii) the posting of a guarantee is an appropriate counterbalance to

²⁴ Stay Reply, para 199, (ii).

the negative effect of the stay on the award creditor, in particular where there is a risk of non-compliance with the award.

41. Fifth, the Respondent on Annulment argues that there is no risk of multiple recovery by SCB HK and no risk of non-recoupment from SCB HK in the event that the award is annulled, because SCB HK is not seeking to recover anything more than is due to it under the loan and it has an obligation to account to IPTL for any balance recovered above the amount due under the loan.²⁵
42. The Respondent on Annulment argues that given the PPA Tribunal's findings in the Award, exchange rate movements, and the increase in the amount outstanding under the loan due to IPTL's continued default, the amount outstanding under the loan is now over US\$168 million, and the Award is only for US\$148 million (plus interest). As such, it argues that now the Award will not discharge the loan in full and that SCB HK will only recover the loan if: (i) the Award is paid in full by TANESCO; and (ii) further sums are recovered under other proceedings.²⁶
43. SCB HK argues that its claim in the English High Court pursuant to the loan was brought not in an attempt to recover more than SCB HK is entitled to under the loan, but to counter the arguments made in Tanzania for a number of years concerning the validity of the assignment of the loan. Moreover, it argues that it is not clear whether SCB HK will be able to enforce the Flaux J Judgment against IPTL, as the "**PAC Report**" (a report by the Tanzanian Public Accounts Committee on 17 November 2014) confirms that once the US\$120 million contained in the Escrow Account was paid to PAP, some US\$75 million was paid to VIP Engineering & Marketing Limited, IPTL's minority shareholder, following which it "*started to be distributed to private individuals*" and that

²⁵ Stay Reply, paras 177-189.

²⁶ Stay Reply, paras 177-184.

*“[a]mong the money paid to individuals, there are the names of political leaders, religious leaders, judges and other government officials.”*²⁷

44. Further, SCB HK argues, with respect to the Implementation Agreement claim, that it is claiming damages for GoT's actions with respect to the release of the Escrow Account funds, among other things, and that if it recovers in excess of the amount of its loan, it will account for the balance as appropriate.
45. Finally, the Respondent on Annulment argues that there is no risk of non-recoupment from SCB HK in the event that the Award is annulled. It explains that SCB HK is a bank with substantial assets, and with profit in the year ended 31 December 2016 of HK\$7,929 million (approx. US\$1 billion). It further notes that it is also a subsidiary of Standard Chartered Bank, a global financial institution with offices and branches all over the world, including in Tanzania. It further argues that annulment committees have previously held that, in the case of large multinational claimant companies, the risk of non-recoupment of an award is not a relevant factor, referring to *CDC Group Plc v. Republic of the Seychelles*.²⁸
46. The Respondent on Annulment argues that annulment committees have recognized that the *prima facie* grounds for annulment are not relevant to whether an applicant on annulment is entitled to a stay.²⁹

²⁷ Stay Reply, para 183.

²⁸ Stay Reply, para 188.

²⁹ Stay Reply, para 192: “As noted by the committee in *Sempra Energy International v Argentine Republic* (citing the passages relied upon by TANESCO in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v The Republic of Chile* and *CMS Gas Transmission Company v Argentine Republic*): ‘Previous *ad hoc* committees have consistently rejected the proposition that a preliminary assessment of the prospects of the application for annulment should be a factor influencing the Committee’s decision whether a stay should be granted or not.’”

III. THE COMMITTEE’S ANALYSIS

47. In light of the Parties’ positions set out above, there are three main issues to be addressed by the Committee. First, whether the stay on the enforcement of the Award should be maintained pending a decision on the Application (**Section III.1**). Second, if the Committee decides to maintain the stay on the enforcement of the Award, whether the ordering of such stay should be made subject to conditions (**Section III.2**). Third, if the Committee decides to impose conditions on the granting of the stay, what are the conditions that it should impose on the granting of the stay (**Section III.3**).

III.1 THE GRANTING OF THE STAY ON ENFORCEMENT OF THE AWARD

48. The first issue to be considered is whether the stay on enforcement of the Award should be maintained pending a decision on the Application. First, the Committee will address the legal standard for the continuation of the stay (**III.1.1**) and then comment on the factors relevant for issuing this decision of the stay on enforcement of the Award (**III.1.2**).

III.1.1 LEGAL STANDARD FOR THE CONTINUATION OF THE STAY

49. ICSID Convention Article 52(5) stipulates that: *“The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay on enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.”*³⁰
50. The use of the phrase: *“if it [the committee] considers that the circumstances so require,”* rather than the formulation *“so permit,”* indicates the necessity for the committee to positively establish circumstances prone to justify the requested

³⁰ ICSID Convention, April 2006, Article 52(5), pp. 26-27.

stay on enforcement. The use of the word “*may*” indicates that it is a matter within the discretion of the committee whether or not to stay enforcement of the award pending its decision on an application for annulment.

51. Although not bound by prior decisions in other ICSID cases, the Committee has taken note of, and given consideration to, the existing cases on the grant of stays under Article 52(5) of the ICSID Convention referred to by both sides in their submissions, as well as to the arguments and legal authorities referred to during the First Session. The Committee considers that in the present case, it is not necessary to deal extensively with the reasoning of prior decisions on requests to stay the enforcement of awards. Each decision has been based on a different set of factual circumstances from the ones at issue, and consideration of whether to grant a stay must be dependent upon the particular circumstances of the present case.
52. In consideration of the previous, it is the view of the Committee that it is empowered to exercise its discretion as to whether or not to continue the stay on the enforcement of the Award pending its decision on the Application.³¹
53. Article 52(5) does not indicate that one particular party bears the burden of establishing circumstances requiring a stay. It rather seems that establishing the existence of such circumstances is part of the Committee’s discretionary power, and that Article 54(4) of the Arbitration Rules require the applicant to specify the circumstances requiring the stay.
54. In the opinion of the Committee from an interpretation of the ICSID Convention and Arbitration Rules, it is for the award debtor to advance grounds (supported as necessary by evidence) for the stay. If the award creditor

³¹ See further *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25 – Annulment proceeding, Decision on Stay of Enforcement of the Award, 4 April 2016, LE-2.

disputes these grounds, it must also advance evidence in support of any “positive allegations” that it makes. As clearly expressed in *Libananco Holdings Co. Limited v. Republic of Turkey*: “The exercise of the discretion of the Committee depends on the circumstances surrounding the Stay Request ... and the Committee considers that its decision should be based on an assessment of all relevant circumstances.”³²

55. According to the above, the Committee must establish the existence of circumstances sufficient to justify the stay, taking into consideration the allegations submitted by the Parties. The Committee’s discretion is to be exercised in consideration of the circumstances of the present case - a specific, fact-driven decision.

56. Committees have taken into account several factors when assessing whether to grant a stay on enforcement depending on all relevant circumstances, including the risk of non-recovery of sums due under the award if the award is annulled, non-compliance with the award if the award is not annulled, adverse economic consequences on either party and the balance of both parties’ interests, among others.³³

III.1.2. FACTORS RELEVANT FOR THIS DECISION ON THE GRANTING OF A STAY ON ENFORCEMENT

57. The following is not intended to provide an exhaustive list of all the circumstances that may be deemed of relevance by committees to rule upon requests for stay on enforcement. Rather, in line with the facts-based approach

³² Stay Reply, FN 8: “*LE-1*, *Libananco Holdings Co. Limited v Republic of Turkey*, *ICSID Case No. ARB/06/8*, *Decision on Applicant's Request for Continued Stay on Enforcement of the Award*, 7 May 2012, at [43], footnote referencing *Pey Casado v Republic of Chile* omitted.”

³³ Updated Background Paper on Annulment for the Administrative Council of ICSID, up to 5 May 2016.

provided in Article 52(5) of the ICSID Convention, it aims at addressing some relevant and duly established factors raised by the Parties in the case at hand.

58. In deciding on whether to maintain or terminate the stay on enforcement, the Committee will take into consideration the adverse economic consequences on either party and the balance of the Parties' interests should the stay be granted or lifted. The Parties have pleaded the following factors:
- a. strength of the case for or against annulment;
 - b. risk of non-compliance with the Award and prospect of enforcement if the Award is upheld; and
 - c. possible irreparable injury to the award debtor in the case of immediate enforcement: (i) hardship if the stay is lifted; and (ii) problems with recovering payment if the award is later annulled.

(A) STRENGTH OF THE CASE FOR OR AGAINST ANNULMENT

59. The Applicant argues that the existence of serious grounds for annulment also clearly supports the maintenance of the stay and that other committees have established that a request for continuation of a stay can be denied only if it is obvious that the application is "*without any basis under the Convention*" and is purely "*dilatory*" in nature, which is not the case in these proceedings.³⁴
60. The Committee does not consider appropriate at this time to evaluate whether there is a strong case for or against annulment in deciding on the Stay Request. The Committee is guided by the reasoning expressed by annulment committees, which have recognized that the *prima facie* grounds for annulment are not relevant to whether an applicant on annulment is entitled to a stay.³⁵

³⁴ Stay Submission, para 28.

³⁵ Stay Reply, para 190-196: "*As noted by the committee in Sempra Energy International v Argentine Republic (citing the passages relied upon by TANESCO in MTD Equity Sdn. Bhd. and MTD Chile S.A. v The Republic of Chile and CMS Gas Transmission Company v Argentine Republic): 'Previous ad hoc committees have consistently rejected the proposition that a preliminary assessment of the prospects of the*

61. TANESCO has exercised its right to apply for annulment contemplated under the ICSID Convention, and as such it has a legitimate right to request that the stay is continued, until the final decision is rendered by the Committee. There is no reason to consider that in this particular case the institution of the annulment proceedings was purely dilatory in nature.

(B) RISK OF NON-COMPLIANCE WITH THE AWARD AND PROSPECT OF ENFORCEMENT IF THE AWARD IS UPHELD

62. The approach advocated by the committees in *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile* and *CMS Gas Transmission Company v. Argentine Republic* and *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic* is followed by the Committee in the present case. The key test is whether there is sufficient doubt that the applicant on annulment will comply with the award, if upheld.³⁶
63. It is SCB HK's case that the test of “*sufficient doubt*” has been satisfied in the present case. The Committee hereby will consider whether this test is met.
64. First, the Committee gives weight to the fact that in its Stay Submission, TANESCO's position on whether it would be able to pay the Award is unclear. On the one hand, TANESCO states that “*there is no evidence that TANESCO would not have the means of paying the Award, should the Committee not annul it.*”³⁷ On the other, TANESCO states that if the stay on enforcement is lifted: “*TANESCO would be put under considerable financial stress, which would risk undermining its ability to fulfill its obligations vis-à-vis IPTL and its other contractual counterparties with the possible consequence that IPTL would no longer be in a position*

application for annulment should be a factor influencing the Committee's decision whether a stay should be granted or not.”

³⁶ Stay Reply, paras 160-162.

³⁷ Stay Submission, para 12.

to supply electricity to TANESCO under the PPA, therefore leaving millions of Tanzanian residents without electricity.”³⁸

65. If TANESCO's position is that payment of the Award would put it under considerable financial stress which would risk undermining its ability to pay its contractual counterparties, then there must be a risk that TANESCO will be unable to pay the Award – particularly if payment is further delayed and the amount due increases as interest continues to accrue.
66. Further, TANESCO has indicated that should “*the Capacity Payment*” (payable pursuant to clause 5.1(a) of the PPA) be paid into court, as requested by SCB HK in local enforcement proceedings, the same could not be paid to IPTL, which is currently performing its obligations under the PPA. The former would jeopardize the supply of electricity by IPTL.³⁹
67. From the above assertions, the Committee considers that in the present case, there is a substantial risk that TANESCO will not comply with the Award in the event that it is not annulled. Additionally, the Committee notes that in the present Application, there are serious allegations made by SCB HK that TANESCO has conspired with PAP and the GoT to dissipate the Escrow Account, held at the Bank of Tanzania, which should have provided security against payment of the Award and that TANESCO has misled the PPA Tribunal,⁴⁰ which if confirmed, would raise the risk of non-enforcement of the Award.
68. Also, the conduct of TANESCO, following the issuance of the Award, gives an indication as to its possible reluctance to comply. TANESCO sought to resist recognition and enforcement in the Tanzanian Courts before filing the Application, arguing that “*the amount involved is colossal*” and that complying

³⁸ Stay Submission, para 18.

³⁹ Stay Submission, para 13.

⁴⁰ Stay Reply, paras 121-151.

with the Award would “*affect the operations of the applicant while pending the determination of the intended application for stay of execution before the ICSID Tribunal and intended application for annulment are heard and determined.*”⁴¹

(C) RISK OF POSSIBLE IRREPARABLE INJURY TO THE AWARD DEBTOR IN THE CASE OF IMMEDIATE ENFORCEMENT

(i) *Hardship if the stay is lifted*

69. The Committee is guided by the following test for hardship set out by the committee in *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*: whether termination of the stay (or the granting of security) would have catastrophic, immediate and irreversible consequences for the award debtor's ability to conduct its affairs.⁴²
70. It is likely that if the stay is lifted, SCB HK will pursue the enforcement proceedings of the Award which it has already commenced before the High Court of Tanzania and possibly in other jurisdictions.⁴³ Although enforcement proceedings in Tanzania have been stayed as recently as 27 February 2017 by consent of all parties to those proceedings (including SCB HK) pending determination of the Application before the Committee, SCB HK has expressed that it would request that such stay be lifted if there is no stay granted in the current annulment proceeding.⁴⁴

⁴¹ Stay Reply, para 134, FN 135, Exhibit-051 Miscellaneous Civil Application No. 686 of 2016, Affidavit of Isdor Paul Nkindi, para 10.

⁴² Stay Reply, para 114, FN 118. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 - Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, Annex-28 (“*Enron v. Argentina*”).

⁴³ Stay Submission, para 10.

⁴⁴ Stay Reply, para 17.

71. Thus, TANESCO could still be forced to litigate enforcement proceedings in Tanzania while the Application is pending.⁴⁵

72. A lift of the stay would not entail unjustified multiple recovery for SCB HK. SCB HK has stated that it is not seeking to recover anything more than is due to it under the loan and that it has an obligation to account to IPTL for any balance recovered above the amount due under the loan.⁴⁶

(ii) Problems with recovering payment if the Award is later annulled

73. The Committee considers that in the present case, the risk of non-recoupment of the Award is not a relevant factor given that a company is involved, as noted by the committee in *CDC Group Plc v. Republic of the Seychelles*.⁴⁷ In the present case, SCB HK is a bank with substantial assets, and which has stated it had a profit in the year ended 31 December 2016 of HK\$7,929 million (approx. US\$1 billion). It is also a subsidiary of Standard Chartered Bank, a global financial institution with offices and branches all over the world, including in Tanzania. Thus, there are no elements on record to sustain the risk of non-recoupment. The press record submitted by TANESCO during the First Session does not prove otherwise.⁴⁸

III.2 IMPOSING CONDITIONS ON THE GRANTING OF THE STAY ON THE ENFORCEMENT OF THE AWARD

74. The second issue to be considered is whether conditions should be imposed on the granting of the stay. The Parties disagree on whether the Committee has the discretionary power to condition the stay.

⁴⁵ Stay Submission, para 13.

⁴⁶ Stay Reply, paras 177-189.

⁴⁷ Stay Reply, para 188.

⁴⁸ TANESCO's Hearing Bundle, Tab. 14.

75. As a starting point, the Committee notes that the terms of the ICSID Convention are the source of the Committee’s power to modify or grant a stay. The question whether the Committee can make a stay conditional on the provision of security is a matter of interpretation of the ICSID Convention. In conducting such interpretation, the Committee is guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).
76. In line with the interpretation carried out in *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*,⁴⁹ under Article 31.1 of the VCLT, the Committee notes that the ICSID Convention is silent on the question whether or not an *ad hoc* committee can make a stay conditional on the provision of security. The Committee does not view that silence as meaning that the power does not exist. That discretionary power to allow or deny such remedy may implicitly include a power to allow the remedy subject to conditions. This interpretation is consistent with the object and purpose of Article 52(5), which is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.
77. According to Article 31.3(b) of the VCLT, “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*” shall also be considered. The Committee has not been made aware that an ICSID Contracting State has expressed concern in any forum that the decisions issued by a committee conditioning the stay exceeds the *ad hoc* committee’s power under Article 52(5).
78. As for Article 32 of VCLT, the Committee also turns to supplementary means of interpretation in order to confirm the meaning of Article 52(5).
79. First, regarding the preparatory work of the ICSID Convention, TANESCO argues that the Preliminary Draft of the ICSID Convention provided for *ad hoc*

⁴⁹ *Enron v. Argentina*, Annex-28.

committees to have a power to recommend any provisional measures necessary for the protection of the rights of the parties in connection with a stay of enforcement, but that power did not appear in later drafts of the ICSID Convention.⁵⁰ The Committee finds that it is not clear why the power to recommend provisional measures was omitted nor why the ICSID Convention differs from the New York Convention in this regard. The Committee notes that Arbitration Rule 53 appears to be broad enough to confer on an *ad hoc* committee the power to recommend provisional measures contained in Arbitration Rule 39.

80. In view of this, Article 52(5) must be given a broader, rather than a narrower, interpretation since the *ad hoc* committee has the power to balance the rights of the parties pending the annulment proceeding.
81. Second, as regards previous ICSID decisions: *“There have been a total of 43 requests for a stay of enforcement in the 90 registered annulments, 41 of which have led to Committee decisions. Thirty-six decisions granted the stay of enforcement. In 22 of those instances where a stay was granted it was conditioned upon the issuance of some type of security or written undertaking. In 11 of those 22 cases, the stay was terminated because the condition had not been satisfied.”*⁵¹
82. The Committee considers that although not bound by these decisions, weight must be given to the fact that a sizeable group of committees have ordered stays conditional on the provision of security.
83. As regards to doctrine, the Committee has not been referred to any doctrine expressing the view that there is no power under Article 52(5) to make a stay

⁵⁰ Transcript, 30 March 2017, pp. 140-141.

⁵¹ Updated Background Paper on Annulment for the Administrative Council of ICSID, up to 5 May 2016.

conditional on security. On the contrary, the Committee has been referred to doctrine affirming the existence of this power.⁵²

84. Further, the obligation that each State assumed on ratification of the Convention, under Article 53, to comply with awards against it is particularly important. This obligation is as important as the right to pursue annulment under Article 52 of the ICSID Convention. These two articles are linked together.
85. Having regard to all these matters, the Committee finds that, under Article 52(5) of the ICSID Convention, it may make the continuation of the stay on enforcement conditional.
86. In the present case, the Committee considers it necessary to grant the stay on enforcement of the Award, given that there is a possible risk that prior to the decision on annulment, TANESCO may suffer considerable financial stress, which could risk undermining its ability to continue fulfilling its obligations *vis-à-vis* IPTL and its other contractual counterparties with the possible consequence that IPTL would no longer be in a position to supply electricity to TANESCO under the PPA, leaving millions of Tanzanian residents without electricity. Notwithstanding the former, these assertions have also led the Committee to decide to condition such a stay. Given TANESCO's own assertions that it would be in considerable financial stress should the Award be enforced, this raises a valid concern on the part of SCB HK that there is uncertainty as to TANESCO's ability and willingness to fulfill the Award. By conditioning the stay, Claimant's right of enforcement shall also be protected, in order to balance the interest of the Parties.

⁵² Hearing Bundle, Exhibit 17, Christoph H. Schreuer *et al.*, *The ICSID Convention, A Commentary*, Second Edition, p. 1081.

87. The Committee rejects the argument that security constitutes betterment.⁵³ The lifting of the provisional stay or imposition of a guarantee are not punishments: the parties have a procedural right guaranteed by the ICSID Convention that allows them to request the annulment of an award, but this right cannot operate against the presumption of validity of awards rendered under the ICSID Convention. Therefore, the Committee is convinced that the stay on enforcement shall be conditioned as detailed below.

III.3. CONDITIONS TO BE IMPOSED ON THE GRANTING OF THE STAY ON THE ENFORCEMENT OF THE AWARD

88. In light of the facts, the Committee decides that: The provisional stay on enforcement of the Award is extended until such time as the Committee determines, on the condition that TANESCO provides, within 30 days of the decision of the Committee, an unconditional and irrevocable bank guarantee or security bond issued by a first-tier reputable international credit institution (outside of Tanzania and with no principal establishment branch in Tanzania) for the full amount of the Award rendered against TANESCO, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond, and immediately payable to or cashable by SCB HK upon the issuance of a final decision of the Committee rejecting the annulment, or if the annulment proceedings are withdrawn or discontinued. In the event that TANESCO declines to issue such guarantee and informs the Secretary-General of ICSID within 30 calendar days following the notification of this Decision, the stay on enforcement shall be automatically terminated. In the case that the

⁵³ Transcript, 30 March 2017, p.166. See further Stay Reply, para 172: “...in *Sempra Energy International v Argentine Republic*: ‘the Committee considers that the appropriate comparison is not with a scenario where the award debtor would not comply with its obligation under Article 53 (where a guarantee would obviously be “better”), but with one where the debtor would comply. In such case the guarantee would not place the award creditor in a better situation...Although not relevant for the comparison, if there is a risk that the award debtor – whether a State party or a foreign investor – would not comply with its obligation under Article 53, the safeguard inherent in provision of a guarantee would be fully warranted.’”

Committee annuls the Award, the bank guarantee or security bond granted will be released.

IV. DECISION

89. The Committee decides to continue the stay on enforcement of the Award pending a decision on the Application and subject to the conditions set out above in numeral III.3.
90. If the conditions set out above are not complied with, the stay on enforcement shall be automatically terminated.

[Signed]

On behalf of the *ad hoc* Committee
Dr. Claus von Wobeser
President of the *ad hoc* Committee
Date: 12 April 2017