South Sudan Faced with Debt Restructuring Dispute at ICSID

By:

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South Sudan - Africa's latest independent country[1] – is facing its second ICSID claim[2] brought by Qatar National Bank, a Qatari State-owned entity ("SOE"). It was reported that the dispute is related to default by the BSS (which is the Central Bank of South Sudan) on the payment of a US$ 700 million loan it borrowed during the civil war. It was during the civil war that Qatar National Bank sought to establish a presence as the first middle eastern Bank in the country.

Qatar National Bank was sufficiently confident to invest in the newly independent country. A press release at the time of the inauguration of its branch office in Juba in 2011 highlighted that "South Sudan holds strong economic potential and is expected to develop rapidly. Key factors among these areas are infrastructure development projects and the overall elevation of GDP per capita through the promotion of international trade and commerce by the government".

The banking dispute is brought against the backdrop of the oil sector. The attractive upstream oil industry is set to have played a major role in attracting investors, as South Sudan has one of the largest reserves of crude oil in sub-Saharan Africa. However, its exploitation is conditioned on cooperation with Sudan. The geopolitical situation in times of conflict with Sudan jeopardizes the nation's economy. South Sudan is on the UN list of Least Developed Countries. Pursuant to an Oil Agreement entered into in September 2012, South Sudan agreed to resume production in its oil fields, with the oil being transferred into Sudan via cross-border pipelines for refining.

In 2012, in the midst of a dispute with Sudan, which halted oil production and prompted an internal crisis, Qatar National Bank loaned South Sudan US$ 250 million. Notably, in 2012 South Sudan joined the ICSID Convention. That same year, South Sudan defended its first ICSID dispute against Sudanese SOE Sudapet [3] concerning the exploration and production of hydrocarbons, key components of crude oil and natural gas.

In the case reviewed in this alert, the line of credit was allegedly dedicated to funding food and fuel purchases following the sharp decrease in oil production due to civil disturbance. It was further reported that the Bank provided additional funds to South Sudan, to counter the side-effects of its dependency on the oil sector. In May 2015, the Bank of South Sudan defaulted on payment obligations it had assumed in connection with the line of credit provided by Qatar National Bank.

The Qatari Bank and the South Sudanese central bank entered into a debt restructuring agreement on 3 February 2016 for the repayment of Bank South Sudan's outstanding obligations. Further loans were provided in 2018, accompanied by a Facility Agreement to reschedule the repayment over a period of 15 years starting in 2019. When South Sudan defaulted once again on the payment, Qatar National Bank filed the ICSID claim under the Facility Agreement.

Although banking disputes in ISDS have seen an exponential trend, difficulties may arise as the debt restructuring investment arbitration case law is not settled.[4] Another challenge on the jurisdictional front for the claimant would be that the Bank of Sudan is not designated by South Sudan at ICSID. This is

the first case among 24 concluded and 18 pending ICSID cases in the banking sector, whereby a Bank is named as a respondent.[5]

Qatar National Bank retained the services of the London office of Withers. Based on its previous experience as Respondent, one may expect South Sudan to appoint outside counsels. The ICSID website mentions as Respondent's representatives South Sudan's Minister of Finance and Economic Planning, the Ministry of Justice and the Governor of the Bank of South Sudan.

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[1] South Sudan gained independence in 2011 following its secession from Sudan.

[2] *Qatar National Bank (Q.P.S.C.) v. Republic of South Sudan and Bank of South Sudan*, ICSID Case No. ARB/20/40.

[3] *Sudapet Company Limited v. Republic of South Sudan*, ICSID Case No. ARB/12/26.

[4] *See*, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic) , Dissenting Opinion George Abi-Saab, 28 October 2011; *see also,* Po?štová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8 commented by A. MITSOU (2016) Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders, 33 J. Int'l Arb. 687, accessible at : https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0033&div=58&id=&page=
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[5] In United Agencies Limited SA v. People's Democratic Republic of Algeria (ICSID Case No. ARB/20/1) the Algerian Bank appears in representation for the State but is not a respondent.

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