Definitive Greenlight for Vedanta to Pursue Arbitration Against Zambia in Mining Dispute

By:

Munia El Harti Alonso

December 3, 2020

A week ago, the Zambian Court of Appeal issued an order to halt the liquidation of the public limited company Konkola Copper Mines ("KCM"). The liquidation proceedings were attempted by State Owned Entity ZCCM Investments Holdings, a successor company to Zambia Consolidated Copper Mines Limited (ZCCM Ltd). Zambia is already defending an ICSID claim in the mining sector filed this summer by Kansanshi Mining Plc. [1]

Vedanta the claimant in the arbitration is a "London listed diversified global natural resources major. The group produces aluminum, copper, zinc, lead, silver, iron ore, oil & gas and commercial energy. Vedanta has operations in India, Zambia, Namibia, South Africa, Ireland, Liberia, Australia and Sri Lanka". [2] The company already pursued a claim against India in 2015 based on the India-UK BIT, [3] enforced in September 2020.

Vedanta invested more than USD 3 Billion in KCM in 2008, holding a majority 79.4% share in KCM against 20% for ZCCM. The mining sector in Zambia has undergone several reforms, with mines in the Zambian Copper belt initially owned by Anglo American Corporation and Roan Selection Trust, nationalized in the 70's, and privatized again in the 2000s.

In the dispute, ZCCM has alleged a breach of environmental regulations and the mining license, as well as mismanagement of KCM, one of the largest mine producers in Africa. ZCCM started the court liquidation proceedings in Zambia back in May 2019 before the Lusaka High Court. Vedanta responded with an appeal in the Zambian Courts and a successful anti-suit injunction in the South African Courts, already allowing it to proceed to arbitration[4]. Vedanta filed the injunction in South Africa because the UNCITRAL Arbitration has its seat in Johannesburg.

To add another layer of complexity, Vedanta is involved in a mass claim against the company in the UK regarding environmental law breaches.[5] A mass class of Zambian citizens had already unsuccessfully litigated against KCM in the Zambian courts previously.[6] In April 2019 the Supreme Court allowed claimants to proceed against Vedanta, finding a duty of care of Vedanta to those affected by its subsidiary, KCM.[7] In view of other decisions from the English courts that found liability against KCM,[8] it is clear that the *Lungowe* case will go forward in the pending merits phase of the proceedings. The UK decisions against Vedanta are set to play an important role in Zambia's defense in the ICSID setting. The states strategy[9] in light of the emergence of human rights in ISDS,[10] may encompass the possibility of a counterclaim as was seen in *Urbaser*,[11] or damages against the investor alike of the *Burlington* finding.[12]

The arbitration that is likely to proceed in the upcoming months, will "consist of a sole arbitrator (the "Tribunal") and the appointing authority shall be the Secretary General of the permanent Court of Arbitration at The Hague. The place of arbitration shall be Johannesburg and the language of the arbitration shall be English".[13]

The halting of the liquidation is set to thwart the Zambian government plans to

replace Vedanta and open KCM to other investors. However Zambia has not uttered its last word, as ZCCM plans to appeal the ruling halting the liquidation.

Vedanta was represented before the Courts by Mulenga Mundashi and Corpus Legal Practitioners and Norton Rose Fulbright. Counsel for ZCCM is not known. Vedanta has instructed Norton Rose Fulbright as well in the arbitration proceedings, while ZCCM is retained Clyde & Co.

---

[1] *Kansanshi Mining Plc v. Republic of Zambia* (ICSID Case No. ARB/20/17); see also, *Zambia. Gunvor SA v. The Government of the Republic of Zambia* (Ministry of Mines, Energy and Water Development) PCA Case No. 2017-19.

[2] Vedanta official website, accessible at : https://www.vedantaresources.com/Pages/Home.aspx.

[3] Notice of Claim, 27 March 2015, accessible at : https://www.italaw.com/sites/default/files/case-documents/italaw8775.pdf.

[4] Vedanta Resources Holding Limited v ZCCM Investment Holdings Plc and Lungu, Milingo, South African High Court Decision of 24 July 2019.

[5] *Lungowe and others v. Vedanta Plc and KCM Plc* [2016] EWHC 975 (TCC)

[6] *Nyasulu and 2,000 others v. KCM*.

[7] *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20.

[8] *U & M Mining Zambia Ltd v. Konkola Copper Mines Plc* [2014] EWHC 2146 (Comm); [2014] EWHC 2374 (Comm); and [2014] EWHC 3250 (Comm).

[9] ICSID Practice Notes for Respondents in ICSID Arbitration, accessible at : https://icsid.worldbank.org/sites/default/files/Practice%20Notes%20for%20Respondents%2%20Final.pdf

[10] *See,* The Hague Rules on Business and Human Rights Arbitration, launched in 2019.

[11] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, whereby the tribunal dismissed a right to water enshrined in international law. However the tribunal hinted that if it was a negative obligation such as a human rights violation, the claim could have prevailed, paras 1210 and 1220; *see also*, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award. dated 18 September 2018, finding prima facie jurisdiction on the counter-claim, para 742 and highlighting that a counterclaim is a claim per se that has to conform to the procedural requirements of Art.21 of the UNCITRAL Arbitration Rules, paras 745-747.

[12] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), Decision on Counterclaims, 7 February 2017, para 1075; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019, para 1023.

[13] Arbitration clause 26.1. of the Shareholders Agreement concluded between Vedanta and ZCCM.

View online: Definitive Greenlight for Vedanta to Pursue Arbitration Against Zambia in Mining Dispute

Provided by Afronomicslaw