

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

STANDARD CHARTERED BANK (HONG KONG) LIMITED

Claimant

and

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED
(TANESCO)

Respondent

ICSID Case No. ARB/10/20

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal
Prof. Donald McRae, President
Prof. Zachary Douglas, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

Date of dispatch to the Parties: February 12, 2014

REPRESENTATION OF THE PARTIES

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(Hong Kong) Limited:

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Mr. Dominic Kennelly
Ms. Elizabeth Kantor
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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Addendum No. 1	Addendum No. 1 to the PPA dated June 9, 1995 (Exh. C-39/R-2)
Calculations and Forecasting Agreement	Calculations and Forecasting Agreement in relation to the Tegeta Power Project dated June 28, 1997 (Exh. C-208)
Capacity Payment	The Capacity Payment is reimbursement for the cost of capital in the construction of the plant, <i>i.e.</i> the loans, the taxes to be paid and the dividends on equity.
Cl. Mem.	Claimant's Memorial of February 3, 2012
Cl. PHB	Claimant's Post-Hearing Brief of February 19, 2013
Cl. Rep.	Claimant's Reply of November 7, 2012
Danaharta	Danaharta Managers (L) Limited, a company incorporated in Malaysia and set up by the Malaysian Government to purchase loans from financial institutions in distress
Deed of Assignment	Deed executed by Danaharta on August 17, 2005 further to the SPA (Exh. C-56/R-114)
GoT	Government of Tanzania
ICSID 1 award	Award dated July 12, 2001, issued in ICSID Case No. ARB/98/8, <i>TANESCO v. IPTL</i> (Exh. C-10/R-8)
ICSID 1 tribunal	Tribunal constituted in ICSID Case No. ARB/98/8, <i>TANESCO v. IPTL</i>
ICSID award model	Financial model in Appendix F to the ICSID 1 award
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Implementation Agreement	Implementation Agreement dated June 8, 1995, entered into between IPTL and the GoT (Exh. C-28/R-90)
Implementation Model	The 2002 financial model used by IPTL to prepare and submit invoices to TANESCO on an ongoing basis (Exh. R-44)
IPTL	Independent Power Tanzania Limited
IRR	Internal Rate of Return
[CLA] [RLA]	Legal Authority [Claimant] [Respondent]

Loan Agreement (also Facility Agreement)	Loan Facility Agreement entered into on June 28, 1997 by IPTL and a consortium of Malaysian banks (Exh. C-11/R-47)
LPA	Law of Property Act 1925 (CLA-62)
Mechmar	Mechmar Corporation (Malaysia) Berhad
PAP	Pan Africa Power Solutions (T) Limited
PPA	Power Purchase Agreement dated May 26, 1995, entered into by IPTL and TANESCO (Exh. C-4/R-1)
Promoters/Shareholders Agreement	Agreement dated September 28, 1994, entered into by Mechmar and VIP (Exh. C-48/R-45)
Reference Tariff	The Reference Tariff is the amount payable by TANESCO under the PPA calculated initially in Appendix B to the PPA and then recalculated in the ICSID award model and the Implementation Model.
Resp. CM	Respondent's Counter-Memorial of August 24, 2012
Resp. PHB	Respondent's Post-Hearing Brief of February 19, 2013
Resp. Rej.	Respondent's Rejoinder of November 21, 2012
RfA	Request for Arbitration of September 15, 2010
SCB	Standard Chartered Bank
SCB HK or Claimant	Standard Chartered Bank (Hong Kong) Limited
SCJA	Supreme Court of Judicature Act 1873 (CLA-64)
Security Deed	Security Deed dated June 28, 1997, entered into by IPTL and a Security Agent (Exh. C-16/R-68)
Share Pledge Agreement	Share Pledge Agreement dated June 28, 1997, entered into by Mechmar and VIP with the Security Agent (Exh. C-18)
Shareholder Support Deed	Share Pledge Agreement dated June 28, 1997, entered into by Mechmar, VIP and IPTL with the Security Agent (Exh. C-40)
SPA	Sale and Purchase Agreement dated August 4, 2005, entered into between SCB HK and Danaharta (Exh. C-55/R-15)
TANESCO or Respondent	Tanzania Electric Supply Company Limited
TANESCO's Memorial on Jurisdiction	TANESCO's Memorial filed on April 13, 2012
Tr. [date] [page] [line]	Transcript of the hearing on jurisdiction and the merits
VIP	VIP Engineering and Marketing Ltd.
Working Financial Model	Working Financial Model dated April 14, 2011 (Exh. C-46)

I. Introduction

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 (the “ICSID Convention”), arising out of a Power Purchase Agreement dated May 26, 1995 (the “PPA”), entered into by Tanzania Electric Supply Company Limited (“TANESCO”), the Respondent in this proceeding, and Independent Power Tanzania Limited (“IPTL”).
2. The Claimant is Standard Chartered Bank (Hong Kong) Limited (“SCB HK” or the “Claimant”), a company organized under the laws of Hong Kong with its principal place of business in 32nd Floor, Standard Chartered Bank Building, 4-4a Des Voeux Road Central, Hong Kong. It is a subsidiary of Standard Chartered Bank (“SCB”), which is incorporated in the United Kingdom. The Claimant brings its claim in this arbitration in its capacity as assignee of IPTL’s rights and is claiming various payments owed to IPTL by TANESCO which allegedly remain outstanding.¹ The claim is brought on the basis of the arbitration clause contained in the PPA which refers to ICSID arbitration.
3. The Respondent, the Tanzania Electric Supply Company Limited (“TANESCO” or the “Respondent”), is an entity wholly owned by the United Republic of Tanzania (“Tanzania” or the “GoT”) and designated as an agency of Tanzania pursuant to Article 25(1) of the ICSID Convention. TANESCO’s address is P.O. Box 9024, Dar es Salaam, Tanzania. Oversight of TANESCO is through the Ministry of Energy and Minerals.
4. The Claimant and the Respondent are hereinafter collectively referred to as “the Parties.” The Parties’ respective representatives and their addresses are listed above.

¹ RfA, para. 2.

II. Procedural History

A. Request for Arbitration

5. On September 15, 2010, ICSID received a request for arbitration of the same date (the “Request” or “RfA”) from SCB HK against TANESCO.
6. On October 1, 2010, the Secretary-General of ICSID sent the Parties a Notice of Registration in accordance with Article 36(3) of the ICSID Convention. In issuing the Notice, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. Constitution of the Tribunal

7. The Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and pursuant to the following method:
 - i. The Tribunal was to be made up of 3 arbitrators, one appointed by each of the Parties and the third, the President, to be agreed between the two party-appointed arbitrators;
 - ii. SCB HK was to appoint an arbitrator and notify ICSID and the Respondent of its appointment by November 8, 2010;
 - iii. Respondent was to appoint an arbitrator and notify ICSID and the Claimant of its appointment by January 7, 2011;
 - iv. Each of the Claimant and the Respondent was to provide their appointee and each other with the names of 3 possible candidates as President of the Tribunal no later than January 14, 2011;
 - v. Following the provision of the lists of possible candidates, the two party-appointed arbitrators were to confer in order to appoint the third arbitrator, who would act as President of the Tribunal, from the lists provided by the Parties;

vi. The Parties had also agreed on a default method of appointment in the event that the two co-arbitrators could not find an agreement.

8. SCB HK appointed Professor Zachary Douglas, a national of Australia, who accepted his appointment on November 12, 2010. TANESCO appointed Professor Brigitte Stern, a national of France, who accepted her appointment on January 10, 2011. Professor Douglas and Professor Stern further appointed Professor Donald McRae, a national of Canada and New Zealand, as President of the Tribunal, who accepted his appointment on April 18, 2011. The Tribunal was constituted on April 19, 2011. Ms. Aurélia Antonietti, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. First session of the Tribunal

9. The Tribunal held a first session with the Parties in London, England, on July 7, 2011. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English and that the place of any hearings would be London, England.

D. Parties' submissions and hearing on jurisdiction and the merits

10. At the outset, the Respondent indicated that it wished to bifurcate the proceedings. Given that the Tribunal was not in a position to decide on bifurcation at the first session, a schedule was put in place for the production of documents and the submissions of the first round of pleadings. The Claimant filed its Memorial on February 3, 2012 ("Cl. Mem."), and the Respondent filed a Memorial on jurisdiction on April 13, 2012, together with a request to bifurcate and address its objections to jurisdiction as a preliminary matter.

11. The Tribunal held a hearing in London on May 14, 2012, on the issue of bifurcation and also heard the Parties on issues of production of documents. On May 29, 2012, in Procedural Order No. 5, the Tribunal rejected the Respondent's request for bifurcation, in the following terms:

The Tribunal has not, for the purposes of this decision on bifurcation, come to a definitive view as to whether the Respondent's preliminary objection, if upheld, would

have the effect of disposing of the entire case. The Tribunal has simply resolved that the Respondent has not discharged its burden of establishing that the separate adjudication of its preliminary objection would achieve the efficiency and cost savings that the Respondent claims.

12. The schedule for the filing of written submissions was modified upon the Parties' requests through various procedural orders that the Tribunal need not recall in detail here.² On August 24, 2012, the Respondent filed a Counter-Memorial on jurisdiction and the merits ("Resp. CM"). On November 7, 2012, the Claimant filed a Reply on jurisdiction and the merits ("Cl. Rep."). On November 21, 2012, the Respondent filed a Rejoinder on jurisdiction and the merits ("Resp. Rej.").
13. Throughout this process, the Tribunal issued two procedural orders concerning the production of documents on November 14, 2011, and July 6, 2012, respectively.
14. The Tribunal also notes that ICSID received correspondence from third parties, as will be mentioned below, which was transmitted to the Parties and the Members of the Tribunal. The Parties informed the Centre and the Tribunal on September 13, 2012, that they had agreed that unsolicited communications from third parties were to be first sent to the Parties for consultation as to whether such communications should be forwarded to the Tribunal and that either Party could, at any time, request the Secretariat to forward the document to the Tribunal. On August 16, 2013, the Parties further informed the Centre that in the absence of any such request from either Party, the Centre should assume that the Parties were content for documents/correspondence from third parties not to be provided to the Tribunal.
15. A hearing on jurisdiction and the merits took place at the IDRC in London from December 3 to 6, 2012, and from December 10 to 11, 2012 (the "December hearing"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the December hearing were:

On behalf of the Claimant:

Mr. Matthew Weiniger

Mr. Iain Maxwell

Herbert Smith Freehills LLP

Herbert Smith Freehills LLP

² Procedural Order No. 7 dated July 11, 2012 to Procedural Order No. 10 dated November 20, 2012.

Mr. Dominic Kennelly	Herbert Smith Freehills LLP
Ms. Elizabeth Kantor	Herbert Smith Freehills LLP
Ms. Alisa Logvinenko	Herbert Smith Freehills LLP
Mr. James Denham	Standard Chartered Bank
Ms. Victoria Garrod	Standard Chartered Bank
Prof. Gerard McCormack	University of Leeds
Mr. Ashif Kassam	RSM Ashvir
Mr. Nicholas Zervos	Velma Law Chambers

On behalf of the Respondent:

Hon. Nimrod E. Mkono, M.P.	Mkono & Co. Advocates
Dr. Wilbert Kapinga	Mkono & Co. Advocates
Mr. Ajit Kapadia	Mkono & Co. Advocates
Mr. John Jay Range	Hunton & Williams LLP
Mr. John Beardsworth	Hunton & Williams LLP
Mr. Alexander Kullar	Hunton & Williams LLP
Mr. Patrick Rutabanzibwa	Government of Tanzania
Mr. Godwin Ngwilimi	TANESCO
Mr. David Ehrhardt	Castalia
Ms. Cristina Cano	Castalia

16. The following persons were examined:

On behalf of the Claimant:

Mr. Colin Johnson, Grant Thornton, financial expert
 Mr. Ashif Kassam, RSM Ashvir, expert
 Mr. Nicholas Zervos, Velma Law Chambers, expert
 Prof. Gerard McCormack, University of Leeds, expert

On behalf of the Respondent:

Mrs. Subira Wandiba, witness
 Mr. Patrick Rutabanzibwa, witness
 Prof. Luitfried X. Mbunda, witness
 Mr. Leonard Mususa, witness

Mr. David Ehrhardt, Castalia, financial expert

17. The Parties filed simultaneous Post-Hearing Briefs on February 19, 2013.
18. On February 19, 2013, the Respondent reiterated its request for bifurcation or in the alternative for the stay of the proceeding.
19. At the close of the December hearing, the Parties agreed to hold a further hearing, and such a hearing on the issue of bifurcation, jurisdiction and the merits took place at the IDRC in London, United Kingdom, on March 14 and 15, 2013 (the “March hearing”). In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the March hearing were:

On behalf of the Claimant:

Mr. Matthew Weiniger	Herbert Smith Freehills LLP
Mr. Iain Maxwell	Herbert Smith Freehills LLP
Mr. Dominic Kennelly	Herbert Smith Freehills LLP
Ms. Alisa Logvinenko	Herbert Smith Freehills LLP
Ms. Kira Krissinel	Herbert Smith Freehills LLP
Mr. James Denham	Standard Chartered Bank
Ms. Sandy Cowan	Grant Thornton

On behalf of the Respondent:

Hon. Nimrod E. Mkono, M.P.	Mkono & Co. Advocates
Dr. Wilbert B. Kapinga	Mkono & Co. Advocates
Mr. John Jay Range	Hunton & Williams LLP
Mr. John Beardsworth	Hunton & Williams LLP
Mr. Alexander Kullar	Hunton & Williams LLP
Mr. James Head	Hunton & Williams LLP
Mr. Godwin Ngwilimi	TANESCO
Mr. Tulumbumi Mwambi Abel	Government of Tanzania

20. On April 18, 2013, the Parties were informed by the Centre that the Respondent’s request of February 19, 2013, for bifurcation or a stay of proceedings was rejected and that reasons would be provided in this Decision.

III. Overview of the Case and of the Parties' Positions

21. The Tribunal finds it useful to provide first an overview of this case, which involves complex facts, multiple proceedings and multiple participants. The Tribunal has been charged with the daunting task of settling a dispute that traces back to 1998 and which has already generated two ICSID arbitration proceedings and an interpretation proceeding as well as an LCIA arbitration and multiple domestic proceedings in Tanzania and Malaysia.
22. As it will be explained in more detail below, in 1995 TANESCO and IPTL entered into the Power Purchase Agreement (the "PPA")³ whereby IPTL agreed to design, construct, own, operate and maintain an electricity generating facility in Tanzania. This case arises out of the alleged non-payment by TANESCO of various payments due to IPTL under the PPA.
23. An original dispute in 1998 between TANESCO and IPTL was settled by an ICSID tribunal in the case of *TANESCO v. IPTL*, ICSID Case No. ARB/98/8, which rendered an award on July 12, 2001 (the "ICSID 1 award").⁴ The parties to that arbitration had further agreed on a financial model to be applied to calculate tariffs under the PPA. Payments were made pursuant to that award, but as of January 2007, TANESCO failed to make further payments to IPTL.
24. From October 2006 onwards, IPTL did not service its lenders through which it had secured the original financing for the project. IPTL's loan was originally subscribed with a consortium of Malaysian lenders who in 2005 sold the loan to SCB HK, the Claimant in this case.
25. It should also be noted that IPTL has been at the centre of a legal dispute between its shareholders (VIP and Mechmar) before the Tanzanian courts, and was under the control of a provisional liquidator, while the issue of its winding up was being resolved. The power plant, which had been operated under the control of a provisional liquidator until September 2013, is apparently now under the control of Pan Africa Power Solutions (T) Ltd ("PAP") which, the Tribunal understands, has purchased the interest of VIP in IPTL. Both Parties seem to be in agreement that IPTL has not been in control of the plant since

³ Exh. C-4/R-1.

⁴ Exh. C-10/R-8, also available on the ICSID website.

October 2009.⁵ They disagree however on the question of whether an expropriation occurred in October 2009.

26. As far as the jurisdiction of the Tribunal is concerned, SCB HK alleges that, further to the occurrence of an event of default under IPTL's loan, in its capacity of Security Agent acting as agent for and on behalf of the lenders, it is entitled to bring this proceeding as IPTL's assignee under the PPA. The Claimant argues that IPTL's contractual rights under the PPA have been vested in SCB HK and it is requesting from the Tribunal, *inter alia*, a declaration that TANESCO owes it outstanding payments in the sum of US\$258.7 million, and an order to pay it US\$138 million to discharge its loan, or alternatively to pay it the amounts due under the PPA.⁶
27. The Respondent objects to the Tribunal's jurisdiction on the ground that SCB HK's alleged security assignment is void against IPTL's liquidator and creditors, and that SCB HK should have obtained leave from the Tanzanian High Court before proceeding to arbitration.
28. On the merits, it is disputed between the Parties whether IPTL's equity contribution to the project could have been made by way of a shareholder loan, as it had been, rather than by way of subscription for shares. The Respondent claims that IPTL substituted a shareholder loan for equity, thus distorting the agreed financial model to calculate the capacity payments, and resulting in substantially overcharging TANESCO and rewarding IPTL a higher rate of return than agreed.⁷ Thus, for the Respondent, IPTL engaged in misrepresentation and/or breached its contractual obligations to TANESCO, resulting in tariff overcharges.⁸ While having paid more than US\$150 million in capacity payments, the Respondent would now owe SCB HK more than the original approved debt; for the Respondent, this is the result of the unauthorized refinancing of IPTL's debt and the

⁵ RfA, para. 8. Exh. C-14.

⁶ See *infra* para. 196, for the Claimant's latest request for relief.

⁷ Resp. CM, para. 10.

⁸ Resp. CM, para. 11.

diversion of funds intended to pay the senior debt for the payment of costs that were not authorized as project costs.⁹

29. In the alternative, the Respondent objects to the various payment calculations and asks for a rectification of the tariff calculation model.

IV. Factual Background

30. The Tribunal will provide a description of the factual background to this dispute.

A. The PPA and related agreements – 1995 - 1998

31. In response to a power shortage in Tanzania in the early 1990's, on May 26, 1995, TANESCO and IPTL entered into the PPA, whereby IPTL agreed to design, construct, own, operate and maintain an electricity generating facility with a nominal net capacity of 100 megawatts, to be located in Tegeta, Tanzania. Pursuant to the PPA, and a related Implementation Agreement,¹⁰ which included a guarantee, executed between IPTL and the GoT, IPTL was to deliver electricity generated by the plant to TANESCO for a period of 20 years. The power plant was designed to work only at times of peak demand and has not been running on a continuous basis.¹¹ The applicable law under the PPA is Tanzanian law.
32. The financial assumptions for the project were that the projected cost was of US\$163.5 million; the debt/equity ratio was at 70% senior debt and 30% equity; the amortization for the 70% senior debt was at 7 years (later changed to 8 years in 1998) and the internal rate of return on equity was at 23% (later corrected to 22.31% by agreement of the parties after the ICSID 1 award).¹² These assumptions, the ICSID 1 tribunal was later to determine, were reflected in a letter from IPTL to the GoT on May 31, 1995.¹³ The May 31, 1995 letter stated in relevant part:

We refer to our telephone conversation of yesterday and hereby wish to confirm that the following assumptions used to determine the capacity charge are contained in the

⁹ Resp. CM, para. 13.

¹⁰ Exh. C-28/R-90.

¹¹ RfA, para. 18.

¹² Resp. CM, para. 3.

¹³ Exh. C-38 (IPTL's letter dated May 31, 1995).

MECHMAR proposal submitted to the Government in November 1994 which was the basis of negotiations and agreements reached in January, 1995.

1) Project Cost	US\$163.5 million (1994)
2) Senior Debt	70%
3) Equity	30%
4) Aggregate Interest Rate for Senior Debt	10.940%
5) Amortisation	7 years
6) Tax Holiday	5 years
7) Capacity Factor	85%
8) Levelized Discount Rate	10%
9) Fixed Operating Costs/Year	US\$4.3 million
10) Hours in the Year	8,760
11) IRR	23%
12) Degraded Heat Rate (BTU/kWhHHV)	8,913

You will notice that the main factor which can alter the capacity charge is the Total Project cost item of US\$ 163.5 million and we have made a provision in the agreement with TANESCO that any changes in the stated assumptions will result in adjustments in the Reference Tariff proportionately.

At the moment the PPA is talking about the Reference Tariff and not the Final Tariff and we agreed with the Minister and the Principal Secretary before they left for Canada that in view of the clarifications we provided you would seek the approval of State House so that we sign the PPA immediately as directed by the Cabinet but mentioning the Reference Tariff.

You know very well that the process of negotiations with the Banks for the Debt Financing component takes between 4 - 6 months and we have already lost 5 months since January, 1995 when we completed negotiations waiting for the PPA to be signed. We request you to authorise TANESCO to sign the PPA now mentioning the Reference Tariff so that we can take the documents to the Banks for debt negotiations and any justifiable changes can be done by way of side memoranda or addendum to the Agreement.

[...]

33. The financial models used by IPTL at the time in order to structure financing for the project, including the 1995 Model (the “1995 Financial Model”),¹⁴ were not provided to

¹⁴ Exh. R-99 (1995 Financial Model).

TANESCO.¹⁵ It has also been argued that a model developed by IPTL in May 1998,¹⁶ was not provided to TANESCO.

34. Initially, there had been an agreement on a fixed price contract, but in Addendum No. 1 to the PPA, dated June 9, 1995 (“Addendum No. 1”), a new basis for calculating the Reference Tariff in the PPA was provided, as follows: “*Before commencement of commercial operations the Reference Tariff [...] will be adjusted upwards or downwards depending on the effect of changes that will have taken place on any or all the underlying assumptions stated in the Power Purchase Agreement.*”¹⁷
35. Payments (capacity and energy payments, supplemental charges, bonus payments, as well as interest on overdue payments) under the PPA were to be made to IPTL on a monthly basis for a term of 20 years. Capacity payments and energy payments to be made after the commencement of commercial operation, which constituted the “Reference Tariff”, had been computed on the basis of assumptions mentioned in the appendices of the PPA.¹⁸
36. IPTL had been formed in 1994 by Mechmar, a Malaysian corporation, and VIP, a Tanzanian company. VIP held 30% of the shares of IPTL, and Mechmar held the remaining 70%.¹⁹ IPTL’s authorized share capital was of US\$10 million and its paid up share capital was equivalent to US\$100.²⁰
37. IPTL raised funds to establish the power plant by means of a credit facility extended to it by a consortium of Malaysian banks²¹ under a US\$105 million 1997 Loan Facility Agreement (the “Loan Agreement” or “Facility Agreement”)²² to be repaid over 8 years. The loan contemplated a debt/equity ratio of 70/30.²³

¹⁵ Cl. PHB, para. 43.

¹⁶ Exh. R-98 (1998 Financial Model).

¹⁷ Exh. C-39.

¹⁸ Resp. PHB, para. 20. PPA, Art. 5.1 and 1.1. See Appendix B to the PPA.

¹⁹ Cl. Mem., para. 23, Exh. C-48/R-45 (Shareholders Agreement between Mechmar and VIP).

²⁰ See e.g., Cl. Rep., para. 112.

²¹ Bank Bumiputra Malaysia Berhad (BBMB) as arranging bank and facility agent, Sime Bank Berhad as security agent and arranging bank, BBMB International Bank (L) Limited and Sime International Bank (L) Limited both as lenders, Cl. Mem., para. 49, Resp. PHB, para. 33.

²² Exh. C-11/R-47.

²³ Cl. Mem., para. 52.

38. IPTL did not draw down the full US\$105 million under the loan, but drew down approximately US\$85 million between August 1997 and January 2000.²⁴
39. On June 28, 1997, IPTL entered into a Security Deed (the “Security Deed”), with Sime Bank Berhad, which provided securities to the lenders, including right, title and interest to various contracts including the PPA. The Security Deed is governed by English law.²⁵ Under the 1997 Security Deed and the Loan Agreement, Sime Bank Berhad of Malaysia (and later its successors RHB Bank Berhad and Danaharta)²⁶ was appointed as Security Agent.
40. A Mortgage of Right of Occupancy between IPTL and Sime Bank Berhad as mortgagee was also entered into.²⁷
41. On June 28, 1997, Mechmar and VIP also pledged their shares to the Security Agent under a Charge of Shares (the “Share Pledge Agreement”)²⁸ as security for the loan. On the same day, Mechmar and VIP together with IPTL and the Security Agent entered into a Shareholder Support Deed (the “Shareholder Support Deed”).²⁹ Under the Shareholder Support Deed, the Shareholders’ Funds could be subscribed by way of ordinary shares or the provision of subordinated loans to IPTL.³⁰ The shareholders also undertook not to take any action in furtherance of the winding up, liquidation or dissolution of IPTL.³¹ Mechmar also undertook specific obligations under the Shareholder Support Deed such as to

²⁴ Resp. PHB, para. 35. Exh. C-43.

²⁵ Clause 20.1 of the Security Deed, Exh. C-16/R-68. Cl. Mem., footnote 32: “*The Security Deed was between IPTL and Sime Bank Berhad ‘in its capacity as Security Agent under the Facility Agreement... which expression includes any successor appointed as Security Agent’ (C-16 at page 486). Clause 22(H) of the Facility Agreement details the procedure for the replacement of Security Agents (C-11 at page 421).*”

²⁶ Cl. Mem., para. 84(3): “*The interest of the final original lender, Sime Bank, was transferred to RHB Bank Berhad (“RHB”) through an order of the High Court of Malaysia dated 29 June 1999 (the “Vesting Order”). [Exh. C-53] The Vesting Order operated to transfer the entire banking business of Sime Bank to RHB. [Exh. C-53] RHB subsequently novated its rights under the Facility Agreement to Danaharta in July 2001. [Exh. C-54]*”.

²⁷ Resp. PHB, para. 34.

²⁸ Exh. C-18 (Share Pledge Agreement).

²⁹ Exh. C-40 (Shareholder Support Deed).

³⁰ Cl. Mem., para. 54.

³¹ Exh. C-40, Art. 4.1.3.

guarantee to the Security Agent that it would pay any sum payable under the financing agreements if IPTL did not do so.³²

42. It is agreed between the Parties that, as recorded in a letter of May 31, 1995³³ from IPTL to the GoT, the assumption of the parties to the PPA was that the debt/equity ratio for the project was to be 70/30. It is disputed whether the equity contribution could be made by way of subordinated shareholder loan, the Respondent's position being that it was not allowed. It is undisputed, however, that IPTL's equity contribution was in fact made mostly by way of a shareholder loan, and not by way of subscription for shares.³⁴ According to the Claimant, Mechmar made a loan to IPTL in an amount of US\$27 million in December 1997, and a further loan of US\$33 million in December 1998.³⁵
43. On March 12, 1998, the Security Agent, originally Sime Bank Berhad, provided notice to TANESCO that IPTL had assigned the PPA to it as security for the loan provided for in the Facility Agreement.³⁶

B. The earlier ICSID proceedings and the origin of the dispute

44. In 1998, prior to commercial operation, TANESCO submitted to ICSID a request for arbitration against IPTL claiming that it was entitled to terminate the PPA or, alternatively, to obtain a material reduction of the tariff because the cost of the facility was excessive. IPTL submitted a counterclaim against TANESCO for damages. A tribunal composed of Mr. Kenneth S. Rokison, a national of the United Kingdom (President), Mr. Charles N. Brower, a national of the United States of America, and Mr. Andrew Rogers, a national of Australia (the "ICSID 1 tribunal"), issued an award on July 12, 2001 (the "ICSID 1 award").³⁷
45. The ICSID 1 tribunal decided that TANESCO had no right to terminate the PPA, which was and remained valid and took note of the Reference Tariff agreed upon by the parties.

³² Exh. C-40, Art. 5.1.1.

³³ Exh. C-38, quoted above.

³⁴ Cl. Mem., para. 14, *see also* paras. 63-64.

³⁵ Cl. Rep., para. 54. Resp. CM, para. 7, questioning the reality of the 1997 loan and referring to a US\$45 million total loan, *see also* Resp. Rej., para. 6.

³⁶ Exh. C-26. *See infra* paras. 119-125.

³⁷ Exh. C-10/R-8, also available on the ICSID website.

Based on the tribunal's initial rulings, the parties had adjusted the financial model that would be used to calculate the capacity and energy tariffs after commercial operation started. That adjusted financial model was submitted to the tribunal pursuant to a "Stipulation and Agreement" between TANESCO and IPTL and incorporated into the award as Appendix F. The 2001 ICSID 1 award reduced the cost of the project from US\$163.5 million to US\$127.2 million,³⁸ with a senior debt of US\$89 million (further reduced to US\$85.3 million)³⁹ and the remainder (approximately US\$38 million) in equity. The costs that the ICSID 1 tribunal deemed not to have been prudently incurred and disregarded when calculating the tariff, are referred to as the "Disallowed Costs." These costs were to be the sole responsibility of IPTL.

46. Although the plant had been completed in 1998, the commercial operation of the facility did not start until January 2002, after the ICSID 1 proceeding. According to the Claimant, the plant has been called upon to generate some electricity during each month from January 2002 to April 2007, as well as in June 2007, in March 2008 and from November 2009 to October 2011.⁴⁰
47. However, according to the Claimant, TANESCO failed to make the required capacity payments, alleging that IPTL's equity contribution had been made by way of shareholder loan rather than subscription for shares. It also stopped making the other payments to IPTL due under the PPA as of April 2007.⁴¹ An invoice dispute was formally raised on June 17, 2004, by TANESCO.⁴² It then started making monthly payments into an escrow account established with the Bank of Tanzania.⁴³ Counsel for the Respondent indicated at the March hearing that the amount currently in that account is about US\$90 million.⁴⁴

³⁸ Further reduced to US\$121.5 million by agreement of the parties, Cl. Mem., para. 74. *See* Resp. CM, para. 69.

³⁹ Cl. Rep., para. 86.

⁴⁰ Cl. Mem., para. 76 indicating that TANESCO did not produce information after October 2011.

⁴¹ Cl. Mem., para. 173.

⁴² Resp. PHB, paras. 76 and *seq.*

⁴³ Resp. CM, para. 124.

⁴⁴ Mr. Range, Tr. March 15, 2013, page 124, line 13. Statement of accounts of November 23, 2011, Exh. C-106.

48. In June 2008, IPTL filed with ICSID an application for interpretation of the ICSID 1 award.⁴⁵ The ICSID 1 tribunal was recomposed for an interpretation proceeding and reconstituted following the resignation of Judge Charles Brower. The Members of the tribunal were Messrs. Rokison and Rogers and Mr. Makhdoom Ali-Khan, a national of Pakistan.
49. According to the Respondent, it was Mechmar who had made the application for interpretation on behalf of IPTL, without securing first VIP's authorization or the authorization of IPTL's Provisional Liquidator.⁴⁶ SCB HK sought to intervene in that proceeding as assignee under the PPA but its intervention was not accepted.⁴⁷
50. The ICSID 1 tribunal issued an order for discontinuance of the case on August 19, 2010, pursuant to ICSID Arbitration Rule 44.⁴⁸ The Respondent contends that Mechmar requested the discontinuance, while the Claimant argues that it was the Provisional Liquidator who made the request.⁴⁹
51. Another ICSID arbitration was also initiated by SCB, the Claimant's parent company, in May 2010, against the Republic of Tanzania (ICSID Case No. ARB/10/12) on the basis of the 1994 UK-Tanzania bilateral investment treaty.⁵⁰ That case was dismissed on jurisdictional grounds on November 2, 2012.⁵¹ SCB filed an application for annulment of

⁴⁵ Exh. C-12 (Request for interpretation filed by Nixon Peabody). Both Parties seem to agree that it was at the time the short lived administrator of IPTL who authorized the proceeding, and not the Provisional Liquidator, *see* Tr. March 15, 2013, page 88.

⁴⁶ Resp. PHB, para. 96. *See* section E below for the details on IPTL's liquidation.

⁴⁷ Cl. Mem., para. 116. Mr. Weiniger, Tr. March 15, 2013, page 128, lines 7-10: "*The simplest explanation is that under the ICSID rules, only a party can bring interpretation proceedings, and the Bank was not a party.*" Mr. Range, Tr. March 15, 2013, pages 133, lines 24-25, page 134, lines 1-4: "*The reason why that ended the way it did is that they decided [...] to give up their application to intervene in the interpretation proceedings because they were informed, accurately, that IPTL had decided to discontinue the interpretation proceeding.*"

⁴⁸ ICSID Arbitration Rule 44 "Discontinuance at Request of a Party" reads as follow: "*If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.*"

⁴⁹ Resp. PHB, para. 97; Cl. Mem., para. 117.

⁵⁰ Exh. R-76 (SCB's Request for Arbitration).

⁵¹ The award dated November 2, 2012 is available on the ICSID website.

the award. The application for annulment was registered by ICSID on February 11, 2013, and the case is currently suspended by agreement of the parties to that proceeding.⁵²

C. The IPTL's debt restructurings – 2001 - 2003

52. The Parties do not agree on the consequences of the ICSID 1 award in respect of the amounts due to IPTL's lenders. It is not disputed, however, that in 2001 and 2003, a refinancing of the 1997 Loan Agreement took place.
53. According to the Respondent, in 2001, Mechmar, purporting to act in IPTL's name, and Danaharta Managers (L) Ltd. ("Danaharta")⁵³ – a Malaysian governmental institution created to remove non-performing loans from the Malaysian financial system – replaced the 1997 Loan Agreement with two new loans ("Term Loans 1 and 2") and extended the amortization period from 8 years to 10 years.⁵⁴ The Respondent maintains that TANESCO had no knowledge of this restructuring. The new loans amounted to over US\$120 million, more than the senior debt authorized by the ICSID 1 award, and allegedly included penalty interest that had accrued on the original Loan Agreement prior to the commencement of commercial operations.⁵⁵
54. In addition, according to the Respondent, in May 2001, Mechmar obtained a short-term loan from Danaharta in the amount of US\$5.2 million, which was repaid by October 2002, as it had been ranked in priority to other loans extended to IPTL, including the senior debt.⁵⁶
55. Furthermore, the operations and management contractor responsible for constructing the facility, Wartsila, obtained through an alleged "secret side-deal" a loan from Danaharta for US\$32 million, which also had higher priority than the other loans extended to IPTL, including the senior debt.⁵⁷

⁵² See ICSID website, Procedural Details, ICSID Case No. ARB/10/12.

⁵³ Danaharta was previously Sime International Bank (L) Limited, one of the original lenders. It changed its name in January 2009. See Cl. Mem., para. 84.

⁵⁴ Resp. CM, paras. 94 and *seq.*, para. 118. Resp. PHB, paras. 65 and *seq.*

⁵⁵ Resp. CM, para. 92.

⁵⁶ Resp. CM, para. 93.

⁵⁷ Resp. CM, paras. 95 and *seq.* Resp. PHB, paras. 70 and *seq.*

56. According to the Respondent, all of this altered the waterfall of payments with the final result that IPTL paid down the senior debt more slowly than agreed, with 13.3% paid down in the first three years instead of 60%.⁵⁸ The Claimant does not dispute the restructuring or the new loans but claims that the changed waterfall of payments resulted in the senior lender being paid off more quickly.⁵⁹

D. The SCB HK's involvement – 2005 onwards

57. It is not disputed by the Parties that by 2005, Danaharta was the sole lender under the Facility Agreement.⁶⁰ Further to an auction of distressed debt, in August 2005, SCB HK acquired from Danaharta, for US\$76.1 million,⁶¹ Term Loans 1 and 2, which had a face value of US\$101.7 million, and became the sole lender to IPTL.⁶² Under that transaction, SCB HK was assigned a number of contracts, including the 1997 Security Deed, the Implementation Agreement and the Guarantee Agreement concluded between IPTL and the GoT.⁶³

58. SCB HK also became the Security Agent under the Share Pledge Agreement and the Shareholder Support Deed.⁶⁴ According to the Claimant, “[a]s Security Agent, SCB HK holds all of IPTL’s ‘right, title and interest in and to the Assigned Contracts, including all moneys which may at any time be or become payable to the Borrower.’”⁶⁵

59. SCB HK became the Security Agent on November 4, 2009.⁶⁶

60. From 2006 onwards, IPTL failed to pay the amounts due towards its interest and principal repayments. This led to the occurrence of an event of default under the Loan Agreement.

⁵⁸ Resp. CM, para. 103.

⁵⁹ Cl. Rep., para. 184.

⁶⁰ See Cl. Mem., para. 84. Sime International Bank (L) Limited changed its name to Danaharta; BBMB International Bank (L) Limited novated its rights to Danaharta as did RHB.

⁶¹ Resp. CM, para. 122.

⁶² Exh. C-55/R-15 (Sale and Purchase Agreement).

⁶³ Exh. C-56/R-114 (Deed of Assignment).

⁶⁴ Cl. Mem., para. 87.

⁶⁵ Cl. Mem., para. 87.

⁶⁶ Cl. Mem., footnote 79: “The original Security Agent, Sime Bank, was succeeded by RHB in 1999. By letter dated 29 October 2009 from SCB HK, RHB was removed as Security Agent (see C-57). SCB HK was appointed as Security Agent on 4 November 2009 and duly accepted such appointment (see C-58). This took place after SCB Malaysia had earlier declined the appointment (see letter to SCB Malaysia dated 29 October 2009 at C-59 and letter from SCB Malaysia to SCB HK at C-60).” See Cl. Mem., para. 120 and Cl. Mem., paras. 210-211.

61. Under clause 8 of the Security Deed, upon the occurrence of an event of default under the Loan Agreement, IPTL is no longer authorized to exercise and enforce the rights, discretions and remedies conferred on it under the PPA. Those rights, discretions and remedies are instead exercisable by the Security Agent acting as agent for and on behalf of the lenders. Subsequent to the occurrence of the event of default, SCK HK exercised the step-in rights conferred on it. It therefore considers IPTL's contractual rights under the PPA to have been vested in SCB HK.
62. In December 2009, IPTL and TANESCO were notified of the occurrence of an event of default by the Facility Agent under the Financing Documents.⁶⁷ Subsequently, steps were taken to enforce the security interests created by IPTL in favour of the Security Agent, SCB HK.⁶⁸
63. In addition, SCB HK's charge over the shares pledged by VIP and Mechmar also became enforceable.

E. The IPTL shareholders' dispute and IPTL's status – 2001 onwards

64. On or around 2001, certain disputes arose between the Malaysian majority shareholder of IPTL, Mechmar, and the Tanzanian minority shareholder, VIP.
65. According to the Claimant:

VIP argued that the costs that the ICSID 1 Tribunal had disallowed for the purpose of tariff calculations should not be included in IPTL's accounts when calculating VIP's profits to be earned as a shareholder in IPTL. Instead, VIP contended those costs should be counted only against the other shareholder of IPTL, Mechmar. Similarly, VIP contended that the costs associated with the delay in the operation of the Power Plant should be for Mechmar's account alone, and not counted when calculating the value of VIP's shares.⁶⁹

VIP argued that if those costs were removed from the accounts of IPTL and put on the books of Mechmar, then the value of its shares at that point in time would have been US\$31,273,783. It asked that Mechmar pay it this amount. Mechmar did not agree. VIP then demanded that Mechmar represent in writing to third parties that VIP's

⁶⁷ Exh. C-23. Letter from SCB HK to IPTL dated December 15, 2009. Cl. Mem., paras. 120 and 210.

⁶⁸ Exh. C-25. Letter from Standard Chartered Malaysia to SCB HK dated December 15, 2009.

⁶⁹ Cl. Mem., para. 78.

shares were valued at US\$31 million. When Mechmar refused to do so, VIP began a series of actions to “*strongarm*” Mechmar into acceding to its wishes.⁷⁰

66. According to the Respondent:

Mechmar argued that IPTL should bear all of the disapproved costs, while VIP maintained that only the costs approved by the ICSID 1 Tribunal should be borne by IPTL, and that Mechmar alone should bear the disapproved costs. Mr. Rugemalira believed that Mechmar deliberately inflated project costs, and that therefore all disallowed costs should be assigned to Mechmar and not to IPTL.⁷¹

67. On February 25, 2002, VIP petitioned the High Court of Tanzania for the winding up of IPTL. VIP also requested various forms of provisional relief including that the Court appoint a provisional liquidator over IPTL.

68. Mechmar also commenced an arbitration under the rules of the London Court of International Arbitration (the “LCIA”) to decide the dispute between Mechmar and VIP pursuant to the Promoters/Shareholders Agreement. An award was issued on August 26, 2003 (the “LCIA award”)⁷² directing VIP to discontinue the winding up proceedings it had initiated against IPTL before the High Court of Tanzania. Mechmar’s attempts to enforce the LCIA award in Tanzania are said to have been to no avail.⁷³

69. On November 21, 2008, SCB HK applied to the High Court of Tanzania seeking an order to restrain VIP from continuing with the winding up, which was dismissed by the Court for want of prosecution. In December 2008, pursuant to its rights under a Charge of Shares of VIP in IPTL, RHB Bank Berhad, acting as security agent for SCB HK, appointed, Ms. M. K. Renju, as Receiver over the Mechmar shares.⁷⁴

⁷⁰ Cl. Mem., para. 78.

⁷¹ Resp. PHB, para. 55. Mr. Rugemalira was the Director of IPTL and author of the May 31, 2005 letter to GoT.

⁷² Exh. C-45.

⁷³ The Tribunal also notes that there were allegations of various proceedings between SCB and Mechmar in Malaysia and in the British Virgin Islands.

⁷⁴ Cl. PHB, para. 27(16). Exh. C-153.

70. On December 16, 2008, the Tanzanian High Court appointed a Provisional Liquidator (the “PL”), an appointment to which Mechmar objected. A few days later, SCB HK informed the PL that it held security over IPTL’s assets under the Security Deed.⁷⁵
71. On January 27, 2009, upon SCB HK’s request made a few days earlier, the High Court of Tanzania appointed *ex parte* an administrator over IPTL (the “Administrator”). On the ground that notice should have been issued to all of the interested parties, the appointment of the Administrator was set aside by the Tanzanian Court of Appeal on April 9, 2009.⁷⁶ SCB HK withdrew its first petition and filed a second petition to appoint an Administrator on September 17, 2009 (“SCB HK’s Second Administration Petition”).
72. Around October 2009, according to the Claimant, the GoT took control of the power plant, and the PL and TANESCO entered into an interim PPA on February 5, 2010 (the “Interim PPA”).⁷⁷ According to the Claimant, “[t]he PL has not properly accounted for monies received pursuant to the interim operation of the Plant. Despite repeated requests by SCB HK, the PL has failed to disclose detailed accounts reflecting the current state of IPTL’s finances.”⁷⁸
73. On September 15, 2010, SCB HK filed its request for arbitration with ICSID.
74. On July 15, 2011, an order for IPTL’s winding up was issued by the High Court of Tanzania, and the winding up was deemed to have commenced February 25, 2002 – the date of the petition (the “2011 Winding Up Order”).⁷⁹ The Court appointed a liquidator under the Tanzanian Companies Ordinance (the “Liquidator”).
75. On April 3, 2012, the Liquidator issued a notice directing IPTL’s creditors to submit their claims against IPTL’s estate by April 24, 2012.⁸⁰ According to TANESCO, Wartsila asserted a claim for over US\$22 million in the liquidation proceeding.⁸¹

⁷⁵ Cl. Mem., para. 119.

⁷⁶ Exh. C-302/R-152, page 6.

⁷⁷ Cl. Mem., para. 122.

⁷⁸ Cl. Mem., para. 124.

⁷⁹ Letter of the Liquidator dated July 10, 2012, para. 7, and order under Exh. 2 to that letter.

⁸⁰ TANESCO’s Memorial on Jurisdiction, para. 40. Exh. R-20.

⁸¹ TANESCO’s Comment on Submission of the Liquidator of IPTL, August, 15, 2012, para. 28.

76. On April 5, 2012, the High Court granted SCB HK's and Mechmar's request to temporarily stay the Liquidator from going forward with IPTL's liquidation pending full briefing on SCB HK's request to enjoin the winding up.⁸²
77. On July 10, 2012, the Liquidator wrote to ICSID, disputing SCB HK's authority to commence the ICSID proceeding. The letter was transmitted to the Parties, who provided their comments to the Tribunal. Commenting on this letter, TANESCO submitted that the Tribunal should stay the proceeding to allow SCB HK to seek a declaration of the validity of its claimed assignment in Tanzanian courts where the Liquidator could be joined as a party.⁸³
78. In August 2012, ICSID received from VIP a copy of its letters dated July 31, 2012, and August 25, 2012, sent to the Liquidator claiming *inter alia* that SCB HK is not a creditor of IPTL. The letter was transmitted to the Parties, who provided their comments to the Tribunal.
79. On December 17, 2012, the Court of Appeal in the Civil Revision Proceeding No. 1 vacated all proceedings in the winding-up petition retroactive to July 17, 2009, including the Winding up Order of July 15, 2011, and directed that the matter be considered by the High Court.⁸⁴ The Court of Appeal decided that the High Court should not have appointed a liquidator in 2011 while SCB HK's Second Administration Petition to appoint an administrator to IPTL was pending. The Court of Appeal remitted the matter to the High Court for consideration.
80. The Parties are in disagreement as to the consequences of that decision on the jurisdiction of this Tribunal, as will be explained below.
81. On February 17, 2013, VIP requested the High Court to have the administration proceeding expedited, allegedly given the absence of steps taken by SCB HK.⁸⁵

⁸² TANESCO's Memorial on Jurisdiction, para. 42.

⁸³ TANESCO's Comment on Submission of the Liquidator of IPTL, August, 15, 2012, para. 33.

⁸⁴ Exh. R-152, page 27. *Also* Exh. C-295.

⁸⁵ Exh. R-159 (new exhibit handed out at the March hearing). Mr. Range, Tr. March 14, 2013, page 144.

82. In April 2013, ICSID received a new letter from VIP's Dutch counsel which was transmitted to the Parties and the Tribunal and regarding which the Parties declined to comment.
83. On June 10, 2013, ICSID received a letter from the PL from IPTL, Mr. Saliboko, which was transmitted to the Parties and the Tribunal and regarding which the Parties declined to comment.
84. On September 5, 2013, the High Court of Tanzania made an order (i) permitting VIP to withdraw its winding up petition in respect of IPTL, (ii) terminating the appointment of the PL, and (iii) ordering IPTL's affairs, including the plant, to be handed over to PAP, which purported to have acquired VIP's 30% shareholding in IPTL.⁸⁶ SCB HK also indicated that it has also withdrawn its administration petition.
85. According to SCB HK, at the end of 2013, there was "*no winding-up petition or substantive administration petition in respect of IPTL pending before the Tanzanian courts, and no prospect of a liquidator or administrator being appointed.*"⁸⁷ SCB HK further indicated that it had been informed that TANESCO had entered into an agreement with IPTL to settle the outstanding tariff payments under the PPA that are in issue in these proceedings, thereby facilitating release of the funds placed in escrow by the GoT as security for TANESCO's obligations under the PPA. SCB HK concluded that it was concerned about this deterioration in its position and requested an award as soon as possible.
86. TANESCO responded on December 13, 2013, noting that SCB HK had not sought to block the sale of VIP's shareholding to PAP; that the agreement by PAP to sell electricity to TANESCO at reduced tariffs is not a change in practice and is not a deterioration in SCB HK's position; that TANESCO had no control over the escrow account agreement whose parties are the GoT, IPTL and Bank of Tanzania. TANESCO disagreed with SCB HK that there is no longer any prospect of a liquidator or administrator being appointed over IPTL.

⁸⁶ SCB HK's letter to the Tribunal, November 27, 2013, attaching the Order of the High Court of Tanzania dated September 5, 2013.

⁸⁷ SCB HK's letter to the Tribunal, November 27, 2013, attaching the Order of the High Court of Tanzania dated September 5, 2013.

87. It appears that, at the present time, control over IPTL has been asserted by Ms. M. K. Renju as administrative receiver appointed in 2008 by SCB HK.⁸⁸
88. It also appears that Mechmar is under liquidation in Malaysia.⁸⁹
89. The Tribunal was also informed that on November 12, 2013, VIP filed suit in the High Court in Tanzania against SCB, SCB HK, Wartsila and the liquidators of Mechmar.⁹⁰ According to the Respondent, VIP's Complaint (i) seeks damages for losses it suffered from the unlawful restructuring of IPTL's debt, (ii) challenges the legality of SCB's/SCB HK's alleged purchase of the debt in 2005 from Danaharta, and (iii) seeks a declaration that SCB/SCB HK lacks standing as a valid creditor or as a valid secured creditor of IPTL. VIP also seeks damages of almost US\$500 million from the defendants.⁹¹

V. The Positions of the Parties on Jurisdiction

90. The Parties' positions on jurisdiction have evolved throughout this proceeding in light of events in the Tanzanian courts.

A. The Respondent's position on jurisdiction

91. The Respondent first contended that SCB HK's interests were void against the Liquidator because the security interest had not been registered with the Companies Registrar in Tanzania (1). Further to the decision of the Court of Appeal of December 17, 2012, referred above at paragraph 79, it more recently contended that this Tribunal lacks jurisdiction because SCB HK failed to obtain leave of the High Court to enforce its security assignment (2).

1. SCB HK's interests were not registered

92. The Respondent contends that because SCB HK failed to register with the Companies Registrar in Tanzania both the security assignment of IPTL's interests in the assigned

⁸⁸ Exh. 4 to TANESCO's letter of December 13, 2013, Notice of Appointment.

⁸⁹ Parties' respective letters of November 27 and December 13, 2013.

⁹⁰ Exh. 1 to TANESCO's letter of December 13, 2013.

⁹¹ TANESCO's letter of December 13, 2013.

contracts under clause 3.2 of the Security Deed, and the specific charges created by clause 3.1 of the Security Deed, these interests are void against the Liquidator of IPTL.⁹²

93. According to the Respondent, SCB HK was wrong when it considered that the assignment of the PPA was an absolute assignment and need not be registered. The Respondent argues that, while an absolute assignment needs no registration, an assignment by way of charge or a security assignment must be registered under Tanzanian law, which follows English companies law.
94. The Respondent considers that the security assignment under clause 3.2.1 of the Security Deed had to be registered or it was void by virtue of section 79 of the Tanzanian Companies Ordinance 2002, because it was a charge on book debts or a floating charge.⁹³

2. SCB HK failed to obtain leave of the High Court to enforce its security assignment - the consequence of the December 17, 2012 decision

95. In its PHB, the Respondent requested that the Tribunal:

Dismiss the arbitration for lack of jurisdiction, or stay the arbitration pending a determination by the High Court of Tanzania as to whether SCB HK should be granted leave to enforce its claimed security as provided in Section 249(1)(b) of the Companies Act 2002.⁹⁴

96. According to the Respondent, the consequence of the decision of the Court of Appeal of December 17, 2012, is as follows:

The Court further held that under Section 249 of the Tanzanian Companies Act 2002, the presentation of the Second Administration Petition to the High Court resulted in a “freeze” or automatic stay (i) on the pending Winding Up Petition filed by VIP Engineering and Marketing Ltd. (“VIP”) against Independent Power Tanzania Limited (“IPTL”); (ii) on any effort by a creditor of IPTL to enforce its security; and (iii) on any suit against IPTL, without first obtaining leave of the High Court. As a result, the Court of Appeal vacated all proceedings in the Winding Up Petition retroactive to 17 July 2009. It also directed the High Court to consider the merits of SCB HK’s Second Administration Petition, including the threshold questions of whether SCB HK was a creditor of IPTL or had proper standing.⁹⁵

⁹² Resp. CM, para. 135.

⁹³ Respondent’s Reply to the Claimant’s Opposition to Bifurcation of Proceedings, para. 14. CLA-10.

⁹⁴ Resp. PHB, para. 342.

⁹⁵ Resp. PHB, para. 2.

97. For the Respondent, Section 249 of the Tanzanian Companies Act 2002 applies with the result that SCB HK should have obtained the leave from the High Court to enforce its security. It argues that the Court of Appeal held that SCB HK was “*barred by Section 249 of the Companies Act 2002 from invoking [the PPA arbitration clause] until and unless it obtain[ed] leave of the High Court to enforce its claimed security assignment.*”⁹⁶ It is alleged that the Court of Appeal directed the High Court to consider the merits of SCB HK’s Second Administration Petition, including whether SCB HK was a creditor of IPTL or had proper standing.
98. On the basis of this second argument, on February 20, 2013, the Respondent renewed its request to bifurcate the case and dismiss it for lack of jurisdiction. Alternatively, TANESCO requested the Tribunal to stay the case pending further proceedings in the Tanzanian courts until:
- (i) SCB HK applies for and obtains leave of the High Court to pursue this claim, on such conditions as the Court may direct; or (ii) an administrator for IPTL is appointed and that administrator authorizes SCB HK to pursue this claim, on such conditions as the administrator may provide; or (iii) the Second Administration Petition is dismissed on such terms, if any, as would permit SCB HK to proceed with this arbitration.⁹⁷
99. In any event, the Respondent argued, SCB’s HK security interest is void against a liquidator or an administrator (should an administrator be appointed) for lack of registration.

B. The Claimant’s position on jurisdiction

100. The Claimant considers that as legal assignee it is entitled to exercise all rights and remedies in relation to the PPA. “*Therefore, no standing issues arise, and the Tribunal should proceed to issue an award in SCB HK’s favour.*”⁹⁸

1. Section 249 of the Ordinance Act has no extra territorial effect

101. At the March 2013 hearing, the Claimant argued that the Respondent’s objections under section 249 were untimely.⁹⁹ It further argued that section 249 is a procedural rule which

⁹⁶ Resp. PHB, para. 1.

⁹⁷ Resp. PHB, para. 5.

⁹⁸ Cl. PHB, para. 7.

is not applicable in this proceeding and in any case it has no extra territorial effect.¹⁰⁰ It is equivalent to an anti-suit injunction;¹⁰¹ it is a procedural moratorium which does not affect the jurisdiction of the Tribunal.

2. On the issue of obtaining a leave from the High Court - the consequence of the December 17, 2012 decision

102. For the Claimant, the 2011 Winding up Order has been set aside and IPTL is no longer in liquidation. Until September 2013, it was under the control of the PL who had been appointed in December 2008.¹⁰²

103. In addition, the Companies Ordinance renders a registrable but unregistered charge void as against a liquidator or secured creditor, but not as against a provisional liquidator.¹⁰³ For the Claimant, the reference in section 79 to the “Liquidator” does not apply to the PL.¹⁰⁴ Accordingly, following the December 17, 2012 decision, the assignment of the PPA is valid, irrespective of whether it was required to be registered.¹⁰⁵

3. On the issue of registration

104. According to the Claimant,

(1) In the alternative, [...] the assignment of the PPA was not required to be registered, as it is neither a charge on book debts nor a floating charge; and

(2) In the further alternative, [...] even if the assignment of the PPA was required to be registered and is therefore caught by the invalidation provisions of the Companies Ordinance, SCB HK is nonetheless entitled to have the invoice dispute resolved by this Tribunal.¹⁰⁶

⁹⁹ Tr. March 14, 2013, page 107.

¹⁰⁰ Tr. March 14, 2013, page 124, line 2.

¹⁰¹ Tr. March 14, 2013, page 109, line 22.

¹⁰² Cl. PHB, paras. 6 and 386. It appears that the Administrative Receiver appointed by SCB HK, Ms. Renju, now claims that she has authority over IPTL (Notice of Appointment of Administrative Receiver of IPTL dated September 6, 2013 - Exh. 4 to TANESCO’s letter dated December 13, 2013).

¹⁰³ Cl. PHB, paras. 393 and *seq.*

¹⁰⁴ Cl. PHB, para. 396.

¹⁰⁵ Cl. PHB, para. 386.

¹⁰⁶ Cl. PHB, para. 8.

105. The Claimant in its initial pleadings had not specified whether it was relying upon clause 3.1 or 3.2 of the Security Deed to assert rights under the PPA.¹⁰⁷ The Claimant subsequently clarified, however, that it was relying exclusively upon the assignment of the PPA under clause 3.2 of the Security Deed.¹⁰⁸
106. The Claimant accepted that clause 3.2.1 of the Security Deed creates a security interest and does not operate as an outright assignment (such as a gift).¹⁰⁹ According to the Claimant, clause 3.2.1 is a “security assignment” in the form of a mortgage: “*It operates as an assignment of the benefit of the PPA to SCB HK, subject to an equity of redemption in favour of IPTL.*”¹¹⁰ A mortgage is a “charge” pursuant to section 79(10)(a) of the Companies Ordinance. According to the Claimant, however, it is not a charge that is subject to registration because it is neither a charge on book debts nor a floating charge.¹¹¹
107. The Claimant further maintained that the assignment of the PPA pursuant to clause 3.2.1 is a statutory assignment in the sense that it fulfills the conditions set out in section 25(6) of the Supreme Court of Judicature Act 1873 (the “SCJA”).¹¹² It follows, according to the Claimant, that SCB HK, as the assignee, acquires all available remedies in relation to the PPA as the assigned contract and is entitled to enforce the same in its own name without joining the assignor.¹¹³

VI. The Tribunal’s Analysis on Jurisdiction

108. The Tribunal will first consider the question of its jurisdiction under the ICSID Convention and then examine the assignment of the PPA and the impact of the proceedings before Tanzanian courts on the jurisdiction of the Tribunal.

¹⁰⁷ Cl. Mem., paras. 202-203.

¹⁰⁸ Claimant’s Opposition to Bifurcation of Proceedings, para. 11.

¹⁰⁹ Cl. Rep., para. 195. TANESCO had submitted in its Reply to the Claimant’s Opposition to Bifurcation of Proceedings that clause 3.2.1 does not operate as an outright assignment, para. 14; TANESCO’s Submissions Relating to Letter from Liquidator of IPTL, paras. 6-13.

¹¹⁰ Cl. Rep., para. 196.

¹¹¹ Cl. Rep., paras. 221-222.

¹¹² Cl. Rep., para. 201.

¹¹³ Cl. Rep., para. 198.

A. On the Tribunal's jurisdiction under the ICSID Convention

109. Although the Respondent did not raise any objections to the Tribunal's jurisdiction under the ICSID Convention, the Tribunal must examine its jurisdiction in light of Article 25 of the ICSID Convention. In order for the Centre to have jurisdiction over a dispute, four conditions must be satisfied:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*, *i.e.* the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration;
- fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

110. Regarding the first condition, SCB HK is a company organised under the law of Hong Kong. China is an ICSID Contracting State. TANESCO is an entity wholly owned by Tanzania and designated as an agency of Tanzania pursuant to Article 25(1) of the ICSID Convention. Tanzania is an ICSID Contracting State.

111. Regarding the second condition, the Tribunal is satisfied that by virtue of its purchase of the outstanding debt under the loans to IPTL and the assigning of the rights under the relevant agreements, SCB HK has an investment for the purposes of the ICSID Convention. There is undoubtedly a legal dispute arising out of the investment.

112. Regarding the existence of consent in writing, as will be explained below (paras. 152-153 *infra*), the Tribunal is satisfied that the arbitration agreement contained in the PPA concluded between IPTL and TANESCO has been assigned to SCB HK.

113. The time of consent by IPTL is deemed to be May 26, 1995, the date of the PPA. The Tribunal is satisfied that the ICSID Convention was applicable at the initial time of consent, *i.e.* May 26, 1995 when the PPA was concluded, and on August 17, 2005 when SCB HK became entitled to exercise the rights, discretions and remedies under the PPA.

114. For the above reasons, the Tribunal is satisfied that the jurisdictional conditions of the ICSID Convention are met.

B. The impact of the assignment of the PPA and the relevance of proceedings in Tanzania involving IPTL on the Tribunal's jurisdiction

1. The relevant contractual provisions relating to the assignment of the PPA

115. The Claimant relies upon clause 3.2.1 of the Security Deed (between IPTL and Sime Bank),¹¹⁴ which reads:

3.2 Assignments: The Borrower [IPTL] with full title guarantee and as continuing security for the payment and discharge of all Liabilities hereby assigns to the Security Agent [now SCB HK] for the benefit of the Secured Creditors:

3.2.1 all its present and future right, title and interest in and to the Assigned Contracts, including all moneys which at any time may be or become payable to the Borrower pursuant thereto and the net proceeds of any claims, awards and judgements which may at the time be receivable or received by the Borrower pursuant thereto [...]¹¹⁵

116. The definition of “Assigned Contracts” includes the PPA.¹¹⁶

117. Clause 19.2 of the PPA permits assignment of the PPA on the following terms:

19.2 Assignment

Neither this Agreement nor any of the rights or obligations hereunder, may be assigned, transferred or delegated by either Party without the express prior written consent of the other party, which consent shall not be unreasonably withheld or delayed provided that THE SELLER may assign its rights and/or obligations under this Agreement to the Financing Parties and their successors and assigns as required for financing and refinancing purposes, and provided further that, unless expressly agreed to by the other Party, no assignment, whether or not consented to, shall relieve the assignor of its obligations hereunder in the event its assignee fails to perform.¹¹⁷

118. Article 18.3 of PPA contains an ICSID arbitration clause:

¹¹⁴ Cl. Mem., para. 203.

¹¹⁵ Exh. C-16.

¹¹⁶ Exh. C-16, page 2.

¹¹⁷ Exh. C-4/R-1, page 56.

18.3 Arbitration

- (a) Any Dispute arising out of or in connection with this Agreement shall be settled by arbitration in accordance with the Rules of Procedures for Arbitration Proceedings (the “ICSID Rules”) of the International Centre for the Settlement of Investment Disputes (the “Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “Convention”). For purposes of consenting to the jurisdiction of the Convention, the Parties agree that THE SELLER [IPTL] is a foreign controlled entity unless the amount of the voting stock in THE SELLER held by foreign investors should decrease to less than fifty percent (50%) of the outstanding voting stock of THE SELLER.
- (b) If for any reason the Dispute cannot be settled in accordance with the ICSID Rules, whether due to any failure to implement the Convention, or THE SELLER should not be agreed to be a foreign controlled entity, or the request for arbitration proceedings is not registered by the Centre, or the Centre fails or refuses to take jurisdiction over such Dispute, or otherwise, such Dispute shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the “ICC Rules”) by one or more arbitrators appointed in accordance with the ICC Rules.
- (c) The arbitration shall be conducted in London, England and, unless otherwise agreed by the Parties, the number of arbitrators shall be three; one arbitrator nominated by THE SELLER, one arbitrator nominated by TANESCO and one arbitrator nominated by the arbitrators appointed by THE SELLER and TANESCO provided that if the arbitrators appointed by THE SELLER and TANESCO fail to nominate an arbitrator or agree on the nomination of the arbitrator within 28 days of either both being appointed either party may apply to the High Court of the England and Wales to appoint the third arbitrator.
- (d) No arbitrator appointed pursuant to Article 18.3(b) or Article 18.3(c) shall be a national of the jurisdiction of either Party to this Agreement or of the jurisdiction of any shareholder or group of shareholders holding more than thirty (30) percent of THE SELLER nor shall any such arbitrator be an employee or agent or former employee or agent of any such person.
- (e) The Law governing the procedure and administration of any arbitration instituted shall be the English Law.¹¹⁸

2. The factual background to the assignment of the PPA

119. On March 12, 1998, the Security Agent under the Facility Agreement and the Security Deed with IPTL, which at the time was Sime Bank Berhad, provided notice to TANESCO that:

¹¹⁸ Exh. C-4/R-1, pages 54-55.

IPTL has, as security for the repayment of amounts owing under the Facility Agreement, charged to the Security Agent by way of first legal assignment, all of the rights, title and interest in and to the [PPA] and all benefits accruing to IPTL thereunder.¹¹⁹

120. TANESCO acknowledged receipt of the notice on the same day.¹²⁰
121. SCB HK acquired the outstanding debt under the loan to IPTL from Danaharta pursuant to a Sale and Purchase Agreement dated August 4, 2005¹²¹ (the “SPA”), for the sum of US\$76,100,00.00.¹²² Pursuant to clause 3(1) of the SPA, Danaharta transferred “*all of its rights, title and interest to the Sale Assets and under the Asset Documentation.*” The “List of Asset Documentation” at Schedule 2 to the SPA includes the Security Deed, the PPA, the Facility Agreement and the Shareholder Support Deed.
122. At the option of SCB HK, this transfer was implemented by a Deed of Assignment¹²³ duly executed by Danaharta on August 17, 2005 (the “Deed of Assignment”). Clause 2 of the Deed of Assignment reads:
- In consideration of the Purchaser having paid the Assignor the Purchase Price (as defined in the Sale and Purchase Agreement) the Assignor hereby assigns absolutely to the Assignee all of its rights title and interest vested in the Assignor in the Sale Assets and the Asset Documentation.
123. Schedule 1 to the Deed of Assignment mirrors Schedule 2 of the SPA and thus includes reference to the Security Deed, the PPA, the Facility Agreement and the Shareholder Support Deed within the definition of the “Asset Documentation.”
124. According to the Claimant, “*In effect, as a result of the transaction SCB HK became the sole lender of record to IPTL in place of Danaharta with the benefit of all of the rights of the previous Project lender.*”¹²⁴
125. SCB HK appointed itself as the Security Agent within the meaning of the Facility Agreement and the Security Deed by a letter of November 4, 2009.¹²⁵ (SCB Malaysia had

¹¹⁹ Exh. C-26.

¹²⁰ Exh. C-26.

¹²¹ Exh. C-55/R-15. This is not in dispute: TANESCO’s Memorial on Jurisdiction, para. 31.

¹²² Schedule 5 to SPA, Exh. C-55/R-15.

¹²³ Exh. C-56/R-114 (Deed of Assignment).

¹²⁴ Cl. Mem., para. 86.

earlier declined the appointment.¹²⁶) It is noted in that letter that RHB Bank Berhad had been removed from this role by SCB HK's letter of October 29, 2009.¹²⁷ The original Security Agent, Sime Bank Berhad, had been succeeded by RHB Bank Berhad in 1999.

3. The law applicable to the question of the assignment of the PPA

126. It is common ground between the Parties that the validity of the assignment of rights in the PPA must be determined in accordance with Tanzanian law in accordance with the choice of law rule in Article 12(2) of Rome Convention, which, although not binding on this Tribunal, nonetheless sets out a general principle of private international law suitable for application in these proceedings.¹²⁸
127. It is also common ground that English judicial decisions prior to July 22, 1920 are binding on the Tanzanian courts, save where subsequently modified in Tanzania, and that English judicial decisions after that date are persuasive authority (especially where they relate to similar statutory provisions and/or there is no relevant Tanzanian authority).¹²⁹

4. The issues to be resolved

128. The object of the alleged assignment effectuated under clause 3.2.1 of the Security Deed is a chose-in-action: it is the benefit of the PPA (principally the right to receive various contractual payments from TANESCO) and any corresponding rights to enforce that benefit.
129. A chose-in-action can be the object of a statutory assignment or an equitable assignment under Tanzanian law (as is the case in English law). If the conditions are fulfilled for a statutory assignment, then the assignee of the chose-in-action acquires a legal right to it and can sue in its own name. An assignment of a chose-in-action which does not conform to the conditions for a statutory assignment is an equitable assignment. Under an equitable assignment, it is generally necessary to have the assignor joined as a claimant.

¹²⁵ Exh. C-58.

¹²⁶ Exh. C-60.

¹²⁷ The letter is at Exh. C-57.

¹²⁸ Cl. Mem., para. 216; Cl. Rep., para. 192.

¹²⁹ Cl. Rep., para. 192; Additional Statement by Professor Mbunda, paras. 5-7.

130. The statutory provisions on assignment are set out in section 25(6) of the SCJA, which is the applicable statute in Tanzania. This statute applies equally to an outright sale or gift of a chose-in-action as well as to a mortgage of such a right. A mortgage of such a right is otherwise known as a “security assignment” because it is an assignment by way of security that is subject to re-assignment on redemption. It is the Claimant’s submission that the assignment under clause 3.2.1 operates by way of a mortgage because the secured interest is subject to re-assignment on redemption under the PPA. It is conceded by the Claimant that there has been no outright assignment under clause 3.2.1 of the Security Deed.
131. If the assignment under clause 3.2.1 amounts only to a charge on the chose-in-action, then this does not operate to transfer any proprietary interest and is outside the scope of the statutory provisions. It will only have an effect in equity.
132. The **first issue** is thus whether or not a valid mortgage has been created in respect of the benefit of the PPA pursuant to clause 3.2.1 of the Security Deed, such that there has been an effective transfer of the legal right to that benefit and all the remedies relating to that benefit to SCB HK, by a statutory assignment in accordance with section 25(6) of the SCJA.
133. The **second issue** is the consequence of the Tribunal’s decision on the first issue in relation to its jurisdiction, which the Claimant has asserted on the basis of the arbitration agreement in clause 18.3 of the PPA. Subject to the registration point raised below, the existence of the Tribunal’s jurisdiction would appear to be contingent upon the legal right to the benefit of the PPA having passed to SCB HK pursuant to section 25(6) of the SCJA. If this is not the case, and SCB HK merely has an equitable charge over the assets listed in clause 3.2.1 of the Security Deed, then this would not be effective to vest SCB HK with the right to arbitrate against TANESCO provided for in clause 18.3 of the PPA. An equitable charge does not, like a mortgage, involve the transfer of ownership to the creditor. Instead, it is the right to have a designated asset of the debtor appropriated to the discharge of the indebtedness from the proceeds of the sale of the asset in question. An equitable charge cannot, therefore, be effective to transfer any rights in respect of the arbitration clause in clause 18.3 of the PPA.

134. Assuming, for the purposes of this introductory analysis, that there has been a valid transfer of the legal right to the benefit of the PPA to SCB HK pursuant to clause 3.2.1 of the Security Deed and section 25(6) of the SCJA, the **third issue** is whether that security interest created by a mortgage was required to be registered under section 79 of the Companies Ordinance in whole or in part. There is no purpose in considering the separate question of whether, on the hypothesis that clause 3.2.1 of the Security Deed creates an equitable charge over the benefit of the PPA, *that* security interest had to be registered, because if the security interest is merely an equitable charge then the Tribunal is without jurisdiction.
135. The **fourth issue** relates to the consequences that follow if the security interest created by clause 3.2.1 of the Security Deed was required to be registered in whole or in part but was not registered (there is no dispute that the security interest was not in fact registered). If there has been a valid security interest created by a mortgage pursuant to clause 3.2.1 of the Security Deed, then that security interest is generally enforceable against the debtor (IPTL). The perfection of a security interest through registration is required to make it effective against third parties. The purpose of registration is precisely to put third parties on notice of the security interest, so that it is just for the law to make it effective against them. A failure to register a security interest under section 79 of the Companies Ordinance means that it is “*void against the liquidator and any creditor of the company.*”¹³⁰
136. This fourth issue was critical at one point of the proceedings because a liquidator was in fact in place in respect of IPTL in Tanzania. It will be recalled that an order for IPTL’s winding up was issued by the High Court of Tanzania on July 15, 2011 and the winding up was deemed to have commenced on February 25, 2002, which was the date of the petition.¹³¹ On December 17, 2012, however, the Court of Appeal in the Civil Revision Proceeding No. 1 quashed the 2011 Winding up Order. Its principal reason for doing so was that there was a pending petition by SCB HK to appoint an administrator for IPTL when the High Court had made its Winding up Order and this was an error of law by virtue of section 249(1)(a) of the Companies Act 2002, which reads:

¹³⁰ CLA-10, section 79(1).

¹³¹ Letter of the Liquidator dated July 10, 2012. *See supra* paras. 77 and *seq.*

(1) During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition-

(a) no resolution may be passed or order made for the winding up of the company [...]¹³²

137. At the time of this Decision, the Tribunal understands that SCB HK has withdrawn its petition for an administration order in respect of IPTL, but that the Parties disagree about the possibility of the future appointment of an administrator or liquidator.¹³³

138. Although the fourth issue is not a live one at the time of rendering this Decision, the Tribunal considers that it is nevertheless prudent to deal with it given the history of the insolvency proceedings in respect of IPTL and the, albeit disputed, possibility that a liquidator or administrator could be appointed in the future.

139. On the basis of the Court of Appeal's interpretation of section 249(1) of the Companies Act 2002, the Respondent filed its "Renewed Application for Bifurcation or, in the Alternative, for a Stay of this Arbitration" ("Renewed Application") on February 19, 2013. The issues relating to this application were heard by the Tribunal on March 14-15, 2013. In essence, the Respondent submits:

The Court's rationale for applying Section 249(1)(a) of the Companies Act 2002 must also apply to Section 249(1)(b), which prohibits SCB HK from seeking to enforce its security without first obtaining leave of the High Court. By force of logic, the automatic stay contained in Section 249 that required the Court to vacate all orders in the Winding Up Petition prior to 17 September 2009 applies equally to SCB HK and its actions related to this arbitration. Since filing the Second Administration Petition on 17 September 2009, SCB HK lost whatever right and authority it might have had to seek to enforce its security without obtaining prior leave of the High Court. As SCB HK has never requested nor been granted leave, SCB HK could not and has not lawfully invoked the arbitration clause in Article 18.3 of the PPA as required for jurisdiction under the ICSID Convention.¹³⁴

140. On April 15, 2013, the Tribunal wrote to the Parties affirming its prior decision not to stay the proceedings and not to bifurcate them. The Tribunal undertook to provide its reasons for this affirmation in its Decision and hence this will be addressed as the **fifth issue**.

¹³² RA-59.

¹³³ Parties' respective letters of November 27, 2013 and December 13, 2013.

¹³⁴ Respondent's Renewed Application, para. 22.

a) First issue: was there a valid mortgage and statutory assignment?

141. The Parties are in agreement that clause 3.2.1 of the Security Deed creates a security interest but appear to be divided as to the nature of that interest. It is the Claimant's submission that clause 3.2.1 amounts to an assignment by way of mortgage. The strongest evidence of this is that there is an express provision that makes the assignment subject to an equity of redemption in clause 16.3 of the Security Deed,¹³⁵ which reads:

Final Redemption: Subject and without prejudice to Clause 16.4, upon proof being given to the satisfaction of the Security Agent that all the Liabilities have been discharged in full or that provision acceptable to the Security Agent for such discharge has been made, and that all facilities which might give rise to Liabilities have terminated, the Security Agent shall at the request and cost of the Borrower execute and do all such deeds, acts and things as may be necessary to release the Charged Assets from the Charges.¹³⁶

142. TANESCO has not made the distinction between a mortgage and a charge a primary aspect of its submissions. In fact the distinction is addressed in a single footnote in TANESCO's Rejoinder:

SCB HK argues that the security assignment is a "mortgage" and not a "charge." *See* SCB HK Reply Memorial ¶195. TANESCO does not believe the Tribunal will find placing these labels on the security assignment is particularly useful in resolving the issue of whether the security needed to be registered. One difficulty is that while the charging language in Section 3.2 appears to create an assignment where "ownership of the property used as security is transferred to the lender," which SCB HK classifies as a "mortgage," the lenders in the Facility Agreement at Section 19(C) contract with IPTL that unless it is in default, the Facility Agent will not allow the Security Agent to exercise the rights, including the step-in rights, granted to the Security Agent in the Security Deed, such that SCB HK's supposed "mortgage" in practice only "gives the lender recourse to the property used as security in the event that the debt is not repaid," which SCB HK says is the essential definition of a "charge." The substance of the business arrangement, and in this regard, even SCB HK acknowledges "clause 3.2.1 of the Security Deed constitutes a 'charge' for the purposes of section 79 of the Tanzanian Companies Ordinance." Reply Memorial at ¶ 221.¹³⁷

143. TANESCO thus concludes that the nature of the security interest is irrelevant: the critical point in its view is that it had to be registered and it was not and therefore it is void. In the Tribunal's view, this conclusion conflates several issues. The nature of the security interest may have an impact on the scope of rights that SCB HK has in relation to the PPA.

¹³⁵ Cl. Rep., para. 196.

¹³⁶ Exh. C-16, pages 17-18.

¹³⁷ Resp. Rej., footnote 5.

Moreover there are two distinct stages of the analysis. The first is the creation of a security interest that is enforceable against the debtor. The second is the perfection of that interest so as to make it effective against third parties. The issue is not, therefore, as simple as “*whether the security needed to be registered*” as maintained by TANESCO.

144. SCB HK has argued that the assignment in clause 3.2.1 is a statutory assignment. This is critical to the characterisation of the security interest as a mortgage because the principal difference between a mortgage and an equitable charge is that ownership over the asset is transferred to the creditor pursuant to a mortgage but not on the basis of an equitable charge. For SCB HK to have legal rights to the benefit of the PPA, the assignment of this chose-in-action must satisfy the requirements for a statutory assignment under section 25(6) of the SCJA, which remains in force in Tanzania but which was subsequently replaced in England by section 136 of the Law of Property Act 1925 (the “LPA”). These provisions are in substance the same.

145. In accordance with section 25(6) of the SCJA,¹³⁸ there are three requirements for a statutory assignment:

- a) It must be an “absolute assignment [...] (not purporting to be by way of charge only)”;
- b) The assignment must be made “*by writing under the hand of the assignor*”;
and
- c) Express written notice of the assignment must have been given to the counterparty to the assigned contract.

146. SCB HK sets out its submissions on each of these points in its Reply and its legal experts, Professor McCormack and Mr. Zervos, also address these points in their reports. TANESCO did not make submissions on these points in its Rejoinder and they are not addressed by its legal expert, Professor Mbunda.

147. In respect of the first requirement, which is identical in terms to section 136 of the LPA, the following analysis appears in *Chitty on Contracts*:

The assignment must be absolute and not purport to be by way of charge only. **An assignment by way of mortgage may, however, be absolute within the meaning of**

¹³⁸ CLA-64.

the section, if there is an express or implied *proviso* for reassignment on repayment of the loan: for the reassignment would involve fresh notice to the debtor, who would thus be in no doubt as to whom he ought to pay the debt. **An assignment of all moneys due or to become due from the debtor, which was expressed to be by way of continuing security for all moneys due from the assignor to the assignee, has been held to be absolute.** On the other hand, where the assignor charged a sum which would become due to him from the debtor as security for advances made to him by the assignee, and assigned his interest in that sum until the advances were repaid to the assignee with interest, this was held to be by way of charge and not within the section... **The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only.** Much may depend on the language of the particular instrument; in construing it, the court will look at the whole of its language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor. Thus the fact that the assignee is to hold the proceeds of the debt, or the surplus proceeds beyond a stated amount, on trust for the assignor does not prevent the assignment from being absolute.¹³⁹ (Emphasis added)

148. The passages in bold are particularly relevant to this case. First, it is clear that an assignment by way of mortgage can be absolute for the purposes of section 25(6) of the SCJA. The authority cited by *Chitty on Contracts* for this proposition is *Tancred v. Delagoa Bay Co.*,¹⁴⁰ which is a case that was decided on the basis of that very provision. Second, the language of clause 3.2.1 of the Security Deed tracks the language that is identified as being consistent with an absolute assignment: “*The Borrower with full title guarantee and as continuing security for the payment of discharge of all Liabilities hereby assigns to the Security Agent [...].*” Once again, the authority cited by *Chitty on Contracts* in this respect is also a case decided on the basis of section 25(6) of the SCJA: *Hughes v. Pump House Hotel Co.*¹⁴¹ In that case, an assignment of all monies due or to become due to the debtor under a building contract for the purpose of a “continuing security” was held absolute and not given by way of charge only. Third, there can be no doubt from clause 3.2.1 of the Security Deed that IPTL’s rights to the assigned contracts (including the PPA) have been transferred to the Security Agent (SCB HK) and that TANESCO could not be under any doubt as to whom to pay. Express written notice was given to TANESCO of the

¹³⁹ CLA-18, para. 19-012, footnotes omitted.

¹⁴⁰ (1889) 23 QBD 239.

¹⁴¹ [1902] 2 KB 190.

assignment of the PPA on March 12, 1998,¹⁴² and TANESCO acknowledged receipt of that notice on the same day.¹⁴³

149. Finally, it will be recalled that TANESCO has submitted that, by virtue of section 19(c) of the Facility Agreement, the lenders have stipulated to IPTL that unless it is in default, the Facility Agent will not allow the Security Agent to exercise the step-in rights granted to the Security Agent in the Security Deed.¹⁴⁴ This does not, however, prevent clause 3.2.1 of the Security Deed from effecting a statutory assignment. According to a leading authority on the assignment of contracts: “*The fact that proceedings to enforce a security assignment cannot be taken until default does not alone render an assignment conditional.*”¹⁴⁵
150. The assignment envisaged in clause 3.2.1 of the Security Deed thus satisfies the first requirement for a statutory assignment. The second and third requirements are also satisfied. The assignment of the PPA was in writing under the hand of IPTL, which executed the Security Deed. Moreover, as previously mentioned, TANESCO was given notice of the assignment on March 12, 2008.¹⁴⁶
151. The Tribunal concludes that clause 3.2.1 of the Security Deed is a valid statutory assignment of IPTL’s rights under the PPA to SCB HK. This was finally accepted by the Respondent in oral submissions at the hearing on March 14, 2013.¹⁴⁷

b) Second issue: what are the consequences for the Tribunal’s jurisdiction?

152. The security assignment that SCB HK has over the benefit of the PPA confers a more extensive range of rights in relation to the PPA than would be the case if clause 3.2.1 of the Security Deed had given SCB HK merely an equitable charge over certain assets. By the means of the statutory assignment pursuant to section 25(6) of the SCJA, SCB HK has become the legal owner of the rights arising under the PPA, which must include the arbitration agreement in clause 18.3 of the PPA. Moreover, pursuant to that statutory provision, the assignee of a chose-in-action is conferred “*the legal right to such debt or*

¹⁴² Exh. C-26.

¹⁴³ Exh. C-26.

¹⁴⁴ Resp. Rej., footnote 5.

¹⁴⁵ Tolhurst, *The Assignment of Contractual Rights* (2006), page 374, CLA-19.

¹⁴⁶ Exh. C-26.

¹⁴⁷ Mr. Range, Tr. March 14, 2013, page 165.

*chose in action from the date of such notice, and all legal and other remedies for the same, [...] without the concurrence of the assignor.”*¹⁴⁸

153. It follows that SCB HK is entitled to invoke the arbitration agreement in clause 18.3 of the PPA as a right that has been assigned to it and can bring proceedings against TANESCO without joining IPTL as a party to the action. **The Tribunal thus has jurisdiction over the Parties and the dispute.** The Tribunal’s jurisdiction extends in particular to the questions of whether there is a valid security assignment and whether the security interest had to be registered. This is by virtue of the broad formulation of the arbitration agreement in clause 18.3(a) of the PPA, which covers “[a]ny Dispute arising out of or in connection with [the PPA].” The question of whether SCB HK was entitled to step into the shoes of IPTL and assert rights against TANESCO under the PPA is an issue arising in connection with the PPA.

c) Third issue: did the security interest need to be registered?

154. At the time IPTL granted security interests to the Security Agent under the Security Deed, the requirement that certain security interests had to be registered to be perfected was governed by section 79 of Tanzania’s Companies Ordinance:

Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered in Tanzania and being a charge to which this section applies shall, so far as any security on the company’s property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner are delivered to or received by the Registrar for registration in manner required by this Act within forty two days after date of its creation.

(2) This section applies to the following charges --

[...]

(e) a charge on book debts of the company;

(f) a floating charge on the undertaking or property of the company [...]

[...] ¹⁴⁹

¹⁴⁸ CLA-64.

155. This provision was subsequently replaced on March 1, 2006, by sections 96 and 97 of Tanzania’s Companies Act. There was no change in substance to section 79 of the Companies’ Ordinance.
156. TANESCO maintains that clause 3.2.1 of the Security Deed is a charge on book debts and/or a floating charge that was required to be registered under section 79 of the Companies’ Ordinance. SCB HK’s accepts that clause 3.2.1 does amount to a charge insofar as a “charge” is defined in section 79(10)(a) of the Companies’ Ordinance to include a “mortgage.” It is SCB HK’s position, however, that it is not a charge on book debts or a floating charge and therefore it does not have to be registered under section 79.¹⁵⁰
157. The security assignment created by clause 3.2.1 of the Security Deed grants SCB HK as the Security Agent a bundle of rights in the PPA. TANESCO correctly points out that “*the bundle of rights represented by the PPA was close to 100% of all the assets of IPTL. It included but was not limited to the right to receive all present and future funds payable to the company.*”¹⁵¹ The most important right that SCB HK acquired was the right to receive all present and future funds payable to the company. It was not the only right: it has already been noted that one of the rights transferred to SCB HK was the right to invoke the arbitration agreement in clause 18.3 of the PPA. It is, however, the right that is the object of SCB HK’s claim in the present proceedings against TANESCO.
158. As against IPTL, there is no doubt that SCB HK has created a valid security interest. The question is whether that security interest had to be perfected so as to make it effective against third parties. If the security interest created by clause 3.2.1 of the Security Deed requires registration pursuant to section 79 of the Companies’ Ordinance, then it will “*be void against the liquidator and any creditor of the company*” because it is not in dispute that no security interest created by the Security Deed was registered with the Tanzanian authorities.

¹⁴⁹ CLA-10.

¹⁵⁰ Cl. Rep., paras. 221-222.

¹⁵¹ Resp. Rej., para. 24.

159. It is TANESCO's primary case that clause 3.2.1 of the Security Deed creates a charge on future book debts and is therefore registrable under section 79 of the Companies' Ordinance. SCB HK formulates the two principles governing the analysis of whether the assignment of the PPA amounts to a charge on book debts as follows:

(1) Where the charge is over existing property, it is necessary to look to the nature of the charged property as at the date of creation of the charge. In particular, if the charge relates to an existing contract that, as at that date, does not include a book debt, then the charge is not registrable, even though the contract may ultimately give rise to a book debt in the future.

(2) On the other hand, if, on its proper construction, the charge is granted over future book debts as and when they arise, then the charge will be registrable, notwithstanding that the book debts to which it relates are not yet in existence.¹⁵²

160. It is TANESCO's submission that clause 3.2.1 of the Security Deed gives rise to a charge on future book debts.¹⁵³ It is clear from SCB HK's formulation of its second principle that both Parties accept that a charge on future book debts is registrable. It is SCB HK's submission, however, that clause 3.2.1 creates a charge that relates to an existing contract that, as of the date of the execution of the Security Deed, does not include a book debt and therefore is not registrable. Thus, according to SCB HK, the present case falls within the first principle set out above and SCB HK relies primarily on the English authority of *Paul & Frank Ltd v. Discount Bank (Overseas) Ltd & the Board of Trade*¹⁵⁴ in support of this submission.

161. In *Paul & Frank*, Paul & Frank Ltd drew a bill of exchange on the buyers of its goods for the price and subsequently delivered the goods. Paul & Frank Ltd completed a letter of authority conferring a power on the Board of Trade to pay any sums becoming due under an insurance policy for the liabilities of foreign buyers of Paul & Frank Ltd's goods to Discount Bank. The buyer of Paul & Frank Ltd's goods did not pay for them. The bill of exchange was dishonoured. A liquidator was appointed for Paul & Frank Ltd. The Board of Trade paid sums to Discount Bank under the insurance policy on reliance of the letter of

¹⁵² Cl. Rep., para. 224. Elsewhere, SCB HK set out three different categories of charge which reflect these two principles: *see* Cl. PHB, para. 444.

¹⁵³ Resp. Rej., para. 25.

¹⁵⁴ [1967] Ch 348.

authority. The liquidator sought a declaration that the letter of authority was void as an unregistered charge on a book debt of Paul & Frank Ltd.

162. Professor McCormack, SCB HK’s legal expert, places particular importance on the following passage of Pennycuick J’s judgment in that case:

It seems to me that, in order to ascertain whether any particular charge is a charge on book-debts within the meaning of the section, one must look at the items of property which form the subject matter of the charge at the date of its creation and consider whether any of those items is a book-debt. In the case of an existing item of property, this question can only be answered by reference to its character at the date of creation. Where the item of property is the benefit of a contract and at the date of the charge the benefit of the contract does not comprehend any book-debt, I do not see how that contract can be brought within the section as being a book-debt merely by reason that the contract may ultimately result in a book-debt.¹⁵⁵

163. This statement must be read in conjunction with Pennycuick J’s characterisation of the contract of insurance, which was the relevant contract before him, as a “contingency contract”:

I do not think in ordinary speech one would described as a “book-debt” the right under a contingency contract before the contingency happens. By “contingency contract” in this connection I mean contracts of insurance, guarantee, indemnity and the like.¹⁵⁶

164. When Pennycuick J spoke of the benefit of the contract “*not comprehend[ing] any book debt*”, he clearly meant debts of a contingent nature; *viz.* debts the payment of which is contingent on the happening of some uncertain future event. This was the nature of an amount payable under an insurance policy upon the occurrence of the insured event. According to Pennycuick J’s findings in respect of the expert accountancy evidence, such an amount would not even be recorded as a book debt even after the admission of liability under the insurance policy and the ascertainment of the amount.¹⁵⁷

165. The contractual payments to be made by TANESCO to IPTL under the PPA in this case were not contingent debts akin to debts payable under contracts of insurance, guarantee and indemnity. At the time the Security Deed was executed, they were future debts comprehended by the PPA that would have been entered into the books of IPTL as book

¹⁵⁵ [1967] Ch 348, 362. Expert Report of Professor Gerard McCormack, para. 38.

¹⁵⁶ [1967] Ch 348, 360.

¹⁵⁷ [1967] Ch 348, 362.

debts as they arose.¹⁵⁸ Indeed, it can be readily inferred that the lenders made the US\$105 million facility loan to IPTL primarily on the back of the capacity payments that were anticipated to be received under the PPA and this is reflected by the very terms of clause 3.2 of the Security Deed.

166. The facts of the present case are also distinguishable from another case cited by SCB HK in support of its argument, the decision of the Irish High Court in *Farrell v. Equity Bank Ltd.*¹⁵⁹ This case involved an entitlement to refunds of premiums on insurance policies in the event that such policies were cancelled prior to the expiration of their term. It was found by Lynch J that “*the mere possibility that future refunds of premiums might become payable in amounts that were wholly unascertained and might never arise at the date of the creation of the charge does not make that transaction a book debt which must be registered.*”¹⁶⁰
167. Like *Paul and Frank Ltd*, the *Farrell* case concerned a contingent debt rather than a future debt. The making of contractual payments by TANESCO to IPTL under the terms of the PPA can hardly be described as a “mere possibility” and in amounts that “were wholly unascertained.” If that were the case, it would have been impossible to obtain financing for the construction of the power plant.
168. The Tribunal concludes that clause 3.2.1 of the Security Deed creates a charge over future book debts and thus had to be registered pursuant to section 79 of Tanzania’s Companies Ordinance. In light of this finding, there is no need for the Tribunal to address TANESCO’s alternative submission that clause 3.2.1 creates a floating charge.

d) Fourth issue: what are the effects of non-registration?

169. There is no doubt that the non-registration of a security interest does not invalidate the charge against the company. According to Professor Goode’s leading treatise *Principles of*

¹⁵⁸ SCB HK’s expert on accounting practices in Tanzania, Mr. Kassam, accepted that the capacity payments should have been entered into IPTL’s financial statements once the relevant billing period had elapsed following the commencement of commercial operations and were in fact entered on this basis: Mr. Kassam’s Statement, paras. 59 and 68.

¹⁵⁹ [1990] 2 IR 549.

¹⁶⁰ [1990] 2 IR 549, 554.

Corporate Insolvency Law, which was quoted by the Tanzanian Court of Appeal in its judgment quashing the liquidation order against IPTL:

In should be borne in mind that registration is purely a perfection requirement designed to give notice to third parties; it is not a condition of validity of the charge, which remains fully enforceable against the company prior to winding up or administration. It follows that if the company does go into liquidation or administration the consequent avoidance of the unregistered charge has no impact on the charge to the extent that he has already realised his security or perfected it by seizure or judicial foreclosure or has otherwise obtained payment, for to that extent his security has been satisfied and there is nothing for him to enforce.¹⁶¹

170. As matters stand today, the fact that SCB HK failed to register a charge over future book debts in relation to clause 3.2.1 of the Security Deed does not have any effect on the Tribunal’s jurisdiction or the relief requested by SCB HK in these proceedings. This is because there is currently no liquidator or administrator appointed in respect of IPTL.
171. The Tribunal nonetheless considers that it would be prudent to rule upon the effect of non-registration in the event that a liquidator or administrator were appointed in respect of IPTL and the history of these proceedings suggests that the *status quo* is liable to change. This issue has, moreover, been the object of extensive submissions and expert evidence from both Parties.
172. The Respondent has disputed whether the arbitration agreement is severable from those parts of the Security Deed that create a registrable charge in the event that a liquidator or administrator is appointed in respect of IPTL. According to the Respondent: “*the voiding of the security interest created by the assignment [under Section 3.2] voids all the rights created by the assignment of the arbitration clause, as the assignment was only given for the purposes of security.*”¹⁶² The Respondent further submitted that: “*It is the assignment of the PPA itself, rather than the individual provisions thereof, that requires registration under the laws of Tanzania.*”¹⁶³
173. The Tribunal does not accept the Respondent’s arguments on this point.

¹⁶¹ CLA-89, pages 609-610.

¹⁶² Resp. Rej., para. 71; Resp. PHB, para. 152.

¹⁶³ Resp. PHB, para. 158.

174. The Respondent referred the Tribunal to *Shinyanga Regional Training Co Ltd & Another v. National Bank of Commerce*¹⁶⁴ and *Esberger & Son, Ltd v. Capital and Counties Bank*.¹⁶⁵ Neither of these cases, however, assists the Respondent because they relate to the validity of a single security interest. In *Esberger*, a security interest over the title deeds to a parcel of land was deemed to be void because the interest was not registered in due time. There was no issue of severability raised in that case. Likewise, in *Shinyanga*, the issue was simply the validity of an unregistered debenture and the power of sale conferred by that debenture. No issue of severance was raised in that case. The Respondent accepted in oral submissions that there were “*no cases whatsoever in Tanzania on [the severance point].*”¹⁶⁶
175. The Claimant has referred the Tribunal to *Re Cosslett (Contractors) Ltd*¹⁶⁷ and *Re North Wales Produce and Supply Society Limited*.¹⁶⁸
176. In *Re Cosslett*, a clause in a construction contract allowed the employer, if the contractor abandoned the contract, to (i) use the contractor’s plant and materials to finish the works and (ii) sell the contractor’s plant and materials and apply the proceedings in satisfaction of sums owed to the employer by the contractor. The Court of Appeal held that right (ii) was a registrable charge that was void against the contractor’s administrator for non-registration. In respect of right (i), however, the Court held that this right was unaffected by its conclusion relating to right (ii).
177. Although the Respondent submitted that *Cosslett* is distinguishable,¹⁶⁹ it clearly indicates that the failure to perfect a security interest does not invalidate other parts of the relevant instrument that do not require registration.
178. In *North Wales*, it was stated by the Court that:

[A]n instrument giving a security on several properties is a security for the whole amount on each of those properties and on every part of each of them and [...] the excision of one property in law, by a statute, or, in fact, by an earthquake, effects a

¹⁶⁴ [1997] TLR 78.

¹⁶⁵ [1913] 2 Ch 366.

¹⁶⁶ Mr. Range, Tr. March 14, 2013, page 156.

¹⁶⁷ [1998] Ch 495, CLA-29.

¹⁶⁸ [1922] Ch 340, CLA-90.

¹⁶⁹ Resp. PHB, paras. 155-158.

separation between the properties and withdraws that one of them from the operation of the instrument, but leaves the instrument intact and still operative as regards the rest.¹⁷⁰

179. The Court went on to say that it did not matter whether or not the items charged were separately described in the instrument.¹⁷¹
180. The Tribunal is persuaded by these authorities cited by the Claimant that as a matter of law it is possible to sever those security interests that are void for lack of registration from those interests that are not. This conclusion is further supported by the commercial reality underlying the Security Deed, which was to ensure that the lenders had security over all of IPTL's assets, including any rights or benefits under the PPA. The right to bring arbitration proceedings against TANESCO to enforce its obligations under the PPA is clearly a valuable right that is not subject to registration and can be severed from those interests that do require registration. Furthermore, clause 18 of the Security Deed expressly provides that the illegality, invalidity or unenforceability of any provision of the Security Deed shall not affect the legality, validity or enforceability of any other provision. Finally, the Tribunal's conclusion is also consistent with the policy underlying the registration of security interests, which is to give notice to third party creditors. There is no reason for third parties to be on notice of other contractual rights such as an agreement to arbitrate. This also militates in favour of severance.
181. It follows that if a liquidator or administrator were to be appointed in respect of IPTL in the future, this would have no effect on the Tribunal's jurisdiction either prospectively or retrospectively. This is because the arbitration agreement in clause 18.3 of the PPA has been legally assigned to SCB HK and that right is severable from the charge on future book debts created by clause 3.2.1 of the Security Deed.
182. The registration issue is irrelevant for another reason. The Tribunal has concluded elsewhere that, in so far as SCB HK has stepped into the shoes of IPTL in respect of its rights under the PPA, this Tribunal only has jurisdiction in respect of IPTL's rights against TANESCO under the PPA. As will be discussed later, this means that the Tribunal can

¹⁷⁰ CLA-90, page 345.

¹⁷¹ *Ibid.*, page 345.

make a declaration as to any amounts owed by TANESCO to IPTL, but it cannot make an order requiring TANESCO to pay any such amounts to SCB HK independently of IPTL. SCB HK has no rights as against TANESCO as the lender to IPTL in these arbitration proceedings; it only has rights against TANESCO as the assignee of IPTL's rights under the PPA.

183. If a liquidator or administrator were to be appointed in respect of IPTL, this would only have an impact in respect of any order of the Tribunal requiring the enforcement of SCB HK's security interest against IPTL's assets. But for independent reasons, the Tribunal has concluded that it has no jurisdiction to make such an order in any case. **It follows that the registration issue is irrelevant so long as the Tribunal confines itself to giving declaratory relief, which the Tribunal is obliged to do in the circumstances of this case.**

e) The fifth issue: Respondent's request for a stay of proceedings and renewed application for bifurcation

184. As was previously noted, the Respondent had submitted that, in light of the Tanzania Court of Appeal's judgment of December 17, 2012,¹⁷² section 249(1) of the Companies Act 2002 must be interpreted as proscribing the continuation of these arbitration proceedings by SCB HK while its petition for the appointment of an administrator in respect of IPTL was pending. According to the Respondent:

The Court's rationale for applying Section 249(1)(a) of the Companies Act 2002 must also apply to Section 249(1)(b), which prohibits SCB HK from seeking to enforce its security without first obtaining leave of the High Court. By force of logic, the automatic stay contained in Section 249 that required the Court to vacate all orders in the Winding Up Petition prior to 17 September 2009 applies equally to SCB HK and its actions related to this arbitration. Since filing the Second Administration Petition on 17 September 2009, SCB HK lost whatever right and authority it might have had to seek to enforce its security without obtaining prior leave of the High Court. As SCB HK has never requested nor been granted leave, SCB HK could not and has not lawfully invoked the arbitration clause in Article 18.3 of the PPA as required for jurisdiction under the ICSID Convention.¹⁷³

¹⁷² See *supra* para. 79.

¹⁷³ Respondent's Renewed Application, para. 22.

185. Section 249(1) of the Companies Act 2002 reads:

(1) During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition-

(a) no resolution may be passed or order made for the winding up of the company;

(b) no steps may be taken to enforce any security over the company's property or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose; and

(c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as aforesaid.¹⁷⁴

186. The Respondent relies upon section 249(1)(b) of the Companies Act 2002 in its Renewed Application. The Respondent maintains that the present arbitration amounts to taking steps to enforce SCB HK's security, which the Respondent quotes Professor Goode as meaning "*a mortgagee or chargee of book debts or other receivables who without the consent of the administrator or leave of the court collects or demands payment from the account debtors is taking steps to enforce security over the company's property in breach of the prohibition.*"¹⁷⁵

187. As the Tribunal has already clarified, it does not have jurisdiction to order TANESCO to pay to SCB HK sums owed to IPTL. The Tribunal's jurisdiction is limited to giving declaratory relief, viz. to quantify TANESCO's outstanding debt to IPTL. The present proceedings do not, therefore, constitute a "*step to enforce any security over [IPTL's] property*" for the purposes of section 249(1)(b) of the Companies Act 2002. The fact that the Tribunal's jurisdiction has been vested by way of a security assignment is also irrelevant: the assignment has already been executed and hence there is nothing to enforce in respect of SCB HK's right to invoke the arbitration agreement in the PPA.

188. There is also a more fundamental reason for rejecting the application of section 249(1)(b) of the Companies Act 2002: it is a procedural rule in a Tanzanian statute and thus has no application in an ICSID arbitration governed by the ICSID Convention and international

¹⁷⁴ RA-59.

¹⁷⁵ RA-71.

law. Section 249(1)(b) is part of the *lex fori* in Tanzania and thus would be applicable in respect of any court proceedings in Tanzania. But the procedural law of this arbitration is not the law of Tanzania and hence section 249(1)(b) does not apply to these proceedings. The Respondent has conflated the law applicable to the merits of the claims in this arbitration and the law applicable to the procedure. For instance, in its “Reply in Support of its Renewed Application for Bifurcation or Stay”, the Respondent wrote: “*TANESCO only asks the Tribunal to abide by Tanzanian law which it is required to apply under the PPA.*”¹⁷⁶ But the choice of Tanzanian law in clause 19.4 of the PPA relates to the law applicable to the PPA as a contract and not to the procedural law of this arbitration, which comprises the ICSID Convention and the ICSID Arbitration Rules pursuant to clause 18.3 of the PPA.

189. Neither party has referred to Tanzanian authorities as to whether section 249(1)(b) of the Companies Act 2002 is a procedural or substantive rule. The Claimant has instead referred to English authorities in respect of the proper characterization of the same rule in the English insolvency statute. In *Barclays Mercantile v. Sibec LTD*,¹⁷⁷ Millett J had to interpret the effect of section 11(3) of the Insolvency Act 1986, which read:

During the period for which an administration order is in force [...] (c) no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose; and (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.

Millett J noted that this section “*is couched in purely procedural terms*” and thus could not alter the parties’ substantive rights.¹⁷⁸ The Tribunal is persuaded that section 249(1)(b) of the Companies Act 2002 in Tanzania should be characterised in precisely the same way.

190. The Tribunal concludes that, as a procedural provision, section 249(1)(b) of the Companies Act 2002 only applies where Tanzanian law is the *lex fori* for the legal proceedings in

¹⁷⁶ Respondent’s Reply in Support of its Renewed Application for Bifurcation or Stay, para. 30.

¹⁷⁷ [1992] 1 WLR 1253. CLA-81.

¹⁷⁸ *Barclays Mercantile v. Sibec LTD* [1992] 1 WLR 1253, 1257. CLA-81.

question. That is not the case in respect of the present ICSID arbitration proceedings. For these reasons, the Tribunal was not prepared to accede to the Respondent's request to stay the proceedings or change its position that the proceedings should not be bifurcated.

191. In the light of the above, the Tribunal concludes that there has been a valid statutory assignment of IPTL's rights under the PPA to SCB HK, that the Tribunal has jurisdiction over the Parties and the dispute, that clause 3.2.1 of the Security Deed creates a charge over future book debts and thus had to be registered pursuant to section 79 of Tanzania's Companies Ordinance, that the arbitration agreement in clause 18.3 of the PPA was severable of the charge on future book debts, and therefore did not need to be registered, that the registration issue is irrelevant so long as the Tribunal confines itself to giving declaratory relief, and that there is no basis for staying the proceedings or for bifurcation of the proceedings in this case.

VII. Positions of the Parties on the Merits

192. The Tribunal will now review the positions of the Parties on the merits, dealing first with the claims made by each Party and then with the arguments of the Parties on the scope of the award, the Debt/Equity dispute and the quantum of any award. In doing so, the Tribunal would observe that this task has been complicated by the fact that the Parties' positions have changed on numerous occasions throughout the proceedings.

A. The claims of the Parties

1. The position of the Claimant

193. In its Memorial, the Claimant requested, first, a declaration that "*since January 2007, TANESCO has breached its obligation to pay the Capacity Payments, Energy Payments, Supplemental Charges, Bonus Payments and Interest Payments arising under the PPA [...]*"¹⁷⁹ It requested, second, a declaration that TANESCO "*is required to pay the approximately US\$225 million in outstanding invoices [...] together with any sums due under invoices that have not been disclosed to SCB HK.*"¹⁸⁰ The Claimant requested, third,

¹⁷⁹ Cl. Mem., para. 235, sub-para. (1).

¹⁸⁰ *Ibid.*, sub-para. (2).

an order “that out of the sum outstanding under the PPA, TANESCO shall pay to SCB HK an amount sufficient to discharge SCB HK’s loan to IPTL in full on the date of discharge, including interest and penalties.”¹⁸¹ It indicated that, at the date of the Memorial, this required a payment of US\$130,062,332.50.¹⁸² And, the Claimant requested, fourth, an order “that TANESCO pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon.”¹⁸³

194. In its Reply, the Claimant reiterated the requests made in its Memorial, but changed the amount for which a declaration was requested under the second request from US\$225 million to US\$258 million, and the amount for which it requested an order under the third request from US\$130,062,332.50 to US\$133,854,986.59.

195. In its Post-Hearing Brief, the Claimant set forth a more comprehensive list of requests for relief as follows:¹⁸⁴

(1) A declaration that shareholder loans qualify as equity for the purposes of the 31 May 1995 Letter, and that no change to the reference tariff is required;

(2) A declaration that, since January 2007, Tanesco has breached its obligation to pay the Capacity Payments, Energy Payments, Supplemental Charges, Bonus Payments and Interest Payments arising under the PPA (calculated in accordance with the PPA, the ICSID Award and the Implementation Model);

(3) **A declaration** that Tanesco is liable to pay the **Bonus Payments** claimed by SCB HK in its Memorial;

(4) **A declaration** that Tanesco is liable to pay, as damages, the **exchange rate losses** arising from its failure to pay the Capacity Payments, Energy Payments, Supplemental Charges, Bonus Payments and Interest Payments in accordance with the PPA;

(5) A declaration that SCB HK is entitled to recover the **amounts paid by Tanesco to the Provisional Liquidator or Liquidator** under the Interim PPA;

(6) **A declaration** that, **as a result of these breaches**, Tanesco is liable to pay SCB HK either:

(a) **US\$258.7 million**,¹⁸⁵ made up of outstanding invoices, interest on outstanding invoices, and damages resulting from Tanesco’s failure to pay invoices rendered to it in accordance with the requirements of the PPA, together with any sums due under

¹⁸¹ *Ibid.*, sub-para. (3).

¹⁸² *Id.*

¹⁸³ *Ibid.*, sub-para. (4).

¹⁸⁴ Cl. PHB, para. 611.

¹⁸⁵ Calculated as of September 2012, Tr. March 14, 2013, page 6, line 20.

invoices that have not been disclosed to SCB HK or fell due after the date of SCB HK's Reply Memorial, and any further damages resulting from Tanesco's ongoing delay in paying outstanding invoices; **or**

(b) at least a sum in excess of the amount calculated by SCB HK as sufficient to discharge SCB HK's loan to IPTL in full on the date of discharge;

(7) **An order** that out of the sum Tanesco is liable to pay SCB HK under the PPA, Tanesco shall pay to SCB HK an amount calculated by SCB HK as sufficient to discharge SCB HK's loan to IPTL in full on the date of discharge, including interest and penalties (as at 31 January 2013, this would require a payment of US\$ **138,726,761.95**); and

(8) **An order** that Tanesco pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon, to the extent that these have not been included as enforcement costs in the sum calculated by SCB HK as sufficient to discharge SCB HK's loan to IPTL, referred to in paragraph 611 (7). (Emphasis added)

196. Thus, in its PHB, the amount for which a declaration was sought had changed from the US\$258 million requested in the Counter-Memorial to US\$258.7 million, and the amount for which an order had been sought in the Counter-Memorial of US\$133,854,986.59 had changed to US\$138,726,761.95.

197. As pointed out in sub-para. 7 of para. 611 of the Claimant's PHB, and as had been noted in its Memorial and Reply, the amount requested, was "*an amount calculated by SCB HK.*" It was not an amount the Tribunal was asked to verify. Perhaps anticipating that the Tribunal might have some reservations about ordering an amount whose accuracy it was not able to confirm, the Claimant stated in its PHB, but not in its prayer for relief:

In the alternative, if the Tribunal considers that it cannot order that Tanesco pay to SCB HK the amount SCB HK calculates as due under the Facility Agreement, even though such sum is less than the full amount the Tribunal concludes is owed by Tanesco under the PPA, then **SCB HK requests that the Tribunal instead order Tanesco to pay SCB HK the full amount outstanding under the PPA.** SCB HK will then account for any balance in excess of the amount outstanding under the senior debt to IPTL.¹⁸⁶

198. Furthermore, in its PHB, the Claimant provided various options for the Tribunal in dealing with the quantum of the amount for which it claimed a declaration as owing under the PPA. First, the Tribunal could determine the amount owing and make a declaration

¹⁸⁶ Cl. PHB, para. 515.

accordingly and make an order as to the payment of the amount IPTL owed SCB HK as calculated by SCB HK.¹⁸⁷ Second, if it could not make a determination of a specific amount owing under the PPA, it could instead declare that it was in any event in excess of the amount IPTL owed SCB HK as calculated by SCB HK, and order the payment of this latter amount.¹⁸⁸ Third, if the Tribunal was unable to determine that the amount owing SCB HK under the PPA was greater than the amount IPTL owed SCB HK as calculated by SCB HK, then it is suggested that the Tribunal issues “*an interim Order determining the points of principle at issue between the parties, and instructs the parties to seek to resolve the amounts due, either by negotiation between the parties or, failing agreement, further application to the Tribunal.*”¹⁸⁹

199. In short, in its prayer for relief and in the body of its PHB, the Claimant offered the Tribunal a veritable smorgasbord of options.

2. The position of the Respondent

200. In its Counter-Memorial, the Respondent asked the Tribunal to reject the Claimant’s claim for damages.¹⁹⁰ It based this on a variety of grounds, including that the IPTL had financed its 30% equity contribution not by paid up share capital but by debt,¹⁹¹ that the claim was in part based on “unexplained and undocumented” enforcement costs,¹⁹² that the “interim fees” claimed by the Claimant had already been paid,¹⁹³ that contrary to the Claimant’s position the Respondent is entitled to exercise a right of set-off,¹⁹⁴ that the Claimant had incorrectly converted the claim from Tanzanian shillings into US dollars at historical rates rather than present exchange rates,¹⁹⁵ that the Claimant was not eligible to receive bonus payments,¹⁹⁶ and that the Claimant had diverted funds that should properly have been used to pay down the senior debt to unsecured creditors Wartsila and Mechmar.¹⁹⁷ Finally, the

¹⁸⁷ *Ibid.*, para. 516, Scenario 1.

¹⁸⁸ *Ibid.*, Scenario 2.

¹⁸⁹ *Ibid.*, Scenario 3.

¹⁹⁰ Resp. CM, para. 259.

¹⁹¹ *Ibid.*, pages 58-95.

¹⁹² *Ibid.*, pages 95-98.

¹⁹³ *Ibid.*, pages 98-99.

¹⁹⁴ *Ibid.*, pages 99-100.

¹⁹⁵ *Ibid.*, pages 100-101.

¹⁹⁶ *Ibid.*, page 102.

¹⁹⁷ *Ibid.*, pages 102-105.

Respondent argued that the Claimant could not demand tariff payments for the period after it claimed that the Government of Tanzania had expropriated the Tegeta plant.¹⁹⁸

201. In the alternative, the Respondent claimed in its Counter-Memorial that since the tariff had been based on an assumption of a 30% equity contribution by IPTL, the tariff had to be recalculated to reflect the fact that the 30% had been constituted by a shareholder loan not by a contribution of share capital. In the Respondent's view, equity could only mean paid up share capital.¹⁹⁹
202. In its Rejoinder, the Responder took a slightly different approach, requesting the Tribunal to reject the Claimant's request for declaratory relief and to determine the amounts owing under the PPA up to October 2009 when the Claimant alleged that the plant was expropriated. The Respondent also requested that the Tribunal deny any other relief claimed by SCB HK and order SCB HK to pay the costs of the arbitration.²⁰⁰ Although it did not explicitly do so in its request for relief, in the body of its Rejoinder the Respondent reiterated its alternative argument that the PPA should be rectified to reflect the fact that there had been no 30% equity contribution.²⁰¹
203. In its PHB, the Respondent took a position closer to that set out in its Counter-Memorial. First, it requested the Tribunal to reject all of the Claimant's requests for relief. Second, it asked the Tribunal to declare that the failure of IPTL to disclose that it had not contributed 30% equity, or to adjust the tariff calculation to reflect that the 30% contribution was by way of debt, constituted a breach of the PPA. Third, it requested the Tribunal to dismiss all of SCB HK's claims on the merits, or in the alternative "*require the parties to recalculate and determine any amounts due pursuant to the principles set forth in TANESCO's submissions.*"²⁰²

¹⁹⁸ *Ibid.*, pages 105-106.

¹⁹⁹ *Ibid.*, paras. 247-258.

²⁰⁰ Resp. Rej., para. 219.

²⁰¹ *Ibid.*, pages 66-83.

²⁰² Resp. PHB, para. 343, sub-para. (c).

B. The Debt/Equity issue

1. The position of the Claimant

204. According to the Claimant, the concept of “equity” was never defined by the parties.²⁰³ It appeared in the May 31, 1995 letter of Mr. Rugemalira and thus was a term that originated with IPTL. The meaning of the term “equity” had to be understood in terms of what the parties themselves took it to mean and what it would be understood to mean in project finance.²⁰⁴ In this regard, the Claimant argued that IPTL, including Mr. Rugemalira, the lenders, and TANESCO itself, all were aware that IPTL’s equity contribution was to be financed by a shareholder loan, and that shareholder loans are widely accepted in project finance to constitute equity.
205. In respect of Mr. Rugemalira, the Claimant relied on documents that he was aware of, communications by him and his attendance at the ICSID 1 hearings.²⁰⁵ In addition, the Claimant argued that IPTL and its shareholders, VIP and Mechmar, were aware of the shareholder loan, referring *inter alia* to the shareholder agreement between IPTL and Mechmar, IPTL’s memorandum and articles of association, the shareholder loan itself, the drawdown notices for the loan facility and IPTL’s accounts for 1997 and 1998.²⁰⁶ In addition, the financing documents made the lenders aware of the shareholder loan and these were again documents that IPTL’s shareholders were also aware of.²⁰⁷
206. TANESCO’s understanding that the equity contribution was to be by way of shareholder loan is said by the Claimant to be based on TANESCO’s awareness of relevant documents, including the 1998 Financial Model, the Facility Agreement, the Shareholder Support Deed and IPTL’s accounts for 1997 and 1998.²⁰⁸ The Claimant also relies on what TANESCO would have known from its participation in the ICSID 1 proceedings, its communications with the GoT and the knowledge of the GoT through Mr. Rutabanzibwa.²⁰⁹ In sum, the

²⁰³ Tr. December 3, 2012, page 83, lines 20-21.

²⁰⁴ Cl. Rep., para. 14

²⁰⁵ Cl. Rep., para. 111.

²⁰⁶ *Ibid.*, para. 112. See also, Cl. PHB, paras. 122 and *seq.*, paras. 178 and *seq.*

²⁰⁷ Cl. Rep., para. 113.

²⁰⁸ *Ibid.*, para. 114. See also, Cl. PHB, paras. 191 and *seq.*

²⁰⁹ Cl. Rep., paras. 115-119. Mr. Rutabanzibwa was Permanent Secretary of the Ministry of Energy and Minerals of the Government of Tanzania at the time of the conclusion of the PPA.

Claimant argues that TANESCO fully understood that IPTL's equity contribution was being made by way of shareholder loan and only in 2007 put forward the argument that it did not in order to oppose without valid reasons the payments of invoices.²¹⁰

207. The Claimant also relied on the expert reports of Colin Johnson and Asif Kassam to show that “*a shareholder loan would be considered to be shareholders' equity for the purposes of the debt to equity ratio in the context of standard project financing transactions entered into at the time.*”²¹¹
208. The Claimant also took the view that even if the PPA did not reflect the common intention of the parties with respect to the Debt/Equity issue, there was no mechanism under English law for the Tribunal to rectify the agreement for common mistake,²¹² and the requirements for rectification in the case of unilateral mistake have not been met.²¹³
209. Finally, the Claimant took the view that even if the Tribunal disagreed with it on the equity issue, there was no need for the tariff to be recalculated and the IRR should remain at 22.31%.²¹⁴ In this regard, the Claimant disputed the calculations for an adjusted tariff offered by the Respondent's expert David Ehrhardt,²¹⁵ relying instead on the report of its own expert Colin Johnston.²¹⁶
210. During the hearing of March 15, 2013, the Claimant took the view that if the Tribunal did decide that there had to be an adjustment to the tariff, then the Parties should be given a time-limited opportunity to work out the modalities of any such adjustment.²¹⁷

2. The position of the Respondent

211. In its Counter-Memorial, the Respondent argued that IPTL falsely informed TANESCO that there was to be a 30% equity contribution, in order to induce it to enter into the

²¹⁰ *Ibid.*, para. 126.

²¹¹ *Ibid.*, para. 121.

²¹² *Ibid.*, para. 139.

²¹³ *Ibid.*, paras. 140-148.

²¹⁴ Cl. PHB, paras. 284 and *seq.*

²¹⁵ *Ibid.*, paras. 309 and *seq.*

²¹⁶ *Ibid.*, paras. 293 and *seq.*

²¹⁷ Tr. March 15, 2013, page 82, line 21, page 83, lines 1-15.

PPA.²¹⁸ Instead of an equity contribution, however, IPTL funded its 30% contribution by a shareholder loan and failed to inform TANESCO of this.²¹⁹ Yet, a shareholder loan was not understood, nor would it have been understood in Tanzania or internationally, as an equity contribution.²²⁰ In this regard, the Respondent relied on the declaration of Leonard Mususa and the expert report of David Ehrhardt.²²¹

212. The Respondent also argued that the tariff calculation was based on an assumption that the equity contribution would be true equity and not a shareholder loan.²²² In its view, the model on which the tariff was calculated assumed that the 22.31% IRR would be achieved through dividends payable over 20 years and a release of accumulated “trapped cash” at the end of that 20 year period.²²³ Relying on the expert report of David Ehrhardt, the Respondent argued that the models would have provided an entirely different payment schedule if the 30% equity contribution had been substituted by a shareholder loan.²²⁴ The effect of using a shareholder loan, according to the Respondent, was to increase the IRR beyond the agreed rate of return of 22.31%.²²⁵

213. The Respondent rejected the arguments of the Claimant that TANESCO was aware that IPTL was substituting a shareholder loan for its 30% equity contribution. It was not provided for in the May 31, 1995 Rugemalira letter, nor do the documents relied on by the Claimant to show knowledge of both Mr. Rugemalira and of TANESCO constitute notice to TANESCO of the shareholder loan.²²⁶ In particular, the 1997 Loan Facility Agreement and the Shareholder Support Deed were not documents to which TANESCO was a party.²²⁷ The Respondent denies that there is a “common practice” under which shareholder loans are treated as a substitute for equity,²²⁸ and SCB HK’s claim that

²¹⁸ Resp. CM, para. 159.

²¹⁹ *Ibid.*, para. 162.

²²⁰ *Ibid.*

²²¹ *Ibid.*, paras. 163-164.

²²² *Ibid.*, paras. 168 and *seq.*

²²³ *Ibid.*, para. 170 b.

²²⁴ *Ibid.*, para. 171.

²²⁵ *Ibid.*, paras. 181 and *seq.*

²²⁶ *Ibid.*, paras. 184-193.

²²⁷ *Ibid.*, paras. 194-200.

²²⁸ *Ibid.*, paras. 201-203.

TANESCO had knowledge that a shareholder loan was to be used is “misplaced and misleading.”²²⁹

214. The Respondent further argued, in the alternative, that the PPA should be rectified to calculate the tariff based on a shareholder loan rather than 30% equity, arguing that under English law rectification could be done on the basis of either common or unilateral mistake.²³⁰ In the view of the Respondent, it was for the Tribunal to decide whether the agreement between IPTL and TANESCO required a downward adjustment to the tariff and the capacity charges to reflect the substantial costs savings IPTL gained by using debt in lieu of equity.²³¹

215. In this regard, the Respondent argued, the IRR had not been correctly calculated based on the use of a shareholder loan.²³² *“In TANESCO’s view, whether the model accurately calculates the tariff is the ultimate test.”*²³³ In order to calculate an accurate IRR, subordinate debt has to be shown in the model separately and calculated separately from true equity.²³⁴

216. Based on the expert report of David Ehrhardt, the Respondent offered various approaches to recalculating the tariff:

- The IRR could be calculated by reference to Mechmar’s actual costs of capitalization for providing the shareholder loan (Malaysian Interbank rate (KLIBOR) plus 2.5% from January 1997 to April 2003 and 2% thereafter).²³⁵
- The IRR could be calculated on the basis of a post-tax interest rate of 16% that Mechmar would have received had it contributed 30% true equity in the project as calculated by TANESCO’s expert.²³⁶ Applying the latter rate, the unpaid capacity charges for the period through October 2009 would be totaling 96.3 billion Tanzanian shillings as opposed to the 130.5 billion SCB HK is claiming.²³⁷

²²⁹ *Ibid.*, paras. 204-210.

²³⁰ *Ibid.*, paras. 247-258.

²³¹ Resp. PHB, para. 160.

²³² *Ibid.*, para. 13.

²³³ *Ibid.*, para. 14.

²³⁴ *Ibid.*

²³⁵ *Ibid.*, para. 236.

²³⁶ *Ibid.*, para. 237.

²³⁷ *Ibid.*, para. 237.

217. The IRR could also provide the same 22.31% rate of return on the shareholder loan that IPTL received, which would result in unpaid capacity charges of 118.2 billion of Tanzanian shillings.²³⁸
218. However, the Respondent noted that the various options took into account only unpaid capacity charges to October 2009, and did not reflect any offsets or other factors that might be taken into account in determining the amount owing.²³⁹ In the end, the Respondent took the view that if the Tribunal concluded that there had to be an adjustment to the tariff, it would need to come back to the Parties to let them try to work out what that tariff adjustment should be.²⁴⁰

C. The question of quantum

1. The position of the Claimant

a) The “Disallowed Costs” issue

219. According to the Claimant, the fact that certain costs had been “disallowed” by the ICSID 1 tribunal did not mean that IPTL was relieved of its obligation to pay those costs.²⁴¹ The costs had not been included in the calculation of the tariff, which was intended to reflect the costs that were allowed and not the reality of IPTL’s actual debt obligations. Furthermore, the restructuring entered into between IPTL and its creditors, which was done to ensure that commercial operation could be achieved,²⁴² was not secret and was fully known to TANESCO.²⁴³ In its PHB, the Claimant argued that the effect of its paying to its senior lenders and contractor the “disallowed costs” was not that TANESCO paid more, but that IPTL’s shareholders received less.²⁴⁴

²³⁸ *Ibid.*, para. 239.

²³⁹ *Ibid.*, para. 239.

²⁴⁰ Tr. March 14, 2013, page 238, line 25, page 239, lines 1-2; *see also* Tr. March 15, 2013, page 81, lines 17-24.

²⁴¹ Cl. Rep., paras. 68 and *seq.*

²⁴² *Ibid.*, para. 90.

²⁴³ *Ibid.*, para. 98.

²⁴⁴ Cl. PHB, paras. 374 and *seq.*

b) Exchange rate losses

220. In its Memorial, the Claimant calculated the total amount owing on the basis of the US dollar value of the claim at the date that the unpaid invoices were issued.²⁴⁵ In its Reply, the Claimant explained that historical rates were appropriate because under the Calculations and Forecasting Agreement it had reached with its lenders it was required to convert the moneys received by it into US dollars within two business days of receipt,²⁴⁶ and this, the Claimant argues, was known to the Respondent. Furthermore, under the ICSID award model, it was clear that IPTL's loans would be paid off in US dollars.²⁴⁷ Thus, losses resulting from the inability to convert to US dollars were "foreseeable exchange rate losses."²⁴⁸

221. In its PHB, the Claimant argued that although the evidence was limited, it was very likely, "on a balance of probabilities", that if TANESCO had paid the tariff promptly, IPTL would have converted the payments into US dollars.²⁴⁹ The Claimant argued that, under English law, the "exchange rate losses" were not too remote because they fell under the first limb of *Hadley v. Baxendale*, that is losses "*arising naturally, i.e. according to the usual course of things from [the] breach of contract itself.*"²⁵⁰ On that basis, the Claimant argued, Article 17.1 of the PPA did not apply because it covered only indirect or consequential loss, which is loss that falls under the second limb of *Hadley v. Baxendale*.²⁵¹

c) Bonus, supplementary and interest payments

222. In its Memorial, the Claimant argued that there were undisputed bonus payments, supplementary payments and interest payments outstanding.²⁵² These amounted to US\$34,295,038.64.²⁵³ In its Counter-Memorial, the Claimant argued that IPTL should not be denied the opportunity to receive bonus payments from the fact that the plant had been put in "non-dispatch mode" as a result of TANESCO's failure to make the tariff

²⁴⁵ Cl. Mem., Appendix I.

²⁴⁶ Cl. Rep., para. 293.

²⁴⁷ *Ibid.*, para. 295.

²⁴⁸ *Ibid.*, para. 296.

²⁴⁹ Cl. PHB, para. 541.

²⁵⁰ *Ibid.*, para. 554(1)(a).

²⁵¹ *Ibid.*, para. 565.

²⁵² Cl. Mem., para. 174.

²⁵³ *Ibid.*, para. 198.

payments.²⁵⁴ In its PHB, the Claimant further argued that bonus payments did not constitute “consequential” loss and thus were not barred by Article 17.1 of the PPA. The fact that bonus payments were owed, the Claimant argued, is confirmed by the fact that invoices were issued for bonus payments in 2007 and 2008 that were undisputed. The Claimant also makes a claim for bonus payments based on three other invoices issued in 2009, 2010 and 2011.²⁵⁵

d) Enforcement costs

223. In its Reply, the Claimant argued that under the terms of the Facility Agreement it is entitled to claim enforcement costs incurred to protect its rights under the financing agreements.²⁵⁶ TANESCO, it argued, is not a party to the Facility Agreement and thus SCB HK does not have to provide any proof of those costs to TANESCO.²⁵⁷ Further, in its oral argument, the Claimant also stated that the Tribunal had no jurisdiction to consider the correctness of amounts claimed under the Facility Agreement.²⁵⁸

e) Payments made to the Provisional Liquidator

224. In its Memorial, the Claimant argued that TANESCO was not entitled to deduct from the capacity charges owing to IPTL, amounts paid to the PL under the Interim PPA entered into with the PL.²⁵⁹ In its Reply, the Claimant reiterated that TANESCO was fully aware of SCB HK’s rights under the PPA, and payments made under a different agreement, the Interim PPA, to which SCB HK was not a party, could not diminish SCB HK’s rights under the PPA.²⁶⁰

²⁵⁴ Cl. Rep., para. 299.

²⁵⁵ Cl. PHB, para. 595.

²⁵⁶ Cl. Rep., para. 336.

²⁵⁷ *Ibid.*, para. 338.

²⁵⁸ Tr. March 14, 2013, page 14, lines 9-10.

²⁵⁹ Cl. Mem., paras. 193-197.

²⁶⁰ Cl. Rep., paras. 303-306; *see also* Cl. PHB, paras. 596-599.

2. The position of the Respondent

a) The “Disallowed Costs” issue

225. In its Counter-Memorial, the Respondent argued that IPTL and SCB HK had improperly diverted capacity payments made by TANESCO to unsecured creditors Wartsila and Mechmar under a restructuring of its loans that had not been disclosed to TANESCO.²⁶¹ As a result, costs that had been disallowed by the ICSID 1 tribunal in the calculation of the capacity payments were now being paid out of those capacity payments. Hence, the Respondent argued, these amounts should be offset against SCB HK’s damages claim.²⁶² According to calculations made by the expert David Ehrhardt, the payment by IPTL of these “disallowed costs” had the effect of increasing the liability of TANESCO by US\$82.9 million dollars.²⁶³

226. In its PHB, the Respondent argued that the secret restructuring and the making of payments of the “disallowed costs” constituted “*breaches of IPTL’s contractual obligations to TANESCO under Addendum 1 to the PPA and the PPA’s incorporated financial model.*”²⁶⁴ According to the Respondent, this had the effect of negating the ICSID 1 award and disadvantaging the GoT, which in the event of expropriation would have to pay a much larger outstanding balance on the senior debt.²⁶⁵

b) Exchange rate losses

227. In its Counter-Memorial, the Respondent argued that the Claimant had wrongfully converted the invoice amounts at historical exchange rates, rather than at the rate applying at the date of the claim. The amounts owing under the PPA, the Respondent argued, were to be paid in Tanzanian shillings,²⁶⁶ and thus any conversion that was to take place had to

²⁶¹ Resp. CM, paras. 235-236.

²⁶² *Ibid.*, para. 241.

²⁶³ *Id.*

²⁶⁴ Resp. PHB, para. 266.

²⁶⁵ *Ibid.*, paras. 267-268.

²⁶⁶ Art. 6.10 of the PPA provides: “*Notwithstanding anything contained in this Agreement, (i) all payments to be made by either Party under this Agreement shall be made in lawful currency of the United Republic of Tanzania, and (ii) any payment that becomes due and payable on a day that is other than a Business Day shall be paid on the succeeding Business Day.*”

occur at the time of the claim, not at the time of the invoice.²⁶⁷ The effect of using historical rates, according to expert David Ehrhardt, was to inflate the amount claimed by the Claimant by \$38.7 million.²⁶⁸

228. In its Rejoinder, the Respondent rejects the view that the Calculations and Forecasting Agreement, to which it was not a party, or that the ICSID award model, whose final output was based on the payment of invoices in Tanzanian shillings, could affect the obligation under the PPA to make payments in Tanzanian shillings.²⁶⁹ The Respondent further argued that the “exchange rate losses” were consequential losses, which could not be recovered because of Article 17.1 of the PPA.²⁷⁰ In addition, the Respondent argued that recovery for exchange rate losses was not a risk that TANESCO had assumed, and it was never clear to TANESCO that the monies received by IPTL would be used for the paying down of debt.²⁷¹

c) Bonus, supplementary and interest payments

229. In its Counter-Memorial, the Respondent argued that the Claimant was not entitled to bonus payments since during the relevant period the plant was in “non-dispatch” mode and thus no bonus payments could be generated.²⁷² In its Rejoinder, the Respondent further argued that the Claimant had not proved that it would have been entitled to bonus payments and that in any event such losses would come up against the bar in Article 17.1 of the PPA to the recovery of consequential losses.²⁷³ During the hearing, the Respondent clarified that it did not dispute that bonus payments claimed during the period of the PL were recoverable; it disputed only bonus payments claimed for the period that the plant was in “non-dispatch” mode.²⁷⁴

²⁶⁷ *Ibid.*, paras. 226-229.

²⁶⁸ *Ibid.*, para. 231; Expert Report of David Ehrhardt, paras. 58-63.

²⁶⁹ Resp. Rej., paras. 188-191.

²⁷⁰ *Ibid.*, para. 197; Resp. PHB, para. 259.

²⁷¹ *Ibid.*, paras. 205-208; Resp. PHB, para. 248 and paras. 261-262.

²⁷² Resp. CM, para. 233; *see also* Resp. PHB paras. 324-329.

²⁷³ Resp. Rej., paras. 209-210.

²⁷⁴ Tr. March 14, 2013, page 262, lines 5-11.

d) Enforcement costs

230. In its Counter-Memorial, the Respondent argued that the Claimant had provided no proof of these claims and in any event they were incurred in different legal proceedings.²⁷⁵ In its Rejoinder, the Respondent reiterated that the Claimant had failed to provide any documentation of its alleged enforcement costs.²⁷⁶

e) Payments made to the Provisional Liquidator

231. In its Counter-Memorial, the Respondent argued that SCB HK was not entitled to include in its claim the fees it had already paid to the PL, as these fees were the cost of running the facility.²⁷⁷ In its Rejoinder, the Respondent reiterated that payments were always made to IPTL and thus when it was in liquidation payments went to the PL.²⁷⁸

VIII. The Tribunal's Analysis of the Merits

A. The issues presented

1. The scope of any award/decision

232. There are two aspects to the question of scope. First, since the Claimant has requested both declarations of amounts owing and the award of specific sums, assuming the Tribunal were to decide in favour of the Claimant on the merits, and in light of the past and potential future proceedings in the Tanzanian courts relating to the winding up of IPTL, does the Tribunal have jurisdiction to make the declarations and the awards requested? Second, the Respondent has argued that any award should be limited to the period ending October 2009, the date when SCB HK is alleged to have claimed that the Tegeta plant was expropriated. Is, then, the application of any award or declaration that the Tribunal makes to be limited to the period up to October 2009?

²⁷⁵ Resp. CM, paras. 211-219.

²⁷⁶ Resp. Rej., paras. 215-217; *see also* Resp. PHB, paras. 314-317.

²⁷⁷ Resp. CM, paras. 220-222.

²⁷⁸ Resp. Rej., para. 213. *See also* Resp. PHB, paras. 318-320.

2. The Debt/Equity issue

233. Did the assumption of a 30% equity contribution in the letter of May 31, 1995, which the ICSID 1 tribunal incorporated into the contract between IPTL and TANESCO, include the possibility that this contribution might be by way of a shareholder loan? If not, should the tariff be recalculated on the basis of a shareholder loan instead of a 30% contribution by way of paid up share capital? If such a recalculation is to be undertaken, what are the modalities for doing it?

3. The question of quantum

a) The “Disallowed Costs” issue

234. Was the restructuring of the loan between IPTL and its senior lenders, and the repayments to Wartsila and Mechmar in respect of unsecured debt, a breach of IPTL’s obligations under the PPA and its financial model? Does TANESCO suffer any loss from the delay in paying down the senior debt that would warrant a reduction in the damages claimed by SCB HK?

b) Exchange rate losses

235. Were the losses resulting from the inability of IPTL to exchange the monies it would have received from TANESCO’s unpaid invoices into US dollars “foreseeable” losses within the meaning of *Hadley v. Baxendale* or were they losses whose risk was assumed by IPTL and not by TANESCO? Even if such losses were “foreseeable” losses, would Article 17.1 of the PPA bar their recovery?

c) Bonus, supplementary and interest payments

236. Are bonus payments payable for the period the plant was in “non-dispatch” mode?

d) Enforcement costs

237. Are the Claimant’s “enforcement costs”, claimed pursuant to Article 24 of the Facility Agreement, recoverable?

e) Payments made to the Provisional Liquidator

238. Can SCB HK include in its claim amounts already paid to the PL?

B. The Tribunal's analysis

1. The scope of any award/decision

a) Can the Tribunal order the payment of a specific sum, or is it limited to making a declaration?

239. The Claimant argues that the Tribunal can make both a declaration of the amount owing under the PPA and an order that the Respondent pay that amount or, as is the Claimant's preference, make an order for the amount owing from IPTL to SCB HK. While the Tribunal accepts that it is able to make a declaration of the amount owing under the PPA to IPTL in whose shoes SCB HK stands, it does not have jurisdiction to make the other declarations or orders that the Claimant requests.

240. In Section VI. B above, the Tribunal concluded that there was a valid statutory assignment of IPTL's rights under the PPA to SCB HK and that therefore the Tribunal has jurisdiction to hear the claim of SCB HK against TANESCO without joining IPTL. The Tribunal also concluded that in accordance with Tanzanian law the security interest held by SCB HK had to be registered and that the consequences of non-registration was a matter to be determined by Tanzanian law. However, if the Tribunal restricts itself to making a declaration of the amount owing by TANESCO to IPTL under the PPA and not making any order for payment of monies, then it leaves open the question of priority amongst creditors.

241. The potential appointment of a liquidator and the resumption of proceedings in Tanzania for the winding up of IPTL would have consequences for any order that might be made by this Tribunal. An order by the Tribunal that TANESCO pay a specific sum to SCB HK, which would be enforceable in domestic courts, would potentially interfere with the question of priority amongst creditors, which is a matter for a liquidator and Tanzanian courts to decide. By contrast, a declaration that TANESCO owes a specific sum under the PPA leaves to the Tanzanian courts any question of priority amongst creditors.

242. This limitation on the jurisdiction of the Tribunal applies whether the Tribunal were to make an order for the full amount owing by TANESCO to SCB HK as the assignee of IPTL's rights or whether it were to make an order for an amount equivalent to the sum needed to discharge IPTL's obligations to SCB HK. In either case, an order by this Tribunal for the payment of a specific amount potentially encroaches on the power of the Tanzanian courts to determine priority amongst IPTL's creditors.
243. There are, however, further reasons why the Tribunal is unable to make an award of an amount owing sufficient to discharge the debt of IPTL to SCB HK. In its PHB, the Claimant identifies this sum as US\$138,726,761.95, but nowhere in its pleadings does it indicate how this amount is arrived at. Indeed, the Claimant states expressly that it is "*an amount calculated by SCB HK*" and that any disputes between IPTL and SCB HK on the amount owing to SCB HK by IPTL are not within the jurisdiction of the Tribunal.²⁷⁹ Thus, the Tribunal is asked to make an award of an amount that SCB HK claims is accurate but has not been put to the methods of proof that are normally undertaken before a tribunal makes an order.
244. The Tribunal has no jurisdiction over the relationship between SCB HK and IPTL which arises under the Facility Agreement. For this very reason, the Tribunal cannot take into account what SCB HK says is the amount owing under the Facility Agreement in the framework of the calculation of the debt owed by TANESCO to IPTL under the PPA. In light of this, the Tribunal is not in a position to make an order determining what amount is allegedly owed by IPTL to SCB HK, or even make a determination of what that amount should be and issue a declaration. The Tribunal has jurisdiction over TANESCO and SCB HK as the assignee of IPTL's rights by virtue of the PPA. It does not have jurisdiction over the relationship between SCB HK and IPTL. The sole Parties before the Tribunal are SCB HK, as the assignee of IPTL's rights, and TANESCO, and thus the Tribunal is in a position to determine only the rights as between those Parties.
245. In sum, the Tribunal concludes that the only relief it is in a position to provide in these proceedings is a declaration of any amount owing by TANESCO to IPTL to which SCB HK has a claim as assignee of all of IPTL's rights.

²⁷⁹ Cl. Rep., para. 317.

b) Is any declaration made the Tribunal to be limited to the period up to October 2009?

246. The Claimant has calculated an amount owing under the PPA from the alleged date of breach of the PPA by TANESCO to the date of the last unpaid invoice.²⁸⁰ The Respondent argues, however, that since SCB HK has alleged that the plant was expropriated in October 2009, it could only claim for any breach of the PPA up to that date.²⁸¹
247. The issue of expropriation is a matter between SCB HK and the GoT, not between SCB HK and TANESCO, and it has been the subject of a separate ICSID arbitration between SCB and the Government of Tanzania.²⁸² The GoT is not a party to the present arbitration nor has the question of expropriation been placed before this Tribunal. Thus, the Tribunal is not in a position to determine whether and at what date any expropriation might have taken place or fix a date for the determination of loss relying on an expropriation date as the effective date for limiting any damages claim for breach of the PPA.
248. In sum, the Tribunal is able to determine whether there has been a breach of the PPA and what loss flows from that breach. And, the loss it can determine includes all losses resulting from that breach. It cannot fix a limit on those losses on the basis of an expropriation claim that has not been placed before it and it is not in a position to decide. Any claim that the acts of a third party have the effect of suspending either IPTL or TANESCO's obligation to perform the PPA would have to be made on the basis of the PPA itself; in other words, it would have to be pleaded on the basis of an express contractual term (such as a force majeure clause) or an equivalent doctrine under the applicable law of the PPA. No such claim has been made by the Respondent.

2. The Debt/Equity issue

249. As the Tribunal will point out in this part of its Decision, the 70% debt and 30% equity split, mentioned in the letter of May 31, 1995, was an assumption introduced into the PPA by virtue of Addendum No. 1 and found by the ICSID 1 tribunal to be a contractual undertaking between the parties to the PPA. Although the ICSID 1 tribunal did not

²⁸⁰ Cl. Mem., para. 235(2).

²⁸¹ Resp. Rej., para. 219(2).

²⁸² *Supra* para. 51.

provide a definition of the term “equity”, the returns provided for in the ICSID award model on which the Implementation Model was based, were calculated on the basis that 30% equity reflected fully paid up share capital. Even apart from the ICSID 1 award, the contemporaneous documents on which the Parties based their arguments do not support the view that the 30% equity could have been provided by way of a shareholder loan. All of this is further reinforced by the reasoning of the ICSID 1 tribunal in the ICSID 1 award.

a) The background to Addendum No. 1 to the PPA

250. The PPA contains no term dealing with the amount of equity, if any, to be contributed by IPTL to the project. As originally drafted and conceived, the PPA was a fixed price contract and hence there would have been no need for IPTL and TANESCO to address that issue in the PPA itself. TANESCO signed the PPA in this original form on May 26, 1995 but it was retained by TANESCO until June 9, 1995, when it was handed over to IPTL at the same time that Addendum No. 1 was signed by both IPTL and TANESCO.²⁸³ Addendum No. 1 introduced a significant change to the tariff structure for the PPA in the following terms:

Before commencement of commercial operations the Reference Tariff mentioned in Table I of Appendix B will be adjusted upwards or downwards depending on the effect of changes that will have taken place on any or all the underlying assumptions stated in the Power Purchase Agreement.²⁸⁴

251. The Respondent’s expert, David Ehrhardt, described the effect of Addendum No. 1 in the following way:

Thus the effect of Addendum No. 1 was to turn this fixed price contract into something closer to a cost plus contract. If key assumptions regarding financing, operating and project costs changed, the Capacity Purchase Price could change, and thereby change the amount TANESCO would pay for the capacity. Problems of interpretation arise, however, because none of the text or the PPA or the Implementation Agreement was modified to accommodate changes required by Addendum No. 1.²⁸⁵

252. This is an accurate description of the PPA before and after the execution of Addendum No. 1.

²⁸³ ICSID 1 award, Appendix B ‘Decision on Preliminary Issues’, para. 30. Exh. C-10/R-8.

²⁸⁴ Exh. R-2.

²⁸⁵ Expert Report of David Ehrhardt, August 10, 2012, para. 41.

253. In the intervening period between TANESCO's signing of the PPA and its delivery to IPTL together with the execution of Addendum No. 1, and upon the request of the Government of Tanzania, IPTL sent to the GoT a letter on May 31, 1995 setting out the "assumptions used to determine the capacity charge."²⁸⁶ That letter refers to "Senior Debt: 70%" and "Equity: 30%." Addendum No. 1 was signed shortly after on June 9, 1995.

b) The ICSID 1 proceedings

254. TANESCO's position during the ICSID 1 proceedings was that the introduction of Addendum No. 1 rendered the entire PPA void for uncertainty:

[F]irst, because the assumptions underlying the Reference Tariff were not stated in the PPA, and it was therefore impossible to derive from the words used the parties' presumed intention as to the assumptions to which the Addendum was intended to refer; and second, because there was no machinery provided in Addendum No. 1 for adjusting the Reference Tariff to take account of any changes in the relevant assumptions.²⁸⁷

255. In addressing TANESCO's submission, the ICSID 1 tribunal set out four possibilities for the interpretation of Addendum No. 1:

- (1) That the reference to "assumptions" was a reference to those set out in appendix H to the PPA, which related only to tax and duty matters;
- (2) That the reference to "assumptions" was a reference to those set out in the letter of 31 May 1995 to which we have just referred;
- (3) That the reference to "assumptions" was a reference to all the assumptions which had been made by IPTL in arriving at the Reference Tariff, whether or not expressed in that letter;
- (4) That the meaning of Addendum No. 1 was so uncertain that it should be rejected as void and meaningless.²⁸⁸

256. The ICSID 1 tribunal ultimately concluded that possibility (2) should be preferred. The most important consideration in reaching that conclusion appears to be that "*it [was] common ground that the letter [of May 31, 1995] was before the draftsmen of Addendum*

²⁸⁶ Exh. R-3.

²⁸⁷ ICSID 1 award, Appendix B 'Decision on Preliminary Issues', para. 13(2). Exh. C-10/R-8.

²⁸⁸ ICSID 1 award, Appendix B 'Decision on Preliminary Issues', para. 38. Exh. C-10/R-8.

*No. 1.*²⁸⁹ The assumptions set out in the May 31, 1995 letter were thus incorporated into Addendum No. 1 by the ICSID 1 tribunal and hence were deemed to have contractual significance for the parties to the PPA from the date Addendum No. 1 entered into force.

257. It is important to emphasise that the ICSID 1 tribunal did not attempt to trace the assumptions set out in the May 31, 1995 letter to earlier exchanges between the parties to the PPA or other evidence of their mutual intent on the record of the arbitration. In other words, the ICSID 1 tribunal did not interpret its task as discerning whether there was a “meeting of the minds” as between the parties on the assumptions set out in the May 31, 1995 letter. Faced with TANESCO’s submission that the whole PPA should be declared void for uncertainty, which the ICSID 1 tribunal described as “an admission of defeat” were it to be accepted,²⁹⁰ the ICSID 1 tribunal searched for something on the record that would fill the gap left by the bare mention of “assumptions” in Addendum No. 1. The ICSID 1 tribunal found that the May 31, 1995 letter could fill this gap:

As has been seen from the exchanges of correspondence among the Tanzanian Government, TANESCO and IPTL during the period leading up to the signature of the PPA, the Government was anxious not only that TANESCO should benefit from any savings in the assumptions underlying the PPA, but also to be informed what those assumptions were. **The only assumptions which were reported to TANESCO in response to the Government’s enquiries were those set out in the letter of 31 May 1995.**²⁹¹ (Emphasis added)

c) The positions of the Parties in respect of the approach to the interpretation of the term “Equity” in the May 31, 1995 letter

258. The dispute between the Parties in this arbitration concerns the proper interpretation of the term “Equity: 30%” in the May 31, 1995 letter, given that this “assumption” was incorporated into the contractual relationship of the parties to the PPA by virtue of the ICSID 1 award. There is, however, no discussion of what is meant by this term in the ICSID 1 award.

259. It is the Claimant’s position that the term “Equity” in the May 31, 1995 letter “*is IPTL’s term, not a contractually agreed term between IPTL and Tanesco [...] [a]s such, it is*

²⁸⁹ ICSID 1 award, Appendix B ‘Decision on Preliminary Issues’, para. 47. Exh. C-10/R-8.

²⁹⁰ *Ibid.*, para. 43. Exh. C-10/R-8.

²⁹¹ *Ibid.*, para. 45. Exh. C-10/R-8.

IPTL's usage and understanding of the term that is the most important."²⁹² The Claimant then relies upon "[e]vidence available from a number of sources [that] shows that the word was being used by IPTL in a project finance context, and that Tanesco understood this to be the case."²⁹³

260. The Respondent is correct that this approach to discerning the meaning of "equity" in the May 31, 1995 letter is impermissible in the circumstances of this case.²⁹⁴ The Claimant has conceded that there was no "meeting of the minds" on the issue of what was meant by the term "equity";²⁹⁵ indeed the Claimant recognised that "*nobody ever discussed the meaning of the word 'equity'.*"²⁹⁶ This is entirely understandable: such a discussion would have been pointless until the parties resolved to change the PPA from a fixed price contract to a "cost plus contract" by executing Addendum No. 1. But given that both Parties accept that there was no "meeting of the minds" on the meaning of "equity" as an assumption in the May 31, 1995 letter, the Tribunal cannot now fairly place a construction on that term on the basis of documents and correspondence to which only one of the parties to the PPA, IPTL, was privy. This is precisely what the Claimant is asking the Tribunal to do. According to the Claimant:

As the 31 May 1995 Letter was written by IPTL, the Contemporaneous IPTL Documents should be afforded most weight. The Contemporaneous IPTL Documents show IPTL understood that a shareholder loan qualified as equity.²⁹⁷

261. The Tribunal rejects this approach. The assumptions set out in the May 31, 1995 letter were incorporated into the PPA via Addendum No. 1 by the decision of the ICSID 1 tribunal. The ICSID 1 award is binding upon the parties to it. The Tribunal cannot legitimately place a construction upon the terms of those assumptions by referring to evidence of only one party's understanding of a particular term that preceded the May 31, 1995 letter.

²⁹² Cl. PHB, para. 95.

²⁹³ *Ibid.*, para. 96.

²⁹⁴ Resp. PHB, paras. 163-164.

²⁹⁵ Tr. December 3, 2012, page 85, lines 8-9.

²⁹⁶ Tr. December 3, 2012, page 83, lines 20-21.

²⁹⁷ Cl. PHB, para. 122 (heading).

262. Another approach to the interpretation of the word “equity” in the May 31, 1995 letter, proffered by both Parties, is to discern its objective meaning by reference to specialist literature on project finance or more general reference works including dictionaries.²⁹⁸ This approach does not suffer from the same flaw as the approach calling for reliance upon evidence of one party’s understanding of the term “equity.” The Parties debated the correct “objective” meaning of the word “equity” at great length in the written pleadings, expert reports and at the hearing on the merits. Fortunately, in light of the analysis that follows, the Tribunal is not required to resolve this debate.

d) The ICSID 1 award

263. Although the ICSID 1 tribunal did not elucidate in its award the meaning of the word “equity” in the May 31, 1995 letter, it did implicitly adopt an interpretation of that term in its financial model in Appendix F to the ICSID 1 award (the “ICSID award model”). It was agreed by the parties to the PPA that this financial model would supplement the PPA and, in the event of any inconsistency with the PPA, would prevail over the terms of the PPA:

The parties recognize that there are instances where the formulae, mechanisms, notes, or comments contained in the Financial Model differ from or supplement the terms of the PPA. Where such differences exist, the parties agree that the Financial Model shall govern and supersede the terms of the PPA.²⁹⁹

264. It was also recognised that certain further adjustments would have to be made to the ICSID award model prior to commencement of commercial operations but that such adjustments would have to be consistent with the assumptions in the ICSID award model:

The parties recognize that certain further mechanical steps need to be undertaken in order to make the Financial Model fully useful and operational for purposes of billing and tariff adjustment. The parties agree to cooperate together to take whatever steps are required to effectuate that end. However, the parties agree that the Financial Model sets forth the agreement of the parties as to the calculation of the tariff, and that any further steps which are taken must be consistent with the Financial Model.³⁰⁰

²⁹⁸ *E.g.* Expert Report of Colin Johnson, October 26, 2012 (as amended November 6, 2012), paras. 5.13-5.23; Expert Report of David Ehrhardt, August 10, 2012, paras. 93-98.

²⁹⁹ ICSID 1 award, Appendix F ‘Stipulation and Agreement’, para. 2. Exh. C-10/R-8.

³⁰⁰ *Ibid.*, para. 3. Exh. C-10/R-8.

265. The financial model that was subsequently agreed by the parties before commencement of operations is referred to as the “Implementation Model.”
266. Thus, to the extent that the ICSID award model reflected an assumption of the meaning of “equity”, that assumption became part of the agreement between the parties upon the issuance of the ICSID 1 award on July 12, 2001 and prevailed over any inconsistency in the PPA itself. It also bound the parties to the PPA notwithstanding any adjustments they made in the finalisation of the Implementation Model.
267. The Respondent’s expert, David Ehrhardt, set out detailed reasons why he understood the ICSID award model to be constructed on the assumption that “equity” could not be in the form of a shareholder loan:

The Implementation Model [it is clear that Mr. Ehrhardt meant “ICSID award model”³⁰¹] treats equity as equity; the projections contained therein are not compatible with the view that the equity could be “in the form” of a shareholder loan. In particular, the model shows that the returns to the shareholders would be provided exclusively through dividends on equity, and not through repayment of any shareholder loan. This is shown by the following:

- The model’s only provisions for loan repayment relate to the Senior Debt, which was used to finance 70 percent of the project costs. The model makes no provision for repaying any shareholder loan.
- The model states that equity would provide 30 percent of the project funds (totalling \$38.2 million), and then projects the payments that would be needed to provide IPTL’s shareholders with the agreed 22.31 percent, after-tax return on that amount of equity at the end of year 20.
- The model shows that all of the payments made to achieve the 22.31 percent return on equity are to be made through dividend payments subject to dividend payment constraints, rather than by payments on a loan (which would not be subject to the dividend payment constraints). This is reflected in the “Accumulated Cash Account for Divids” section of the Dividends & Accounts sheet. That section shows the dividend payment constraints restrict the amount of cash that can be paid to shareholders for years 8 through 19, which results in a growing accumulation of trapped cash. In year 8, for example, the dividend payment constraints restrict the permissible dividend to \$11.429 million out of the \$18.391 million in “After-Tax Cash Available to Pay Dividends,” which results in trapped cash of \$6.962 million that year. Similarly, in year 9, the dividend payment constraints restrict the dividend to \$18.065 million out of the \$24.182 million in “After-Tax Cash Available to Pay Dividends,” which results in the trapped cash growing to \$13.079 million that year.

³⁰¹ In a letter to the Tribunal dated February 4, 2013, Mr. Ehrhardt noted that the words “The Implementation Model” in this extract should read “The Award Model”.

As a result of the operation of the dividend payment constraints, the model shows that the trapped cash ultimately grows to \$25.361 million in year 20.

- In the “Shareholders Cash Flow & Return” sheet, the model further shows that that shareholders’ agreed 22.31% after-tax return on equity is achieved in year 20, when the dividends paid over the term of the contract are added to the accumulated trapped cash that could not be paid earlier because of the dividend payment constraints.³⁰²

268. Mr. Ehrhardt concludes this analysis with the following observations:

The model would have provided an entirely different payment schedule if IPTL were permitted to substitute a shareholder loan for the required 30 percent equity contribution. If the shareholder loan had been permitted in lieu of an equity contribution, the payments to shareholders would not have been subject to the dividend payment constraints, which would have eliminated or reduced the “trapped cash” and would have required a much smaller Capacity Payment to provide the agreed 22.31 percent, after-tax return on equity. Therefore, this model confirms that the required 30 percent equity contribution was required to consist of true equity, and not a shareholder loan.³⁰³

269. The Tribunal concurs with Mr. Ehrhardt’s observations. Under Addendum No. 1 to the PPA, the tariff that TANESCO had to pay IPTL was no longer a fixed tariff, but was going to be calculated at the commencement of commercial operations, taking into account any changes that had occurred in the basic assumptions on the basis of which the PPA was signed:

Before commencement of commercial operations the Reference Tariff mentioned in Table 1 of Appendix B will be adjusted upwards or downwards depending on the effect of changes that will have taken place on any or all [of] the underlying assumptions stated in the Power Purchase Agreement.³⁰⁴

270. The result was that cost savings would result in a lower tariff, to the benefit of TANESCO, as well as the reverse, *i.e.* that cost increases would result in a higher tariff to the detriment of TANESCO. The Capacity Payment was based on the cost of the financing of the Project as foreseen in the basic assumptions, the cost of financing depending itself on the respective costs of loans and of equity, which were to be in the ratio of 70/30. If in the implementation of the Project this ratio were not respected, the cost would be different, and

³⁰² Expert Report of David Ehrhardt, August 10, 2012, para. 110.

³⁰³ *Ibid.*, para. 111. The Respondent’s expert on Tanzanian accounting, Mr. Mususa, appeared to adopt a similar position in redirect examination: Tr. December 10, 2012, page 60, line 8 to page 61, line 3.

³⁰⁴ Exh. R-2.

depending on the situation TANESCO would be required to pay more or less than it was due to pay under the ICSID award model.

271. It has to be underscored that loans are paid before taxation and dividends distributed after taxation. The financial effect of replacing true equity, *i.e.* paid up capital by a shareholder loan, was explained by Mr. Ehrhardt. The Tribunal is persuaded that a shareholder's loan would cost a substantial amount less than true equity over the life of the project, even if both earned exactly the same rate of return. This means that in replacing equity by a shareholder loan, IPTL was incurring less costs than the costs used for the calculation of the Capacity Payment. In other words, TANESCO was paying more than what it would have had to pay under the assumptions if they had been respected. The tax assumptions are set forth in Appendix H to the PPA, where it is indicated that Corporate Income tax is equal to 0% during the first five years and equal to 35% from year 6 to 20. The Capacity Payment is deemed to pay for the cost of capital, *i.e.* for the reimbursement of the loans, the taxes to be paid and the dividends on equity. Because loans are repaid before taxation and dividends after taxation, the replacement of equity by loans necessarily has an influence on the amount of taxes to be paid. The simple explanation is that, if taxes are paid on the amount earned less repayment of the debt, then they are higher because they are calculated on a higher amount of income than if they are calculated on the amount earned after both repayment of the senior debt and repayment of the shareholders' loan. The difference in the global cost – on which the Capacity Payment's calculation was based – is the economy realized in tax payments, which has not been taken into account in the calculation of the Capacity Payment. The Tribunal concurs with the Respondent's observation that: "*As a result, TANESCO was being charged to 'reimburse' IPTL for millions of dollars in taxes that would never be incurred.*"³⁰⁵ Whilst the Tribunal has not made its own calculation of the amount in taxes, it is clear that in principle TANESCO was effectively reimbursing IPTL for taxes that would only have been incurred if the project sponsors had contributed paid-up capital instead of shareholders' loans.

³⁰⁵ Resp. CM, para. 174.

272. The Claimant’s expert, Colin Johnson, did not seek to rebut these specific points made by Mr. Ehrhardt in his expert report.³⁰⁶ Mr. Johnson conceded that “[t]he model certainly does not provide a separate line for subordinated debt paid out differently than share capital.”³⁰⁷ Nonetheless, Mr. Johnson maintained that Mr. Ehrhardt’s points were irrelevant, primarily because “[a] model is not reality but an approximation for it. It also does not set out the structure for a project [...]”³⁰⁸
273. Whether or not financial models reflect the reality of a project or set the structure for a project as a general matter in project finance transactions, the situation in this case is *sui generis*. The ICSID 1 award incorporated the assumptions set out in the ICSID award model and, by reference, the Implementation Model, as a constituent element of the parties’ contractual relationship. Not only were those assumptions incorporated into the parties’ contractual relationship, but also henceforth they were to prevail over any inconsistent terms in the parties’ existing contractual relationship under the PPA. It follows that any assumption about the nature of “equity” reflected in the ICSID award model is binding on the parties to the PPA regardless of what either party understood by that term prior to the ICSID 1 award and regardless of what that term might be understood to mean in the general literature on project finance.
274. Indeed, later in his report, Mr. Johnson states: “Whilst I am clear that what the Implementation Model does is not what was originally intended in the PPA, I agree that it was accepted by both parties in the Stipulation and Agreement and is therefore the agreed approach.”³⁰⁹ The reality is, however, that the only “meeting of the minds” relating to the equity issue is the parties’ agreement on the assumptions underlying the ICSID award model, which were adopted by the ICSID 1 tribunal and which, in any case, supersede any prior assumptions in accordance with the express terms of the Stipulation and Agreement as Appendix F to the ICSID 1 award.
275. The Tribunal is satisfied, based on the observations made by the Respondent’s expert on the ICSID award model and the Implementation Model, that there was an assumption built

³⁰⁶ Expert Report of Colin Johnson, October 26, 2012 (as amended November 6, 2012), paras. 5.49-5.52.

³⁰⁷ *Ibid.*, para. 5.50.

³⁰⁸ *Ibid.*, para. 5.50.1.

³⁰⁹ *Ibid.*, para. 5.52.

into these models that IPTL would contribute “true” equity and was not permitted to substitute a shareholder loan for that 30% equity contribution. In accordance with the Stipulation and Agreement as Appendix F to the ICSID 1 award, this assumption has been incorporated into the contractual relationship between the parties to the PPA and is binding upon the parties to the PPA. Thus, any quantification of the IPTL’s entitlement to Capacity Payments must reflect the assumption that the IPTL’s 30% equity contribution would be in the form of paid-up share capital. **Accordingly, before this Tribunal can quantify the amount owing by TANESCO to IPTL under the PPA, the tariff must be recalculated to take account of that fact that there had not been a 30% equity contribution in the form of paid up share capital.**

e) The principal contemporaneous documents do not, in any event, support the Claimant’s understanding of “Equity”

276. Even in the absence of the ICSID 1 award and the implicit determination of the “equity” issue therein, the important contemporaneous documents do not support the Claimant’s interpretation of “equity” for the purposes of the assumption set out in the May 31, 1995 letter.

The Promoters/ Shareholders Agreement dated September 28, 1994 (Exh. C-48/R-45)

277. This document was not transmitted to TANESCO; indeed, there was an obligation pursuant to Article 10 not to disclose its existence: “*Each of the parties [which are VIP, as the First Sponsor and Mechmar as the Second Sponsor] hereto agrees, for as long as it is a party to this Agreement, to keep strictly secret and confidential [...] any or all technical, economic, **financial**, marketing or other information acquired from any party hereto, or from the company [...].*” (Emphasis added)

278. The agreement envisages the creation of IPTL, with an authorized capital of “*Ten Million (US\$10,000,000.00) divided into one million (1,000,000) ordinary shares at United States of America Ten dollars (US\$10.00) par value each [...]*” It was moreover specified that:

The paid-up capital of the company shall be United States of America Dollars One million (US\$1,000,000.00) which shall be subscribed for by the parties [...] in the ratio as set out below:

(a) as to the First Promoter United States of America dollars Three hundred thousand (US\$300,000.00) at par value in cash to be advanced by the Second Promoter [...] of Thirty thousand (30,000) ordinary shares in the company always representing 30% of the company's paid-up capital for the time being

(b) as to the Second Promoter United States of America dollars Seven hundred thousand (US\$700,000.00) at par value in cash of Seventy thousand (70,000) ordinary shares in the company always representing 70% of the company's paid-up capital for the time being [...].

279. The Tribunal is not persuaded by the Claimant's argument that it was always foreseen that equity would only be partially constituted by paid-up capital. According to the Claimant: *"it is clear from the \$10,000,000 authorised share capital agreed that IPTL's shareholders never intended to contribute the full amount of equity in the Power Plant by way of paid up share capital."*³¹⁰ The fact that an initial amount of capital is indicated is without prejudice to the evolution of the capital and of possible capital increases. This conclusion is reinforced by the reference to the words "for the time being." It is not unusual for a company not to have the fully authorized and paid-up capital when it is first created. The reference to this minimal arrangement for starting the company does not indicate that the final paid-up capital when the plant started to operate would not be around US\$45 million as indicated by IPTL to the Tanzanian Government in its proposal a month later.³¹¹
280. It should also be noted that it appears from the Memorandum and Articles of Association dated November 1, 1994³¹² that if the authorized capital was indeed in conformity with the Shareholders/Promoters Agreement, the paid up capital was only Tanzanian shillings 50.000, which is the equivalent of US\$100. This is much less than what had been envisaged "for the time being" and has no relationship to the representations made to the GoT in the same month. It is also to be noted that in this document, the power for the company to increase its capital is explicitly mentioned in paragraph 39(d).
281. The fact that the initial intention was indeed to have 30% of equity and not a shareholder loan, as transmitted to the GoT in the framework of the negotiation of the PPA with TANESCO, is confirmed by the draft prepared by Deloitte & Touche for the Tanzanian

³¹⁰ Cl. PHB, para. 127.

³¹¹ See *infra* paras. 283-289.

³¹² Exh. R-61.

Revenue Authority on November 2, 1998³¹³ where the anticipated scheme was explained as follows:

Share Capital

Project Financing Equity, is in line with the Loan Facility Agreement which yourselves have viewed where the Debt Equity ratio equals to 70:30. There is no correlation between the issued and paid up share capital as per the Companies Ordinance, Chapter 212, Section 108 and 307 with reference to share capital and shares. It is clear that IPTL Nominal Share Capital TShs 5,000,000,000 divided into 1,000,000 shares is TShs 5000 each. The issued and paid up share capital of IPTL is 10 shares of TShs 5000 each, amounting to TShs 50,000.00. ~~The call and allotment of the remaining shares to the tune of US D 45 million will be done after the Power Station has been completed and commissioned. The Equity or Paid up Share Capital, thereafter will be in the following ratio;~~

Mechmar Corp Berhad 70%	= USD 31.50 million
VIP Engineering & Marketing Ltd. 30%	= USD 13.50 million
Total Equity or Nominal Share Capital or Authorised Share Capital	USD 45.00 million

To be remove

282. It is interesting to note that IPTL had suggested the deletion of the commitment to have a fully paid-up capital of US\$45 million after the commencement of commercial operations, including the following sentence: *“The call and allotment of the remaining shares to the tune of USD 45 million will be done after the Power Station has been completed and commissioned.”*

Proposal for a Privatised 100MW Power Development in Tanzania dated November 21, 1994 (Exh. C-173)

283. This document contains a proposal for a 100 MW power station to serve as the TANESCO power station, submitted in response to a Memorandum of Understanding between Mechmar Corporation and the Government of Tanzania.

284. This is one of the first documents addressed to the GoT in relation to this project. IPTL’s proposal document, addressed to the GoT, states that the total cost of the project would be

³¹³ Exh. R-125.

US\$148 million: the anticipated equity requirement was US\$44.4 million and the remaining part was to be financed by loans. In para. 7.2, it is stated that:

Independent Power Tanzania Ltd. will pursue a **project finance strategy** for the financing of the Project, **on a limited recourse basis**. The concept of project finance can be defined as a financing method in which the burden of credit support comes from the economic viability and cashflow of the project itself.³¹⁴ (Emphasis added)

285. The finance plan was described as follows:

The proposal is based on a debt equity ratio of 70:30. The anticipated equity requirement is US\$44.4 million.³¹⁵

286. Debt was to be raised on the financial markets whereas the project sponsors were to “*contribute all of the equity needed for the Project.*” It was stated in para. 2.5.2:

The financial advisor for the Project will seek to raise all of the debt in the financial markets. The Project sponsors will, on their part, contribute all of the equity needed for the Project, on a parri [sic] passu basis with the debt.

287. The financial terms are elaborated further in section 7 of the proposal:

Independent Power Tanzania Ltd. will secure construction and term financing for the Project at competitive terms so that a sound and attractive financial structure supports the overall venture. The financial structure of the Project will be developed to:

- provide **an adequate level of debt** financing for the Project;
- maintain sufficient margins of financial safety;
- provide **equity investors** with a **commercial rate of return on their funds**;

(Emphasis added)

288. In the same section 7, two different paragraphs are then devoted to the financing of equity and the financing of debt:

7.4.2.2 Terms and Conditions of Equity

The optimal combination of debt and equity results in a reasonable return to equity while maintaining a competitive tariff for the sale of electricity. ... the Project financial advisors recommend an equity level of 30 percent of project costs for this Project. Equity is anticipated to be funded parri passu with the debt.

³¹⁴ See Exh. C-173, para. 7.2, page number SCBHK/D/003375.

³¹⁵ Exh. C-173, page number SCBHK/D/003179.

In summary, the following are the assumptions regarding equity for the Project (Base Case):

Debt-equity ratio	70:30
Total amount	US\$ 148 million
Commitment date	at financial closing
Drawdown period	24 months, parri passu with loan drawdown

7.4.3.2 Terms and Conditions of Debt

Total debt for the Project is expected to account for 70% of the total project costs [...].

The following are the expected terms for the loan facility for the Project:

Ratio of debt to equity	70:30
Total amount	USD 148 million
Terms of debt	24 months construction and 7 years term loan
Repayment basis	7 years, unequal semi-annual repayments
Interest during construction	Fully capitalised & added to construction costs
Interest rate	10.94% per annum
Withholding tax rate on interest	20%
Interest rate after withholding tax	13.68%
Drawdown period	24 months, parri [sic] passu with equity
Debt-service reserves	6 months of debt service, funded from Project cash flow

7.5.1 Capital Costs

The total sources of funds are as follows (USD'000):

Equity	44,379
Senior Debt	103,551
TOTAL	147,930

7.8 THE FINANCIAL MODEL

The financial advisor has developed a financial model that incorporates cash flows of the Project including financing flows and tax and profit calculations for the entire term of the Project (20 years). The proposed electricity tariff is then derived from the estimated operations and maintenance expenses, tax payments, fuel cost and **acceptable levels of debt service and return on equity**. (Emphasis added)

289. The Tribunal considers this document to be of particular significance, because there is a clear reference to the “total debt” that was expected to account for 70% of the costs. This does not appear to be consistent with the Claimant’s position that the “70%” in the ratio of debt to equity referred only to the senior debt, leaving open the possibility that shareholders’ loans could be added.

The May 31, 1995 letter (Exh. C-38/R-3)

290. As previously noted, the ICSID 1 tribunal concluded that this letter set out the basic assumptions underlying the PPA.
291. There is a reference in the May 31, 1995 letter to IPTL's 1994 proposal as examined above. Indeed IPTL stated that they "*wish to confirm that the following assumptions used to determine the capacity charge are contained in the MECHMAR proposal submitted to the Government in November 1994 which was the basis of negotiations and agreements reached in January, 1995.*"
292. Among other key assumptions, the letter indicates the total projected cost of the project as US\$163.5 million; the debt/equity ratio of the project at 70% senior debt and 30% equity; the aggregate rate of interest for the senior debt at 10.94% with an amortisation period of 7 years; and the internal rate of return on equity (the "IRR") at 23%.

The 1995 Financial Model (Exh. R-99)

293. The same assumptions also underlie the 1995 Financial Model. This model was not transmitted to TANESCO but it is an indication of the intention of the investors at that time to make a contribution in the form of paid-up capital. This is because it is a model in which dividends are taken into account, which implies that there was going to be not only debt, but also 30% of "true" equity.
294. At that time, the total cost of the project was valued at US\$163,531,000.00. For this amount the source of funds were indicated as follows in thousands of US\$:

Senior Debt 70%: 114,472

Equity 30%: 49,059

295. The Senior Debt was to be amortized over 7 years and the aggregate rate of interest was to be 10.940%.
296. The 1995 Financial Model also has an entry "Taxable Operating Income" which is based on the "Operating Margin" "Less: Interest on Senior Debt" which gives the "Income

Before Capital Allowances”.³¹⁶ The “Interest on Senior Debt” was foreseen as follows, in thousands of US\$: 12,523 in 1998, 10,770 in 1999, 8,891 in 2000, 6,888 in 2001, 4,759, in 2002, 3,131, in 2003, 783 in 2004 and 0 for all the following years from 2005 to 2017, with a total of 47,745. As far as the repayment of the capital was concerned, it was also foreseen to be achieved in 7 years, with the following figures for the “Total Senior Debt Service”: 28,549 in 1998, 27,941 in 1999, 27,207 in 2000, 26,348 in 2001, 25,364 in 2002, 20,303 in 2004, 6,506 in 2004 and 0 for the following years. The debt was clearly distinct from another entry “Dividends Payments”,³¹⁷ which refers to the “After Tax Cash Available to Pay Dividends”, the sums, in thousands of US\$ also, being the following: 0 in 1998, 12,410, in 1999, 16,103, in 2000, 16,962, in 2001, 17,946 in 2002, 14,099 in 2003, 18,072 in 2004, 18,678 in 2005, 27,920, in 2007, 27,920 in 2008, 27,920 in 2009, 27,920 in 2010, 27,920 in 2011, 27,920, in 2012, 27,920 in 2013, 27,920 in 2014, 27,920 in 2015, 27,920 in 2016, 27,920 in 2017 making a total of Dividends available for distribution of 449,314.

297. Moreover, the reference tariff table at the last page of the 1995 Financial Model has been incorporated in Table 1 to Appendix B to the PPA.
298. The separate entries concerning the senior debt and the equity contribution are quite evident from this 1995 Financial Model, which served as the template for all the models that followed, and which maintained the same distinction between debt and equity.

The Power Purchase Agreement dated May 26, 1995 (Exh. C-4/R-1)

299. There is a link between the 1995 Financial Model and the PPA because in its Article 1 devoted to “Definitions”, the terms “Capital Component” and “Debt Component” are given “(t)he meaning ascribed thereto in Appendix B”.
300. In this Appendix B, a clear distinction can be found again between the “Capital Component” and the “Debt Component”, defined as follows:

Capacity Purchase Price Components

8.1 Capital Component

This component includes the fixed operations and maintenance cost, the insurance

³¹⁶ Exh. R-99, pages 29-30.

³¹⁷ *Id.*

cost, the administrative cost and the **return on equity**, etc. The Capital Component will be escalated in accordance with the procedure in Section 13.

8.2 Debt Component

This component covers the **debt servicing charges** including payments of principal, interest and other fees to THE SELLER's Lenders. This component will decline with the passage of time as the loans related to the Project are repaid and shall be adjusted for Exchange Rate and Interest Rate fluctuation according to Section 13.

301. Also, the mechanisms for adjustments of the Capital Component of the Capacity Purchase Price and the Debt Component of the Capacity Purchase Price are not the same, as is clear from Article 13.2 of Appendix B.

302. Table 1 annexed to this Appendix is also based on a clear distinction between debt and equity:

Table 1
REFERENCE TARIFF

Contract Year	Capital Component (USD/kW/Month)	Debt Component (USD/kW/Month)	Capacity Purchase Price (USD/kW/Month)	Fuel Cost Component (US cents/kWh)	Variable Operations and Maintenance Component (US cents/kWh)	Energy Purchase (US cents/kWh)
1	17.44	24.43	41.88	2.23	1.02	3.25
2	17.96	23.91	41.88	2.23	1.02	3.25
3	18.59	23.28	41.88	2.23	1.02	3.25
4	19.33	22.55	41.88	2.23	1.02	3.25
5	20.17	21.71	41.88	2.23	1.02	3.25
6	24.50	17.37	41.88	2.23	1.02	3.25
7	36.31	5.57	41.88	2.23	1.02	3.25
8	41.88	0	41.88	2.23	1.02	3.25
9	41.88	0	41.88	2.23	1.02	3.25
10	41.88	0	41.88	2.23	1.02	3.25
11	41.88	0	41.88	2.23	1.02	3.25
12	41.88	0	41.88	2.23	1.02	3.25
13	41.88	0	41.88	2.23	1.02	3.25
14	41.88	0	41.88	2.23	1.02	3.25
15	41.88	0	41.88	2.23	1.02	3.25
16	41.88	0	41.88	2.23	1.02	3.25
17	41.88	0	41.88	2.23	1.02	3.25
18	41.88	0	41.88	2.23	1.02	3.25
19	41.88	0	41.88	2.23	1.02	3.25
20	41.88	0	41.88	2.23	1.02	3.25

The Facility Agreement, June 28, 1997 (Exh. C-11/R-47)

303. TANESCO was not privy to this agreement but it throws light on what IPTL negotiated at that time with the Malaysian banks concerning the financing of the project. Through this agreement, IPTL received a loan facility from several Malaysian banks of US\$105,000,000.00. It shows that the understanding with the banks did not match the commitment to TANESCO, which was that the “total debt” should not amount to more than 70% of the cost of the project. It is stated that:

“Debt Equity Ratio” means as at any date the ratio of (1) the Outstandings of all the Banks as at that date to (2) the total amount of equity subscribed and fully paid up on that date by the Shareholders to the Borrower [IPTL] by way of either (a) the subscription for ordinary shares or (b) the provision of subordinated loans.³¹⁸

304. Also the “Shareholders Funds” was defined as follows:

“Shareholders Funds” means the aggregate of the amount which the Shareholders are obliged to provide to the Borrower (whether by way of subscription for shares or by means of the provision of subordinated loans or otherwise) under the Shareholder Support Deed.³¹⁹

305. The financing was still based on a 70/30% debt/equity ratio, and it was made clear that IPTL could only draw down on the loan facility if the shareholders had provided their part of the financing:

Article 18 A (19) Equity: the Borrower will procure that:

(i) on or prior to each drawdown, Shareholders’ Funds of not less than the equivalent of thirty per cent (30%) of aggregate Project Expenditure at any time [...] shall have been paid in cash into the Project Bank Account before each drawdown or otherwise applied to meet Construction Expenditure;

306. In the “Shareholder Support Deed” of the same date, the debt/equity ratio and the manner in which it should be implemented is reiterated in the same terms and it is moreover agreed between the shareholders, IPTL and the banks that they undertake not to “*create or permit to exist a Security Interest securing all or any part of the Subordinated Indebtedness.*”³²⁰

³¹⁸ Exh. C-11/R-47, page 4.

³¹⁹ Exh. C-11/R-47, page 17.

³²⁰ Exh. C-40, Art. 4.5.2 (i)(a).

307. This agreement was not fully implemented as the entire amount of the loan facility was not used. As evidenced in the record, between August 1997 and December 1999, nine drawdowns were approved by the lenders for a total of US\$85,862,022.06 advanced to IPTL under the Facility Agreement.³²¹ However, following the ninth drawdown, the lenders indicated to IPTL that they would not permit any further drawdowns in light of the commencement of the ICSID 1 proceedings. No further drawdowns were made and the total amount advanced under the Facility Agreement remained as US\$85,862,022.06.
308. The fact that the Malaysian banks were willing to accept that equity could be replaced by shareholder loans cannot, of course, be dispositive as to the meaning of “equity” as an assumption underlying the PPA.
309. In conclusion, the principal contemporaneous documents do not evidence an understanding that “equity” could be contributed in the form of shareholders’ loans; more unequivocally, they certainly do not evidence that such an understanding was ever communicated to or accepted by TANESCO. As previously held, however, this is irrelevant in the final analysis because the ICSID 1 award was clearly decided on the basis that “equity” was paid-up capital and that award, or more specifically its financial model, is binding on the parties.

f) The findings in the ICSID 1 arbitration

310. Given the importance of the ICSID 1 arbitration to the “equity” issue under consideration, the Tribunal now provides an additional summary of the ICSID 1 tribunal’s principal findings relating to the adjustment of the tariff and how they were reflected in the ICSID award model.
311. One of the questions before the ICSID 1 tribunal was to determine “[w]hat, if any, adjustment should be made to the Reference Tariff by reason of the alleged reduction in IPTL’s deemed equity [...]?”³²²

³²¹ Exh. C-41.

³²² ICSID 1 award, para. 57(3). Exh. C-10/R-8.

312. The tribunal’s answer was in the negative: “*The Tribunal rejected TANESCO’s submission that there should be a further adjustment to the Reference Tariff by reason of the alleged reduction of IPTL’s equity contribution to the project.*”³²³
313. In the Decision on Preliminary issues,³²⁴ included in Appendix B, one of the preliminary issues to be dealt with was the following:
- How is the final Reference Tariff to be calculated, in the light of the said change [the change in the diesel engines and other differences in the building] and any other differences which may be established?³²⁵
314. Appendix C, Decision on Tariff and Other Remaining Issues,³²⁶ is devoted in part to the principles to be used in the adjustment of the Reference Tariff. The focus was on the costs that were either not at all, or not reasonably incurred. In dealing with this question, the ICSID 1 tribunal arrived at some conclusions. First, it decided that the cost of the EPC contract of Warstila was not reasonable and had to be reduced by US\$10 million, and by a further US\$6 million because of housing that was accounted for but not built; and second, it decided that the “Development Costs” had to be reduced, especially the “Staff and Management Costs” amounting to US\$6,238,000, including US\$5,385,000 for “work performed by Mechmar directors and employees” which was deemed to be unreasonable and thus should be reduced by US\$2.5 million. The total amount allowed for Development Costs was valued by the tribunal at US\$3,036,064.00.
315. The question of the tariff adjustment was again addressed by the tribunal when it revisited the question of “[w]hat, if any, adjustment should be made to the Reference Tariff by reason of the alleged reduction in IPTL’s deemed equity [...]?” in Appendix D.³²⁷
316. In revisiting this issue, the tribunal made reference in a footnote to Dr Swales’ Fifth Witness Statement to the effect that “*he was unable to verify from the documents produced by IPTL that it did in fact contribute equity equal to 30% of the claimed project costs.*”³²⁸

³²³ ICSID 1 award, para. 62. Exh. C-10/R-8.

³²⁴ ICSID 1 award, Appendix B ‘Decision on Preliminary Issues’. Exh. C-10/R-8.

³²⁵ *Ibid.*, para. 2.3.

³²⁶ ICSID 1 award, Appendix C ‘Decision on Tariff and Other Remaining Issues’. Exh. C-10/R-8.

³²⁷ ICSID 1 award, Appendix D ‘Decision on All Further Remaining Questions’, para. 7(4). Exh. C-10/R-8.

³²⁸ *Ibid.*, para. 23.

317. The problem raised here was whether or not different disallowed costs should be taken out of the debt portion or the equity portion, with the result that it might call for a re-evaluation of the proportion between debt and equity. But neither was the existing proportion of equity as such contested, nor was its implementation verified. The tribunal agreed with IPTL's contention that *“one should not assume for these purposes that these items of claimed expenditure were to be identified as having been funded by or attributed to IPTL's equity contribution, and others as being the product of bank loans. Both aspects of the money contributed went to one notional ‘pot’ from which expenditure was made.”*³²⁹ Therefore, the tribunal concluded that it was difficult to determine *“what contribution was in fact made by the banks on the one hand or by IPTL on the other in relation to each item of claimed cost which the Tribunal rejected or reduced.”*³³⁰ In other words, the ICSID 1 tribunal considered that the disallowed costs, even if they were initially costs accounted as part of equity, were to be allocated between debt and equity, so that the two amounts should be diminished proportionally, in order to ensure that the 70:30% ratio was maintained, as one of the basic assumptions on which the PPA rested. The amounts of debt and equity were therefore reduced in order to keep the 70/30 ratio. The total cost was reduced from US\$163,531 (in thousands of US\$) to US\$127,201 (in thousands of US\$), the respective amounts of debt and equity were modified proportionally, which meant that the figures included in the ICSID award model were the following, in thousands of US\$:

Senior Debt 70%: 89,041

Equity 30%: 38,160

318. The ICSID award model includes the modifications introduced by the ICSID 1 tribunal, as far as the total costs are concerned, with the consequential change in the respective amounts of debt and equity in order to keep the ratio of 70/30%, as well as the agreed modification by the parties of the IRR to 22.33, which was incorporated in the award, and the extension of the amortisation period of the senior debt from 7 to 8 years.

319. The “Senior Debt” was foreseen to be repaid in 8 years with the following parameters: “Amortisation %” was to be 18% in 2001, 20% in 2002, 22% in 2003, 10% in 2004, 10%

³²⁹ ICSID 1 award, Appendix D ‘Decision on All Further Remaining Questions’, para. 25. Exh. C-10/R-8.

³³⁰ *Ibid.*, para. 26.

in 2005, 5% in 2006, 5% in 2007, 10% in 2008 and 0% for all the following years from 2008 to 2020; the “Interest Rate” (grossed up) was 8,500% in the years 2001 to 2005 and 10% in the years 2006 to 2008, with a rate of 0% for all the following years from 2008 to 2020; the “Total Senior Debt Service” implied payments in thousands of USD of 23,255 in 2001, 23,616 in 2002, 23,865 in 2003, 11,747 in 2004, 10,985 in 2005, 6,122 in 2007, 9,572 in 2008 and 0 for all the following years from 2008 to 2020.

320. The dividends on equity were dealt with separately, and were foreseen to be distributed only after two years of operation. In other words, the “Dividends Paid” in thousands of USD were indicated along the following schedule: 0 in 2001, 0 in 2002, 5,132 in 2003, 18,368 in 2004, 21,378 in 2005, 14,250 in 2006, 10, 286 in 2007, 16,259 in 2008, 16,460 in 2009, 18,384 in 2010, 18,480 in 2012, 18,576 in 2013, 18,672 in 2014, 18,768 in 2015, 18, 863 in 2016, 18,959 in 2017, 19,055 in 2018, 19,151 in 2019, 19,247 in 2020. Again this is not reconcilable with the existence of only US\$100 of “true” equity.

321. The “Drawdown Schedule” to implement the senior loan as foreseen in the Facility Agreement, was reduced by the ICSID 1 tribunal in order to take into account its decisions on the reduction of costs. Also in this Schedule, the “Equity Contribution to Match Drawdowns” were clearly indicated, as can be seen, for example for the first 6 years of operation:

Tanzania 100MW IPP							
SOURCES & USES OF FUNDS – CONSTRUCTION	Fin. Close	1	2	3	4	5	6
US Dollars in Thousands							
DRAWDOWN SCHEDULE							
Monthly Budgeted Expense	22,409	10,159	28,664	1,040	14,930	1,919	15,012
Cumulative Budgeted Expense	22,409	32,569	61,233	62,273	77,203	79,212	94,133
Estimated Senior Debt Portion	15,687	7,111	20,065	728	10,451	1,343	10,508
Drawdown in Multiples of 500,000	16,000	7,000	20,000	1,000	10,500	1,000	10,500
Equity Contribution To Match Drawdown	6,857	3,000	8,571	429	4,500	429	4,500
Total Debt and Equity	22,857	10,000	28,571	1,429	15,000	1,429	15,000
% Debt to Cumulative Drawdown	70%	70%	70%	70%	70%	70%	70%
% Equity to Cumulative Drawdown	30%	30%	30%	30%	30%	30%	30%
Cumulative Debt	16,000	23,000	43,000	44,000	54,500	55,500	66,000
Cumulative Equity	6,857	9,857	18,429	18,857	23,357	23,786	28,286
Total	22,857	32,857	61,429	62,857	77,857	79,286	94,286
Excess Drawdown over Actual	448	289	196	584	654	164	152

322. It is interesting to note that the 70/30 ratio has been scrupulously followed. And the same holds true for the subsequent years.

323. It was also indicated at the end of Appendix F to the ICSID 1 award entitled “Stipulation and Agreement”³³¹ that “[t]he parties recognize that certain further mechanical steps need to be undertaken in order to make the Financial Model fully useful and operational [...] the parties agree that [...] any further steps which are taken must be consistent with the Financial Model.”

³³¹ ICSID 1 award, Appendix F ‘Stipulation and Agreement’, para. 3. Exh. C-10/R-8.

324. The Tribunal concludes, therefore, in light of the decision of the ICSID 1 tribunal, specifically as it relates to the assumptions to be included in the ICSID award model and hence in the Implementation Model, of the contemporaneous documents relied on by the Parties, as well as of the reasoning contained in the ICSID 1 tribunal's determinations, that the Claimant has failed to demonstrate that the equity contribution to the project could be by way of shareholder loan. **Accordingly, before the Tribunal can quantify the amount owing by TANESCO under the PPA, the tariff must be recalculated to reflect the fact that IPTL's 30% equity contribution was not in the form of paid-up share capital.**

g) What are the parameters for a recalculation of the Capacity Payment?

325. The Tribunal notes that the first question to answer is the cut-off date at which a recalculation of the Capacity Change should be made, as the Parties had strongly diverging views on that issue. The next question is whether the Tribunal should endeavour to recalculate this amount itself on the basis of all the expert presentations before it or refer the matter back to the Parties and then perhaps convene a further hearing, if the Parties cannot agree on the recalculation.

(i) When is the cut-off date for recalculation of the Capacity Payment?

326. The Claimant considers that the cut-off date is September 1998, when the commercial operation should have commenced, relying on the following conclusion of the ICSID 1 tribunal:

The Reference Tariff should be adjusted in accordance with Addendum 1 by reference to changes that had taken place, before commercial operations would have commenced but for TANESCO's purported Notice of Default, in any of the assumptions listed in Mr Rugemalira's letter [...] dated 31 May 1995.³³²

327. The Respondent, relying on another earlier conclusion of the same tribunal, insisted on the fact that all changes that were made in the assumptions of the May 31, 1995 letter before the effective date of commencement of the operation, which would be January 2002, should be taken into account:

³³² ICSID 1 award, Appendix B 'Decision on Preliminary Issues', para. 119. Exh. C-10/R-8.

The result of our conclusions [...] is that the Reference Tariff falls to be adjusted “upwards or downwards”, depending on changes that have taken place in any of the underlying assumptions stated in IPTL’s letter dated May 31, 1995.³³³

328. In Appendix F to the ICSID 1 award, which is an integral part of the award, the following is stipulated:

TANESCO and IPTL agree that the tariff which is to be calculated pursuant to the Power Purchase Agreement (“PPA”) dated 26 May 1995, as amended, shall be calculated based on the Decisions of the Arbitrators herein dated 9 February 2001 and 24 May 2001, the applicable terms of the PPA, and the financial model [...] annexed hereto [...] (the “Financial Model”). The tariff shall be calculated initially at commencement of commercial operation of the Tegeta power plant and during the term of the PPA in accordance with the PPA and the Financial Model.

329. The Decision on Tariffs and Other Remaining Issues of February 9, 2001 is Appendix C to the ICSID 1 award, the Decision, on All Further Remaining Issues of May 24, 2001 is Appendix D to the ICSID 1 award. The Respondent argued that Appendix B, in which the statement concerning the cut-off date as the date of commercial operations but for the notice of default, was not taken into account in the agreement of the parties endorsed by the ICSID 1 tribunal. Instead, according to the Respondent, it was agreed by the parties to the ICSID 1 arbitration, TANESCO and IPTL, and integrated in the ICSID 1 award, that the tariff was to be calculated at the actual commencement of commercial operation.

330. The Tribunal disagrees with the Respondent. A careful reading of the ICSID 1 award shows that the Respondent’s reasoning is based on a false premise, *i.e.* that the parties do not refer to Appendix B. The reverse is true, as the following is stated in Appendix C, which the parties indeed agreed to follow:

[...] on 22 May 2000 the Tribunal issued its Decision On Preliminary Issues of Construction/Law, a copy of which is attached hereto as Appendix B and which **is incorporated herein by reference**. As set forth in paragraph 19 of that Decision, the “Conclusions” of the Tribunal on the Preliminary Issues were as follows:

[...]

That the Reference Tariff should be adjusted in accordance with Addendum No. 1 by reference to changes that had taken place, **before commercial operations would have commenced** but for TANESCO’s purported Notice of Default, in any of the

³³³ ICSID 1 award, Appendix B ‘Decision on Preliminary Issues’, para. 109. Exh. C-10/R-8.

assumptions listed in Mr Rugemalira's letter to the Principal Secretary of the Ministry of Water, Energy and Minerals dated 31 May 1995 [...] ³³⁴ (Emphasis added)

331. Last but not least, the same statement was reiterated in the ICSID 1 award itself at paragraph 34 (3).
332. **The Tribunal concludes therefore that the cut-off date is the date when the commercial operation would have commenced**, if TANESCO had not presented a notice of default, which gave rise to the ICSID 1 proceedings, in other words, that the cut-off date is September 1998.
333. The Tribunal wishes to indicate the consequences of this ruling on the cut-off date on the final settlement of the case.
334. It is not contested that the failure to make the equity contribution as it should have been made in light of the assumptions of the PPA, occurred before September 1998. Thus, there must be a recalculation of the Capacity Payment because the change of the assumption concerning the Debt/Equity ratio of 70/30% happened before that date.
335. Basing itself on the date of the real commencement of the operation of the plant, the Respondent argued also for a further recalculation of the Capacity Payment, because it alleged that the senior debt had been restructured in violation of the assumptions of the May 31, 1995 letter, which provided for a an amortization period of 7 years, stating for example that:

IPTL's secret restructuring of 100% of its debt prior to COD of the Facility, its failure to fully and accurately disclose the changes to the key assumptions from the 31 May 1995 letter and to provide accurate information concerning the senior debt in order to properly calculate the tariff prior to COD, and its agreement to alter the waterfall of payments in a manner that was inconsistent with the requirements of the ICSID 1 Award all constitute breaches of IPTL's contractual obligations to TANESCO under Addendum 1 to the PPA and the PPA's incorporated financial model. ³³⁵

336. This argument cannot be accepted by the Tribunal, both for the reasons set out in paras. 347-353 *infra* and because the restructuring of the senior debt clearly took place after September 1998.

³³⁴ ICSID 1 award, Appendix C 'Decision on Tariff and Other Remaining Issues', para. 33. Exh. C-10/R-8.

³³⁵ Resp. PHB, para. 266.

(ii) How to proceed with recalculation?

337. The Tribunal notes that the question of recalculation was discussed extensively in the reports of the experts of the Parties. The Tribunal also notes that the Parties were in agreement that if the Tribunal were to consider recalculation necessary, then providing the Parties with an opportunity to attempt to agree on the recalculation was preferable.³³⁶ The Tribunal agrees and directs the Parties to undertake such an attempt.
338. In seeking to agree on the tariff the Parties are to be guided by the following considerations.
339. First, the Tribunal does not believe that a tariff of 22.31% would be appropriate. That tariff was based on an assumption that IPTL's equity contribution could be made by way of shareholder loan, which the Tribunal has rejected. Furthermore, as the Tribunal has pointed out in this Decision, the substitution of a shareholder loan for equity resulted in benefits accruing to IPTL, in particular in relation to taxation, which were not contemplated under the PPA. Simply to agree on a tariff of 22.31% would effect no change in the situation between the Parties.
340. Second, the Tribunal is equally of the view that a 0% tariff would be inappropriate. Since the Parties' experts do not suggest that this would be an appropriate tariff in any event,³³⁷ this does not appear to be a matter of contention.
341. Third, the recalculated tariff cannot introduce new assumptions into the relationship of the Parties or require new elements in that relationship. Thus, a tariff based on the assumption that new capital or further shareholder loans would have been provided by IPTL is also inappropriate.
342. Fourth, the Tribunal considers that the tariff has to be set in a way that recognizes that the rate of return for the shareholder loan is higher than the return on senior debt. The Parties' experts both acknowledged that since the senior debt ranked higher in security than the

³³⁶ For the views of the Respondent, *see* Respondent PHB, para. 19; for the views of the Claimant, *see* Tr. March 14, 2013, page 36, lines 23-25, page 37, lines 1-6, page 38, lines 1-9.

³³⁷ Expert Report of David Ehrhardt dated August 10, 2012, para. 126; Expert Report of Colin Johnson dated October 26, 2012 (as amended on November 6, 2012), para. 6.37.

shareholder loan, a higher rate of return would have been expected for the shareholder loan.³³⁸ The Tribunal agrees.

343. Accordingly, the Tribunal directs the Parties to enter into discussions on the recalculation of the tariff taking account of the above considerations, as well as all other conclusions reached in this Decision with a view to reaching agreement on a new tariff. If within three (3) months of the date of this Decision, the Parties have been unable to reach agreement on that tariff, they are to report to the Tribunal either jointly or separately on their final positions in the discussions and the reasons underlying those positions. The Tribunal will then decide, in consultation with the Parties, whether a further hearing on recalculation is necessary.

3. The question of quantum

a) The Disallowed Costs issue

344. In 2001 and 2003, IPTL restructured its loans with its senior lenders.³³⁹ This was done, SCB HK claims, in order to ensure that commercial operation of the plant could commence. Following receipt of tariff payments from TANESCO after the commencement of commercial operations, IPTL proceeded to pay down these restructured loans in accordance with their terms. Thus, IPTL did not pay down the senior debt in the way contemplated in the ICSID award model.

345. The Respondent argues that the restructuring of the loans was without the knowledge of TANESCO and that this constituted a breach of the PPA. Moreover, the fact that IPTL was paying Wartsila and Mechmar to cover amounts that had been disallowed by the ICSID I tribunal had the effect of slowing the rate at which the senior debt was being paid down and increasing the amount owing by TANESCO. This, too, the Respondent argued, was a breach of the terms of the PPA.

346. The Tribunal is unable to accept the Respondent's arguments on the "disallowed costs" issue. First, the restructuring of the loans was a matter between IPTL and its creditors, not

³³⁸ Expert Report of Colin Johnson dated October 26, 2012 (as amended on November 6, 2012), para. 6.37.

³³⁹ *Supra* paras. 52-56.

a matter that fell under the PPA and hence could not constitute a breach of the PPA. Second, the “disallowed costs” had been excluded from calculating the tariff under the ICSID award model and the obligation of TANESCO was to pay the tariff as calculated in that model. What IPTL did with the funds it received from the tariff payments had no impact on what TANESCO owed under the PPA.

(i) Loan restructuring

347. The loans entered into by IPTL to finance the Tegeta project were set out in a series of agreements between IPTL and its senior lenders. These included the Loan Facility Agreement, the Security Deed, the Share Pledge Agreement and the Shareholder Support Deed.³⁴⁰ TANESCO was not a party to any of these agreements. The PPA makes no mention of these agreements, nor does it deal with the way that IPTL was to structure its financing. Indeed, in alleging a breach of the PPA, the Respondent makes no reference to any specific provision of the PPA that has been breached.
348. The Respondent, instead, focuses on the ICSID award model, which sets out the way in which the tariff payments are structured and includes assumptions about the rate at which the senior debt would be paid down. However, the Tribunal is unable to see how these assumptions about the rate of pay down of the senior debt could have had any effect on the total amount owing by TANESCO under the PPA. They were certainly important in showing how the monthly tariff was constructed, but what was critical in the relations between IPTL and TANESCO was the tariff itself, because it was the payment of the tariff that was TANESCO’s obligation under the PPA.
349. Furthermore, the assumptions set out in the May 31, 1995 letter from IPTL to the GoT, which the ICSID 1 tribunal incorporated as assumptions built into the PPA, contains no reference to the debt assumed by IPTL apart from stipulating that the ratio of senior debt to equity was to be 70/30. Thus, there is nothing in the May 31, 1995 letter that would suggest that the assumptions for repayment of the senior debt set out in the ICSID award model operated as a contractual obligation between IPTL and TANESCO so that

³⁴⁰ *Supra* paras. 37-41.

deviations in the structuring of the senior debt (provided it did not change the senior debt/equity ratio) constituted a breach of the PPA.

350. Nor can it be argued that the debt restructuring should have been taken into account in the negotiation of the ICSID award model or the Implementation Model. As pointed out earlier, the debt restructuring took place after the cut-off date of September 1998. And, in any event, the tariff was based on the allowed senior debt as approved by the ICSID 1 tribunal, not on the actual debt that had been assumed by IPTL. As pointed out below, it was the senior debt excluding the disallowed costs that was the basis for the determination of the tariff.

351. It is true that the repayment of the new debt taken on by IPTL as a result of the restructuring has resulted in a slowing down of the repayment of the senior debt, but the Tribunal fails to see how this causes any loss to TANESCO. Once TANESCO has completed the tariff payments it is obliged to make under the terms of the PPA, then its obligations to make payments come to an end regardless of whether the senior debt is extinguished or not. As the Claimant pointed out in its PHB, failure to pay down the senior debt results in a loss to IPTL's shareholders, not to TANESCO.³⁴¹

352. The Respondent argued that failure to pay down the senior debt created a potential loss for the GoT which in the event of expropriation would be faced with a greater compensation amount. Again, the Tribunal fails to see how this could be a loss to TANESCO. The GoT is not a party to these proceedings and it is only loss to TANESCO that is relevant.

353. As a result, the Tribunal is unable to accept the Respondent's argument that IPTL's restructuring of its loans constituted a breach of the PPA.

(ii) Payment of Disallowed Costs

354. The Respondent also argued that the payment by IPTL of costs incurred by Wartsila and Mechmar that had been disallowed by the ICSID 1 tribunal also constituted a breach of the

³⁴¹ Cl. PHB, para. 342.

PPA and results in TANESCO having to pay what the ICSID 1 tribunal had said that it did not have to pay. In effect, the Respondent argued, it is having to pay twice.³⁴²

355. The ICSID 1 tribunal disallowed certain costs incurred by IPTL in the construction of the Tegeta plant, which it concluded had not been prudently incurred.³⁴³ This had the effect of reducing the amount of senior debt recoverable from TANESCO from US\$89 million to US\$85.3 million. The new figure was then used in calculating the tariff that TANESCO had to pay under the ICSID award model.
356. The ICSID 1 tribunal, then, was concerned with the obligations of TANESCO towards IPTL and vice versa. It was not concerned with, and had no jurisdiction over, the relationship between IPTL and its lenders. As the Claimant pointed out, regardless of the finding of the ICSID 1 tribunal, its obligations to its lenders remained. How it fulfilled those obligations was not a matter regulated by the PPA. If the senior debt expanded, then IPTL's obligations to its lenders increased, but this was not a matter addressed by the PPA.
357. Nor could an increase in the senior debt have any impact on TANESCO. The obligation of TANESCO was to pay the tariff as set out in the ICSID award model. Any change or increase in the senior debt had no effect on that tariff. The tariff had been set on the basis of the senior debt as allowed by the ICSID 1 tribunal and TANESCO's obligation was no greater than to pay that tariff. As pointed out earlier, once TANESCO had completed the tariff payments provided for in the ICSID award model, its obligation to make payments would have come to an end. And this was so regardless of whether IPTL had paid off its senior debt. TANESCO only had to pay once; it was not paying twice.
358. Accordingly, the Tribunal concludes that the payments made by IPTL under the restructured debt arrangements, including those payments of costs "disallowed" by the ICSID 1 tribunal did not constitute a breach of the PPA and caused no loss to TANESCO.

³⁴² Tr. March 14, 2013, page 181, lines 17-18.

³⁴³ *Supra* para. 314.

b) Exchange rate losses

359. The Claimant argues that the loss resulting from IPTL being unable to convert the tariff payments it should have received from TANESCO into US dollars within a short time of receiving those payments was a “foreseeable” loss and thus recoverable. The Respondent argues that TANESCO never assumed the risk of such exchange rate losses and in any event such losses are barred by virtue of Article 17.1 of the PPA, which prohibits recovery of “indirect” or “consequential” losses.
360. The PPA itself makes no reference to “exchange rate losses”, nor is there any provision in the PPA concerning the conversion of tariff payments into US dollars. The Claimant relies on its obligation under the Calculations and Forecasting Agreement with its lenders to transfer such funds into US dollars within two days of their receipt. The provisions of this agreement, the Claimant argues, were known to the Respondent, as was the fact that the ICSID award model makes its calculations in US dollars.
361. In the absence of any express agreement to pay for exchange rate losses, the question is whether such losses are foreseeable within the meaning of the English law of remoteness of loss as set out initially in the classic case of *Hadley v. Baxendale*.³⁴⁴ In this regard, the Tribunal does not accept the Respondent’s argument that the losses could not be recovered because it was a risk that TANESCO had not assumed.³⁴⁵ Whether a risk has been assumed does not depend on whether it has been expressly assumed by a party. Moreover, exchange rate losses were not expressly excluded in Article 17.1 of the PPA. It is, as the Tribunal has said, a question of remoteness.
362. As the Claimant pointed out,³⁴⁶ the test for remoteness has two parts. Under the first limb of the test in *Hadley v. Baxendale* losses “*arising naturally, i.e. according to the usual course of things from [the] breach of contract itself*” can be recovered. Under the second limb losses that “*may reasonably be supposed to have been in the contemplation of both*

³⁴⁴ (1854) 9 Ex. 341.

³⁴⁵ In this regard, the Respondent relies on the House of Lords decision in *Transfield Shipping Inc. of Panama v. Mercator Shipping Inc. of Monrovia* [2008] UKHL 48.

³⁴⁶ Cl. PHB, para. 554.

parties at the time they made the contract, as the probable result of the breach of it”³⁴⁷ can also be recovered.

363. The Claimant argues that the exchange rate losses were losses that fell under the first limb – losses that arose naturally from the breach. The first limb, the Claimant says, includes imputed knowledge and each party is “*taken to understand the ordinary practices and exigencies of the other’s trade or business.*”³⁴⁸ In the present case, the Claimant argues, where the senior debt had been contributed to by foreign lenders, “*a reasonable businessman would understand that IPTL would repatriate some or all of the tariff payments in a currency other than Tanzanian shillings.*”³⁴⁹
364. The Tribunal does not agree that the exchange rate losses here fall under the first limb of *Hadley v. Baxendale*. It cannot agree that the exchange rate losses are losses that would occur in the ordinary course of events or would be “the natural and probable result” if the contract were to be breached. Moreover, the Claimant is claiming specifically losses that would result from the inability of IPTL to exchange Tanzanian shillings into US dollars within two business days of the date of receipt of the tariff payments.³⁵⁰ It is unclear how in the absence of specific knowledge a reasonable businessman could contemplate when such a conversion would take place.
365. Rather, in the Tribunal’s view, the claim for foreign exchange losses falls under the second limb of *Hadley v. Baxendale*. Indeed, much of the Claimant’s argument itself reinforces this. The fact that IPTL was to convert Tanzanian shillings into US dollars within two business days of receipt was provided for in the Calculations and Forecasting Agreement between IPTL and its lenders, which TANESCO allegedly was aware of. And the fact that the ICSID award model included repayments in US dollars was also cited as evidence of knowledge of TANESCO that conversion to US dollars would take place. In other words, it is not that exchange rate loss would flow in the ordinary course of events that is the basic argument of the Claimant; it is because of the exigencies of this particular case, which had been brought to the attention of TANESCO. That, in the Tribunal’s view, falls within the

³⁴⁷ (1854) 9 Ex. 341, at 354.

³⁴⁸ Cl. PHB, paras. 554 and 566.

³⁴⁹ *Ibid.*, para. 567.

³⁵⁰ *Ibid.*, para. 541.

second limb of *Hadley v. Baxendale* which encompasses actual knowledge, or knowledge that in the circumstances of the case would be “*reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.*”³⁵¹

366. However, if exchange rate losses fall within the second limb of *Hadley v. Baxendale*, then by the Claimant’s own admission, they are not recoverable. Article 17.1 of the PPA provides a barrier to recovery. Article 17.1 of the PPA provides that neither party shall be liable for “*any indirect, consequential, incidental punitive or exemplary damages.*” In its PHB, the Claimant argues that under English law indirect or consequential damages are “*losses that are recoverable only under the second limb of the rule in Hadley v Baxendale.*”³⁵²

367. Since the Tribunal has concluded that the exchange rate losses are losses that fall under the second limb of *Hadley v. Baxendale*, then Article 17.1 of the PPA prevents their recovery.

c) Bonus, supplementary and interest payments

368. The only issue in contention between the Parties under this heading is the question of bonus payments. As the Respondent clarified at the March 2013 hearing, it limits its disagreement on the question of bonus payments to the time when the plant was in “non-dispatch” mode.³⁵³

369. The Claimant argues that the plant was put in “non-dispatch” mode because of TANESCO’s failure to make tariff payments.³⁵⁴ Although the Respondent points out that the placing of the plant in “non-dispatch” mode resulted from the agreement of IPTL and Wartsila through an amendment to the Suspension Agreement,³⁵⁵ it makes no argument to contradict the Claimant’s contention that the reason for doing this was that TANESCO had ceased to make tariff payments. In short, the claim that the plant was placed in “non-

³⁵¹ *Ibid.*, para. 554.

³⁵² *Ibid.*, para. 565, citing to *Watford Electronics Ltd. v. Sanderson CFL Ltd.* [2001] EWCA Civ 317, para. 43.

³⁵³ Tr. March 14, 2013, page 262, lines 5-11.

³⁵⁴ Cl. Rep., para. 299.

³⁵⁵ Exh. R-91 (First Amendment to the Suspension Agreement).

dispatch” mode because TANESCO had breached the contract by failing to make tariff payments appears unanswered.

370. In these circumstances, the question for the Tribunal is whether the loss of bonus payments was a loss that was foreseeable. In the view of the Tribunal, it was. Bonus payments were an entitlement under the PPA provided that certain conditions were met. A breach of contract through a failure to make tariff payments deprived IPTL of the opportunity to receive what it was entitled to receive under the contract, that is the opportunity to receive bonus payments. It is, therefore, a loss that flowed in the ordinary course of things from the breach of the contract, and thus a loss that falls under the first limb of *Hadley v. Baxendale*. And, since it is loss under the first limb, it does not constitute “indirect” or “consequential” loss and thus does not fall within the scope of Article 17.1 of the PPA.
371. Although the Tribunal is of the view that bonus payments during the period the plant was in “non-dispatch” mode are in principle payable, what is less clear is the amount that should be recoverable under this head. The Claimant has asserted an amount based on the assumption that if the plant had been operating then IPTL would have been entitled to the payment of full bonus payments.³⁵⁶ The Respondent has not contradicted the specific amounts claimed. Rather, by focusing on its position that bonus payments are not recoverable, the Respondent has simply not addressed the question of quantum if in fact such payments were to be recoverable.
372. **In the Tribunal’s view, the parties should be afforded the opportunity to determine the correct amount of the bonus payments.** They are in the position to determine whether bonus payments were made each time in the past when the plant was operating, or whether the operation of the plant resulted in bonus payments for only a certain percentage of the time. With this information they would be in a position to determine the likelihood that bonus payments would have been made if the plant had not been in “non-dispatch” mode and then use that as a basis for calculating the amount that is recoverable.
373. Accordingly, during the time set aside for the Parties to agree on the recalculation of the tariff, the Parties are also directed to attempt to agree on the amount recoverable for bonus

³⁵⁶ Cl. PHB, para. 595, Invoice No. 02/209 IPTL, 04/2010 IPTL.

payments that would have been payable if the plant had not been in non-dispatch mode. As in the case of tariff recalculation, if the Parties are unable to agree within the stipulated time they are to report to the Tribunal either jointly or separately on their final positions in the discussions and the reasons underlying those positions.

d) Enforcement costs

374. The claims for enforcement costs are claims made under the Facility Agreement. TANESCO is not a party to that agreement, and this Tribunal has no jurisdiction over it. The claims would be relevant only if the Tribunal were prepared to consider the claim that SCB HK has in respect of IPTL. However, as pointed out earlier,³⁵⁷ the Tribunal is not in a position to consider amounts claimed in relation to an entity that is not a party to these proceedings and in respect of amounts that the Tribunal is unable to verify. Thus, the Tribunal will not include enforcement costs in any declaration it makes about the amount owing by TANESCO under the PPA.

e) Payments made to the Provisional Liquidator

375. The Claimant argues that TANESCO cannot deduct from what it is owing to SCB HK monies paid to the PL under the Interim PPA. In the Claimant's view, these were monies paid under a separate contract to which SCB HK was not a party and this could not affect the rights that SCB HK has to the tariff payments. The Respondent, by contrast, took the view that it could not be required to pay twice for the operation of the plant when it was in the hands of the PL.

376. The Parties were never entirely clear on how much was in fact paid to the PL and what it was intended to cover.³⁵⁸ It is clear that a substantial amount of those payments went to the operation and maintenance of the plant. In any event, in the view of the Tribunal, the issues of principle are clear. SCB HK, as the assignee of IPTL's rights, is entitled to a declaration of the loss IPTL has suffered as a result of TANESCO's failure to make tariff payments, but that declaration cannot include expenses that IPTL did not incur. Those fall into the category of expenditure saved rather than loss suffered.

³⁵⁷ *Supra* paras. 244-245.

³⁵⁸ Tr. March 14, 2013, page 211, lines 7-14, page 245, lines 2-16, and page 266, lines 11-23.

377. In the present case, SCB HK is entitled to recover the tariff payments due during the period when the plant was being operated by the PL, which will include capacity charges and bonus payments, less the amount that covered the operation and maintenance of the plant, which were expenses that were not incurred by IPTL in whose shoes SCB HK stands. The Tribunal does not have before it an accurate figure for this amount and thus it is an additional matter for the Parties to attempt to resolve themselves before the Tribunal issues its Award.

IX. Costs

378. The Tribunal will determine the question of costs at a later stage.

X. Disposition

A. Jurisdiction

379. The Tribunal has jurisdiction over the Parties and the dispute but its jurisdiction is limited to making a declaration of the amount owing by TANESCO under the PPA.

B. Merits

380. The Tribunal concludes that the tariff must be recalculated to reflect the fact that IPTL's equity contribution was by way of shareholder loan and not by way of paid up share capital.

381. The Tribunal orders the Parties to attempt to agree on the recalculation of the tariff taking into account the considerations set out by the Tribunal in paras. 337-343 *supra* as well as all other conclusions reached in this Decision. If within three (3) months of the date of this Decision the Parties have been unable to reach agreement on the tariff they are to report to the Tribunal either jointly or separately on their final positions in the discussions and the reasons underlying those positions.

382. The Tribunal concludes that restructuring of IPTL's loans did not constitute a breach of the PPA and TANESCO has no claim in this regard.

383. The Tribunal concludes that the exchange rate losses claimed by the Claimant are not recoverable by virtue of Article 17.1 of the PPA.
384. The Tribunal concludes that bonus payments for the period the plant was placed in “non-dispatch” mode are recoverable.
385. The Tribunal orders the Parties to attempt to agree on the amount recoverable for bonus payments that would have been payable if the plant had not been in non-dispatch mode taking into account the considerations set out by the Tribunal in paras. 368-372 *supra* as well as all other conclusions reached in this Decision. If within three (3) months of the date of this Decision the Parties have been unable to reach agreement on the amount recoverable for bonus payments they are to report to the Tribunal either jointly or separately on their final positions in the discussions and the reasons underlying those positions.
386. The Tribunal concludes that the Claimant’s “enforcement costs” are not recoverable.
387. The Tribunal concludes that tariff payments payable during the period of the operation of the plant by the Provisional Liquidator are recoverable, less any monies paid for operation and maintenance costs.
388. The Tribunal orders the Parties to determine in accordance with paras. 375-377 *supra*, the amount recoverable for payments made to the Provisional Liquidator. If with three (3) months of the date of this Decision the Parties have been unable to reach agreement on the amount recoverable representing payments made to the Provisional Liquidator they are to report to the Tribunal either jointly or separately on their final positions in the discussions and the reasons underlying those positions.
389. The Tribunal reserves its decision as to the costs of the arbitration to a later stage.

[Signed]

Zachary Douglas
Arbitrator

[Signed]

Brigitte Stern
Arbitrator

[Signed]

Donald McRae
President