

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Standard Chartered Bank (Hong Kong) Limited

v.

United Republic of Tanzania

(ICSID Case No. ARB/15/41)

PROCEDURAL ORDER NO. 5b

ON PRODUCTION OF DOCUMENTS BY THE CLAIMANT

Members of the Tribunal

Professor Lawrence Boo, President of the Tribunal
David Unterhalter SC, Arbitrator
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal

Aurélia Antonietti

11 September 2017

1. These directions contain the Tribunal's decisions on the Respondent's applications for document production orders submitted on 14 August 2017. In reaching its Decision the Tribunal has considered the Respondent's grounds for requests, the Claimant's objections and comments and the Respondent's replies, as well as, the letter of the Claimant dated 25 August 2017 and the Respondent's reply thereto of 29 August 2017.
2. In this Procedural Order,
 - a. The term "document" means documents whether in hard copies or any by electronic means containing the information or data directed to be disclosed and not to any meaning or definition as ascribed by the Parties in their Requests;
 - b. The documents ordered to be produced are made following the sequence of the requests made by the Parties. In the case that documents which have been directed to be produced fall within more than one request made, the respective party may comply with its obligation by identifying the location within the bundles of disclosed documents, without need for further production of the same document;
 - c. The term "Order to Produce" without qualification means that the respective party shall (unless disclosure had earlier been made in this Arbitration) make such disclosure requested of it as set out in the second column;
 - d. Subject to (h) below, where an Order to Produce is made with limitations, the obligation of the respective party is limited to the qualification specified;
 - e. Where an Order to Produce is made "as agreed", production is limited to the documents earlier agreed to be disclosed by the producing party;
 - f. If any document(s) ordered to be produced in this Procedural Order had earlier been disclosed in this Arbitration, the respective party may comply with its obligation by identifying the same to the other without need for further production;
 - g. Subject to (h) below, the term "No Order" means that the respective party has no obligation to produce. This does not however absolve any party whose burden it is to substantiate its claims and assertions with evidence sufficient to discharge such burden of proof; and

- h. Notwithstanding the Tribunal's ruling of "No Order" or "Order to Produce" made with limitations, the respective party shall honour any offer already made to make disclosure of any other documents which it believes to be responsive to the requests.
3. If the respective party is unable to produce a document so ordered, it (by an individual with primary responsibility for the instruction, coordination and supervision of the search for relevant documents) shall affirm an affidavit deposing to the reasons why the documents so ordered to be produced are not able to be disclosed. If appropriate, the affidavit should also state what searches were made and by whom and, in relation to any documents or categories of documents which are said never to have existed or, if they existed, cannot now be identified or found, give a full explanation of what documents within the categories sought are likely to have been brought into existence, what systems were in place for the retention and recovery of documents, and why documents which may have existed can no longer be found.
4. To facilitate easy identification and subsequent reference, a party producing documents is encouraged to prepare an index of any or all documents produced, and identify said documents that relate to the other party's application for document production, in hard and electronic forms, searchable, paginated and tabulated.
5. The costs leading to rulings made herein shall be deferred for later consideration or determined together with the award to be made in this arbitration.
6. According to the revised schedule in Procedural Order No. 4, the deadline for production of documents (voluntary and as ordered by the Tribunal) is **2 October 2017**.

THE RESPONDENT'S REQUESTS

No.	Description of the Requested Document(s)	Tribunal's Decision
1.	All documents evidencing the payment of US\$76.1 million from SCB HK to Danaharta for Term Loans 1 and 2.	Order to Produce
2.	All documents discussing or evidencing: (i) the decision of SCB HK to acquire Term Loans 1 and 2 in August 2005; and (ii) the reasons for the pricing of its offer in the amount of US\$76.1 million.	<p>Order to Produce, <u>limited</u> to the documents produced by the Claimant in in the BIT Arbitration on 4 May 2011 responding the BIT Requests 3, 4 and 5 namely -</p> <p><i>"[t]he documents relating to SCB or SCB HK's purchase of Term Loans I and II, including the correspondence and emails concerning negotiations...";</i></p> <p><i>"[t]he financial statements, balance sheets, ledgers, correspondence, and other documents reflecting SCB's or SCB HK's internal valuation of Term Loans I and II";</i> and</p> <p><i>"[t]he audit statements, consulting reports, and other documents reflecting any valuation of Term Loans I and II that were provided to SCB or SCB HK by a third-party."</i></p>
3.	All documents referring to the potential unenforceability of the Loan Facility Agreement and the other Financing Documents, to the Security Deed (and the notices of assignment therein included), and to the Charge of Shares over IPTL including but not limited to: (i) internal documents of SCB HK discussing the 21 June Question and Answer Session with Kurien Thomas and Faridah Abdullah, dated 21 June 2005 (<u>Ex. R-11</u>); (ii) any other documents in SCB HK's possession, whether created by it or any other entity, such as Danaharta.	No Order
4.	All documents (including the due diligence report and related documents) prepared by SCB HK concerning the Sale and Purchase Agreement with Danaharta, dated 4 August 2005 (<u>Ex. R-12</u>).	No Order
5.	All documents previous to and subsequent to the purported acquisition by SCB HK of Term Loans 1 and 2 from Danaharta discussing or addressing: (i) the requirement of IPTL needing to seek the prior written approval of the Government under Article 15.2(a) of the Implementation Agreement for the creation of a security interest in favour of the Lenders; (ii) whether the Government's consent under Article 15 of the Implementation Agreement	<p>Order to Produce as agreed –</p> <p>To the extent that the request seeks documents discussing or assessing any requirement to seek such consent, the Claimant agrees to search for and produce responsive documents:</p> <p>(i) up to the date of acquisition by SCB HK of Term Loans 1 and 2 (insofar as such documents are not subject to privilege, which for the avoidance of doubt the Claimant does not agree to waive). This will include a reasonable and proportionate search of</p>

	was required when SCB HK acquired Term Loans 1 and 2.	documents reviewed by the Claimant as part of due diligence, to the extent that copies are retained; and (ii) between 1 October and 4 November 2009, when the Claimant became Security Agent in place of RHB, which had been the Security Agent since 1999.
6.	All documents previous to and subsequent to the purported acquisition by SCB HK of Term Loans 1 and 2 from Danaharta relating to any assessment performed by SCB HK as to the nature of the security interest created by Section 3.2.1 of the Security Deed.	No Order
7.	All documents relating to SCB HK's assessment of the advice given to IPTL and the original lenders by LAA Associates that the Security Deed needed to be registered in BRELA under Section 79 of the Companies Ordinance 1921 in order to be valid under Tanzanian Law.	No Order
8.	All documents relating to SCB HK's assessment of the advice given to Danaharta that leave off the High Court of Tanzania was necessary under Section 172 of the Companies Ordinance 1921 for the transfer of IPTL's loan.	No Order
9.	Any documents from late 2008 until late 2009 discussing or assessing any action to be taken by Ms. Martha Renju as a receiver to IPTL's shares or Ms. Renju's subsequent attempt to obtain possession of the Facility, including any necessary notification to the Government under Article 15.2(b) of the Implementation Agreement of SCB HK's intentions to operate the Facility.	Order to Produce as agreed -- The Claimant to carry out a reasonable and proportionate search of documents held by the Claimant in relation to this request, and to produce responsive documents. No Order is made in respect of any documents in the possession of any third party or Ms Martha Renju. In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
10.	All documents (including internal documents of the SCB group) relating to: (i) the decision, in November 2009, to make SCB HK the Security Agent under the Loan Facility Agreement after SCB MB's refusal to be appointed to that position; (ii) the reasons for SCB MB declining to be appointed as Security Agent.	No Order
11.	All documents in 2009 (including internal documents of the SCB group) relating to SCB HK's decision to intervene in the Interpretation Proceedings and thereafter to initiate separate arbitrations when the Interpretation Proceedings were withdrawn.	No Order
12.	All documents and correspondence in 2010 providing evidence of any interaction or exchanges between Mr. Joe Casson of SCB HK and Mr. Datuk	Order to Produce

	Majid of Mechmar and of the content of those interactions.	
13.	All documents in 2010 evidencing the decision by SCB HK to pursue proceedings in Malaysia and the British Virgin Islands.	<p>Order to Produce as agreed (“The Claimant agrees to carry out a reasonable and proportionate search for additional documents in the period 1 June to 7 August 2010 (the date SCB HK commenced proceedings in Malaysia) concerning the reasons for commencing the proceedings, and to produce any non-privileged documents located”),</p> <p>together with the documents responsive to this request produced in the BIT Arbitration and in the PPA Arbitration (“At request no.13 of the BIT Requests, the Respondent sought production of: “[a]ll pleadings and documents filed in any Malaysian court in connection with litigation between an SCB entity and Mechmar.” No objection was made to this request and responsive documents were produced on 4 May 2011.</p> <p>Further, at request no.4 of the PPA Requests, Tanesco sought production of: “[t]he pleadings, correspondence, orders, settlement offers, settlement agreements, transcripts and demand letters from the lawsuit filed on 23 March 2011 by SCB HK against Mechmar.” The Claimant agreed to provide pleadings, orders and transcripts responsive to this request.</p> <p>Similarly, at request no.3 of the PPA Requests, Tanesco sought production of: “[t]he pleadings, correspondence, orders, settlement offers, settlement agreements, transcripts and demand letters from the lawsuit filed by Martha Renju against Piper Link in the Virgin Islands.” The Claimant agreed to provide pleadings, orders and transcripts responsive to this request. “)</p> <p>In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.</p>
14.	All documents and correspondence in late 2011, in 2012 and in 2013 providing evidence of any interaction or exchanges between Mr. Joe Casson of SCB HK and Mr. Harbinder Singh Sethi of PAP, their negotiation of the Memorandum of Agreement and the termination of the Memorandum of Agreement.	Order to Produce
15.	All documents between 21 August 2013 and 3 September 2013 (which is the period running from when SCB HK was provided a copy of the VIP/PAP Sale and Purchase Agreement and of VIP’s application to withdraw the petition for the winding up of IPTL and the hearing before Utamwa J) in which SCB HK assessed the impact of the VIP/PAP Share Purchase Agreement and of VIP’s application on its alleged rights under the Charge of Shares.	<p>Order to Produce as agreed</p> <p>In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.</p>

16.	All documents and correspondence received and exchanged by SCB HK and/or its advisors relating to the hearing which took place before Utamwa J on 3 September 2013, including the watching brief allegedly held by Mr. Nyika on behalf of SCB HK.	Order to Produce as agreed In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
17.	All documents relating to Claimant's discussions and decision not to appeal the Utamwa J Order within the 60-day time limit under Rule 65.4 of the Court of Appeal Rules 2009 (Tanzania) (<u>Ex. RL-17</u>) after receiving the ruling of the Court of Appeal of Tanzania dated 18 October 2013 rejecting its application filed against Utamwa J's decisions of 3 and 7 May 2013 (<u>Ex. R-26</u>).	Order to Produce as agreed In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
18.	All documents and correspondence received and exchanged by SCB HK between September and December 2013 relating to utilising the Escrow Account for enforcing its alleged security over IPTL.	Order to Produce as agreed In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
19.	All documents between 2010 and 2011 and September 2013 and December 2013 discussing or evidencing whether Claimant attempted to provide evidence of its alleged rights under the Charge of Shares to the relevant Tanzanian Governmental Authorities and Tanzanian Courts, including the decisions obtained in the Malaysian and British Virgin Islands courts against Mechmar.	Order to Produce as agreed In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
20.	All documents between September 2013 and December 2013 discussing any negotiations or interactions between Claimant and the Government on the Escrow Account, including the negotiations allegedly held on 13 November 2013 between Joseph Casson of SCB HK and Liz Lloyd (CEO of SCB Tanzania) and the Government.	No Order
21.	All documents evidencing Claimant's decision to withdraw its applications in Tanzania attempting to (i) prevent the release of the monies held in the Escrow Account to IPTL; and (ii) appoint an administrator over IPTL.	Order to Produce as agreed In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
22.	All documents and correspondence relating to the communications between SCB HK and any member of the CAG or PAC: (i) from May 2014 until the publication of the CAG and PAC Reports in November 2014; and (ii) after the publication of the CAG and PAC Reports in November 2014 until January 2015.	Order to Produce In the event that Claimant invokes privilege, it should clearly identify the responsive document and the basis for the purported privilege.
23.	All documents (where relevant in the native spreadsheet file format) and back-up data evidencing how the amount of US\$173,640,480 purportedly outstanding under the Loan Facility Agreement was determined by SCB HK's expert, Mr. Johnson, including but not limited to:	Order to Produce

	<ul style="list-style-type: none"> (i) evidence of all payments made by IPTL under the Loan Facility Agreement to any of its purported lenders / Facility Agent / Security Agent; (ii) agreements and correspondence between IPTL and any of its purported lenders / Facility Agent / Security Agent concerning the application of interest, including penalty interest; (iii) the detail of insurance costs claimed by SCB HK; (iv) the detail of enforcement costs claimed by SCB HK. 	
24.	All documents created prior to the filing of the Request for Arbitration discussing or identifying a discrimination and/or expropriation claim under Articles 16.1 and 16.2 of the Implementation Agreement.	No Order
25.	All documents between September 2013 and April 2014 discussing: (i) any relevant Events of Default under Article 19 of the Implementation Agreement; (ii) the procedure of notice and cure periods to follow under Article 19.2 with respect to those events; and (iii) under which Events of Default SCB HK would send a “Notice of Intent to Terminate.”	No Order
26.	All documents between 12 September 2016 and the filing of Claimant’s Memorial on 16 December 2016 discussing: (i) the failure of TANESCO to pay the PPA Award and/or the failure by the Government to guarantee the payment of the PPA Award as an Event of Default under Article 19 of the Implementation Agreement; and (ii) the time when SCB HK would notify such alleged Events of Default to the Government under Article 19.2 of the Implementation Agreement.	No Order
27.	All documents evidencing Claimant’s discussions and anticipated decision to terminate the Implementation Agreement before the hearing in April 2018.	No Order
28.	All documents between 2016 and 2017 (including internal documents of the SCB group) relating to the enforcement proceedings of the PPA Award and of the 2016 Flaux J Judgment.	No Order

On behalf of the Tribunal

[signed]

Lawrence Boo

President of the Tribunal

Date: 11 September 2017