

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

STANDARD CHARTERED BANK (HONG KONG) LIMITED

Claimant

and

UNITED REPUBLIC OF TANZANIA

Respondent

ICSID Case No. ARB/15/41

AWARD

Members of the Tribunal

Professor Lawrence Boo, President
Justice David Unterhalter SC, Arbitrator
Dr Kamal Hossain, Arbitrator

Secretary of the Tribunal

Ms Geraldine R. Fischer

Assistant to the President of the Tribunal

Ms Sukriti Slehria

Date of dispatch to the Parties: 11 October 2019

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TABLE OF KEY ABBREVIATIONS/DEFINED TERMS

Arbitration Rules or ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BoT	Bank of Tanzania
BRELA	Business Registrations and Licensing Agency of Tanzania
Charge of Shares	The Charge of Shares dated 28 June 1997, executed by Mechmar and VIP over of their shares in IPTL to the Security Agent as security for the Loan
Claimant or SCB HK	Standard Chartered Bank (Hong Kong) Limited
Danaharta	Danaharta Managers (L) Ltd
Escrow Agreement	Escrow Agreement dated 5 July 2006 between the Government of Tanzania, IPTL and Bank of Tanzania
Escrow Account	An account established by GoT pursuant to the Escrow Agreement
Hearing	Hearing on Jurisdiction and Merits held on 16-23 July 2018
Facility Agreement	<i>“Loan Facility Agreement relating to the 100 MW Tegeta Power Project”</i> dated 28 June 1997 between IPTL and a consortium of lenders (several Malaysian banks)
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID 1 Award	Final Award in ICSID Case No. ARB/98/8 dated 12 July 2001 between TANESCO and IPTL
Implementation Agreement/IMA	Implementation Agreement dated 8 June 1995 between IPTL and GoT
IPTL	Independent Power Tanzania Limited
LCIA Award	Award in LCIA Arbitration No. 2353 dated 26 August 2003 between Mechmar and VIP
Mechmar	Mechmar Corporation (Malaysia) Berhad

Mechmar Shares	The 70% shares held by Mechmar in IPTL
PAP	Pan Africa Power Solutions (T) Limited
PPA	Power Purchase Agreement dated 26 May 1995, between IPTL and TANESCO
PPA Award	Final Award of the Tribunal in ICSID Case No ARB/10/20 dated 12 September 2016 between SCB (HK) and GoT
Respondent, Tanzania or GoT	The Government of the United Republic of Tanzania
Security Deed	Security Deed executed by IPTL as borrower dated 28 June 1997 in favour of SIME Berhad (Singapore office) as Security Agent
TANESCO	Tanzania Electric Supply Company Limited
VIP	VIP Engineering and Marketing Limited
VIP Shares	The 30% shares held by VIP in IPTL

I. INTRODUCTION AND PARTIES

1. This is a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Implementation Agreement between the Government of the United Republic of Tanzania and Independent Power Tanzania Limited (“**IPTL**”) dated 8 June 1995 (“**Implementation Agreement**” or “**IMA**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”). This dispute relates to the Claimant’s allegations against the Respondent of breach of Articles 15 and 16 of the Implementation Agreement and the validity of the Claimant’s termination of the Implementation Agreement.
2. The claimant is Standard Chartered Bank (Hong Kong) Limited (“**SCB HK**” or the “**Claimant**”), a corporation registered under the laws of Hong Kong.
3. The respondent is the United Republic of Tanzania (“**Tanzania**” or “**GoT**” or the “**Respondent**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page i.

II. PROCEDURAL HISTORY

Date	Event
18 September 2015	ICSID received a request for arbitration dated 15 September 2015 from SCB HK against the United Republic of Tanzania together with exhibits C-001 through C-046 and legal authority CL-001 (“ Request ”).
30 September 2015	The Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration, wherein the Parties were invited to constitute an arbitral tribunal as soon as possible pursuant to Rule 7 of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ Institution Rules ”).

19 May 2016	<p>The Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), notified the Parties that the Tribunal was constituted pursuant to Article 37(2)(a) of the ICSID Convention.</p> <p>The Tribunal was composed of Prof Lawrence Boo Geok Seng, a national of Singapore, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Sir Stanley Burton, a national of the United Kingdom, appointed by the Claimant; and Dr Kamal Hossain, a national of Bangladesh, appointed by the Respondent. On the same date, Ms Aurélia Antonietti, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal.</p>
27 June 2016	<p>The Tribunal issued Procedural Order No. 1 (“PO 1”) pursuant to the Parties’ agreement in their letters of 14 and 27 June 2016. PO 1 provides, <i>inter alia</i>, that the applicable Arbitration Rules would be those in effect from 10 April 2006; the procedural language is English; and the place of proceeding would be London, England.</p>
29 June 2016	<p>The Respondent filed its proposal for the disqualification of Sir Stanley Burnton, along with Annexes 1 through 11, pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9, on the grounds that his appointment was inconsistent with the arbitration clause contained in Article 21.2 of the Implementation Agreement.</p>
30 June 2016	<p>The Parties were informed that the proposal to disqualify Sir Stanley Burnton would be decided according to Article 58 of the ICSID Convention, and the proceeding was suspended until such decision was made, in accordance with ICSID Arbitration Rule 9(6).</p>
5 July 2016	<p>The Claimant filed observations on the proposal for disqualification.</p>
7 July 2016	<p>The Tribunal consented to the resignation of Sir Stanley Burnton, in accordance with ICSID Arbitration Rule 8(2) and the Secretary-General notified the Parties of the vacancy on the Tribunal and invited the Claimant to appoint the missing arbitrator.</p>

8 July 2016	The Claimant appointed Justice David Unterhalter SC, a national of South Africa.
11 July 2016	Following Justice David Unterhalter's acceptance of his appointment as arbitrator, the Tribunal was reconstituted.
July - August 2016	Correspondence was exchanged between the Parties and the Tribunal regarding a date for the first session, which was set for 5 August 2016.
3 August 2016	The Respondent's request for adjournment, based on the Attorney General of Tanzania not being available, was rejected by the Tribunal on 3 August 2016.
4 August 2016	The Respondent informed the Tribunal that the Attorney General of Tanzania had instructed counsel to not attend the first session in his absence.
5 August 2016	The Tribunal held the first session at the IDRC in London and the participants were the Members of the Tribunal, Mr Francisco Abriani, ICSID Legal Counsel, and counsel for the Claimant.
15 August 2016	The Respondent filed a request to address the Respondent's objections to jurisdiction and admissibility as preliminary questions (" Respondent's Application for Bifurcation ") with legal authorities RL-001 through RL-010.
2 September 2016	The Claimant submitted its Response to the Respondent's Application for Bifurcation (" Claimant's Response to the Application for Bifurcation ") with exhibits C-047 through C-075 and legal authorities CL-002 through CL-004.
15 and 20 September 2016	On 15 and 20 September 2016, the Claimant submitted additional exhibits, C-076 and C-077.
23 September 2016	The Tribunal held the Hearing on Bifurcation in London at the IDRC. The following persons participated to the hearing: <u>Members of the Tribunal:</u> Prof Lawrence Boo, President of the Tribunal Mr David Unterhalter SC, Arbitrator Dr Kamal Hossain, Arbitrator <u>ICSID Secretariat:</u> Mr Marco Tulio Montañés-Rumayor, Legal Counsel

	<p><u>On behalf of the Claimant:</u> Mr Joseph Casson, Standard Chartered Bank (Hong Kong) Limited Mr James Denham, Standard Chartered Bank Mr Matthew Weiniger QC, Linklaters LLP Mr Iain Maxwell, Herbert Smith Freehills LLP Mr Dominic Kennelly, Herbert Smith Freehills LLP Mr Adam McWilliams, Herbert Smith Freehills LLP Mr Divyanshu Agrawal, Herbert Smith Freehills LLP</p> <p><u>On behalf of the Respondent:</u> Mr Beredy Malegesi, Crax Law Partners Prof Bonaventure Rutinwa, R.K. Rweyongeza & Co. Advocates Mr David Hesse, Curtis, Mallet-Prevost, Colt & Mosle LLP Mr Galileo Pozzoli, Curtis, Mallet-Prevost, Colt & Mosle LLP Ms Luciana Ricart, Curtis, Mallet-Prevost, Colt & Mosle LLP Mr James Cockburn, Curtis, Mallet-Prevost, Colt & Mosle LLP Mr Valerio Salvatori, Curtis, Mallet-Prevost, Colt & Mosle LLP Ms Rebecca Johnston, Curtis, Mallet-Prevost, Colt & Mosle LLP Mr Dav Holat, IT technician, Curtis, Mallet-Prevost, Colt & Mosle LLP</p>
26 September 2016	The Claimant submitted an additional legal authority, CL-005, and several additional exhibits, C-078 and C-079.
11 October 2016	The Tribunal issued Procedural Order No. 2 (“ PO 2 ”) concerning procedural matters. On the same date, the Tribunal issued Procedural Order No. 3 (“ PO 3 ”) setting forth its decision not to bifurcate the proceedings.
16 December 2016	The Claimant filed its Memorial on the Merits (“ Claimant’s Memorial ”) with the witness statement of Mr Gaspar Asheri Nyika, dated 16 December 2016, the expert reports of Mr Colin Johnson and Mr Nicholas Zervos, dated 16 December 2016, exhibits C-080 through C-218 and legal authorities CL-006 through CL-055.
26 June 2017	The Respondent filed its Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits (“ Respondent’s Counter-Memorial ”) together with exhibits R-001 through R-071 and legal authorities RL-011 and RL-094.
17 July 2017	The Tribunal issued Procedural Order No. 4 (“ PO 4 ”) concerning the procedural calendar, ordering that the Claimant’s Rejoinder on Jurisdiction would be due on 2 March 2018.

11 September 2017	The Tribunal issued Procedural Orders 5a (“ PO 5a ”) and 5b (“ PO 5b ”) on production of documents by the Respondent and the Claimant respectively.
10 November 2017	The Claimant filed its Counter-Memorial on Jurisdiction and Reply on the Merits (“ Claimant’s Reply ”), along with the second witness statement of Mr Gaspar Asheri Nyika, dated 9 November 2017, the witness statement of Mr Kieran Day, dated 10 November 2017, the witness statement of Mr Joseph Wesley Casson dated 15 November 2017, the expert report of Mr David Chivers QC, dated 8 November 2017, the second expert report of Mr Nicholas Zervos, dated 10 November 2017, exhibits C-219 through C-399 and legal authorities CL-056 through CL-189.
7 December 2017	The Respondent requested an extension of “ <i>at least three months</i> ” to file its Rejoinder on the Merits and Reply on Jurisdiction due on 29 January 2018.
12 December 2017	The Claimant objected to this extension request.
4 January 2018	The Tribunal granted the Respondent’s requested time extension for filing its Rejoinder on Merits and Reply on Jurisdiction.
11 January 2018	The Tribunal confirmed that the April hearing dates were vacated and that the Hearing on Jurisdiction and Merits would take place in London from 16-27 July 2018.
16 January 2018	The Tribunal issued Procedural Orders 6a (“ PO 6a ”) and 6b (“ PO 6b ”) concerning production of documents.
30 January 2018	The Tribunal issued Procedural Order No. 7 (“ PO 7 ”) concerning the procedural calendar.
1 March 2018	Curtis, Mallet-Prevost, Colt & Mosle LLP informed the Tribunal that they were no longer representing the Respondent.
2 May 2018	The Tribunal granted the Parties’ April 2018 requests for an extension of time to file their submissions and informed the Parties that it would have an organizational conference call.
17 May 2018	The President held an organizational conference call with the Parties to receive updates and clarifications regarding the

	Respondent's representation in these proceedings and to discuss procedural issues related to this matter.
23 May 2018	The Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (" Respondent's Rejoinder "), along with exhibits R-072 through R-097 and legal authorities RL-095 through RL-142.
1 June 2018	Further to the Parties' respective letters of 25 and 31 May 2018, the Tribunal informed the Parties that further evidence shall only be permitted if and when the Tribunal so directs.
14 June 2018	The Parties were invited to consider the appointment of Ms Elizabeth Wu as assistant to the President, as well as the appointment of Mr Moin Ghani, as assistant to Dr Kamal Hossain. The Parties were also invited to provide their position on the attendance of the above-mentioned individuals and Ms Chloé Terrapon Chassot, as observer, to the Hearing on Jurisdiction and Merits.
20 and 27 June 2018	The Parties confirmed that they did not object to the appointment of Ms Elizabeth Wu and Mr Moin Ghani as assistants nor to the attendance of Ms Chloe Terrapon Chassot at the hearing.
2 July 2018	The Claimant filed its Rejoinder on Jurisdiction (" Claimant's Rejoinder on Jurisdiction ") with exhibits C-403 through C-408 and legal authorities CL-190 through CL-208.
4 July 2018	The President held a pre-hearing organizational meeting with the Parties by telephone conference.
5 July 2018	The Parties were requested to clarify their positions regarding how the Claimant's witness statements ought to be evidentiarily treated, given that the Respondent did not intend on cross-examining any of the Claimant's witnesses or experts.
6 and 8 July 2018	The Parties submitted their positions regarding the issue of the Claimant's witnesses.
10 July 2018	The Respondent confirmed that Curtis, Mallet-Prevost, Colt & Mosle LLP was retained to represent it. On the same date, the Tribunal decided that the Hearing on Jurisdiction and Merits would take

	place from 16-24 July 2018 and decided on the issue of the Claimant's witnesses.
12 July 2018	A letter said to be from Mr Harbinder Singh Sethi on IPTL letterhead addressed to the Secretary of the Tribunal, was sent by email through the Ukonga Central Prison at Dar Es Salaam seeking the Tribunal's permission to " <i>join IPTL/PAP or alternatively for IPTL/PAP to be called as witnesses in the pending proceedings</i> ". Upon the confirmation from the Parties during the Hearing, the Tribunal declined to accede to the request. ¹
16 July 2018	At the Hearing on Jurisdiction and Merits, Ms Elizabeth Wu, Mr Moin Ghani and Ms Chloe Terrapon Chassot provided the Parties with their respective signed terms of reference and declarations of their independence and impartiality. On the same date, the Tribunal granted the Parties' requests, of 12 and 13 July 2018, to admit RL-143 and RL-144 and C-409 onto the record.
16-23 July 2018	A Hearing on Jurisdiction and Merits was held, at the IDRC in London. The following persons participated at the hearing: <u>Members of the Tribunal:</u> Prof Lawrence Boo, President of the Tribunal Justice David Unterhalter SC, Arbitrator Dr Kamal Hossain, Arbitrator <u>Tribunal Assistants / Observer:</u> Ms Elizabeth Wu, Assistant to Mr Lawrence Boo, President Mr Moin Ghani, Assistant to Dr Kamal Hossain, Co-Arbitrator Ms Chloé Terrapon Chassot, Observer <u>ICSID Secretariat :</u> Ms Geraldine Fischer, Acting Secretary of the Tribunal <u>On behalf of the Claimant:</u> Counsel: Mr Matthew Weiniger QC, Linklaters LLP Mr Iain Maxwell, Herbert Smith Freehills LLP Ms Elizabeth Kantor, Herbert Smith Freehills LLP Mr Aaron McDonald, Herbert Smith Freehills LLP Mr Harry Ormsby, Herbert Smith Freehills LLP

¹ Tr. Day 6 [1304:8-15].

Mr Gavin Creelman, Herbert Smith Freehills LLP
Mr Joel Fenster, Herbert Smith Freehills LLP
Ms Olga Timiryasova, Herbert Smith Freehills LLP

Parties:

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Mr Oliver Perez, Standard Chartered Bank
Mr Daniel Knowles, Standard Chartered Bank

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Mr Kieran Day, The Business Advisory Group
Mr Gaspar Nyika, IMMA Advocates

Experts:

Mr Colin Johnson, Charles River Associates
Mr Sandy Cowan, Grant Thornton
Mr Nicholas Zervos, Velma Law

On behalf of the Respondent:

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Mr Tullio Treves, Curtis, Mallet-Prevost, Colt & Mosle LLP
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Mr Renato Treves, Curtis, Mallet-Prevost, Colt & Mosle LLP
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Ms Neza Hren, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Clarissa Manfré, Curtis, Mallet-Prevost, Colt & Mosle
LLP
Mr Dav Holat, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Lee Southon, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Omar Gargash, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Beredy Malegesi, Crax Law Partners in Association
with RK Rweyongeza and Co. Advocates
Mr Makubi Kunju Makubi, Crax Law Partners in
Association with RK Rweyongeza and Co. Advocates
Mr Andrea Cardani, EconOne
Mr Brendan Moore, EconOne

Parties:

Mr Clement Mashamba, United Republic of Tanzania
Mr George Mandepo, United Republic of Tanzania
Ms Hosana Jacob Mgeni, United Republic of Tanzania

23 July 2018	The Tribunal granted the Claimant's request to admit exhibits C-410 through C-414, and legal authorities, CL-209 through CL-212.
8 August 2018	The Parties were informed that Ms Geraldine Fischer, ICSID Legal Counsel, had been assigned to serve as Secretary of the Tribunal.
7 September 2018	The Parties filed simultaneous Post-Hearing Briefs (" PHB ") with the accompanying exhibits and legal authorities. The Claimant also filed an updated expert report of Mr Colin Johnson.
21 September 2018	The Parties filed simultaneous Reply Post-Hearing Briefs (" Reply PHB ") with the accompanying exhibits and legal authorities together with their submissions on costs.
27 September 2018	The Parties were invited to consider the appointment of Ms Sukriti Slehria to replace Ms Wu as assistant to the President. By correspondence of 27 and 28 September 2018, the Parties confirmed that they did not object to the appointment, and Ms Slehria provided the Parties with her signed terms of reference and declaration of her independence and impartiality.
28 August 2019	The proceeding was declared closed.

III. FACTUAL BACKGROUND

5. The Tribunal provides below a brief summary of the factual background of the events before the dispute as set out in the Parties' submissions in the arbitration. This summary does not constitute any finding by the Tribunal on any facts disputed by the Parties. A detailed analysis of the facts relevant to the Tribunal's determinations on jurisdiction and liability are contained in Sections V and VI.

A. THE FACILITY AND KEY AGREEMENTS²

6. On 28 September 1994, Mechmar Corporation (Malaysia) Berhad ("**Mechmar**") (a Malaysian company) and VIP Engineering and Marketing Limited ("**VIP**") (a Tanzanian Company) entered into a Promoters/Shareholders Agreement ("**PSA**") wherein the parties agreed "to

² HB/A/002/035-143: Claimant's Memorial, paras. 32-40; HB/A/003/144-370: GoT's Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits ("**Respondent's Counter-Memorial**"), paras. 10-16.

form a private limited company incorporated in Tanzania”;³ and it was set out that the “*main object*” of the company would be to apply for the operating licence to build, construct and operate a 100 megawatts (“**MW**”) power plant for 20 years pursuant to the Memorandum of Understanding signed between Mechmar and the Tanzanian Ministry of Water Energy and Minerals dated 27 August 1994; with Mechmar contributing 70% of the paid-up capital and VIP contributing 30% of the paid-up capital for which “*cash [USD 300,000 was] to be advanced by [Mechmar] subject to clause 2(ii)(a)(b)(c) and (d)*” of the PSA.⁴

7. On 1 November 1994, the company IPTL was “*incorporated under the Companies Ordinance [1921] (Cap. 2012)*” in Tanzania as a joint venture company between Mechmar (holding 70% of the shares) (“**Mechmar Shares**”) and VIP (holding 30% of the shares) (“**VIP Shares**”).⁵
8. Several agreements were entered into in 1995, including financing arrangements.

(1) Power Purchase Agreement

9. On 26 May 1995, IPTL and Tanzania Electric Supply Company Limited (“**TANESCO**”), concluded the Power Purchase Agreement (“**PPA**”).⁶ Under the PPA, IPTL undertook to design, construct, own, operate and maintain an electricity generating facility (“**Facility**” or “**Power Plant**”) with a nominal net capacity of 100 megawatts to be located in Tegeta, Dar es Salaam for the generation and sale of electricity, and to deliver the electricity it generated to TANESCO as and when required, for an initial period of 20 years, subject to extensions for further periods (“**Project**”). The PPA is governed by Tanzanian law and contains an ICSID arbitration clause.⁷

(2) Implementation Agreement

10. By Implementation Agreement dated 8 June 1995 signed by IPTL and GoT, the GoT gave various undertakings and assurances in favour of IPTL and “*its permitted successors and assigns*”, including undertakings against discriminatory action and expropriation, and granted IPTL the exclusive right to design, finance, insure, construct, complete, own, operate

³ HB/C/001/001-012: Shareholders Agreement between VIP and Mechmar, 28 September 1994, para. A.

⁴ HB/C/001/001-012: Shareholders Agreement between VIP and Mechmar, 28 September 1994, paras. 2(a), 2(i)(b).

⁵ HB/H/002/002: Certificate of Incorporation of IPTL, 1 November 1994; HB/A/002/035-143: Claimant’s Memorial, para. 33; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 11.

⁶ HB/C/002/013-128: Power Purchase Agreement (“**PPA**”), 26 May 1995.

⁷ HB/C/002/013-128: PPA, 26 May 1995, Recitals, Articles 2.1, 2.2, 18.3, 19.4.

and maintain the Facility. The Implementation Agreement is governed by Tanzanian law and contains an ICSID arbitration clause.⁸

11. The GoT also agreed to execute a guarantee, attached as Schedule 1 to the Implementation Agreement (“**Guarantee**”), undertaking to pay to IPTL any sums owed by TANESCO under the PPA should TANESCO failed to pay.⁹

(3) Facility Agreement

12. IPTL raised the majority of the funds by means of a loan provided by a consortium of foreign lenders (several Malaysian banks) under the “*Loan Facility Agreement relating to the 100 MW Tegeta Power Project*” dated 28 June 1997 (“**Facility Agreement**”).¹⁰ The loan was to be repaid from the cash flows generated by IPTL under the PPA. The Facility Agreement contained a non-exclusive English jurisdiction clause and was governed by English law.¹¹

(4) Security Deed

13. By Security Deed dated 28 June 1997 (“**Security Deed**”),¹² IPTL assigned all its present and future rights, title and interest in and to the Assigned Contracts (which included the PPA and the Implementation Agreement) to the lenders’ nominated Security Agent as security for the loan. The Security Deed contained a non-exclusive English jurisdiction clause and was subject to English law.¹³

(5) Shareholder Support Deed

14. By a “**Shareholder Support Deed**”¹⁴ dated 28 June 1997, Mechmar and VIP agreed to subscribe to the shareholders’ funds of IPTL and bound themselves not to sell, transfer or otherwise dispose the Shareholders’ Funds and undertook, *inter alia*, not to take any action in furtherance of the winding up, liquidation or dissolution of IPTL.

⁸ HB/C/004/132-191: Signed Implementation Agreement (without Schedules), 8 June 1995, Articles XXI, 24.8.

⁹ HB/C/004/132-191: Signed Implementation Agreement (without Schedules), 8 June 1995, Article XXII.

¹⁰ HB/C/008/280-365: Facility Agreement, 28 June 1997.

¹¹ HB/C/008/280-365: Facility Agreement, 28 June 1997, Clause 33.

¹² HB/C/009/366-457: Security Deed, 28 June 1997, Clause 3.2.

¹³ HB/C/009/366-457: Security Deed, 28 June 1997, Clause 20.

¹⁴ HB/C/011/474-511: Shareholder Support Deed between Mechmar and VIP (as Shareholders) and IPTL (as Borrower) and SIME Bank (as Security Agent), 28 June 1997.

(6) Charge of Shares

15. By a “**Charge of Shares**” dated 28 June 1997, Mechmar and VIP charged their shares in IPTL to the Security Agent as security for the loan and agreed that, in an “*Event of Default*” under the Facility Agreement, the shareholders would cease to be authorised to exercise rights with respect to the shares, and the Security Agent alone would be entitled to exercise such rights. The Charge of Shares contained a non-exclusive English jurisdiction clause and was governed by Tanzanian law.¹⁵

(7) Lenders and Security Agents

16. The original lenders were a consortium of Malaysian banks.¹⁶ The Facility Agreement and the other related documents were restructured between 1999 and 2005.¹⁷
17. In 2001 and 2003, IPTL and Danaharta Managers (L) Ltd (“**Danaharta**”) (which had succeeded the Malaysian banks under the Facility Agreement) restructured the loan due under the Facility Agreement into two new loans (“**Term Loan 1**” and “**Term Loan 2**”) (collectively referred to as the “**Loan**” or “**Term Loans**” or “**Loans**”). These loans globally amounted to USD 120 million.¹⁸
18. In August 2005, SCB HK acquired the Loan and related security from Danaharta under a “*Sale and Purchase Agreement (Loan Account – Independent Power Tanzania Limited)*” dated August 2005.¹⁹

¹⁵ HB/C/010/458-473: Charge of Shares between (1) Mechmar Corporation (Malaysia) Berhad, (2) VIP engineering and Marketing Limited and (3) Sime Bank Berhad, 28 June 1997, Clauses 5, 16.1 and 16.2.

¹⁶ See paras. 75 to 77 below.

¹⁷ See paras. 82 to 86 below.

¹⁸ HB/A/002/035-143: Claimant’s Memorial, paras. 57-58; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 28.

¹⁹ HB/C/013/535-551: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005.

B. INTERNATIONAL PROCEEDINGS, TANZANIAN COURT PROCEEDINGS AND OTHER DISPUTES

(1) ICSID 1 Proceedings²⁰

19. On 25 November 1998, TANESCO commenced ICSID arbitration proceedings against IPTL under the PPA, claiming that it was entitled to terminate the PPA on account of breaches by IPTL, and sought for the tariff to be adjusted (“**ICSID 1 Proceedings**”).²¹
20. The tribunal in the ICSID 1 proceedings (“**ICSID 1 Tribunal**”) upheld the PPA as a “*valid and effective contract*,” but also ruled that IPTL could not recover certain costs incurred during the construction phase through the tariff charges under the PPA. The ICSID 1 Award issued on 12 July 2001²² incorporated a financial model (Appendix F annexed to the ICSID 1 Award), which was in accordance with the parties’ agreement and “*was to act as the method for calculating the tariff payments to be made by Tanesco to IPTL following the commencement of commercial operations*” under the PPA.²³

(2) Shareholder Dispute and Winding Up Petition²⁴

21. After the ICSID 1 Award, disputes arose between VIP and Mechmar relating to the attribution of the construction costs that the ICSID 1 Tribunal had decided were not recoverable. On 25 February 2002, VIP filed a petition with Tanzanian courts seeking the winding up of IPTL, among other things, on the ground that IPTL was being “*run as an incorporated partnership (quasi-partnership)*” (“**Winding Up Petition**”).²⁵ IPTL applied to stay and dismiss this petition. Mechmar commenced an arbitration under the rules of the LCIA pursuant to the terms of the PSA. The tribunal in the LCIA arbitration ordered VIP to discontinue the Winding Up Petition in its final award dated 26 August 2003 (“**LCIA Award**”).²⁶ Mechmar then filed an application before the High Court of Tanzania seeking enforcement of the LCIA Award, and

²⁰ HB/A/002/035-143: Claimant’s Memorial, paras. 60-65; HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 19-21.

²¹ HB/D/002/066-299 at pg. 74: Final Award, ICSID Case No. ARB/98/8 (“**ICSID 1 Award**”), 12 July 2001, para. 19.

²² HB/D/002/066-299: ICSID 1 Award, 12 July 2001.

²³ HB/A/002/035-143: Claimant’s Memorial, paras. 54-55.

²⁴ HB/A/002/035-143: Claimant’s Memorial, paras. 60-65.

²⁵ HB/H/037/709-725 at pg. 723: *VIP Engineering and Marketing Ltd v Independent Power Tanzania Limited*, High Court of Tanzania, Misc. Civ. Cause No. 49 of 2002, Petition under Sections 163 and 167(b) & (f) of the Companies Ordinance, Cap. 212 (“**Winding Up Petition**”), 25 February 2002.

²⁶ HB/D/007/616-639: Award in LCIA Arbitration No. 2353 between Mechmar and VIP (“**LCIA Award**”), 26 August 2003.

this application was eventually dismissed with “costs for Mechmar’s failure to prosecute its case” on 31 October 2008.²⁷

(3) Tariff Dispute²⁸

22. On 5 July 2006, GoT, IPTL and the Bank of Tanzania (“**BoT**”) (as the Escrow Agent) entered into an Escrow Agreement, which established an account for GoT to pay into (“**Escrow Account**”)²⁹ and maintain a two-months equivalent of tariff payments due to IPTL under the PPA as GoT’s fulfilment of its obligation to provide security.
23. Following certain tariff disputes between TANESCO and IPTL, as from May 2007 (“**Tariff Dispute**”), TANESCO stopped making tariff payments under the PPA and instead made payments into the Escrow Account.³⁰

(4) Interpretation Proceedings and the Revised Administration Petition³¹

24. In June 2008, IPTL started proceedings seeking an interpretation of the ICSID 1 Award pursuant to Article 50 of the ICSID Convention (“**Interpretation Proceedings**”), which were ultimately discontinued on 19 August 2010, following various events.³² The Claimant sought to intervene in the Interpretation Proceedings, but its efforts (so it contends) were frustrated by the actions of TANESCO and GoT, which conspired with Mechmar to purchase the Mechmar Shares in return for Mechmar withdrawing the Interpretation Proceedings.³³ This is contested by the Respondent.³⁴ In this context, the Claimant filed two applications with the High Court of Tanzania for the appointment of an administrator to IPTL; the first administration petition was allowed by Mihayo J’s Ruling³⁵ and Mihayo J’s Ruling was overturned by the Court of Appeal in its Ruling of 9 April 2009³⁶ and then the second petition

²⁷ HB/H/097/1020-1030 at pgs. 1028-1030: Judgment of Oriyo J in the Tanzanian Court, 31 October 2008.

²⁸ HB/A/002/035-143: Claimant’s Memorial, paras. 71-72.

²⁹ HB/C/015/558-582: Escrow Agreement between GoT, IPTL, and Bank of Tanzania (“**BoT**”), 5 July 2006.

³⁰ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 39 and 95.

³¹ HB/A/002/035-143: Claimant’s Memorial, paras. 73-84.

³² See paras. 310 to 311 below.

³³ HB/A/002/035-143: Claimant’s Memorial, paras. 88-90.

³⁴ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 39-52.

³⁵ HB/H/112/1185-1195: Order of the High Court of Tanzania, 27 January 2009.

³⁶ HB/H/117/1205-1231: Ruling of Court of Appeal of Tanzania, 9 April 2009.

was filed by the Claimant on 17 September 2009 (“**Revised Administration Petition**”) which it withdrew in 2013.³⁷

25. On 15 December 2008, SCB HK appointed a receiver over VIP’s shares in IPTL,³⁸ and later appointed a receiver over Mechmar’s shares in IPTL.³⁹

(5) Interim PPA⁴⁰

26. On 16 December 2008, the High Court of Tanzania appointed the “*Administrator General/Official Receiver*”, Mr T Rugonzibwa as the provisional liquidator (“**First Provisional Liquidator**” or “**First PL**”) of IPTL pursuant to the Winding Up Petition.⁴¹ In October or November 2009, the First PL resumed operation of the Power Plant in response to power shortages in Tanzania. The First PL on behalf of IPTL entered into an interim power purchase agreement with TANESCO (“**Interim PPA**”) on 5 February 2010.⁴²

(6) PPA Arbitration⁴³

27. Following the discontinuation of the Interpretation Proceedings on 19 August 2010, the Claimant initiated ICSID proceedings on 15 September 2010 against TANESCO to recover sums under the PPA in its capacity as assignee of the PPA (“**PPA Arbitration**”). The tribunal in the PPA Arbitration (“**PPA Tribunal**”) issued its Decision on Jurisdiction and Liability on 12 February 2014 (“**PPA Decision**”),⁴⁴ and in its Final Award dated 12 September 2016 (“**PPA Award**”) ⁴⁵ found, among other things, that “*payment out of the Escrow Account to IPTL/ PAP did not discharge TANESCO’s obligation to SCB HK under the PPA*” and ordered

³⁷ HB/H/353/4954-4964: *Standard Chartered Bank (Hong Kong) Limited v IPTL and others*, High Court of Tanzania, Misc. Civil Cause No. 112 of 2009, Ruling (Utamwa J), 6 December 2013.

³⁸ HB/H/101/1051-1075 at pg. 1052: Letter from RHB Bank Berhad to ICSID, 15 December 2008.

³⁹ HB/A/002/035-143: Claimant’s Memorial, para. 78.

⁴⁰ HB/A/002/035-143: Claimant’s Memorial, paras. 85-87; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 55.

⁴¹ HB/H/104/1583-1599 at pg. 1599: High Court of Tanzania’s Appointment of PL, 16 December 2008; HB/A/002/035-143: Claimant’s Memorial, para. 79.

⁴² HB/H/142/1972-1974: Letter from the Ministry of Energy and Minerals, Tanzania to the Provisional Liquidator, IPTL, 12 March 2010.

⁴³ HB/A/002/035-143: Claimant’s Memorial, paras. 20 and 91.

⁴⁴ HB/D/004/367-479: Decision on Jurisdiction and Liability in ICSID Case No. ARB/10/20 (“**PPA Decision**”), 12 February 2014.

⁴⁵ HB/D/005/480-586: Final Award of the Tribunal in the PPA Arbitration (“**PPA Award**”), 12 September 2016.

TANESCO to pay to SCB HK an amount of USD 148.4 million plus interest.⁴⁶ TANESCO filed an application for annulment of the PPA Award on 6 January 2017.⁴⁷

28. The ICSID *ad hoc* Annulment Committee dismissed TANESCO's annulment application on 22 August 2018.⁴⁸

(7) Proceedings in Malaysia and in the British Virgin Islands ("BVI")⁴⁹

29. In August 2010, SCB HK filed proceedings in Malaysia seeking interim relief against Mechmar alleging that Mechmar had breached the Charge of Shares and "*threatened to sell the Subject Shares [Mechmar Shares] to the Government of Tanzania.*"⁵⁰ The High Court of Malaya ("**Malaysian Court**") issued an interlocutory injunction restraining Mechmar from transferring the Mechmar Shares.⁵¹ Mechmar's legal representatives informed SCB HK that the Mechmar Shares were sold by Mechmar on 9 September 2010.⁵² Pursuant to an *Ex parte Injunction Order* by the Malaysian Court⁵³ ordering Mechmar to furnish documents regarding the sale of Mechmar Shares, it produced the Share Sale Agreement dated 9 September 2010 entered between Mechmar and Piper Link Investments Ltd ("**Piper Link**") (a company incorporated in BVI).
30. Ms Martha Renju, in her capacity as receiver of shares of IPTL, then applied for and obtained an *ex parte* order in BVI against Piper Link to deliver the share certificates to the High Court of the BVI ("**BVI Court**") and to take no further steps to transfer, dispose of or otherwise deal with the Mechmar Shares pending trial.⁵⁴
31. On 11 April 2011, the BVI Court ordered summary judgment in favour of Martha Renju.⁵⁵

⁴⁶ HB/D/005/480-586 at pgs. 584 and 585: PPA Award, 12 September 2016.

⁴⁷ HB/H/459/6911-6930: PPA Arbitration, TANESCO's Application for Annulment, 6 January 2017.

⁴⁸ Exhibit CL-216: *Standard Chartered Bank (Honk Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018 (filed along with Claimant's Post-Hearing Brief ("**Claimant's PHB**")).

⁴⁹ HB/A/002/035-143: Claimant's Memorial, paras. 92-100; HB/A/003/144-370: Respondent's Counter-Memorial, paras. 62-64.

⁵⁰ HB/H/153/2113-2119: Amended Statement of Claim in *SCB HK v Mechmar* before the High Court of Malaya, 9 August 2010, para. 13.

⁵¹ HB/D/008/640-642: Interlocutory Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 4 October 2010.

⁵² HB/H/159/2232: Letter from Teh & Associates to M/s SK Yeoh & Partners, 12 October 2010.

⁵³ HB/D/010/647-654: Ex Parte Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 19 October 2010.

⁵⁴ HB/D/014/665-671: Freezing and Custody Order of the High Court of British Virgin Islands ("**BVI Court**") in *Renju v Piper Link*, 8 November 2010.

⁵⁵ HB/D/015/672-674: BVI proceedings (*Renju v Piper Link*), Order for Summary Judgment, 11 April 2011.

(8) Winding Up Order and Setting Aside⁵⁶

32. On 15 July 2011, the High Court of Tanzania ordered the winding-up of IPTL (“**Winding Up Order**”) on the application of VIP’s 2002 petition (see paragraph 21 above) and appointed the “[*Administrator General/*]Official Receiver, Mr Philip Saliboko as the “**Liquidator**” of IPTL.⁵⁷
33. After the Winding Up Order, the Claimant, submitted a proof of debt to the Liquidator wherein it stated, among other things, that it was owed by IPTL a sum of “US\$ 125,970,570.67 for monies advanced pursuant to the [...] loan Agreement [...] (including interest) together with insurance premia and enforcement costs [...]”;⁵⁸ and referred to “Security” documents (including the Charge of Shares and Security Deed) which it highlighted secured “all monies, debts and liabilities” owed by IPTL to it.⁵⁹ Pricewaterhouse Coopers produced a report dated March 2012 (“**PwC Report**”)⁶⁰ in its advice to the Liquidator, in which they confirmed the validity of the loan, and made their conclusions on SCB HK’s security, including that SCB HK “is a valid creditor of IPTL.”⁶¹ The Parties dispute the consequences of the PwC Report’s conclusions.⁶²
34. On 17 December 2012, the Winding Up Order was set aside⁶³ by the Tanzanian Court of Appeal.⁶⁴ The Court declared all proceedings (viz. proceedings in Misc. Civil Cause No 49 of 2002 and Misc. Civil Cause No. 243 of 2003) a “nullity”; rulings and orders made therein relating to VIP’s Winding Up Petition that post-dated the Claimant’s Revised Administration Petition were “...quashed and set aside”, and ordered that Claimant’s Revised Administration Petition be heard expeditiously by the High Court of Tanzania. Consequently, IPTL reverted

⁵⁶ HB/A/002/035-143: Claimant’s Memorial, paras. 101-102, 105-115.

⁵⁷ HB/H/184/2508-2512: Winding Up Order of Kaijage J., 15 July 2011.

⁵⁸ HB/H/218/3133-3137 at pg. 3133: Proof of Debt submitted by SCB HK to the Liquidator, 24 April 2012.

⁵⁹ HB/H/218/3133-3137 at pg. 3135: Proof of Debt submitted by SCB HK to the Liquidator, 24 April 2012.

⁶⁰ HB/H/220/3140-3213: Price Waterhouse Cooper’s Report entitled “IPTL Creditor Claim Assessment”, 29 April 2012.

⁶¹ HB/H/220/3140-3213: Price Waterhouse Cooper’s Report entitled “IPTL Creditor Claim Assessment”, 29 April 2012, para. 1.2.1.

⁶² HB/A/003/144-370: Respondent’s Counter-Memorial, para. 69.

⁶³ HB/H/258/3725-3752: Decision of the Court of Appeal of Tanzania, 17 December 2012.

⁶⁴ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 73.

to the state it was before the Winding Up Order and Mr Saliboko was appointed as provisional liquidator (“**Second Provisional Liquidator**” or “**Second PL**”) of IPTL.⁶⁵

35. On 9 April 2013, Mr Lutema served a petition on behalf of Mechmar to enforce the LCIA Award (“**Lutema Petition**”)⁶⁶ and sought the discontinuance of Misc. Civil Cause No. 49 and Misc. Civil Cause No. 254 of 2003.⁶⁷ The Lutema Petition and the Revised Administration Petition were consolidated on 3 May 2013.⁶⁸ On 5 May 2013, Utamwa J in his Order dated 7 May 2013, directed that the Provisional Liquidator of IPTL and Mechmar be both entitled to be heard in respect of SCB HK’s Revised Administration Petition.⁶⁹

(9) Winding Up Order in Respect of Mechmar

36. On 18 May 2012, a winding up order in respect of Mechmar was made by the Malaysian Court.⁷⁰ According to the Claimant, since late 2011, Mr Sethi and his advocate Mr Lutema had been acting for and representing Mechmar in various court proceedings in Tanzania. Mechmar’s liquidators informed Mr Lutema that only the liquidators had authority to act for Mechmar.⁷¹ Mechmar’s liquidators⁷² obtained, on 16 April 2013, directions from the Malaysian Court (High Court of Malaya) that they had sole power to act on behalf of Mechmar.⁷³

(10) Utamwa J Order

37. On 26 August 2013, VIP gave notice that it would be applying to withdraw the Winding Up Petition over IPTL and all ancillary applications by VIP in consolidating Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003⁷⁴ enclosing the Share Purchase Agreement

⁶⁵ HB/H/274/4319-4228 at pgs. 4321-4322: Letter from Mr Saliboko, The Official Receiver and Provisional Liquidator of IPTL, to the Tribunal in ICSID ARB/10/20 (PPA Arbitration), para. 6; HB/A/002/035-143: Claimant’s Memorial, para. 114; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 68.

⁶⁶ HB/A/002/035-143: Claimant’s Memorial, para. 119.

⁶⁷ HB/H/266/4245-4282: Petition filed before the High Court of Tanzania by Asyla Attorneys, 9 April 2013.

⁶⁸ HB/H/272/4311-4314 at pg. 4314: Order of the High Court of Tanzania (Utamwa J), 7 May 2013.

⁶⁹ HB/H/272/4311-4314: Order of the High Court of Tanzania (Utamwa J), 7 May 2013; HB/A/002/035-143: Claimant’s Memorial, paras. 118-125.

⁷⁰ HB/D/012/660-661: Order of the High Court of Malaya, 18 May 2012.

⁷¹ HB/A/002/035-143: Claimant’s Memorial, paras. 116-117.

⁷² Heng Ji Keng and Michael Joseph Monteiro were the Liquidators of Mechmar.

⁷³ HB/D/013/662-664: Directions from the High Court of Malaya, 16 April 2013.

⁷⁴ HB/H/288/4507-4537: Application by VIP to the High Court of Tanzania, 26 August 2013.

dated 15 August 2013⁷⁵ entered between VIP and PAP for the sale of VIP's 30% shareholding in IPTL to PAP ("**VIP-PAP-SPA**"), and on 30 August 2013 VIP also tendered before the High Court the draft terms of order to be made by the Court.⁷⁶

38. On 5 September 2013, Utamwa J granted this application and ordered *inter alia* that all of IPTL's affairs, including the PPA and the control of the Facility, be transferred to PAP ("**Utamwa J Order**").⁷⁷ The Utamwa J Order was rendered in the proceedings Misc. Civil Cause Nos. 49 of 2002 and 254 of 2003 that corresponded to IPTL's Winding Up Petition and an application to set aside the LCIA Award, both commenced by VIP, and to which the Claimant was not party to either of those two proceedings.⁷⁸
39. The Utamwa J Order is one of the principal matters relied on by the Claimant in this arbitration to support its claim relating to expropriation. The Claimant contends that the reasoning is "*inexplicable*" and that the proceeding leading up to it was "*unjust*", for several reasons: (i) it was made without notice to interested parties; (ii) it was made without giving the interested parties an opportunity to be heard; (iii) it was made in disregard of the Court of Appeal's judgment of 17 December 2012 described above; (iv) it was inconsistent with Utamwa J's own earlier order dated 5 June 2013; (v) it was made pursuant to the VIP-PAP-SPA notwithstanding the fact that the assertion in the VIP-PAP-SPA that PAP purchased the Mechmar Shares in 2011 was contrary to the evidence; (vi) it was made with the express consent of the Second PL, who was on notice of SCB HK's rights; and (vii) it did not explain the legal basis on which control of IPTL and its assets could be passed to PAP on the application of VIP (as minority shareholder), without reference to SCB HK's rights.⁷⁹
40. The Respondent rejects these contentions.⁸⁰ According to the Respondent, SCB HK, despite not being a party to Misc. Civil Cause Nos. 49 of 2002 and 254 of 2003, was put on notice and granted an opportunity to monitor the proceedings and, if it had wished to do so, file a petition to intervene in those proceedings and counter VIP's application to withdraw the

⁷⁵ HB/H/283/4422-4445: VIP-PAP Share Purchase Agreement ("**VIP-PAP-SPA**"), 15 August 2013.

⁷⁶ HB/H/301/4620-4630: Draft Order submitted by VIP before the High Court of Tanzania, 30 August 2013.

⁷⁷ HB/H/311/4733-4748: Ruling by Utamwa J in the High Court of Tanzania ("**Utamwa J Order**"), 5 September 2013.

⁷⁸ HB/A/003/144-370: Respondent's Counter-Memorial, para. 75.

⁷⁹ HB/A/002/035-143: Claimant's Memorial, paras. 134-139.

⁸⁰ HB/A/003/144-370: Respondent's Counter-Memorial, para. 77 *et seq.*

Winding Up Petition, including its request that the High Court order the handing over of all of IPTL's affairs and assets to PAP.⁸¹

(11) English Proceedings and Flaux J's Judgment⁸²

41. In December 2013, Standard Chartered Bank Malaysia Berhad and SCB HK started proceedings in the High Court of England and Wales against IPTL, VIP and PAP under the Facility Agreement, Security Deed, Charge of Shares and Shareholder Support Deed, seeking confirmation of the validity of SCB HK's loan to IPTL and of its security over that loan.
42. IPTL, VIP and PAP raised jurisdictional challenges, which were rejected by Flaux J, and on 16 November 2016,⁸³ Flaux J declared *inter alia* that: (i) the Facility Agreement, Security Deed, Shareholder Support Deed, and Charge of Shares were valid; (ii) Standard Chartered Bank Malaysia Berhad had been the Facility Agent since 21 October 2005; (iii) SCB HK had been the Security Agent since 4 December 2009; and (iv) all the rights, title and interest of the banks under the Facility Agreement, the Security Deed, the Shareholder Support Deed and the Charge of Shares became vested in SCB HK with effect from 17 August 2005 "*as assignee of Danaharta pursuant to the Deed of Assignment [...]; and with effect from 25th October 2005, as sole Bank pursuant to the Novation Notice.*"⁸⁴

C. POST-2013 IPTL EVENTS

(1) PAP's Registration as Owner of Mechmar's Shareholding in IPTL

43. On 6 September 2013, PAP replaced the board of directors of IPTL with its own nominees (including Mr Sethi) as "*First Directors Post Provision Liquidation*" and transferred VIP's 30% shareholding and Mechmar's 70% shareholding to itself. This was registered with the Business Registrations and Licensing Agency of Tanzania ("**BRELA**").⁸⁵

⁸¹ HB/A/003/144-370: Respondent's Counter-Memorial, para. 77.

⁸² HB/A/002/035-143: Claimant's Memorial, paras. 22-30.

⁸³ HB/D/018/755-793: Judgment of the English Commercial Court in *SCB HK and another v IPTL and others*, [2016] EWHC 2908 (Comm) ("**Flaux J Judgment**"), 16 November 2016; HB/D/019/794-799: Order of the English Commercial Court in *SCB (HK) and another v IPTL and others*, 16 November 2016.

⁸⁴ HB/D/019/794-799 at pgs. 795-796: Order of the English Commercial Court in *SCB (HK) and another v IPTL and others*, 16 November 2016.

⁸⁵ HB/H/313/4758-4760: Minutes of IPTL Board Meeting, 6 September 2013; HB/H/347/4923-4931: BRELA Registration Document, 18 November 2013; HB/H/349/4936-4940: BRELA Registration Document, 27 November 2013; HB/H/359/5109-5115: BRELA Registration Document, 6 January 2014.

(2) Payment of the Funds Held in the Escrow Account to PAP

44. In October 2013, TANESCO and IPTL entered into a settlement agreement with regard to the Tariff Dispute.⁸⁶
45. On 21 October 2013, the Permanent Secretary of the Ministry of Energy and Minerals (“**PS MEM**”), on behalf of the Government of Tanzania and IPTL (controlled by PAP) entered into an “*Agreement for Delivery of Funds to [IPTL]*”.⁸⁷
46. On 28 November and 6 December 2013, the funds of the Escrow Account were transferred to PAP.⁸⁸ The Claimant contends that PAP used USD 75 million of the funds obtained from the Escrow Account to pay VIP’s 30% shareholding in IPTL instead of using it to satisfy TANESCO’s payment obligations to SCB HK under the PPA and to pay down the loan.⁸⁹

(3) Investigations in Tanzania⁹⁰

47. The actions of the GoT and TANESCO led to a number of investigations in Tanzania, including a report submitted by the Auditor General to the Speaker’s office of the Tanzanian Parliament on 14 November 2014 (“**CAG Report**”)⁹¹ and a report by the Public Accounts Committee on 17 November 2014 (“**PAC Report**”).⁹² The Parties dispute the evidentiary relevance of these reports and interpret their contents differently.⁹³
48. TANESCO continued making payments to IPTL (then controlled by PAP) but the loan remained undischarged.⁹⁴

⁸⁶ HB/A/002/035-143: Claimant’s Memorial, para. 148; HB/H/334/4855-4861: Minutes of 8 October 2013 meeting between Tanesco and IPTL, 9 October 2013.

⁸⁷ HB/A/002/035-143: Claimant’s Memorial, para. 148; HB/H/338/4877-4882: Agreement between GoT and IPTL for delivery of escrow funds, 21 October 2013.

⁸⁸ HB/H/398/5588-5652 at pg. 5609: CAG Report (English), 14 November 2014; HB/H/400/5769-5826 at pg. 5795: PAC Report (English), 17 November 2014; HB/A/002/035-143: Claimant’s Memorial, para. 148.

⁸⁹ HB/A/002/035-143: Claimant’s Memorial, paras. 153-157.

⁹⁰ HB/A/002/035-143: Claimant’s Memorial, paras. 168-175.

⁹¹ HB/H/398/5588-5652: CAG Report (English), 14 November 2014.

⁹² HB/H/400/5769-5826: PAC Report (English), 17 November 2014.

⁹³ HB/A/002/035-143: Claimant’s Memorial, paras. 168-175; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 106 *et seq.*

⁹⁴ HB/A/002/035-143: Claimant’s Memorial, paras. 176-178.

IV. PARTIES' REQUESTS FOR RELIEF

49. The Claimant requests the following relief in its Request dated 15 September 2015:⁹⁵

(1) A declaration that the United Republic of Tanzania has breached Articles 16.1 and 16.2 of the Implementation Agreement.

(2) An order that the United Republic of Tanzania shall pay SCB HK compensation for its breaches of the Implementation Agreement in an amount to be determined by the Tribunal.

(3) An order that the United Republic of Tanzania pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon.

50. The Claimant requests the following relief in its Post-Hearing Brief dated 7 September 2018:⁹⁶

i. a declaration that the United Republic of Tanzania has breached Articles 15.3, 16.1 and 16.2 of the Implementation Agreement;

ii. a declaration that, as a result of the United Republic of Tanzania's breaches of the Implementation Agreement, SCB HK is entitled to damages of US\$352,514,258, or such other amount as shall be determined by the Tribunal;

iii. a declaration that the Implementation Agreement terminated on 6 July 2018 pursuant to SCB HK's Termination Notice;

iv. a declaration that, as a consequence of that termination, SCB HK is entitled to compensation calculated pursuant to Row 2 of Schedule 2 of the Implementation Agreement, together with a declaration of the amount of compensation thereby due to SCB HK;

v. in the alternative to the relief claimed at points ii and iv above, a declaration that the damages and/or compensation due to SCB HK is greater than the amount outstanding under the Facility Agreement;

vi. an order that, out of the sums declared due under points ii, iv, and/or v above, the United Republic of Tanzania shall pay SCB HK the sum calculated by SCB HK as necessary to pay off the amount due under the

⁹⁵ HB/A/001/001-034: Claimant's Request for Arbitration, para. 134.

⁹⁶ Claimant's PHB, para. 227.

Facility Agreement, which as at the date of these Post-Hearing Submissions is US\$187,269,605; and

vii. an order that, to the extent not covered by the relief granted under point vi above, the United Republic of Tanzania pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of the parties' legal representation and interest thereon.

51. The Claimant states in its Reply PHB that its relief sought in the Claimant's PHB at paragraph 227 is subject to its request in paragraph 126 of its Reply PHB "*that GoT be ordered to pay the entire amount of damages and compensation due under the Implementation Agreement in the event that that the Tribunal is not agreeable to making an order for payment of the amount due under the Facility Agreement without further analysis of that amount.*"⁹⁷

52. The Respondent in its Counter-Memorial dated 26 June 2017 and Reply PHB dated 21 September 2018 requests the Tribunal to:⁹⁸

(i) decline to exercise jurisdiction in the present case;

(ii) to the extent that the Tribunal proceeds to examine the merits of the case, dismiss Claimant's claims in their entirety;

(iii) declare that Respondent owes no damages or compensation to Claimant; and

(iv) order Claimant to pay the totality of costs relating to this Arbitration.

V. JURISDICTION

53. The Respondent raises several grounds to challenge the Claimant's standing in this arbitration. It says firstly that the Claimant lacks capacity to make any claim as it is neither a legal assignee under the Implementation Agreement (discussed at paragraphs 57 to 106 below) nor has it satisfied the requirements of Tanzanian law as a statutory assignee (discussed at paragraphs 107 to 175 below). It also asserts that the Tribunal lacks jurisdiction *ratione personae* and *ratione materiae* under Article 25 of the ICSID Convention (discussed at paragraphs 176 to 252 below).

⁹⁷ Claimant's Reply Post-Hearing Brief ("**Claimant's Reply PHB**"), para. 163.

⁹⁸ Respondent's Reply Post-Hearing Brief ("**Respondent's Reply PHB**"), para. 132.

A. THE CLAIMANT’S STATUS AS A LEGAL ASSIGNEE

54. The Claimant brings its claim against the Respondent as the assignee of IPTL's rights under the Implementation Agreement, which rights it submits were assigned to the Security Agent (now the Claimant) pursuant to the Security Deed. The Claimant argues that, as the statutory assignee of IPTL’s rights under the Implementation Agreement, it can step into the shoes of IPTL and directly enforce IPTL's rights against the Respondent.⁹⁹
55. The Respondent raises two main grounds of challenge in this respect. First, it argues that the assignment is ineffective as the IPTL did not obtain the Respondent’s consent to the initial and successive assignments of IPTL’s rights, as required under Article 15 of the Implementation Agreement.¹⁰⁰ This is described by the Respondent as the “*Contractual Assignment*” issue. Second, the Respondent argues that the Claimant is not a valid assignee under Tanzanian Law, as the Claimant is not a statutory assignee for failing to comply with the requirements contemplated under the *Supreme Court of Judicature Act 1873 (“Judicature Act 1873”)*¹⁰¹ in each of the successive assignments. The Respondent terms this as the “*Statutory Assignment*” issue. Third, the Respondent raises the “*non-registration*” issue as to whether the assignment of the rights to the Implementation Agreement was a registrable charge and the impact of its undisputed non-registration. Fourth, the Respondent submits that the assignment was made void by reason of it being a disposition of property after commencement of IPTL’s winding up proceedings, or the “*Winding-up Issue.*”¹⁰²
56. A summary of the Parties’ arguments and the Tribunal’s analysis on these issues are set out below.

(1) Contractual Assignment

57. Articles 15.1 and 15.2(a) of the Implementation Agreement¹⁰³ provide as follows:

15.1 Assignment

No assignment or transfer by a Party of this Agreement or such Party’s rights or obligations hereunder shall be effective without the prior written consent of the other Party.

⁹⁹ HB/A/006/828-939: Claimant’s Rejoinder on Jurisdiction, para. 9.

¹⁰⁰ HB/A/005/604-827 at pgs. 684-737: Respondent’s Rejoinder, para. 124 *et seq.*

¹⁰¹ HB/G/143/11025-11026: Extract from the Supreme Court of Judicature Act 1873.

¹⁰² HB/A/005/604-827 at pgs. 711-737: Respondent’s Rejoinder.

¹⁰³ HB/C/004/132-191: Signed Implementation Agreement (without Schedules), 8 June 1995 (emphasis in original).

15.2 Creation of Security

(a) Notwithstanding the provisions of Article 15.1, for the purpose of financing the construction and operation of the Facility, the Company may, upon prior written approval of the GOT, whose consent shall not be unreasonably withheld, assign or create a security interest to the Lenders pursuant to the Financing Documents in, its rights and interests under or pursuant to:

- (i) this Agreement;*
- (ii) any agreement included within the Security Package;*
- (iii) the Facility;*
- (iv) the Site;*
- (v) the movable property and intellectual property of the Company;*
or
- (vi) the revenues or any of the rights or assets of the Company.*

a. Parties' Submissions

58. The Respondent contends that it has never provided either its “*prior written consent*” pursuant to Article 15.1 of the Implementation Agreement or its “*prior written approval*” pursuant to Article 15.2 of the Implementation Agreement, to any of the purported assignments of the Implementation Agreement, and that therefore SCB HK is not a valid assignee of IPTL’s rights under the Implementation Agreement.¹⁰⁴ Further, the Respondent submits that if properly construed, Articles 15.1 and 15.2 of the Implementation Agreement both expressly require consent, with the consequence that lack of consent invalidates an assignment.¹⁰⁵ Also, the Respondent argues that the failure to obtain such consent renders any assignment ineffective as against GoT.¹⁰⁶ The Respondent rejects the Claimant’s contentions that it had been estopped from asserting that no prior consent was given when it maintained silence when notified of the assignment to the Lenders in 1997. In its view, GoT had no “*duty to speak*”, and, in any event, estoppel could only be personal to “*the parties and their privies*”. SCB HK therefore could not take the benefit of an estoppel.¹⁰⁷ The Respondent also rejects the Claimant’s assertion that that Article 15.2(a) should be interpreted as a mere undertaking not to assign, the breach of which would only result in damages.¹⁰⁸

¹⁰⁴ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 142-143.

¹⁰⁵ HB/A/005/604-827: Respondent’s Rejoinder, para. 126.

¹⁰⁶ HB/A/005/604-827: Respondent’s Rejoinder, paras. 124–144.

¹⁰⁷ Respondent’s PHB, paras. 45-46 referring to RL-145, RL-153 and RL-146.

¹⁰⁸ HB/A/005/604-827: Respondent’s Rejoinder, para. 126.

59. The Respondent relies, *inter alia*, on *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited*, [1994] 1 AC 85 (“**Linden Gardens**”),¹⁰⁹ which sets out four possible effects of a contractual prohibition on assignments, depending on the construction of the clause in question. This could be: “(i) a mere personal undertaking having no effect on the validity of the assignment, with a breach sounding only in damages; (ii) a stipulation that the assignment is to be ineffective against the debtor without affecting relations between assignor and assignee *inter se*; (iii) a purported bar even on the transfer of ownership of the right or its fruits as between assignor and assignee; or (iv) a stipulation, the breach of which is to entitle the debtor not merely to recover damages but to terminate the contract.”¹¹⁰
60. The Respondent places emphasis on Lord Browne-Wilkinson’s observation in *Linden Gardens* that categories (i) and (iv) are “very unlikely to occur”¹¹¹ in support of its contention that Article 15.2(a) is not a mere undertaking not to assign. It takes the view that it would be unfair to interpret Article 15.2(a) as an undertaking not to assign, because breach of such a provision would be unlikely to lead to any recoverable damage, allowing the Claimant to breach the provision with little risk of consequences.¹¹²
61. The Respondent argues that the commercial reason for a prohibition on an assignment of a contract is that a contracting party has a genuine commercial interest in knowing the identity of the party who can decide to sue him. Where a party is a sovereign State, this interest amounts to a matter of national security and public policy.¹¹³ The Respondent would have a genuine and legitimate interest in, and concern about, the identity, nature and nationality of its contractual counterparties, particularly in relation to a power generation project such as the Facility.¹¹⁴
62. In addition, according to the Respondent, the Respondent was not a party to and had no negotiating power over the provisions of the Security Deed and the other financing

¹⁰⁹ HB/G/187/13232-13264: *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited* [1994] 1 AC 85, 22 July 1993.

¹¹⁰ HB/A/005/604-827: Respondent’s Rejoinder, paras. 135-137; HB/G/316/15426-15444: Roy Goode, “Contractual Prohibitions Against Assignment”, 2009(3) Lloyd’s Maritime and Commercial Law Quarterly 300.

¹¹¹ HB/A/005/604-827: Respondent’s Rejoinder, para. 137; HB/G/187/13232-13264 at pg. 13251: *Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited* [1994] 1 AC 85, 22 July 1993.

¹¹² HB/A/005/604-827: Respondent’s Rejoinder, para. 131.

¹¹³ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 149.

¹¹⁴ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 150; HB/A/005/604-827: Respondent’s Rejoinder, para. 130.

documents. The Respondent submits that the only effective protection for the Respondent to be able to control future assignments and to protect itself in that review and approval process was the inclusion of the provisions of Article 15.1 and 15.2(a) of the Implementation Agreement.¹¹⁵ In light of this, the Respondent argues that Article 15.2 should be construed such that lack of consent by the Respondent will invalidate an assignment.

63. Furthermore, even in the absence of an express term to obtain consent with every assignment, this requirement can be impliedly read into Article 15.2(a) of the Implementation Agreement. In the Respondent's view, every time a private party enters into a contract with a "*sovereign in relation to major infrastructure public utilities projects, it is implied in the negotiations and the final agreements that the counterparty would not change without the sovereign's approval.*"¹¹⁶
64. The Respondent is of the view that its consent was never sought for the assignment made in 1997 to the original Malaysian lenders.¹¹⁷ Consequently, it asserts that any subsequent assignments by the lenders could also not be effective. The Respondent also submits that in any event, all subsequent assignments were ineffective since the Respondent's consent was not sought for each of these.¹¹⁸ As a result, it argues the Claimant has no standing to invoke the arbitration clause of the Implementation Agreement.¹¹⁹ Further, it submits that the Claimant does not meet the contractual requirements of a Security Agent, particularly under Clause 22(H)¹²⁰ of the Loan Facility Agreement.¹²¹ According to the Respondent, the result is that IPTL is the only entity capable of initiating arbitration proceedings against the Respondent under the Implementation Agreement.
65. Finally, the Respondent argues that even if Article 15.2(a) of the Implementation Agreement does not require its consent for the transfer of an existing security interest to a successor Security Agent, the Claimant would still not be entitled to invoke the arbitration clause of the

¹¹⁵ HB/A/003/144-370: Respondent's Counter-Memorial, para. 151; HB/A/005/604-827: Respondent's Rejoinder, para. 130.

¹¹⁶ HB/A/005/604-827: Respondent's Rejoinder, para. 125.

¹¹⁷ HB/A/005/604-827: Respondent's Rejoinder, para. 142.

¹¹⁸ HB/A/005/604-827: Respondent's Rejoinder, para. 124; HB/A/003/144-370: Respondent's Counter-Memorial, para. 153.

¹¹⁹ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 169-170.

¹²⁰ HB/C/008/280-365 at pgs. 338-339: Facility Agreement, 28 June 1997, Clause 22(H).

¹²¹ HB/A/003/144-370: Respondent's Counter-Memorial, para. 154.

Implementation Agreement, since the word “*Lender*” is neither mentioned in the arbitration clause itself, nor in the definition of “*Parties*” or “*Company*.” In addition, the Respondent refers to Article 24.6¹²² of the Implementation Agreement, which it submits expressly states that the agreement “*shall not confer any right of suit or action whatsoever on any third party, except for the specific rights granted to the Lenders pursuant to Articles 15.2, 18.2 and 19.4.*”¹²³ It points out that none of these provisions confer on the “*Lender*” any right to submit disputes to arbitration.¹²⁴

66. The Claimant relies on *Linden Gardens* as well, but argues that Article 15.2(a) of the Implementation Agreement, on its proper construction, is an undertaking not to assign without prior consent, breach of which sounds in damages. It distinguishes Article 15.2(a) from Article 15.1, noting that Article 15.1 explicitly states that “[n]o assignment [...] shall be effective” without prior consent while Article 15.2(a) does not use such language. In the Claimant’s view, if Article 15.2(a) was intended to render assignments ineffective in the same manner as Article 15.1, the Parties would be expected to have used the same explicit language. Hence, it argues that Article 15.2(a) must be an undertaking not to assign.¹²⁵
67. Further, the Claimant submits that Article 15.2(a) of the Implementation Agreement does not only restrict the assignment of (and creation of security interests in respect of) the Implementation Agreement, it also applies to contracts to which the Respondent is not a party to (such as the PPA and the Facility Agreement) and to noncontractual property of IPTL (such as the Site, Facility, movable property and intellectual property). The Claimant contends that, as a matter of law, Article 15.2(a) cannot render such assignments invalid; the most that Article 15.2(a) can do is render IPTL liable to pay damages for breach of contract in respect of such assignments. This according to the Claimant indicates that Article 15.2(a) must have been intended to operate as an undertaking not to assign, rather than as a prohibition on assignment.¹²⁶

¹²² HB/C/004/132-191 at pg. 188: Signed Implementation Agreement (without Schedules), 8 June 1995, Article 24.6.

¹²³ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 171.

¹²⁴ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 171-172.

¹²⁵ HB/A/006/828-939: Claimant’s Rejoinder on Jurisdiction, para. 34(ii).

¹²⁶ HB/A/006/828-939: Claimant’s Rejoinder on Jurisdiction, para. 34(i).

68. The Claimant points out¹²⁷ that GoT had been given Notice of Assignment of the Implementation Agreement to the Security Agent in 1997, and that GoT (by the Ministry of Water, Energy and Minerals) had acknowledged the same by, amongst others, countersigning on the Notice of Assignment in the form essentially as contemplated in the Security Deed,¹²⁸ thus constituting an estoppel or waiver¹²⁹ of the need for “prior” written consent. The Claimant contends that the same conduct may give rise to a waiver or estoppel and that the distinction between waiver and estoppel is more theoretical than real. In this regard, the Claimant cited in support the English Court of Appeal decisions in *Brikom Investments Ltd v Carr*¹³⁰ and *Business Environment Bow Lane Ltd v Deanwater Estates Ltd*.¹³¹
69. As for the Respondent’s interest in controlling the identity of lenders in light of broader public policy concerns, the Claimant contends that these alleged concerns are subjective and after-the-event statements of the Respondent’s motivations in agreeing to Article 15.2(a) of the Implementation Agreement. It notes IPTL’s conflicting subjective interest – that of having the ability to raise finance (including providing security) with minimal interference from the Respondent - and takes the view that the construction of Article 15.2(a) depends on the objective intention as to what the Parties agreed, as evidenced by the language of Article 15.2(a).¹³²
70. Additionally, the Claimant argues that the fact that the PPA permitted its assignment to lenders without prior consent shows that the identity of the lenders to the project as a whole was not critical to GoT and TANESCO. This is particularly since the PPA was negotiated in the presence of GoT representatives.¹³³ Further, the Claimant argues that Article 15.2(a) of the Implementation Agreement cannot operate to invalidate the assignment of contracts to which GoT is not a party. According to the Claimant, regardless of whether Article 15.2(a) operates as an undertaking not to assign or a prohibition on assignment in respect of the

¹²⁷ HB/A/002/035-143: Claimant’s Memorial, paras. 313-326.

¹²⁸ HB/C/014/552-557 at pg. 556: Form of Deed of Assignment Made between Danaharta Managers (L) Ltd and SCB HK, 17 August 2005, Schedule One, para. 3.

¹²⁹ HB/A/002/035-143: Claimant’s Memorial, para. 323.

¹³⁰ Exhibit CL-210: *Brikom Investments Ltd v Carr* [1979] 1 QB 467 at 488G-489A (submitted at the Hearing).

¹³¹ Exhibit CL-211: *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622 at 176 [51] per the Chancellor.

¹³² HB/A/006/828-939: Claimant’s Rejoinder on Jurisdiction, paras. 37-39.

¹³³ HB/A/006/828-939: Claimant’s Rejoinder on Jurisdiction, para. 41, referring to HB/H/011/027-267 at pg. 113: Memorandum on the IPTL Power Project by Patrick Rutabanzibwa, 1 July 1996.

Implementation Agreement, it cannot prevent the lenders from taking control of the Facility pursuant to security granted by IPTL to the lenders in respect of the PPA, the Site and the Facility. In the Claimant's view, the argument that Article 15.2(a) of the Implementation Agreement must be interpreted as a prohibition on assignment in order to control the identity of the lenders is misconceived, because the provision, however it is interpreted, cannot achieve that outcome.¹³⁴

71. Further, the Claimant argues that, as a matter of general principle, there is no reason why a breach of an undertaking not to assign would be unlikely to lead to recoverable damages, and hence this should not be a reason to not construe Article 15.2 as an undertaking not to assign. In the present case, it so happens that the Respondent demonstrated by its conduct in 1997 that it would have given prior consent to the assignment had it been requested, so there is no loss and hence no recoverable damages.¹³⁵
72. The Claimant rejects the Respondent's contention that every time a private party contracts with a sovereign in relation to major infrastructure public utilities projects, there is an implied term that the counterparty will not change without the sovereign's approval. It notes that the Respondent has provided no expert evidence or authority in support of this, nor any explanation of how this satisfies recognised tests for the implication of terms. Further, since Articles 15.1 and 15.2(a) already expressly address the assignment of the Implementation Agreement, there is no room to imply a further consent requirement into the contract.¹³⁶
73. Finally, the Claimant takes the view that no consent is required for subsequent assignments,¹³⁷ and that it meets the contractual requirements of a Security Agent.¹³⁸ As for the Respondent's argument that the assignee cannot invoke the arbitration clause because the arbitration clause refers only to "*Parties*" and does not refer to the "*Lenders*", according to the Claimant, this argument is wrong and reflects a misunderstanding of the law of assignment. The Claimant submits that the effect of a statutory assignment is that the assignee (SCB HK) becomes the legal owner of the benefit of the assigned contract and is entitled to exercise the assignor's rights under the contract, including the right to invoke the

¹³⁴ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 42.

¹³⁵ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 44.

¹³⁶ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 46-47.

¹³⁷ HB/A/002/035-143: Claimant's Memorial, paras. 327-331.

¹³⁸ HB/A/004/371-603: Claimant's Reply, paras. 267-270.

arbitration clause and bring an action in its own name. It does not matter that the arbitration clause only refers to the assignor and does not mention the assignee, because the assignee is stepping into the shoes of the assignor.¹³⁹

b. Tribunal's Analysis

(i) From Original Lenders to Danaharta

74. The Implementation Agreement was entered into by GoT as part of the package of incentives and assurances that GoT had given to IPTL to undertake the Project.
75. On 28 June 1997, IPTL and a syndicate of Malaysian banks entered into the Facility Agreement.¹⁴⁰ IPTL was the borrower of the USD 105,000,000 Loan Facility Agreement relating to the 100 MW Tegata Power Project.
76. The banks under the Facility Agreement were:
- i. Bank Bumiputra Malaysia Berhad, Kuala Lumpur ("**BBMB**");
 - ii. Sime Bank Berhad, Kuala Lumpur ("**Sime Bank**");
 - iii. BBMB International Bank (L) Ltd, Labuan ("**BBMB International**"); and
 - iv. SIME International Bank (L) Ltd, Labuan ("**Sime International**").
77. BBMB was the Facility Agent and Sime Bank Berhad (Singapore Main Office) ("**Sime Singapore**") was the Security Agent.¹⁴¹
78. A Security Deed¹⁴² was simultaneously executed under which IPTL assigned to the Security Agent "*all its present and future right, title and interest in and to the Assigned Contracts [...]*". Amongst the Assigned Contracts was the Implementation Agreement.¹⁴³
79. The Parties do not dispute that no "*prior*" written consent was given by GoT to assign any of IPTL's rights under the Implementation Agreement.

¹³⁹ HB/A/004/371-603: Claimant's Reply, paras. 376-380.

¹⁴⁰ HB/C/008/280-365: Facility Agreement, 28 June 1997.

¹⁴¹ HB/C/008/280-365 at pg. 283: Facility Agreement, 28 June 1997.

¹⁴² HB/C/009/366-457: Security Deed, 28 June 1997, Clause 3.2.

¹⁴³ HB/C/009/366-457: Security Deed, 28 June 1997, Clause 1.1.

80. On 3 October 1997, the Notice of Assignment of the Implementation Agreement was given and acknowledged by the Ministry of Water, Energy and Minerals.¹⁴⁴
81. The Respondent had, in its Post-Hearing Brief, remarked¹⁴⁵ that how Danaharta had acquired its interest in the Implementation Agreement needed to be explained before the Claimant could stake its claim as the assignee of the Implementation Agreement.
82. To address this, the Tribunal has examined the documents submitted and ascertained that:
- i. On 11 January 1999, the Sime International underwent a name change to Danaharta Managers (L) Ltd.¹⁴⁶
 - ii. On 30 June 1999, pursuant to the Order of the High Court of Malaya at Kuala Lumpur, Malaysia,¹⁴⁷ the entire banking business of Sime Bank Berhad, in Malaysia, Brunei, Thailand, Singapore and other countries, pursuant to a merger agreement between Sime Bank Berhad and RHB Bank Berhad (“**RHB Bank**”), was transferred to RHB Bank. The order has the effect of transferring the rights under the Implementation Agreement, and the office of Security Agent (then Sime Singapore), to RHB Bank.
 - iii. On 3 September 1999, pursuant to the Order of the High Court of Malaya at Kuala Lumpur, Malaysia,¹⁴⁸ the court approved a scheme of transfer, under which certain assets and liabilities of BBMB, its shares in subsidiaries and associated companies (other than its Islamic banking business) were transferred to the Bank of Commerce (M) Berhad (“**BOC**”) such that any BBMB instrument shall be construed as and have effect as if for any reference therein to BBMB there was substituted with a reference to BOC.

¹⁴⁴ HB/H/021/315: Notice of Assignment, 3 October 1997.

¹⁴⁵ See Respondent’s PHB at pg. 2, footnote 2.

¹⁴⁶ HB/H/134/1296-1917 at pg. 1807: Copy of the Submission for ICSID Interpretation Proceedings, 17 December 2009 (“**SCB HK’s Submission on Standing in Interpretation Proceedings**”).

¹⁴⁷ HB/H/134/1296-1917 at pgs. 1814-1833: SCB HK’s Submission on Standing in Interpretation Proceedings.

¹⁴⁸ HB/H/134/1296-1917 at pgs. 1837-1853: SCB HK’s Submission on Standing in Interpretation Proceedings.

- iv. By Novation Notice,¹⁴⁹ signed by Danaharta and BBMB International on 1 September 1999, and by BBMB as Facility Agent on 15 September 1999, BBMB International's interest in the Facility Agreement was novated to Danaharta.¹⁵⁰
 - v. On 30 September 1999, BOC was renamed as Bumiputra-Commerce Bank Berhad ("**Bumiputra-Commerce**").¹⁵¹
 - vi. By Novation Notice signed by Danaharta (as New Bank) on 11 July 2001, and by RHB Bank (Singapore Branch) as existing bank and by Bumiputra-Commerce as Facility Agent on 16 July 2001,¹⁵² the interest of RHB Bank in the Facility Agreement was confirmed as having been novated to Danaharta. RHB Bank (Singapore Branch) (Sime Singapore, renamed following the 29 June 1999 Order¹⁵³) remained the Security Agent.¹⁵⁴
83. Through these arrangements, Danaharta eventually had become by July 2001 the sole Bank and lender under the Facility Agreement, with Bumiputra-Commerce (formerly BBMB) remaining as the Facility Agent and RHB Bank Singapore) (formerly Sime Singapore) as Security Agent.
84. It is clear to the Tribunal that Danaharta (formerly Sime International) was not a stranger to this transaction nor to GoT. It was an original lender (a "*Bank*" and "*Secured Creditor*" as defined in the Facility Agreement which definitions are adopted by the Security Deed)¹⁵⁵ which had subsequently acquired the interests of all the other banks and novated all the rights of the other RHB Banks (formerly Sime Bank and Bumiputra-Commerce (formerly BBMB)). There is no doubt in the Tribunal's mind that Danaharta acquired the full legal and beneficial title including the rights under the Security Deed and the assets represented thereunder, such as the Implementation Agreement.

¹⁴⁹ HB/H/134/1296-1917 at pgs. 1809-1812: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵⁰ HB/H/134/1296-1917 at pg. 1809-1812: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵¹ HB/H/134/1296-1917 at pgs. 1855, 1857: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵² HB/H/134/1296-1917 at pgs. 1835-1836: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵³ HB/H/134/1296-1917 at pgs. 1814-1833: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵⁴ HB/H/134/1296-1917 at pgs. 1760-1761: SCB HK's Submission on Standing in Interpretation Proceedings.

¹⁵⁵ HB/C/009/366-457: Security Deed, 28 June 1997, Clause 1.3; HB/C/008/280-365: Facility Agreement, 28 June 1997, Clause 1(A).

(ii) From Danaharta to SCB HK

85. By a Sale and Purchase Agreement dated 4 August 2005,¹⁵⁶ Danaharta agreed to sell and the Claimant agreed to purchase for USD 76.1 million, the assets set out in the agreement, representing the loans and interests outstanding due from IPTL and the associated security. Upon completion of the Sale and Purchase Agreement, Danaharta executed a Deed of Assignment (“**2005 Deed**”) in favour of the Claimant on 17 August 2005.¹⁵⁷ The Implementation Agreement was among the “*Asset Documentation*” assigned to the Claimant.
86. By a Novation Notice¹⁵⁸ signed by the Claimant as the “*New Bank*” on 11 August 2005 and by Danaharta on 17 August 2005, the Claimant became the sole Bank under the Facility Agreement. RHB Bank Singapore remained the Security Agent.
87. By letter dated 22 September 2005,¹⁵⁹ Bumiputra-Commerce resigned from the role of Facility Agent and Standard Chartered Bank (Malaysia) Berhad agreed and signed the same letter on 17 October 2005 taking on the role as Facility Agent.
88. By letter dated 29 October 2009,¹⁶⁰ the Claimant removed RHB Bank Singapore as Security Agent and appointed Standard Chartered Bank Malaysia Berhad, in its stead. On 4 December 2009, the Claimant became the Security Agent.¹⁶¹
89. The validity of the Facility Agreement and Security Deed, the transfer of rights and liabilities under the Facility Agreement and the liability of IPTL under it to the Claimant have been the subject matter before the English High Court¹⁶² and resolved in favour of the Claimant in Case CL-2013-000411 with the holding that the “*Security Deed has become and is enforceable in accordance with the terms of the Security Deed*” and that IPTL was indebted to the Claimant in the sum of USD 168.8 million.¹⁶³

¹⁵⁶ HB/C/013/535-551: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005.

¹⁵⁷ HB/C/014/552-557: Form of Deed of Assignment Made between Danaharta Managers (L) Ltd and SCB HK, 17 August 2005.

¹⁵⁸ HB/H/134/1296-1917 at pgs. 1868-1869: SCB HK’s Submission on Standing in Interpretation Proceedings.

¹⁵⁹ HB/H/134/1296-1917 at pg. 1874: SCB HK’s Submission on Standing in Interpretation Proceedings.

¹⁶⁰ HB/H/129/1288: Letter from SCB HK to RHB Bank Berhad, 29 October 2009.

¹⁶¹ HB/H/132/1292-1293: Letter from SCB HK to SCB HK, 4 November 2009.

¹⁶² HB/D/018/755-793: Flaux J Judgment, 16 November 2016.

¹⁶³ HB/D/019/794-799 at pg. 796: Order of the English Commercial Court in *SCB (HK) and another v IPTL and others*, 16 November 2016.

90. The issue of the assignability of the Implementation Agreement stands independently from the English Court's ruling on the validity and enforceability of the Facility Agreement and the Security Deed.

(iii) Prior Written Consent for First Assignment

91. The Respondent's first objection is that no "*prior written consent*" was first obtained when the parties entered into the Security Deed purporting to assign the Implementation Agreement. It urges the Tribunal to take cognizance of the fact that the Respondent as a sovereign State, should be made aware of and be given the opportunity to know who they would be dealing with as a matter of national security and public policy.

92. As such, "*prior*" written consent is mandatory. The Tribunal has some sympathy with the submission that GoT has a legitimate interest in knowing the assignee and the purpose or need for such an assignment. In this regard, the Tribunal takes the view that such a concern is fully addressed in Article 15.1 of the Implementation Agreement where any purported assignment would be rendered ineffective unless "*prior written consent*" was given.

93. The words of Article 15.1 of the Implementation Agreement are clear. It is a prohibition that, absent prior written consent, "[n]o assignment or transfer [...] of this Agreement" or the "*rights or obligation*" under it "*shall be effective.*" The words clearly require that to effect a valid assignment or transfer rights and obligations under the Implementation Agreement the "*other Party[s]*" prior written consent must be obtained. By this wording, GoT was assured that it would not be dealing with any Party other than IPTL or such other person that GoT approved, thus safe-guarding GoT's national and security interest, as it has urged upon the Tribunal.

94. Article 15.2 of the Implementation Agreement however, creates the exception, that "Notwithstanding the provisions of Article 15.1[...]", "the Company" (*viz.* IPTL), could "for the purpose of financing the construction and operation of the Facility [...] assign or create a security interest to the Lenders pursuant to the Financing Documents in, its rights and interests under or pursuant to" *inter alia*, the Implementation Agreement, if IPTL had obtained "*prior written consent.*"

95. It is clear from Article 15.2, that GoT accepted that IPTL would need financing for the Facility and had, by this provision, agreed that for that purpose, IPTL could "*assign or create a security*

interest” in favour of its “*Lenders*” subject only to IPTL having obtained “*prior written consent*” from GoT.

96. It is common ground that no “*prior*” written consent was given. It could not, however, be disputed that “*written consent*” was subsequently given in the form of:

i. Notice of Assignment dated 3 October 1997¹⁶⁴ given by IPTL and Sime Bank Berhard Singapore which was signed by the Ministry of Water, Energy and Minerals. In it GoT “*acknowledge[d] the receipt of the Notice of Assignment*” and agreed –

“not [to] terminate the IMA [i.e. Implementation Agreement] except as provided in Article 19.4 of the IMA;”

and

“send to the Security Agent, a copy of any notice required to be given to IPTL pursuant to Articles 19.1 and 19.2 of the IMA.”

ii. Letter from the Minister of Finance dated 13 October 1997¹⁶⁵ addressed to IPTL and copied to the Prime Minister, Minister of Energy and Minerals, Minister-Planning, Attorney-General, Chief Secretary, and MD TANESCO expressing that –

a) *“In accordance with Article 15.2 of the Implementation Agreement, all relevant authorities will agree to the execution of the assignments of the Implementation Agreement, the Power Purchase Agreement, the Licence and consents relating to the Project.”*

b) *“Unless you have been notified in writing by us to the contrary, all Project agreements, approvals, licences and consents executed between the Government and IPTL or granted to IPTL remain in full force and effect.”*

iii. Diplomatic Note dated 28 October 1997¹⁶⁶ from the Tanzanian Ministry of Foreign Affairs to the Malaysian Ministry of Foreign Affairs re-affirming GoT’s position set out in (ii)(a) and (b) above.

97. These acknowledgments of GoT clearly recognise that it consented to the assignment of the Implementation Agreement. The acknowledgements constitute both consent to the

¹⁶⁴ HB/H/021/315: Notice of Assignment, 3 October 1997.

¹⁶⁵ HB/H/022/316-317: Letter from Daniel Yona, Minister of Finance, to IPTL, 13 October 1997.

¹⁶⁶ HB/H/023/318: Diplomatic Note from the Ministry of Foreign Affairs of Tanzania to the Ministry of Foreign Affairs of Malaysia, 28 October 1997.

assignment and the relinquishment of the right to require prior consent. The consent is given by GoT with express reference to Article 15.2 of the Implementation Agreement, and thus in contemplation of the requirement of prior consent. This, in the Tribunal's view, amounts to a waiver by GoT of the lack of prior written consent. Accordingly, the Tribunal finds that the absence of prior written consent by GoT is not fatal to the validity of the assignment.

98. The Respondent submits that even if the Tribunal should so find, the Claimant may not rely upon an estoppel, because, under Tanzanian law, estoppel is personal to the representee and may not be relied upon by an assignee. In its view, "*SCB HK could not take an assignment of the benefit of an estoppel.*" As pointed by the Claimant this position was incorrectly taken. The case cited by the Respondent¹⁶⁷ to support its contention was not one concerned with whether estoppel could be relied upon by an assignee on a representation made to the assignor. In that case, the court was dealing with a lessee who had wanted to assign the lease to a third-party and had meanwhile permitted the intended assignee to occupy and use the premises and paying rent directly to the lessor. It was said that by accepting the rents, the lessor had represented to the lessee that the third party was the assignee and would therefore be estopped from denying that there was a valid assignment. This was rejected by the court. In doing so the court made the statement that an "*estoppel by representation is personal to the parties*" in accepting the rent payments made by the third-party it could not have made any representation to the lessee. There was in that case no assignment to be found much less any suggestion that it was a decision to the effect that an assignee could not take the benefit of an estoppel. In this arbitration, however, it was GoT who had signed and acknowledged the Notice of Assignment and returned it to the lender's Security Agent. GoT could not now be permitted to go back to say that it could not be relied on by the assignee.
99. In any event, even if it could be said that estoppel could not be established because estoppel could be said to operate in favour of the original representee, the Tribunal nevertheless finds that the consent of GoT given by its signing of the Notice of Assignment amounts to a waiver of any lack of prior consent. It could not then be permitted to rely on any lack of prior written notice to vitiate the consent expressly given. Such a waiver subsists notwithstanding any subsequent assignment.¹⁶⁸

¹⁶⁷ Exhibit RL-145: *Lankester & Son Ltd v Rennie and another* [2014] EWCA Civ 1515 (submitted at the Hearing).

¹⁶⁸ Exhibit CL-210: *Brikom Investments Ltd. v Carr* [1979] 1 QB 467.

(iv) Prior Written Consent for Successive Assignments

100. The Respondent's second argument under the Contractual Assignment issue is that the requirement for prior written approval was not obtained between 1997 and 2005 "for each of the successive assignments." It is the Respondent's case that the Implementation Agreement is structured on the basis that IPTL's rights might be successively assigned but that each assignment requires prior written approval to be effective. In support of this, the Respondent cited in its Post-Hearing Brief¹⁶⁹ the case of *Barbados Trust Company Ltd v Bank of Zambia and Bank of America*¹⁷⁰ to suggest that a similar provision in that case had been interpreted to require each and any subsequent assignment by each of the banks to first obtain "prior written consent." The Tribunal notes however that the specific provision in that case was worded differently in that it required –

*(A) Each Bank may at any time and from time to time assign all or any part of its rights and benefits in respect of the Facility to any one or more banks or other financial institutions (an "Assignee"), provided that any such assignment may only be effected if [...] the prior written consent thereto of the Borrower shall have been obtained (such consent not to be unreasonably withheld and to be deemed to have been given if no reply is received from the Borrower within fifteen days after the giving of a request for consent by a Bank) [...].*¹⁷¹

101. The Tribunal notes that the issue before the English court related primarily to the requirement for a request being made and "deemed consent" following a period of lapse. The court was not dealing with the need for successive consents. In addition, the intervening assignments were made to and by non-financial institutions in breach of the contractual restrictions. There is, therefore, no useful analogical reasoning that can be drawn from that decision to assist the case before this Tribunal.

102. In the Tribunal's view, Article 15.2 of the Implementation Agreement must be construed by the plain words and in its functional role as an exception to the prohibition set out in Article 15.1 of the Implementation Agreement. Article 15.2 sets out:

- i. the purpose for which an assignment is to be allowed as - "*financing the construction and operation of the Facility*";

¹⁶⁹ Respondent's PHB, paras. 34-36.

¹⁷⁰ Exhibit RL-152: *Barbados Trust Company Ltd v Bank of Zambia and Bank of America* [2006] EWHC 222 (Comm) (filed along with Respondent's PHB).

¹⁷¹ Exhibit RL-152: *Barbados Trust Company Ltd v Bank of Zambia and Bank of America* [2006] EWHC 222 (Comm), para. 7.

- ii. the permissible assignees: the “Lenders pursuant to the Financing Documents”; and
 - iii. the party required to seek consent: “*the Company*” (*viz.* IPTL was to be the borrower under the Financing Documents).
103. It appears clear to the Tribunal that Article 15.2 of the Implementation Agreement specifically made an exception for IPTL to “*assign or create a security interest*” as required under the Financing Documents. To avail itself of this right to assign, IPTL must satisfy the elements listed in paragraph 102(i) to (iii) above.
104. The Respondent has argued that the Implementation Agreement is designed so that IPTL’s rights might be assigned on multiple occasions on the basis that the definition of “*Company*” includes not only IPTL but also “*its permitted successors and assigns.*” Thus, when this provision states that “*the Company*” may assign “*upon prior written approval of the GOT,*” this ability, and this restriction on that ability applies to any entity that is a successor or assignee, which had first obtained the rights through a permitted assignment. The Respondent’s argument, however, ignores the definition of “*Lenders*” in the Implementation Agreement, which is defined as “*the lenders party to the Financing Documents, together with their successors and assigns*”¹⁷² (with no “*permitted*” preceding the term).
105. In this context, the Tribunal’s view is that any subsequent assignment by the banks would be an assignment by the banks *qua* lender holding the rights and interest of the Implementation Agreement *qua* lender under the Security Deed and not as a “*permitted assignee*” of the Company as GoT has asserted. It follows that any subsequent assignment by the original banks to other banks would not require any further consent from GoT. In other words, the carve out in Article 15.2 of the Implementation Agreement is that once the lenders acquire rights, the lenders do not have to secure further approvals from the parties to validly transfer their rights.
106. Counsel for the Parties spent much time on the consequences of non-compliance with the “*prior written consent*” requirement under Article 15.2 of the Implementation Agreement, arguing whether the same merely sounds in damages or would render any such assignment invalid or ineffective against GoT. Interesting observations have been made in particular to the English House of Lord’s decision in *Linden Gardens*. In view of the Tribunal’s finding that

¹⁷² HB/C/005/192-267 at pg. 196: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

the assignment of the Implementation Agreement received express written consent from GoT under Article 15.2, the consequences for non-compliance with the prior consent requirement under Article 15.2 of the Implementation Agreement requires no further determination.

(2) Statutory Assignment under Tanzanian Law

107. The Respondent has raised several grounds upon which it relies to challenge the validity of the assignment in favour of the Claimant under the laws of Tanzania. These are discussed under the following sub-heads: (a) requirements of the *Judicature Act 1873*; (b) notice of assignment; (c) status of the Security Agent; (d) non-registration of charge in violation of Section 79 of the *Companies Ordinance*; and (e) disposition in winding-up in breach of Section 172 of the *Companies Ordinance*.

a. Requirements of the *Judicature Act 1873*

(i) Parties' Submissions

108. Clause 3.2.1 of the Security Deed provides:¹⁷³

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 any time be receivable or received by the Borrower pursuant thereto; [...]

109. The Parties are in agreement¹⁷⁴ that the assignment of the Implementation Agreement to the Security Agent pursuant to Clause 3.2.1 of the Security Deed must comply with the requirements of Section 25(6)¹⁷⁵ of the *Judicature Act 1873*, the legislation applicable to statutory assignments in Tanzania.¹⁷⁶

¹⁷³ HB/C/009/366-457 at pg. 369: Security Deed, 28 June 1997.

¹⁷⁴ HB/A/003/144-370 at pgs. 242-243: Respondent's Counter-Memorial, para. 174; Claimant's PHB, para. 79.

¹⁷⁵ HB/G/143/11025-11026: Extract from the Supreme Court of *Judicature Act 1873*.

¹⁷⁶ Due to its enactment prior to 22 July 1920.

110. The Respondent argues that the security interest created by Clause 3.2.1 of the Security Deed is not absolute as it is by way of charge only and, therefore, does not operate to transfer any proprietary interest.¹⁷⁷ Furthermore, it submits that on a proper construction of the Security Deed, various provisions including Clauses 4.1, 4.2 to 4.6, 5.4.4, 9.3, 11 and 12 indicate that the assignment was by way of charge only.¹⁷⁸
111. The Respondent also contends that the activities of IPTL demonstrate that the Security Deed does not provide for more than a charge. In particular, IPTL continued to run its activities, to issue invoices to and to collect payments from TANESCO for years after the execution of the Security Deed,¹⁷⁹ actively participated in the ICSID 1 arbitration against TANESCO, commenced the Interpretation Proceedings against TANESCO, and attempted to bring claims against GoT under the Guarantee.¹⁸⁰ According to the Respondent, case law demonstrates that an assignor maintaining its rights under the assigned contract up until the moment when it defaults on its obligations *vis-à-vis* the assignee is a “*typical example of non-absolute assignment.*”¹⁸¹
112. The Respondent also refutes the Claimant’s attempt to rely on the PPA Decision, as the Claimant has noted that the tribunal in the PPA Arbitration ruled that Clause 3.2.1 of the Security Deed constitutes a valid statutory assignment,¹⁸² and that counsel for TANESCO expressly conceded likewise.¹⁸³ The Respondent contends that this decision is wrong because the PPA Tribunal disregarded key passages of the relevant authorities and TANESCO’s expert evidence. It maintains that the exchange between counsel for TANESCO and the PPA Tribunal was unclear, that counsel did not concede, or did not intend to concede, the point, and that the PPA Tribunal should not have reached its decision on the basis of this unclear exchange.¹⁸⁴

¹⁷⁷ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 174-178.

¹⁷⁸ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 178–180; HB/A/005/604-827: Respondent’s Rejoinder, paras. 181-182.

¹⁷⁹ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 181.

¹⁸⁰ HB/A/005/604-827: Respondent’s Rejoinder, paras. 175-177.

¹⁸¹ HB/A/005/604-827: Respondent’s Rejoinder, paras. 177-180.

¹⁸² HB/A/002/035-143: Claimant’s Memorial, para. 298.

¹⁸³ HB/A/004/371-603: Claimant’s Reply, para. 313.

¹⁸⁴ HB/A/005/604-827: Respondent’s Rejoinder, paras. 183-184.

113. Finally, the Respondent argues that the notice requirement was not satisfied as there are doubts as to the authenticity of the Notice of Assignment, and the Notice of Assignment was contradicted by various activities of IPTL as stated in paragraph 111 above.¹⁸⁵
114. The Claimant contests the Respondent's construction of the Security Deed, taking the view that various provisions of the Security Deed are indicative of an absolute assignment, while others do not indicate that the assignment is by way of charge only.¹⁸⁶ In particular, the Claimant contends that the Respondent's arguments are based on a misapprehension that, because IPTL remains responsible for performing the assigned contract, the assignment was not absolute. The Claimant draws a distinction between the transfer of the benefit of a contract (an assignment) and the transfer of the benefits and burdens of the contract (a novation).¹⁸⁷ Further, the Claimant contends that the Respondent fails to distinguish between provisions of the Security Deed which relate specifically to assigned contracts, and general provisions that relate to the broader variety of security created by the Security Deed.¹⁸⁸
115. The Claimant disagrees that the activities of IPTL demonstrate that the security interest created by Clause 3.2.1 of the Security Deed is by way of charge only. In its view, the nature of the assignment under the Security Deed is a matter of construction. Further, it submits that post-contractual conduct is irrelevant to the construction of the contract.¹⁸⁹
116. In any event, in the Claimant's view, the conduct relied upon by the Respondent is not inconsistent with an absolute assignment. The fact that IPTL may have carried out the mechanical process of invoicing and collecting payments under the PPA does not mean that the Security Agent was not the legal owner of the rights under the PPA. As for the ICSID 1 arbitration, that was brought by TANESCO against IPTL on the basis that IPTL was in default of its obligations under the PPA. The Claimant submits that this was appropriate as IPTL remained party to the PPA and was responsible for performing its obligations under the PPA.¹⁹⁰

¹⁸⁵ HB/A/005/604-827: Respondent's Rejoinder, para. 175.

¹⁸⁶ HB/A/004/371-603: Claimant's Reply, paras. 282-290; HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 93-94, 113-134, 135-173.

¹⁸⁷ HB/A/004/371-603: Claimant's Reply, para. 288(i).

¹⁸⁸ HB/A/004/371-603: Claimant's Reply, para. 288(ii).

¹⁸⁹ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 101-106.

¹⁹⁰ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 107.

117. Similarly, the Claimant contends that as the Interpretation Proceedings were to interpret the ICSID 1 Award between TANESCO and IPTL, it was appropriate for the interpretation request to be made by IPTL. As for IPTL's conduct in respect of the Guarantee, the Claimant asserts that this has no bearing on the contracts assigned under the Security Deed, and the Claimant has not sought to bring a claim against the Respondent under the Guarantee.¹⁹¹ Finally, even if post-assignment conduct was relevant, the Claimant submits that, none of the conduct related to the assignment of the Implementation Agreement.¹⁹²
118. As for the PPA Tribunal's decision, the Claimant contends that it was a reasoned, robust and correct decision.¹⁹³ According to the Claimant, the PPA Tribunal did not ignore relevant authorities or expert evidence, and TANESCO also clearly conceded that the assignment was a statutory assignment.¹⁹⁴ Finally, the Claimant rejects the Respondent's doubts as to the authenticity of the Notice of Assignment as baseless, and maintains that the requirement of notice was satisfied. The Claimant also notes that there is no requirement under the *Judicature Act 1873* that the notice be countersigned or acknowledged by the counterparty to the assigned contract.¹⁹⁵

(ii) Tribunal's Analysis

119. Section 25(6) of the *Judicature Act 1873*¹⁹⁶ provides that:

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled,

¹⁹¹ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 107-108.

¹⁹² HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 109-112.

¹⁹³ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 186-188.

¹⁹⁴ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 177-185.

¹⁹⁵ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 79-81, 89.

¹⁹⁶ HB/G/143/11025-11026: Extract from the Supreme Court of Judicature Act 1873.

if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

120. The Respondent's submission is that Tanzanian law requires that a statutory assignment must comply with the requirements under Section 25(6) of the *Judicature Act 1873* and that "any absolute assignment [...] of any debt or other legal chose in action" must be: (i) an absolute assignment and not a mere charge; (ii) in writing; (iii) signed by the assignor; and with (iv) express notice to the debtor.
121. The Respondent asserts that the assignment of the Implementation Agreement under the Security Deed was (i) not absolute but by way of charge only; and (ii) that there was no express notice given to that effect.
122. The Tribunal notes that it cannot be disputed that in order to determine whether an assignment is absolute or by way of charge only, one must analyse by the words of the written assignment, in this case by the Security Deed.
123. In examining the Security Deed, the Tribunal notes that Clause 3.1¹⁹⁷ of the Security Deed indeed creates "charges in favour of the Security Agent [...]." Further, Clauses 1.1, 3.1, 3.2, 4.1 (3) of the Security Deed provide as follows -

1.1 "Assigned Contracts" means the EPC Contract, the EPC Performance Bond, the O&M Contract, the O&M (Sub) Guarantee, the FSA, the FSA Performance Bond, the IMA, the PPA and all Consents and the Licence. [...]

3.1 Charging Provision: The Borrower with full title guarantee and as continuing security for the payment and discharge of all Liabilities hereby charges in favour of the Security Agent for the benefit of the Secured Creditors:

3.1.1 by way of mortgage of the right of occupancy [...] the Real Property in Tanzania now belonging to it;

3.1.2 by way of first fixed equitable charge, all Real Property now belonging to it [...] and all Real Property acquired by it after the date of this Security Deed.

¹⁹⁷ HB/C/009/366-457 at pg. 369: Security Deed, 28 June 1997.

3.1.3 *by way of first fixed charge:*

(i) all Book Debts;

(ii) all its present and future Permitted Investments, Rights attaching or relating to Permitted Investments and all Assets hereafter belonging to the Borrower and deriving from Permitted Investments or such Rights;

(iii) all its present and future goodwill and uncalled capital for the time being;

(iv) all its present and future Intellectual Property and the benefit of all present and future licences and sub-licences of Intellectual Property granted either by or to it;

3.1.4 *by way of first floating charge, its undertaking and all its Assets, both present and future (including Assets expressed to be charged by paragraphs 3.1.1 to 3.1.3 above).*

3.2 *Assignments: The Borrower with full title guarantee and as continuing security for the payment and discharge of all Liabilities hereby assigns to the Security Agent 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 any time be receivable or received by the Borrower pursuant thereto;*

3.2.2. *all its present and future right, title and interest in and to all insurances and all proceeds in respect of Insurances and all benefits thereof (including all claims of whatsoever nature relating thereto and returns of premiums in respect thereof);*

3.2.3. *all its present and future Rights in relation to its Real Property (except those charged by Clauses 3.1.1), including all Rights against all past, present and future undertenants of its Real Property and their respective guarantors and/or sureties; and*

3.2.4. *all its present and future Right, title and interest in and to the Bank Accounts.*

3.3 *Ranking: The floating Charge created by Clause 3.1.4 shall rank behind all the fixed Charges created by or pursuant to this Security Deed but shall rank in priority to any other security hereafter created by the*

Borrower except for security permitted by Clause 4.2 and except for security ranking in priority in accordance with Clause 9.3.5.

[...]

4.1(3) Notwithstanding any other provision hereof the Security Agent shall not by virtue of the Security created by or pursuant to this Security Deed be or become obliged or liable under or in respect of the Secured Property or any part thereof:

(a) to perform or observe any of the obligations of the Borrower hereunder;

(b) to make any payment or any enquiry in connection therewith; or

(c) to present or file any claim or take any other action to collect or enforce any payment due to the Borrower or, by virtue, of the Security created by or pursuant to this Security Deed, to the Security Agent.

124. There can be no dispute that Clause 3.1 of the Security Deed is intended to create a charge over the Assets which when so charged constitutes the “*Charged Assets*” as defined in Clause 1.1, Clause 3.3 further provides for the ranking of the charges referred to in Clauses 3.1, 4.2 and 9.3.5.
125. The Security Deed thus makes a clear distinction between the charges created in relation to the “*Assets*” as described in Clause 3.1 and the assignment created under Clause 3.2, which uses the term “*assigns*” without any condition or qualification of “*all its present and future right, title and interest in and to the Assigned Contracts.*” The term “*Assigned Contracts*” as defined falls outside the scope of Assets contemplated under Clause 3.1. On a plain reading, the Tribunal is satisfied that Clause 3.2 creates an absolute assignment and not an assignment by way of charge only.
126. The Respondent in its Post-Hearing Brief also submitted that Clause 4.1(3)(c) of the Security Deed was a “*retention of rights by IPTL including the right to bring claims*” as another indication that the assignment was not absolute but one by way of charge. In the Tribunal’s view this is incorrect. Clause 4.1(3)(c) is not a retention of right in favour of IPTL. It is instead a reservation that, notwithstanding the assignment, the Security Agent is under no obligation to take action to present or file claims against any other party. It does not, however, deprive the assignee of the right to do so if it so wishes.

127. The Tribunal also does not agree that the mere fact that the Security Deed provides for the continuing performance by IPTL of the “Assigned Contracts” supports the Respondent’s suggestion that the assignment could not be an absolute one. Such an argument ignores the very attribute of an assignment as transferring rights and not burdens and obligations. The Tribunal is satisfied that there is nothing in the Security Deed that qualifies or limits in any manner the assignment of the Assigned Contracts (which by definition include the Implementation Agreement).

b. Notice of Assignment

128. There can no longer be any argument that notice was not given by the Security Agent in a formal Notice of Assignment of the Implementation Agreement under the Security Deed as it was acknowledged by the GoT.¹⁹⁸ The Respondent could argue that there is a requirement that at each and every step in the chain of assignments, leading to and concluding with the 2005 Deed from Danaharta to SCB HK, must comply with the requirement of notice to the Government. The Respondent submits that a notice sent to the Government after the 2005 Deed would not only need to notify the Government of the details of that assignment, but also of any earlier steps which had not previously been expressly notified. It also cites in support the decision of the English Court of Appeal in *E Pellas v Neptune Marine*¹⁹⁹ to argue for “*each successive assignment [had] to comply with the 1873 Act.*”²⁰⁰ In that case, the assignor of an insurance policy taken out by the insured, had sued the insurer for the proceeds after the perils insured had occurred. The insured had incurred unpaid premiums due on other policies taken out with the insurer and sought to set-off these amounts against the sum due to the assignee. The Court of Appeal rejected the plea of set-off even though the insurer argued that it was prejudiced by lack of notice of the assignment prior to extending the credit to the insured. Admittedly, the court was concerned with the *Policies of Marine Insurance Act 1868* rather than the *Judicature Act 1873*. The court did nevertheless say in *obiter*, that – “[t]he plaintiffs cannot succeed as assignees of a debt or chose in action pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6, because the defendants have had no notice of the

¹⁹⁸ HB/H/021/315: Notice of Assignment, 3 October 1997.

¹⁹⁹ Exhibit RL-143: *E Pellas & Co v Neptune Marine Insurance Co* (1879) 5 CPD 34 (submitted at the Hearing).

²⁰⁰ Respondent’s PHB, para. 13.

*assignments [...].*²⁰¹ Still, there is nothing in the statement to suggest that the each and every assignment must require a separate notice of assignment.

129. GoT also quoted Lord Denning's statement in *WF Harrison & Co Ltd v Burke*²⁰² as support –

[T]he notice in writing of the assignment is an essential part of the transfer of title to the debt, and, as such, the requirements of [Section 136 of] the [Law of Property] Act [1925] must be strictly complied with, and the notice itself, I think, must be strictly accurate – accurate in particular in regard to the date which is given for the assignment; and even though it is only one day out, as in this case, the notice of assignment is bad.

130. The Tribunal agrees with GoT that the mischief which the *Judicature Act 1873* targeted was a debtor faced with claims by assignees it did not know; the “*key requirement is the full knowledge of the debtor so as to avoid confusion.*”²⁰³

131. The Claimant had at the hearing pointed out that GoT was notified of the Claimant's interest at the latest by 17 December 2009²⁰⁴ when it informed GoT that –

SCB HK has also been assigned the Implementation Agreement dated 8 June 1995 (the “Implementation Agreement”) entered into between IPTL and the Government of Tanzania (“GOT”).

132. The Respondent then took the position that this notice made no mention of when the rights to the Implementation Agreement had left Sime Bank, or any details in between and therefore fell short of the notice required under the *Judicature Act 1873*.

133. The Claimant had also tendered its letter of 3 December 2013²⁰⁵ in which it notified GoT of the occurrence of certain “*Events of Default*” under the Implementation Agreement and in particular that –

By a Security Deed dated 28 June 1997, IPTL assigned all of its present and future right, title and interest in and to the Implementation Agreement to the Security Agent in connection with a US\$ 105,000,000 Loan Facility Agreement provided to IPTL by a consortium of foreign

²⁰¹ Exhibit RL-143 at pg. 37: *E Pellas & Co v Neptune Marine Insurance Co* (1879) 5 CPD 34.

²⁰² Exhibit RL-148 at pg. 421: *WF Harrison & Co Ltd v Burke* [1956] 1 WLR 419 (CA) (submitted along with Respondent's PHB).

²⁰³ Respondent's PHB, para. 15.

²⁰⁴ Exhibit C-411: Letter from Herbert Smith to the Attorney General of Tanzania, 17 December 2009 (submitted at the Hearing).

²⁰⁵ HB/H/352/4948-4953 at pg. 4948: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 3 December 2013, para. 2.

lenders. The GoT was given notice of the assignment on 3 October 1997, which the GoT acknowledged. Standard Chartered Bank (Hong Kong) Limited ("SCB HK") is now the Security Agent, having acquired the loan (and related security) from the previous lenders in 2005. SCB HK is therefore entitled (as assignee) to exercise all rights and remedies granted to IPTL under the Implementation Agreement.

134. The Respondent maintained that this letter still left it confused as to how SCB HK is supposed to have acquired the rights under the Implementation Agreement and that there was no mention of the assignment from Sime Bank to RHB Bank.
135. From these documents, it is clear to the Tribunal that GoT had, at the very latest, since 3 December 2013 (if not by 17 December 2009) been aware that the Claimant asserted its interest in the Implementation Agreement as assignee and the GoT could not therefore complain that it did not know or had no notice of who the assignee was nor should it be confused by any possible adverse claim by any competing claimant under the Implementation Agreement. In fact, GoT has not identified any competing claim.

c. Status of the Security Agent

136. The Respondent had also raised the fact that the Security Agent was changed from Sime Singapore to RHB Bank Singapore and then to the Claimant. The Tribunal notes that (as discussed in paragraph 82(ii) above), there was in fact no entity change from Sime Singapore to RHB Bank Singapore. It was the re-naming of Sime to RHB following a merger sanctioned by the Malaysian High Court. The change in entity of the Security Agent also did not occur in 2005 following the sale by Danaharta to SCB HK.²⁰⁶
137. This then led GoT to argue that when Danaharta assigned the rights to SCB HK, Danaharta did not and could not have assigned its role as Security Agent to SCB HK. The Respondent further argues that "*RHB remained the Security Agent until 29 October 2009, when it was removed from such position by SCB HK*" and SCB HK became the Security Agent on 4 November 2009 by naming itself as the Security Agent.²⁰⁷ The Tribunal notes that this letter²⁰⁸ was not communicated to GoT.

²⁰⁶ See para. 82 above.

²⁰⁷ HB/A/003/144-370: Respondent's Counter-Memorial, para. 38; HB/H/129/1288: Letter from SCB HK to RHB Bank Berhad, 29 October 2009; HB/H/132/1292-1293: Letter from SCB HK to SCB HK, 4 November 2009.

²⁰⁸ HB/H/132/1292-1293: Letter from SCB HK to SCB HK, 4 November 2009.

138. In this regard, the Tribunal notes that the Implementation Agreement was signed by Sime Singapore as the Security Agent, but it was expressly described as -

*[...] in its capacity as Security Agent under the Facility Agreement (the "Security Agent") which expression includes any successor appointed as Security Agent.*²⁰⁹

139. The role of the Security Agent as spelt out in Article 22 of the Facility Agreement²¹⁰ is described as that of an *"agent and principal"* only. In other words, the Security Agent's role is merely to hold the security only on behalf of the principal lenders, following the sale by Danaharta to SCB HK, the sole lender was SCB HK. According to Article 22(H) of the Facility Agreement,²¹¹ the right to appoint and remove the Security Agent lies with the *"Majority Banks"*,²¹² which by 2009 was only SCB HK and no other. In the Tribunal's view, the change of Security Agent from RHB Bank Singapore to SCB HK does not impact upon the right of SCB HK as the assignee as Lender under the Facility Agreement and the assignee of the rights under the Implementation Agreement.

140. The Tribunal is satisfied that:

- i. the Notice of Assignment of 3 October 1997²¹³ was sufficient notice to GoT of the assignment by IPTL of the Implementation Agreement to the lenders and the Security Agent;
- ii. the subsequent notices of SCB HK on 17 December 2009²¹⁴ and 3 December 2013²¹⁵ to GoT were sufficient to inform GoT of the Claimant's interest as sole lender and Security Agent referred to under the Implementation Agreement; and
- iii. the assignment made under Clause 3.2.1 of the Security Deed is in the nature of an absolute assignment and not by way of a charge, compliant with the Section 25(6) of the *Judicature Act 1873*.

²⁰⁹ HB/C/009/366-457 at pg. 367: Security Deed, 28 June 1997.

²¹⁰ HB/C/008/280-365 at pgs. 335-339: Facility Agreement, 28 June 1997.

²¹¹ HB/C/008/280-365 at pgs. 338-339: Facility Agreement, 28 June 1997.

²¹² Clause 1 of the Facility Agreement provides: *"Majority Banks" means from time to time such banks voting or deciding the same way on a particular point holding in the aggregate not less than 66.67% of the aggregate of the Outstandings*"; HB/C/008/280-365 at pg. 293: Facility Agreement, 28 June 1997.

²¹³ HB/H/021/315: Notice of Assignment, 3 October 1997.

²¹⁴ Exhibit C-411: Letter from Herbert Smith to the Attorney General of Tanzania, 17 December 2009.

²¹⁵ HB/H/352/4948-4953 at pg. 4948: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 3 December 2013.

d. Non-Registration of Charge under Section 79 of the Companies Ordinance 1921

(i) Parties' Submissions

141. It is common ground that the assignment of the Implementation Agreement to the Security Agent under Clause 3.2.1 of the Security Deed was not registered with BRELA as a charge under Section 79 of the *Companies Ordinance 1921 (Tanzania)*. However, the Parties disagree as to the requirement for such registration, as well as, the effect of the non-registration on the validity of the assignment of the Implementation Agreement.

142. Sections 79(1) and (2) of the *Companies Ordinance 1921 (Tanzania)* states as follows:

(1) 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, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges –

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

(d) a charge on immovable property wherever situate, or any interest therein;

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

(f) a floating charge on the undertaking or property of the company;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

*(i) a charge on goodwill, a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright. [...]*²¹⁶

143. The Respondent argues that even if the Tribunal were to hold that Clause 3.2.1 of the Security Deed effects a statutory assignment, the security interest created is void under Tanzanian law as it was not registered as required under Section 79 of the *Companies Ordinance 1921 (Tanzania)*. It contends that this interpretation is confirmed by the PwC Report relied on by the Claimant.²¹⁷
144. The Respondent relies on the wording of Section 79, as well as Tanzanian case law, in particular the decision of the Court of Appeal of Tanzania in *Shinyanga Regional Trading Company Limited and Another v National Bank of Commerce (“Shinyanga”)*,²¹⁸ to support the contention that the failure to register a registrable charge voids it not only against liquidator or secured creditor, but against any creditor.²¹⁹
145. The Respondent rejects the Claimant’s contention that *Shinyanga* was decided *per incuriam*. It notes that *stare decisis* is an essential feature of Tanzanian law, and points out that in the similar case of *Marungu Sisal Estate Limited v CRDB Bank Limited (“Marungu”)*,²²⁰ no appeal was made to the Court of Appeal on the basis that *Shinyanga* had been decided *per incuriam*.²²¹ It urges the Tribunal not to give weight to Flaux J’s view that *Shinyanga* was decided *per incuriam*, because until the Court of Appeal of Tanzania overrules *Shinyanga*, the interpretation of Tanzanian law is that that decision is binding law in Tanzania.²²² Further, any concessions made by TANESCO’s counsel in the PPA Arbitration on this point were made in passing, and in any event, the Respondent is not bound by them.²²³

²¹⁶ HB/G/168/11681-11850 at pgs. 11721-11722: *Companies Ordinance 1921 (Tanzania)*, Chapter 212.

²¹⁷ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 195.

²¹⁸ HB/G/283/14764-14780: *Shinyanga Regional Trading Company Limited and Another v National Bank of Commerce* [1997] TLR 78, Judgment, 28 February 1997.

²¹⁹ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 191-195 ; HB/A/005/604-827: Respondent’s Rejoinder, paras. 186-188.

²²⁰ HB/G/246/14090-14125: *Marungu Sisal Estate Limited v CRDB Bank Limited*, Civil Case No 7 of 2000.

²²¹ HB/A/005/604-827: Respondent’s Rejoinder, paras. 187-188.

²²² HB/A/005/604-827: Respondent’s Rejoinder, para. 190.

²²³ HB/A/005/604-827: Respondent’s Rejoinder, para. 189.

146. The Respondent is also of the view that the assignment of the Implementation Agreement was a charge on book debts that should have been registered under Section 79 of the *Companies Ordinance 1921 (Tanzania)*. The Respondent asserts that as the PPA was held by the PPA Tribunal to amount to a charge on book debts, the Implementation Agreement is likewise registrable, because the two agreements were designed to work together and form one and the same transaction. Further, the Respondent contends that the PPA Tribunal found that Clause 3.2.1 of the Security Deed as a whole needed to be registered under Section 79 of the *Companies Ordinance 1921 (Tanzania)*. Additionally, the fact that the Security Deed has a separate provision addressing the assignment of insurance contracts, according to the Respondent, indicates that the Implementation Agreement is not a contingent contract but a book debt.²²⁴ Finally, due to the integrated nature of the Security Deed, the Respondent submits that it is not possible to sever valid charges, if any, from charges that are invalid for want of registration.²²⁵
147. Alternatively, the Respondent submits that, if the Tribunal finds that such security should be granted relative effect despite its lack of registration, the Respondent contends that such effect is confined to the relationship between the Claimant and IPTL and that the Claimant is unable to derive any rights therefrom *vis-à-vis* GoT.
148. The Claimant argues that the assignment of the Implementation Agreement was not a charge on book debts within the meaning of Section 79(2) of the *Companies Ordinance 1921 (Tanzania)* and was not required to be registered. While the PPA might be regarded as entailing a book debt due to the expectation of capacity payments, this is not the case for the Implementation Agreement. Rather, the Implementation Agreement is a contingent contract insofar as payments only become due from the Respondent as damages or compensation, in the event that the protections guaranteed by the Respondent are breached.²²⁶ Although both agreements are part of a suite of project agreements, they are fundamentally distinct in nature.²²⁷ The security created by the assignment of the Implementation Agreement was not a charge on book debts. Further, it asserts that the Respondent's reliance on the PPA

²²⁴ HB/A/005/604-827: Respondent's Rejoinder, para. 191.

²²⁵ HB/A/005/604-827: Respondent's Rejoinder, para. 192.

²²⁶ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 199, 210-213.

²²⁷ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 204.

Tribunal's ruling is misplaced, as the PPA Tribunal did not decide that all security created by Clause 3.2.1 of the Security Deed was registrable.²²⁸

149. The Claimant also submits that to the extent that Clause 3.2.1 of the Security Deed created other charges which were registrable, and assuming that those charges are invalid for want of registration,²²⁹ those invalid charges may be severed from the valid charge in respect of the assignment of the Implementation Agreement. Further, the Claimant submits that this was the position taken in the PPA Decision and is supported by pre-reception English authority (binding as a matter of Tanzanian law), and subsequent English and Australian cases. In the Claimant's view, the principle of severability applies even when security is created in the same instrument, arises in respect of the same project, and relates to the same underlying property. This according to the Claimant is reinforced by the language of Section 79(1) of the *Companies Ordinance 1921 (Tanzania)*, which distinguishes between the "charge", which will be void against the liquidator or secured creditor, and the "*instrument ... by which the charge is created or evidenced, which is not so voided.*"²³⁰
150. Alternatively, the Claimant submits that even if the assignment of the Implementation Agreement was required to be registered, or even if the charge created by the assignment of the Implementation Agreement cannot be severed from charges that required registration, the effect of non-registration is not to invalidate the charge against the whole world. According to the Claimant, Section 79 of the *Companies Ordinance 1921 (Tanzania)* only operates to invalidate registrable but unregistered charges against a liquidator, administrator or secured creditor. It argues that this is clear from the plain language of Section 79 and supported by English authorities.²³¹ As IPTL was not in liquidation, and there was no secured creditor with an interest in the benefit of the "*Assigned Contracts*", the charges created by Clause 3.2.1 of the Security Deed remain valid. Further, it asserts that no reliance can be placed by the Respondent on the position in the PwC Report on this point, because at the time the Report was issued, a Liquidator had been appointed over IPTL.²³²

²²⁸ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 206-209.

²²⁹ Which the Claimant denies; See HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 227.

²³⁰ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 226.

²³¹ Which are binding on Tanzanian Courts pre-reception date and are persuasive authority post-reception date; HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 231.

²³² HB/A/004/371-603: Claimant's Reply, para. 329.

151. The Claimant also argues that the decision in *Shinyanga* is *per incuriam*, as it does not properly reflect Tanzanian law, and the Tribunal is entitled not to apply it.²³³ The decision ignores the plain language of the legislation, and it was made without reference to binding pre-reception date authorities and other persuasive authorities, and nor is it supported by *Marungu*. According to the Claimant, Flaux J correctly rejected the *Shinyanga* decision, and the PPA Tribunal correctly held that the unregistered charge remained valid in the absence of a liquidator. Additionally, TANESCO's counsel did in fact concede that a failure to register a registrable charge would not invalidate the charge unless the company was in liquidation.²³⁴

(ii) Tribunal's Analysis

152. On the basis of the Tribunal's finding that the assignment made under Clause 3.2.1 of the Security Deed is in the nature of an absolute assignment and not by way of a charge, this question requires no further consideration. However, as the Parties have debated this issue extensively, the Tribunal will proceed to deal with them in the following paragraphs.

153. The key question that requires the Tribunal's determination is whether the assignment of the Implementation Agreement, even if it amounts to a charge only, is a "*charge to which Section 79(2)*" of the *Companies Ordinance 1921 (Tanzania)* applies.

154. From the list enumerated in Section 79(2), only the descriptive of "*book debts*" appears to be the closest possible category into which the Implementation Agreement could fall into.

155. Under the Implementation Agreement, the bundle of rights that have been promised by the GoT to IPTL could be described as follows:²³⁵

- i. Article V: The "*exclusive right to design, finance, insure, construct, complete, own, operate, and maintain the Facility in accordance with the terms and conditions contained in this Agreement and the Laws of Tanzania*".
- ii. Article VII: Support of GoT to:
 - a) obtain consents from regulatory agencies;
 - b) use its good offices to support IPTL's performance of its obligations;

²³³ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 233.

²³⁴ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 236-241.

²³⁵ HB/C/005/192-267: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

- c) attach non-discriminatory terms and conditions to the issuance or renewal of any of the Consents as are in accordance with the Laws of Tanzania;
 - d) take actions as are reasonable and appropriate under the circumstances to ensure that IPTL receives the fiscal incentives, concessions, financial arrangements, and any other benefits provided under the *"Policy Framework"*.
- iii. Article IX (9.7): Avoiding *"Double Jeopardy"* – *"Settlement or waiver in writing by TANESCO of any dispute or breach under the Power Purchase Agreement shall be binding on the GOT with respect to the identical issue or claim."*
 - iv. Article XI: Assistance with immigration controls.
 - v. Article XIII: Entitlement for imports and exports of items needed.
 - vi. Article XIV: Consent to open and operate Foreign Currency Accounts.
 - vii. Article XVI: Assurances against discriminatory actions, expropriation, compulsory acquisition and nationalisation of capital or assets of IPTL.
 - viii. Article XVII (17.7): Special compensation for Force Majeure events.
 - ix. Article XVIII: Tax exemptions.
 - x. Article XXII and Schedule 1: Undertaking to Guarantee.
 - xi. Article XXIV (24.10): *"Most Favoured Nation"* treatment.
156. The concept of a *"book debt"* normally refers to the money received or receivable in the ordinary course of business of a company. These would normally include, among others, any money or receivables for sale of services or goods, proceeds of dispositions, or, hire, bank balances, in cash or cash equivalent and so forth. An assignment of a long-term contract for the sale of power under the PPA would no doubt give rise to receivables and constitute book debts. It is, however, rather implausible to suggest the bundle of rights and privileges and promises of support set out in the Implementation Agreement are *"book debts"* contemplated under Section 79 of the *Companies Ordinance 1921 (Tanzania)*. None of the evidence or arguments show in what manner the rights given by GoT under the Implementation Agreement are akin to receivables and could constitute *"book debts"*.
157. On first principles even if the assignment of the Implementation Agreement constitutes some form of *"charge"*, it is nevertheless not a charge of a *"book debt"* or any other kind of charge under Section 79(2) of the *Companies Ordinance 1921 (Tanzania)*. There is accordingly no requirement for the *"charge"* to be registered. It follows that there is no need for the

consideration of whether a failure to register would render the same void against GoT or only against the liquidator.

e. Breach of Section 172 of the Companies Ordinance

(i) Parties' Submissions

158. The Respondent argues that that the transfer of the loan from Danaharta to SCB HK in 2005 was invalid, because it breached Section 172 of the *Companies Ordinance 1921 (Tanzania)*.

159. Section 172 of the Companies Ordinance 1921 (Tanzania) states that:²³⁶

172. Avoidance of dispositions of property, etc., after commencement of winding up

In a winding up by the court, any disposition of the property of the company, including actionable claims, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

160. According to the Respondent, this provision prohibits the transfer of assets and interests, including actionable claims, of a company undergoing winding up proceedings. Any such transfer is null and void if performed without the leave of the High Court of Tanzania.

161. The Respondent argues that since IPTL was in winding up proceedings at the time of the purported acquisition of the loan by the Claimant from Danaharta, and the permission of the High Court of Tanzania was not sought regarding this acquisition, the transfer is null and void. The High Court has continuous supervisory powers once a winding up petition has been commenced, and permission for any disposition must be obtained while the winding up proceedings are ongoing, and not merely after the court has declared the company wound up. The Respondent submits that this interpretation of Section 172 was also put forward by Martha Renju in proceedings in the British Virgin Islands in 2010. Further, it asserts that Danaharta and the Claimant were warned that the transfer of the loan to SCB HK in 2005 could be invalidated by Section 172 but chose to ignore such advice.²³⁷

162. The Respondent also contends that the transfer of the loan was an “*actionable claim*” covered by Section 172, as it comprised a right to bring a claim as security for a loan granted in favour of a company. It further takes the view that the validity of the transfer of the loan is not a

²³⁶ HB/G/168/11681-11850 at pg. 11760: Companies Ordinance 1921 (Tanzania), Chapter 212 (emphasis in original).

²³⁷ HB/A/005/604-827: Respondent’s Rejoinder, paras. 193-195.

question to be governed by English law (the law applicable to the Facility Agreement). As the “transfer took effect in Tanzania with respect to security for a loan granted in favour of a Tanzanian company which was undergoing winding up proceedings in Tanzania, permission from the High Court of Tanzania overseeing those winding up proceedings was a necessary requisite.”²³⁸

163. The Claimant argues that IPTL was not in winding up within the meaning of Section 172 read with Section 174 of the *Companies Ordinance 1921 (Tanzania)* when the Term Loans were transferred from Danaharta to the Claimant in 2005. Section 174 governs the time of commencement of the winding up order, and states as follows:

174. Commencement of winding up by the court

(1) Where before the presentation of a petition for the winding up of a company by the court a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

164. The Claimant contends that, according to commentary on equivalent provisions of English insolvency legislation, this provision operates retrospectively to invalidate property dispositions made after the winding up petition is presented in the event a winding up order is made.²³⁹ Where no such order has been made, property dispositions are not invalidated. In the present case, according to the Claimant, as the Tanzanian Court of Appeal ultimately quashed the Winding Up Order, the transfer from Danaharta to the Claimant was not invalidated. The Claimant points out that this was also the conclusion reached by Flaux J.²⁴⁰ Further, it submits that to the extent that Martha Renju took the position stated by the Respondent, that was incorrect, and in any event, not dispositive of the claim before the BVI

²³⁸ HB/A/005/604-827: Respondent’s Rejoinder, para. 196.

²³⁹ HB/A/004/371-603: Claimant’s Reply, paras. 360-366.

²⁴⁰ HB/D/018/755-793 at pgs. 766-767: Flaux J Judgment, 16 November 2016, para. 45; See also HB/D/016/675-738 at pgs. 695-696: Judgment of the English Commercial Court in *SCB HK and SCB Malaysia Berhad v IPTL, VIP and PAP* [2015] EWHC 1640 (Flaux J Jurisdiction Judgment), 9 June 2015, para. 75.

Court. Further, the Claimant disagrees that any such warning of the invalidity of the loan as asserted by the Respondent was in fact given.²⁴¹

165. The Claimant also notes that, from a policy perspective, a provision which invalidated dispositions made where no winding up order is ultimately made would be pointless as there would be no need to preserve assets for a *pari passu* distribution to creditor. Such a provision would be unjust as companies presented with a winding up petition (however groundless) would be effectively paralysed by the threat of having perfectly legitimate transactions invalidated, even if the winding up petition is later dismissed or withdrawn.²⁴²
166. In the Claimant's view, the transfer of the loan from Danaharta to SCB HK in 2005 was the transfer of a liability of IPTL, not the transfer of property of IPTL. The transfer thus fell outside the prohibition on dispositions under Section 172. This it submits was the conclusion reached in the PwC Report and by Flaux J. Further the Claimant asserts that to the extent that the Respondent is implying that "*actionable claims*" include the Claimant's right to bring a claim in its capacity as Security Agent as the assignee of the legal benefit of the Implementation Agreement, this is not relevant as the disposition by IPTL of the legal benefit of the Implementation Agreement to the Security Agent occurred in 1997 by way of the statutory assignment. From then onwards, the benefit of the contract was no longer part of the property of IPTL. The disposition in 1997, made some 5 years before the Winding Up Petition was filed in 2002, was not a disposition made during the winding up of IPTL.²⁴³
167. In any event, the Claimant contends that Section 172 of the *Companies Ordinance 1921 (Tanzania)* cannot invalidate the transfer of the loan from Danaharta to SCB HK because the validity of the transfer is not governed by Tanzanian law. It argues that the Facility Agreement is governed by English law, and the validity of the transfer is thus also governed by English law. It also states that pursuant to the non-exclusive jurisdiction clause in the Facility Agreement, Flaux J determined that the transfer of the loan is governed by English law, which recognised the transfer as valid.²⁴⁴

²⁴¹ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 268-270.

²⁴² HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 267.

²⁴³ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 272-280.

²⁴⁴ HB/A/004/371-603: Claimant's Reply, paras. 373-375; HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 282-287.

168. Finally, the Claimant notes the irony in the Respondent's purportedly improper recognition of the alleged sale of the Mechmar Shares to PAP when, on its own case, Section 172 would have invalidated the transfer. The VIP-PAP SPA alleged that PAP had purchased the Mechmar Shares from Piper Link in 2011,²⁴⁵ and the SPA was countersigned by Mr Saliboko in his capacity as Second Provisional Liquidator of IPTL. Section 172 expressly applies to "*any transfer of shares*", and the purported transfer allegedly took place after the Winding Up Petition was filed in 2002 but before the Winding Up Order was quashed in 2012 (or withdrawn in 2013). Mr Saliboko recognised the purported transfer of the Mechmar Shares, but refused to recognise the transfer of the loan, even though both would have been invalid according to the Respondent's interpretation of Section 172. The Claimant alleges that the contradictory position taken by Mr Saliboko and the Respondent "*highlights the cynicism and expediency of their stance on the issue.*"²⁴⁶

(ii) Tribunal's Analysis

169. It is not in dispute between the Parties that a Winding Up Petition was filed against IPTL in February 2002. The Winding Up Order was made against IPTL on 15 July 2011 by the Tanzanian High Court (Kaijage J).²⁴⁷ That order for winding-up was, however, set aside by the Court of Appeal on 17 December 2012²⁴⁸ and finally withdrawn by the petitioner VIP on 26 August 2013.²⁴⁹ It is the Respondent's case that the transfer from Danaharta to SCB HK took place in 2005 after the commencement of the winding up proceedings and during such proceedings and as such is rendered null and void under Section 172 of the *Companies Ordinance 1921 (Tanzania)*, as it was made without the permission of the Tanzanian High Court. In its view, it matters not that the Winding Up Order was eventually set aside or that the Winding Up Petition was withdrawn, as Section 172 of the *Companies Ordinance 1921 (Tanzania)* prohibits any disposition immediately following the commencement of winding-up proceedings with no express exceptions save for dispositions made with leave of court.

²⁴⁵ Which the Claimant says was impossible, because the Claimant had successfully enforced its Charge of Shares in respect of the Mechmar Shares in the Malaysian and BVI Courts in 2010 and 2011.

²⁴⁶ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 288-291.

²⁴⁷ HB/H/185/2513-2542: Ruling of Kaijage J in the High Court of Tanzania, 15 July 2011.

²⁴⁸ HB/H/258/3725-3752: Decision of the Court of Appeal of Tanzania, 17 December 2012.

²⁴⁹ HB/H/290/4571-4577: *VIP Engineering and Marketing Ltd v Independent Power Tanzania Limited and others*, High Court of Tanzania, Consolidated Misc. Civil Cause Nos. 49 of 2002 and 254 of 2003, Notice by the Petitioner (VIP) of Withdrawing the Petition for Winding Up IPTL and Withdrawing All Ancillary Applications by VIP received by Adept Chambers on behalf of SCB HK, 26 August 2013 and 27 August 2013.

170. The Tribunal accepts that the scheme contemplated under the winding up provisions of the *Companies Ordinance 1921 (Tanzania)* is that when a winding up order is made it enjoys efficacy to avoid dispositions made after the commencement of the winding-up proceedings. The intent of the scheme is to avoid the preferential treatment of certain creditors. But when no winding up order is made and the petition is eventually withdrawn, dispositions are not rendered void because there remain no proceedings in place that have that effect and any permission that was needed from the Court is no longer required. Similarly, if an order is made but subsequently set aside then dispositions made even during the period of the winding-up would not be rendered void because upon the setting aside of the order, there is no legal entailment that remains giving rise to the disposition being void.
171. In any event, the Tribunal also does not accept that the loans constituted under the Facility Agreement are “*the property of the company*”. Far from being an asset, they constitute liabilities of IPTL and would not in the least impact other creditors. The loan remains a liability of the company and could not become a “*right to bring a claim as security for a loan granted in favour of a company*”. Such a right is embodied in the Implementation Agreement and could be the basis of an “*actionable claim*” but that had already been assigned absolutely, to the lenders/banks in 1997, much before the Winding Up Petition was filed.

(3) Tribunal’s Finding on the Claimant’s Status as Legal Assignee

172. The terms of the Implementation Agreement permit IPTL to “*assign or create a security interest*” in favour of its “*Lenders*” subject only to IPTL having obtained “*prior written consent*” from GoT. Although no “*prior*” written consent was given, the consent was subsequently given on 3 October 1997 and acknowledged by the signature of its Ministry of Water, Energy and Minerals on the Notice of Assignment of the Implementation Agreement,²⁵⁰ and by the letter from its Minister of Finance of 13 October 1997 addressed to IPTL, which was copied to the Prime Minister, Minister of Energy and Minerals, Minister-Planning, Attorney-General, Chief Secretary, and MD TANESCO confirming its agreement to “*the execution of the assignments of the Implementation Agreement [...]*”.²⁵¹ The Tribunal therefore finds that consent was given and the requirement for “*prior*” consent was accordingly waived.

²⁵⁰ HB/H/021/315: Notice of Assignment, 3 October 1997.

²⁵¹ HB/H/022/316-317: Letter from Daniel Yona, Minister of Finance, to IPTL, 13 October 1997.

173. The Tribunal also holds that the requirement for consent from GoT for the original banks to assign their interest in the Implementation Agreement is not required under Article 15.2 of the Implementation Agreement as any subsequent assignment by the banks would be an assignment by the banks *qua* the lender and not as a “*permitted assignee*” of the Company.
174. The Tribunal is satisfied that while Clause 3.1 of the Security Deed creates “*charges*”, Clause 3.2 thereof assigns to the Security Agent for the benefit of the Secured Creditors without any condition or qualification of “*all its present and future right, title and interest in and to the Assigned Contracts*” (which definition includes the Implementation Agreement). The assignment is an absolute one not an assignment by way of charge only. The notice of such assignment in relation to the Implementation Agreement was given by the Security Agent on behalf of the lenders and acknowledged by GoT. GoT was also notified by the Claimant as successor lender of its interest at the very latest in December 2009 and could not therefore claim that it was unaware of the Claimant’s claims as under the Implementation Agreement. Any change in the Security Agent has no impact upon the right of SCB HK as the assignee as Lender under the Facility Agreement and the assignee of the rights under the Implementation Agreement.
175. The assignment is an absolute one and not merely a charge as such it falls outside the requirement for registration under the Section 79(2) of the *Companies Ordinance 1921 (Tanzania)*. As the Winding Up Order made by Kaijage J was subsequently set aside by the Court of Appeal and then eventually withdrawn, the rights of SCB HK under the Implementation Agreement could not be affected and remain actionable. All said, the Tribunal finds that the Claimant (SCB HK) has all the rights under the Implementation Agreement assigned to it by Danaharta (as the successor in title of the Lenders) and accordingly has the title and interest to pursue its claims against GoT for any breach of the Implementation Agreement in its own name.

B. JURISDICTION UNDER ARTICLE 25 OF THE ICSID CONVENTION

176. The Respondent contends that the Tribunal lacks jurisdiction under Article 25 of the ICSID Convention on two grounds: (1) the Claimant is not a “*National of another Contracting State*”; and (2) the Claimant does not have an “*investment*.”

(1) National of Another Contracting State

a. Parties' Submissions

177. The Respondent's response in relation to the Claimant's assertion that the Claimant's nationality should be considered for the purpose of "*diversity of nationalities*" under Article 25 of the ICSID Convention, is that it did not consent to the assignment of IPTL's rights under the Implementation Agreement and so the Claimant is not in fact the statutory assignee of IPTL pursuant to the Implementation Agreement. Accordingly, it follows then that the Claimant has no right to bring this arbitration in its own name. According to the Respondent, in any case, the Implementation Agreement does not permit lenders to bring an arbitration, and the only nationality that should be considered would be as provided under Article 21.2 of the Implementation Agreement is IPTL's nationality.²⁵²
178. The Respondent further contends that under Article 21.2 of the Implementation Agreement (*i.e.* the arbitration clause), the Parties agreed that IPTL would be treated as a foreign entity as long as a foreign investor holds at least 35% of its voting stock. In its view, the question of nationality which must be assessed at the "*time of expressing consent to arbitration (i.e. when signing the Implementation Agreement)*" as well as when the request for arbitration was made in the case.²⁵³ It also asserts that as IPTL is now fully owned and controlled by a Tanzanian entity, namely PAP,²⁵⁴ ICSID's jurisdiction under Article 25 of the ICSID Convention could not be invoked as IPTL, as a Tanzanian national, is not "*a national of another contracting State.*"²⁵⁵
179. The Claimant says that it is an entity incorporated in Hong Kong and thus is a national of the People's Republic of China (a contracting State to the ICSID Convention). Further, it also argues as the Claimant is bringing this claim as the assignee of IPTL's rights under the Implementation Agreement, it is the Claimant's nationality, and not IPTL's nationality, that is relevant.²⁵⁶
180. The Claimant submits that "*foreign control*" under Article 25(2)(b) of the ICSID Convention is an "*objective condition*" and "*must be viewed on its own particular context, on the basis of all of*

²⁵² HB/A/003/144-370: Respondent's Counter-Memorial, paras. 203-204.

²⁵³ Respondent's PHB, para. 74 (citing Exhibit RL-158: *Vacuum Salt Products Ltd. v Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994).

²⁵⁴ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 203-204.

²⁵⁵ Respondent's PHB, para. 75.

²⁵⁶ HB/A/002/035-143: Claimant's Memorial, paras. 344-346.

*the facts and circumstances.*²⁵⁷ The Claimant adds that in any case, even though IPTL is a Tanzanian corporation, it would still fulfil this requirement because Article 25(2)(b) of the ICSID Convention extends the meaning of “*National of another Contracting State*” to include “[...] *any juridical person which had the nationality of the Contracting State party to the dispute ...on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*” The Claimant submits that pursuant to Article 21.1 of the Implementation Agreement the parties to the Implementation Agreement made such an agreement wherein it was set out that “[f]or purposes of consenting to the jurisdiction of the Convention, the Parties agree that the Company is a foreign controlled entity unless the amount of the voting stock in the Company held by Foreign Investors should decrease to less than thirty-five (35) percent of the outstanding voting stock of the Company.”²⁵⁸

181. The Claimant also points out that, Mechmar, a Malaysian entity, owns 70% of the shares in IPTL. It is the Claimant’s position that the transfer of the affairs of IPTL and the sums in the Escrow Account to PAP on the basis that PAP had purchased the Mechmar Shares was illegal and fraudulent. Any assertion by the Respondent that PAP has any valid interest in IPTL would be extraordinary as it would permit the Respondent to rely on its own wrongdoing.²⁵⁹ In response, the Respondent says that PAP was recognised as IPTL’s sole shareholder as per Utamwa J’s Order which took “*judicial notice*” of the VIP-PAP- SPA and transferred all affairs of IPTL to PAP. If the Tribunal accepts the Respondent’s argument that Utama J’s Order is effective, then IPTL would be under complete Tanzanian control for reasons that cannot be attributed to the Respondent and the Tribunal would then not have jurisdiction to assess the Claimant’s claims against it for the alleged violations, including the release of the Escrow Account.²⁶⁰

b. Tribunal’s Analysis

182. The Tribunal has discussed in paragraphs 172 to 175 above and reached the finding that the Claimant is the legal assignee of the Implementation Agreement. It follows that the Claimant

²⁵⁷ Claimant’s PHB, paras. 112-113.

²⁵⁸ HB/A/002/035-143: Claimant’s Memorial, paras. 346-347.

²⁵⁹ HB/A/004/371-603: Claimant’s Reply, paras. 381-385.

²⁶⁰ HB/H/311/4733-4748 at pgs. 4735-4736, 4747: Utamwa J Order, 5 September 2013; Respondent’s PHB, para. 75.

is entitled to enforce the rights thereunder in its own name. Being a Chinese entity, it is indisputably a “*National of another Contracting State.*”

183. In any event, as could be seen from the discussion in paragraphs 349 to 353 below, the Tribunal has found that the Order of Utamwa J of 5 September 2013 directing that control of IPTL, including the IPTL Power Plant, be handed to PAP had been made in curious circumstances, with no regard to the registered shareholder Mechmar or the consequences of permitting PAP to have control of the disposition of the Escrow Account.
184. The Tribunal finds that the Claimant satisfies the requirement of a “*National of another Contracting State*”, namely China.

(2) Whether the Dispute Arises out of an “Investment” within the Meaning of Article 25(1) of the ICSID Convention

a. Applicable Test for Determining the Meaning of Investment

(i) Parties’ Submissions

185. The Respondent’s case is that the Claimant does not have a qualifying “*investment*” within the objective meaning of investment for the purposes of Article 25(1) of the ICSID Convention. According to the Respondent, the Claimant merely purports to have acquired accounts receivables after the Facility was contracted for and built. The acquisition of the loan did not involve any expectation of receiving an economic return beyond the mere repayment of the loan with interest. The Respondent characterises the Claimant as a “*speculative debt-hunter*” and argues that speculative activities ought not to fall within the jurisdiction of an ICSID tribunal.²⁶¹ In the Respondent’s view, the nature of the dispute does not arise “*directly out of an investment.*”
186. The Respondent refers to the “*Salini test*” or “*Salini criteria*” (as set out in *Salini v Morocco*)²⁶² to suggest that there are essential characteristics for the notion of an “*investment*” under Article 25 of the ICSID Convention that all must be met to establish jurisdiction, which include “(1) *the investor’s participation in the risks of the transaction; (2) a substantial contribution by the investor; (3) a certain minimum duration; and (4) a signification*

²⁶¹ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 205-206.

²⁶² HB/G/054/5987-6002: *Salini Costruttori S.P.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001.

contribution to the host State's economic development."²⁶³ The Respondent argues that these conditions are not fulfilled in the present case and the purported acquisition of Term Loans 1 and 2 in 2005 does not constitute investment as per the objective criteria, and therefore there is no investment within the meaning of Article 25(1) of the ICSID Convention.²⁶⁴

187. The Respondent also refers *inter alia* to the decision on jurisdiction in *Consortium R.F.C.C. v Royaume du Maroc*²⁶⁵ to support its argument that the Parties cannot substitute the objective requirements of an investment under Article 25(1) of the ICSID Convention.²⁶⁶ The Respondent also refers to the Report of the Executive Directors on the ICSID Convention, which it submits indicates that the Parties' consent alone is not sufficient to establish jurisdiction under the ICSID Convention.²⁶⁷
188. The Claimant's position is that the *Salini Test* has no basis in the actual text of Article 25(1) of the ICSID Convention. The *Salini Test* cannot override party agreement for defining what constitutes an investment, even though it may be used to define the "outer limits" of what an investment means under Article 25(1) of the ICSID Convention. It submits that the principal legal framework to determine the existence of an investment should be the will of the Parties as set forth in the bilateral investment treaty or investment contract. It refers to the decision of *Pantechniki S.A. Contractors & Engineers v Republic of Albania*,²⁶⁸ to support its argument that the Respondent's approach based on the *Salini Test* can increase the risk of arbitrary and subjective value judgments by a Tribunal.²⁶⁹ The Claimant asserts that, at its highest, the *Salini Test* is an exemplary list of the typical features of an investment and not a mandatory checklist. The Claimant contends that several ICSID tribunals had refused to apply the *Salini Test* or have applied it in modified forms.²⁷⁰

²⁶³ Respondent's PHB, para. 79.

²⁶⁴ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 210, 226.

²⁶⁵ HB/G/088/9327-9360: *Consortium R.F.C.C. v Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001.

²⁶⁶ HB/A/005/604-827: Respondent's Rejoinder, para. 202.

²⁶⁷ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 208-209; HB/G/119/10570-10584 at pgs. 10578-10579: Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 25.

²⁶⁸ HB/G/337/16712-16736: *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, (Award), 30 July 2009.

²⁶⁹ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 337.

²⁷⁰ HB/A/004/371-603: Claimant's Reply, para. 392; See HB/G/021/1925-2002 at pg. 1992: *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 206; HB/G/022/2003-2157 at pgs. 2066-2067: *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No. ARB/10/13, Award, 2

189. The Claimant argues that the loan constitutes an investment pursuant to Article 25 of the ICSID Convention. Moreover, in the absence of a definition of “investment” in Article 25(1) of the ICSID Convention, the tribunals in the cases *Fedax N.V. v Republic of Venezuela*²⁷¹ (“*Fedax*”) and *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*²⁷² (“*CSOB*”) and *Alpha Projektholding GmbH v Ukraine*²⁷³ referred to the Parties’ definition of investment in the relevant “consent-giving” instrument (the bilateral investment treaty), which it submits is the proper test. The Claimant also rejected the Respondent characterising it as a “debt-hunter” by stating that this allegation goes to admissibility and is irrelevant to the jurisdictional issue of what constitutes an investment.²⁷⁴
190. According to the Claimant, the scope of its “investment” for purposes of ICSID Convention Article 25 could be made out from analysing the terms of the Implementation Agreement showing that the Project, the financing of the Project and related security granted in relation to it, form part of the overall investment.²⁷⁵
191. Additionally, the Claimant contends that the Parties included an ICSID arbitration clause in the agreement with the clear expectation that disputes under the Implementation Agreement would relate to a qualifying “investment” under the ICSID Convention. The Claimant points out that the Parties to the Implementation Agreement anticipated that the successors and assigns of the original lenders could become parties to the Implementation Agreement, including the ICSID arbitration clause.²⁷⁶

(ii) Tribunal’s Analysis

192. The Claimant has submitted that the Tribunal should apply a “subjective” test to consider if the Parties had under the terms of the Implementation Agreement accepted that the subject matter is an “investment”, whereas the Respondent submits that the Tribunal must also apply

March 2015, para. 197; HB/G/023/2158-2229 at pgs. 2218-2219: *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paras. 129-131.

²⁷¹ HB/G/002/021-033: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.

²⁷² HB/G/008/441-473: *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

²⁷³ HB/G/016/1222-1404: *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010.

²⁷⁴ HB/A/004/371-603: Claimant’s Reply, paras. 434-435.

²⁷⁵ HB/A/004/371-603: Claimant’s Reply, para. 408.

²⁷⁶ HB/A/002/035-143: Claimant’s Memorial, paras. 347-348, 357-358; HB/A/004/371-603: Claimant’s Reply, paras. 391-407.

an “objective” test to ascertain if the elements of an investment exist in order to establish jurisdiction under Article 25 of the ICSID Convention.

193. On the subjective test, the Claimant relies on the Respondent’s expressed consent in the Implementation Agreement to submit any dispute to ICSID²⁷⁷ under the ICSID Rules. Such a position is supported by several arbitral tribunals, which took the view that the consent of the State party as to what constitutes an investment is of primary importance. The tribunal in *CSOB*²⁷⁸ put it succinctly:

66[...] an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties. The Parties’ acceptance of the Centre’s jurisdiction with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.

67. The Tribunal must accordingly attach considerable significance to the reference made in Article 7 of the Consolidation Agreement to the BIT and thus to the ICSID arbitration clause contained therein (Article 8). The Parties’ acceptance of the relevance and applicability of the BIT to the Consolidation Agreement expresses their view that the latter transaction relates to an investment within the meaning of the BIT. The contrary conclusion would deprive the reference to the BIT in Article 7 of the Consolidation Agreement of its meaning or effet utile.

194. The Tribunal notes, however, that the Parties’ consent as reflected in the contract, while of great importance, could not be the only test and is not conclusive in resolving the issue of whether there is jurisdiction under Article 25 of the ICSID Convention. The subject matter of the dispute must nevertheless still be an investment as contemplated by the ICSID Convention and consent by the Parties alone could not subject an ordinary commercial transaction or political dispute or non-legal dispute to ICSID for resolution. This is expressed in the Report by the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States²⁷⁹ –

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a

²⁷⁷ HB/C/004/132-191 at pg. 182: Signed Implementation Agreement (without Schedules), 8 June 1995, Article 21.2.

²⁷⁸ HB/G/008/441-473 at pg. 464: *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras. 66-67 (emphasis added).

²⁷⁹ HB/G/119/10570-10584 at pgs. 10578-10579: Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 25.

dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

195. The Tribunal therefore accepts that for this aspect of jurisdictional competence two requirements must be met. First, that the subject matter of the dispute constitutes an investment within the meaning of Article 25 of the ICSID Convention. Second, that the Parties consented to such a dispute being submitted to ICSID and its Arbitration Rules.
196. With regard to the second part of the test, the Tribunal has little doubt that the parties to the Implementation Agreement had considered that the activity it was related to (being the construction and financing of the Facility) was an “*investment*” at the time it was entered into as they had expressly agreed to have all disputes arising thereunder to be submitted to ICSID and under the ICSID Arbitration Rules. The Tribunal is of the view that the second part of the test is satisfied.
197. The first part of the test requires a consideration of the elements that constitute an activity as an “*investment*” within the meaning of Article 25 of the ICSID Convention.

b. Elements of an “Investment” under Article 25 of the ICSID Convention

(i) Salini Test

198. The Tribunal notes that the *Salini Test* has indeed received a mixed following. For example, it was followed in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*;²⁸⁰ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*;²⁸¹ and *Ioannis Kardassopoulos v Republic of Georgia*.²⁸²
199. The following tribunals have taken a different approach:

²⁸⁰ HB/G/089/9361-9433 at pgs. 9395-9397: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 130-138.

²⁸¹ HB/G/090/9434-9473 at pgs. 9461-9462: *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 91.

²⁸² HB/G/092/9504-9576 at pg. 9538: *Ioannis Kardassopoulos v Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 116.

- In *Abaclat and others v Argentina*, the tribunal declined to follow the *Salini Test* and suggested that it should “[...] not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”²⁸³
- In *Biwater Gauff v Tanzania*, the tribunal remarked that “These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention [...] it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition [...].”²⁸⁴
- In *Philip Morris Brand Sàrl and others v Oriental Republic of Uruguay*, the tribunal said, “These criteria should not play a role in the Tribunal’s analysis of whether an investment exists, much less to serve as a jurisdictional requirement.”²⁸⁵
- In *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro (“MNSS B.V. v Montenegro”)*, the tribunal more generously suggested that the “[...] elements of the Salini test need to be considered flexibly and as a whole in the context of the specific facts of an investment operation.”²⁸⁶

200. The Tribunal agrees with the observations of the recent ICSID decisions, that the *Salini Test* is a reformulation of the criteria set out by the tribunals in *Fedax*²⁸⁷ and *CSOB*,²⁸⁸ with the additional requirement that there should be some economic contribution to the host country. These *Salini* factors are not to be taken as prescriptive or dispositive but merely as indicative of typical elements that the Tribunal could consider in determining whether the subject matter from which the dispute has arisen is an “investment” contemplated by the ICSID Convention. This flexible approach is consistent with the objective of ICSID Convention as set out in the Executive Director’s Report –

²⁸³ HB/G/017/1405-1688 at pgs. 1546-1547: *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 364-365.

²⁸⁴ HB/G/335/16325-16574 at pg. 16417: *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 312-313.

²⁸⁵ HB/G/021/1925-2002 at pgs. 1986-1987: *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paras. 185-187.

²⁸⁶ HB/G/014/898-1027 at pgs. 962-963: *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 189.

²⁸⁷ HB/G/002/021-033: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.

²⁸⁸ HB/G/008/441-473: *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

Nature of Dispute

26. Article 25(1) requires that the dispute must be a “legal dispute arising directly out of an investment.” The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).²⁸⁹

201. It is the Respondent’s case that the Claimant had not made an investment as contemplated by Article 25 of the ICSID Convention, alleging that: the Claimant assumed no operational risk, was involved in a transitory manner, did not make a substantial contribution and its involvement did not contribute to the economic development of Tanzania. In the Respondent’s view, the Claimant’s only link to the Facility was its acquisition of a “*purported claim to accounts receivables*” long after the Facility was financed and built.²⁹⁰
202. Before any discussion of whether these elements have been satisfied, it is necessary to recall the nature of the transaction and the dispute that had arisen.

a. Nature of the Transaction

(i) Parties’ Submissions

203. The Claimant contends that the Article 25(1) ICSID Convention “*investment*” requirement is met by the following elements:
- i. IPTL’s investment in the Facility;
 - ii. the Claimant’s loan to IPTL to finance the construction of the Facility;
 - iii. IPTL’s shares, over which the Claimant has exercised its right under the Charge of Shares to appoint a receiver; and

²⁸⁹ HB/G/119/10570-10584 at pg. 10579: Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, paras. 26-27 (emphasis in original).

²⁹⁰ HB/A/005/604-827: Respondent’s Rejoinder, para. 203.

- iv. the contractual rights under the Implementation Agreement, the PPA and other agreements assigned by IPTL to its lenders as security for the loan.²⁹¹
204. The Claimant submits that it is widely accepted that a loan will constitute an investment when it contributes or is closely related to an economic venture comprising an investment and relies on several cases to support this proposition, including *Fedax N.V. v Republic of Venezuela*,²⁹² *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*,²⁹³ *MNSS B.V. v Montenegro*²⁹⁴ and *Alpha Projektholding GMBH v Ukraine*.²⁹⁵ Further, the Claimant asserts that in the present case, the loan was essential to the construction of the Facility, as without the loan, the Facility would not have been built and the Facility was itself a significant project intended by the Respondent to develop Tanzania's infrastructure.²⁹⁶
205. The Claimant also points out that the Respondent admitted in its Memorial in the "**BIT Arbitration**" proceedings (*viz. Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No. ARB/10/12) that the original loan was an investment in Tanzania for the purposes of Article 25(1) of the ICSID Convention. Further it submits that the PPA Tribunal also dealt with the same issue and decided that it was satisfied that there was an investment by virtue of the Claimant's purchase of the debt under the loans to IPTL and assigning of the rights under the relevant agreements.²⁹⁷
206. The Claimant submits that the fact that the loan was transferred does not change its nature as an investment in the hands of the new lender and relies on various legal authorities

²⁹¹ HB/A/001/001-034: Request for Arbitration, paras. 120-122; HB/A/002/35-143: Claimant's Memorial, paras. 339-343, 360; HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 17, 298; Claimant's Reply PHB, para. 76.

²⁹² HB/G/002/021-033: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.

²⁹³ HB/G/008/441-473: *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

²⁹⁴ HB/G/014/898-1027: *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

²⁹⁵ HB/G/016/1222-1404: *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010.

²⁹⁶ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, paras. 374-375.

²⁹⁷ HB/A/002/035-143: Claimant's Memorial, paras. 374-378.

including *Fedax v Venezuela*,²⁹⁸ *MNSS v Montenegro*²⁹⁹ and *Abaclat v Argentina*³⁰⁰ to support this contention.³⁰¹

207. In its Reply, the Claimant refers to the decision in *African Holding v DRC*³⁰² to say that an assignment does not change the nature of the original investment and that once an investment has been acquired there is no further investment needed to be made to retain its nature. The Claimant submits that the assignment of a loan is an assignment of economic value of the work done and not paid, and the status of a loan as an investment is constant.³⁰³ It disagrees with the Respondent's suggestion that a mere transfer of a lender would deprive it of its status as an investment, despite the expressed provision in the Implementation Agreement recognising such transfer or assignment.³⁰⁴
208. The Respondent counters that the essence of the Claimant's claim is a claim for the repayment of the debt owed by IPTL, which the Claimant has dressed up as a frivolous discrimination and expropriation claim under the Implementation Agreement. Such a claim does not arise out of the Facility as investment because ultimately it is based on the Loan Facility Agreement between IPTL and the consortium of Malaysian banks which was acquired by the Claimant. Thus, it submits that the link to the Facility is too remote and irrelevant and could not clothe the Claimant as having been exposed to the risks attendant to the Facility.³⁰⁵
209. Further, the Respondent submits that the form and nature of the Claimant's activity does not constitute an investment under Article 25(1) of the ICSID Convention. The Respondent contends that, in a memorandum of July 1996,³⁰⁶ Mr Patrick Rutabanzibwa (as Commissioner for Energy and Petroleum Affairs) wrote that the Facility itself did not contribute to the

²⁹⁸ HB/G/002/021-033: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.

²⁹⁹ HB/G/014/898-1027: *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

³⁰⁰ HB/G/017/1405-1688: *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

³⁰¹ HB/A/002/035-143: Claimant's Memorial, paras. 381-385.

³⁰² HB/G/013/852-897: *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008.

³⁰³ HB/A/004/371-603: Claimant's Reply, paras. 424-433; HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 378.

³⁰⁴ HB/A/006/828-939: Claimant's Rejoinder on Jurisdiction, para. 382.

³⁰⁵ HB/A/003/144-370: Respondent's Counter-Memorial, para. 214; HB/A/005/604-827: Respondent's Rejoinder, paras. 212-217.

³⁰⁶ HB/H/011/027-267: Memorandum on the IPTL Power Project by Patrick Rutabanzibwa, 1 July 1996.

economic development of Tanzania and it also argues that what was needed in Tanzania at the time the Facility was contracted for, financed and built, was an emergency power project and not an onerous medium-term project.³⁰⁷

210. The Respondent argues that: first, the cases referred to by the Claimant in paragraph 204 above are not related to Article 25(1) ICSID Convention, but to the definition of “investment” in the relevant bilateral investment treaty applicable in each case; and second, that the cases relied upon by the Claimant recognize that a loan in itself is not an investment under the ICSID Convention if it is not linked to a process of value creation, or if it does not contribute substantially to the development of the host State. According to the Respondent, the Claimant’s purported acquisition of Term Loans 1 and 2 is not a loan that would constitute an “investment”, because it is not linked to a process of value creation as it is purely a commercial operation not different to those made by financial institutions.³⁰⁸
211. The Respondent says that any alleged admission or statement that was made in the BIT Arbitration was in the context of analysis concerning the bilateral investment treaty between Tanzania and the United Kingdom, and therefore it is not relevant to the present case.³⁰⁹ Further, the Respondent submits that the PPA Tribunal did not engage in analysis of the specific characteristics of an investment and therefore is not useful for the present case.³¹⁰
212. The Respondent contends that all the cases cited by the Claimant are inapposite to the facts of the present case.³¹¹ Further the Respondent asserts that the Claimant relies upon the expansive definitions of investment following the approach of *Fedax v Venezuela*, which has since been criticised by other tribunals and commentators.³¹²

(ii) Tribunal’s Analysis

213. As a starting point, the Tribunal takes the view that the construction and operation of an infrastructure project,³¹³ such as the Facility in Tanzania, is an investment, notwithstanding

³⁰⁷ HB/A/005/604-827: Respondent’s Rejoinder, para. 214.

³⁰⁸ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 225-226.

³⁰⁹ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 232.

³¹⁰ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 233.

³¹¹ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 234.

³¹² HB/A/003/144-370: Respondent’s Counter-Memorial, para. 228.

³¹³ The Respondent’s reference to *Mihaly v Sri Lanka* to suggest that even in a power plant project may not always be an “investment” is inappropriate. In that case, the parties were merely in the negotiation stages and no agreement was eventually entered into. HB/G/094/9597-9615: *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002.

that a senior member of the Tanzanian Government thought at one stage that the Facility did not contribute to the economic development of Tanzania. The provision of electricity from the Facility in the face of power shortages qualifies as an investment. Whether, in hindsight, that investment was optimal or could have been structured differently cannot alter its qualification as an investment.

214. The main thrust of the Respondent's arguments lies on the fact that:
- i. the Claimant was not the original Lender under the Financing Documents and the Implementation Agreement;
 - ii. the purchase of the Loan by the Claimant was not an investment; and therefore
 - iii. the assignment of any security created, including the rights under the Implementation Agreement could not be pursued by an ICSID arbitration.
215. The most critical issue that requires consideration is whether the purchase of the Loan by the Claimant in the circumstances of the case is in the nature of an "*investment*." This then requires an examination of whether there exists in this transaction, the various elements of risk, substantial contribution, minimum duration and arguably, economic development of Tanzania.

b. Risk

(i) Parties' Submissions

216. The Respondent suggests that the Claimant had assumed no "*operational risk*"³¹⁴ for when they took over the Loans, the Facility was already constructed and operating. In the Respondent's view, any risks attendant on the Loans were borne by the original lenders, as they were then exposed to the uncertainty as to whether the Facility would be completed before any income stream could flow. What the Claimant had assumed, according to the Respondent, was merely a "*commercial risk*" which exists in any transaction, and which in this case would be further ameliorated by the security which it enjoyed over the Facility and revenues of IPTL, giving the Claimant an ascertainable return. In its view, the Claimant's best outcome in taking over the loan "*did not go beyond the prospect of receiving an economic*

³¹⁴ HB/A/005/604-827: Respondent's Rejoinder, para. 224.

return through the repayment of the money loaned with interest”³¹⁵ and was nothing more than an exchange, with no value creation for the Facility.³¹⁶

217. The Claimant, on the other hand, argues that under the PPA, TANESCO agreed to pay IPTL the tariff stipulated in the PPA. It was envisaged that the loan would be repaid from the cash flows generated by IPTL under the PPA. The economic success of the Project was dependent upon IPTL receiving regular payments from TANESCO, and the support and non-interference of the Respondent. The Claimant therefore assumed not just the risk of non-payment of the debt, but also the risk of the success or failure of the Facility.³¹⁷

(ii) Tribunal’s Analysis

218. The concept of “commercial risk” has been distinguished from “investment risk” by the tribunal in *Romak v Uzbekistan*³¹⁸ in the following way –

229. All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.

230. An “investment risk” entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.

219. These remarks were adopted by an ICSID tribunal in *Poštová Banka v Greece*³¹⁹ which re-stated the term “investment risk” as “operational risk” and added that such is “not a

³¹⁵ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 226-227.

³¹⁶ HB/A/005/604-827: Respondent’s Rejoinder, para. 224; HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 226-227.

³¹⁷ HB/A/004/371-603 at pgs. 510-511: Claimant’s Reply, para. 411.

³¹⁸ HB/G/095/9616-9680: *Romak S.A. (Switzerland) v Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, paras. 229-230 (emphasis added).

³¹⁹ HB/G/058/6120-6237: *Poštová Banka a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras. 367-370.

*commercial risk or a sovereign risk*³²⁰ and expressed the view that its distinction is that an “operational risk” means that “profits are not ascertained but depend on the success or failure of the economic venture concerned [...]”³²¹ In that case, the tribunal had found that the “Greek Government Bonds” were issued for economically unproductive activity *viz.* for financing government operations, to meet general budgetary purposes and repaying government debts and no “operational risk” was present.

220. The Tribunal accepts that loans and financial instruments standing alone without any link to some economic venture intended to provide for the improvement of the State’s development would not be considered an “investment.” It follows that an assignment of loans merely as an income stream unconnected to any investment is not an “investment” in international investment law.³²²
221. Arbitral tribunals have on several occasions held that loans and financial facilities (whether in the form of direct loans, bonds or notes) issued by or undertaken in the context of financing an investment would qualify as investments under Article 25 of the ICSID Convention.³²³
222. There is no doubt in the Tribunal’s mind that there were clearly investment risks when the original Lenders extended the Loan to IPTL to finance the construction and operation of the Facility and that they had accepted those risks. What the Respondent contends is that the Claimant not being the original Lender, is not in a position to say that it carried any risk akin to that of the original Lenders.
223. On first principles, the Respondent’s suggestion ignores the fact that the Claimant has staked its claim as the assignee of the Loan and the lawful assignee under the Implementation Agreement (which the Tribunal has found in its favour – see paragraph 172 above). As assignee, the Claimant stepped into the shoes of the original Lenders. And as assignee the

³²⁰ HB/G/058/6120-6237: *Poštová Banka a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 369.

³²¹ HB/G/058/6120-6237: *Poštová Banka a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 370.

³²² HB/G/082/8364-8452: *Alps Finance and Trade AG v Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras 242-243.

³²³ See: HB/G/002/021-033: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (case of promissory notes), 11 July 1997; HB/G/008/441-473: *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (a case on assignment of non-performing loans); HB/G/014/898-1027: *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 (a case of the acquisition of shares and loans in the entities that had undertaken to extend loans).

Claimant became entitled to the rights of the original lenders, it also assumed the risks of the original Lenders. Much like the assignment of the loan in *MNSS B.V. v Montenegro*,³²⁴ the assignment of the loan changed the creditor under the Loan Agreement and the beneficiary under the Implementation Agreement but not the nature of the transaction. The substance of the Facility remains the same. The link between the Loan and the Implementation Agreement to the Facility and its continuing operations has not been broken. The risks undertaken by the original Lenders are now borne by the Claimant because the original Lender could not or would not be in a position to do so. Although the construction of the Facility was completed, the Claimant carries the continuing risks of the operation. There was no certainty that the Facility would run smoothly, or that the power generated would yield the projected revenue that could repay the outstanding loans. The risk of TANESCO not paying the tariffs and IPTL not being able to make the Power Plant available; and the political risk of interference by the Respondent with the Project, are not “ordinary commercial risk.” These risks subsequent to the assignment were clearly borne by the Claimant.

224. The Tribunal recognises that it is possible that the right of investment protection could be abused by a speculative debt hunter. An illustration of such an abuse can be seen in *Phoenix Action Ltd v Czech Republic*³²⁵ where the claimant purchased two insolvent companies that were embroiled in litigation not for any economic activity but for the sole purpose of bringing international litigation against the Czech Republic. The tribunal rightly declined jurisdiction as it found that “the whole ‘investment’ was an artificial transaction to gain access to ICSID.”³²⁶
225. The Tribunal does not accept the Respondent’s characterisation of the Claimant. The Claimant acquired the Loans from the original Malaysian banks following a re-structuring initiated by the Malaysian banking authority. The Claimant was the sole bidder willing to take over the Term Loan 1 (USD 92.547 million)³²⁷ and Term Loan 2 (8.236 million)³²⁸ and paid

³²⁴ HB/G/014/898-1027: *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016.

³²⁵ HB/G/057/6058-6119: *Phoenix v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

³²⁶ HB/G/057/6058-6119 at pg. 6115: *Phoenix v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 143.

³²⁷ HB/C/013/535-551 at pg. 548: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005.

³²⁸ HB/C/013/535-551 at pg. 548: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005.

USD 76.1 million³²⁹ on terms that it provided no recourse against the original Lender or the vendor. The fact that the Claimant had paid less than the principal outstanding due is in itself no basis to suggest that it was a “no risk” venture. The original loans were in fact re-structured in the hands of Danaharta to give the borrower more time to make repayment and a forgiving of part of the accrued interest, as well enabling the repayment of the outstanding due by IPTL to the Engineering Procurement and Construction (“EPC”) contractor, Wartsila NSD Nederland B.V.³³⁰

226. The Respondent’s suggestion that the Claimant’s expectation of receiving an economic return through the repayment of the money loaned with interest is indicative that it is a normal commercial transaction with usual commercial risks and nothing more, fails to account for the risks assumed in granting, maintaining and restructuring the loans in relation to the establishment and maintenance of the Facility.
227. The fact that the sale assets were described by the purchaser as “distressed” in fact indicates that the Claimant would be exposed to a higher risk than the original Lender. With no recourse to the original Lender,³³¹ the Claimant assumed all the attendant risks and obligations from the original Lender associated with the Facility as spelt out in the Sale and Purchase Agreement thus:

5. Assumption of Obligations

To the extent that the Vendor shall have obligations remaining to be performed under the Asset Documentation after the Closing Date as disclosed in writing by the Vendor or as contained and disclosed in the Accounts Information relating to the Sale Asset and/or to the extent there are any claims against and/or liabilities on the part of the Vendor in respect of or in connection with the Sale Assets on or after the Closing Date, the Purchaser hereby agrees to perform all such obligations and will indemnify the Vendor and each of their officers, directors, employees and advisors (“a Vendor Party”) and hold each of them harmless from and against any liability to or claim of liability by any third party on account of the failure of such obligations to be performed.³³²

³²⁹ The amount paid by the Claimant for was close to the asset valuation made by Danaharta’s financial advisors of USD 77.4 million. See HB/H/059/ 851-866 at pgs. 862-863: CIMB Ltd Credit Report, 30 August 2004; HB/C/013/535-551 at pg. 550: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005.

³³⁰ HB/H/032/621-628: Loan Management Paper for Approval; Ref: DMLL/LM/J3/2001/268, 11 October 2001.

³³¹ HB/C/013/535-551 at pg. 542: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005, Clause 10.

³³² HB/C/013/535-551 at pg. 539: Sale and Purchase Agreement for Loan Account – IPTL between Danaharta Managers and SCB, 4 August 2005, Clause 5 (emphasis in original).

228. Unlike the claimant in *Phoenix Action Ltd v Czech Republic*, who did nothing other than initiate ICSID arbitration shortly after it made the “investment”, the Claimant here was obliged and was fully engaged in undertaking the obligations as the Lender to IPTL by honouring its obligations to IPTL and the Facility. IPTL continued to make principal and interest repayments until April 2007 when it went into default.³³³ During that same period, GoT engaged the Claimant through its Tanzanian branch officers for the possibility of GoT taking over the loans from the Claimant³³⁴ and a “pretrade agreement” was said to have been signed off with GoT.³³⁵
229. In doing so, the Claimant carried the burden of the original Lender and it would be incorrect to term it as speculative debt. The original loans were required to build and maintain the Facility. The Facility provided a necessary public good. These loans entailed risk. That risk was borne by the original Lender and assumed by the Claimant. That suffices to establish that the Claimant’s acquisition of the loans qualifies as an investment.
230. The Tribunal is therefore satisfied that the Claimant was fully exposed to the investment risk inherent in this transaction.

c. Substantial Contribution

231. The Respondent says that there is no substantial contribution element as that requires contribution of technical know-how, equipment and services, which are absent in the present case.³³⁶
232. The Tribunal notes that the Claimant’s involvement in taking over the loans from Danaharta was made known to GoT more than one year before it occurred. In his report to the PS MEM reported that he was approached by SCB HK and informed of the Malaysian Government’s intention to close Danaharta’s operations and to find a taker for the loan accounts of IPTL. He reported that he had agreed to give support for such a move by SCB HK in exchange for a reduction in IPTL’s capacity charge following the re-financing. SCB HK then subsequently reported that a USD 200,000 per month reduction would be possible for a few years. According to the report, GoT intended to approach the Malaysian Government for assistance.

³³³ HB/H/488/7196-7215: SCB HK Loan Calculations.

³³⁴ HB/H/065/884: Email from Hemen Shah of SCB Tanzania to Andrew Hardacre of SCB HK and others, 17 August 2005; HB/H/067/886: Email from Hemen Shah of SCB Tanzania to Paul Jurie of SCB HK and others, 23 August 2005.

³³⁵ HB/H/069/889: Email from Paul Jurie of SCB HK to Sherazam Mazari of SCB UK and others, 17 October 2005.

³³⁶ Respondent’s PHB, para. 81.

GoT itself was also looking at ways to take over the Facility and had broached the possibility of funding from the World Bank:

20. During the negotiations for the Emergency Power Supply Project which were held with the World Bank in April-May, 2004, the Tanzania delegation to those negotiations formally requested the World Bank's assistance in buying out or otherwise dealing with IPTL's lenders and shareholders so that the burden of the project's capacity charges can be reduced. The World Bank ruled out the possibility of providing funds with which the Government could purchase the IPTL plant, but undertook to look into whether it could identify risk mitigation arrangements and funding sources which could help address the problem. The World Bank undertook to discuss with its affiliates MIGA and IFC to this end, and revert to the Government.³³⁷

233. The report recommended that GoT support SCB's bid to take over the Loan –

19. Standard Bank has suggested that the Government allows the re-financing of IPTL's debt to proceed as a first step. After a few years, when (i) TANESCO's ability to pay both IPTL and Songas has been demonstrated and (ii) the IPTL shareholders' respective rights have been confirmed by the courts, perceived risks about IPTL will diminish and it may be possible to do another re-financing as a second step which would result in a more significant reduction in the capacity charge. It is evident that the perceived risks currently surrounding IPTL are a hindrance to negotiating a meaningful reduction in the capacity charge.

[...]

26. [...] (ii) The Ministry should respond positively to Standard Bank's proposals for re-financing IPTL in two phases (as described in paragraph 19 above) but (a) seek more time to contact the Malaysian government and (b) require the re-financing arrangements to anticipate a second phase which may involve the purchase of the IPTL plant and the possible participation of other financiers including the World Bank or its affiliates.³³⁸

234. There is no doubt that GoT viewed SCB HK's involvement as positive and necessary. There was need for more power generation. GoT wanted a reduction in the capacity charge, but at a reduced cost and IPTL was under-capitalised. GoT had hoped to take control of the Facility or for someone to take over the role of the Lenders. While it is true that the money paid by

³³⁷ HB/H/055/835-844 at pg. 840: Brief on IPTL issues from Patrick Rutabanzibwa to Minister of Energy, 6 July 2004, para. 20.

³³⁸ HB/H/055/835-844 at pgs. 840, 842: Brief on IPTL issues from Patrick Rutabanzibwa to Minister of Energy, 6 July 2004, paras. 19, 26.

SCB HK did not go directly into the Facility, but to Danaharta, SCB HK's involvement brought stability and enabled the Facility to continue operating. All this occurred at a time when TANESCO had disputes with IPTL, had delayed, withheld or threatened to withhold payment to IPTL, thereby triggering possible default.³³⁹ Danaharta could have recalled the loan or refused to re-structure the same. GoT saw the need for SCB HK to take over the loan to enable it to gain time to consider other possible options including funding from the World Bank to take over thereafter.

235. Unlike the case of *Phoenix Action Ltd v Czech Republic*, the Claimant here had paid a discounted but nevertheless substantial sum (USD 76 million) to take over the loans from Danaharta. By doing so, IPTL did not need to seek alternative funding and could continue to operate the Facility. In the Tribunal's view, these facts indicate that the Claimant made a substantial contribution to the Project and to the Respondent.

d. Minimum Duration

236. The Tribunal notes that the Claimant had taken over a commitment to maintain the Loans for a period of up to 10 years. The Facility was intended to be operational for more than 20 years. Such duration is not short by any measure. The Respondent argues however that the Claimant "*could have sold its debt through a financial transaction*" and that the Claimant had admitted through its witness Mr Casson that it had attempted to do so, albeit unsuccessfully. The Respondent submits that the Claimant's commitment fails the "*non-transitory commitment*" to the host State.
237. The Tribunal finds such a criticism quite misplaced. The nature of the Project and the long-term financing arrangement speak for themselves. Mr Casson indeed said that he was in discussion with Mr Sethi and had signed a Memorandum of Agreement on 25 November 2011 for an exit from the loan for a discounted sum of USD 75 million (when the amount outstanding then was USD 128 million). It was however clear from his witness statement³⁴⁰ and oral testimony³⁴¹ that Mr Casson had decided to exit when he felt frustrated by the discriminatory treatment meted out to SCB HK rather than executing what SCB HK had always planned to do so. In his report seeking approval for this arrangement, he stated:

³³⁹ HB/H/056/845-846: Letter from Minister of Energy and Minerals to TANESCO, 8 July 2004.

³⁴⁰ HB/F/004/052-125 at pgs. 91-93: Witness Statement of Joseph Wesley Casson, 15 November 2017, ("**Casson WS**"), paras. 156-162.

³⁴¹ Tr. Day 4 [820:12-823:11].

From the negotiation with Sethi, SCB has signed a Memorandum of Agreement (MOA) on 24 November, on a non-binding basis and subject to credit approval to pencil down a proposal for a one-off payment of US\$75m for the Bank to exit the loan [...]. SCB will then withdraw international arbitrations against GOT and TANESCO. The Bank has been advised the MOA has shown to GOT and the Attorney General by Sethi to request time for finalizing settlement, instead of liquidating IPTL.

[...]

Regarding to settlement risk, it is uncertain to access the availability of the escrow amount of US\$85m, otherwise, how GOT secure sufficient funding for settlement. Local contacts advise TANESCO may inject more to top up escrow funds for a global settlement.³⁴²

238. Quite clearly this was an attempt to resolve the disputes with the other parties globally so that the Claimant could get out of the difficulties they found themselves in over the years (from 2005 to 2011), and not an indication that the Claimant had only intended a transitory holding of the loan portfolio.

239. The Tribunal is satisfied that the Claimant's commitment was non-transitory.

e. Contribution to the Economic Development of Host State

240. This factor is one of the more controversial of the elements suggested by the *Salini* tribunal. As expressed earlier, the Tribunal shares the view articulated by tribunals in recent cases that this element is not a strict requirement but will nevertheless consider this feature as presented by the Respondent.

241. Contribution to the host State's economic development is of course the desired outcome of any foreign investment and the basis for the promotion of foreign investment underlying of the ICSID Convention. As one author reasoned –

Hence, investments not devoted to productive purposes, such as those undertaken for speculative purposes and those that do not develop the productive resources of the host State without positive impact on the productivity or increase the standards of living or labor conditions, could be considered to be beyond the outer limits of ICSID.³⁴³

³⁴² HB/H/203/2622-2624 at pg. 2623: Memorandum from Joe Casson to Joe Stevens, Ivo Philipps and Jake Williams entitled "Divestment of Senior Loan to Independent Power Tanzania Limited (IPTL) Approval Request", 29 November 2011.

³⁴³ HB/G/122/10647-10672 at pg. 10658: Omar E. García-Bolívar, *Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach*, 2(1) TRADE LAW & DEVELOPMENT 145 (2010).

242. The Respondent submits that what is required to be shown is not whether the Facility or the original loan that funded the facility contributed to the economic development of the host State, but rather whether the Claimant's purported acquisition of the Term Loans 1 and 2 made such contribution and added to Tanzania's economic development.
243. The Respondent sets out the circumstances under which the Claimant made the acquisition from Danaharta, a Malaysian Government owned asset management company created to remove non-performing loans. It contends that the purchase provided no benefit to the Respondent State. Rather it was a simple commercial transaction with only the recovery of money in mind. The Respondent points out that there was not a single drawdown by IPTL after the Claimant became the sole lender to underscore the point that SCB HK brought with it no economic benefit to Tanzania.³⁴⁴
244. The Respondent has repeatedly described the Claimant as "nothing more than a speculative and bad faith endeavour which did not contribute to the economic development of Tanzania[...]"³⁴⁵ It submits that had SCB HK not bought the loans from Danaharta it "would not have entailed a disruption of the Facility" as at the time of acquiring the loan the Facility "had already been financed and built and was already operating",³⁴⁶ it therefore reasoned that the Claimant did not "primarily and directly" contribute to the economic development of Tanzania.³⁴⁷ The Respondent has also pleaded that the Claimant's acquisition of the loan outside Tanzania was evidence of the speculative nature of the Claimant's activities.³⁴⁸
245. As stated earlier, the Tribunal notes that the original loans were re-structured when IPTL had difficulty meeting repayments, due to TANESCO's challenging the calculation of the capacity charges and in delaying or withholding making such payments to IPTL. The acquisition of the loan by SCB HK from Danaharta assured IPTL, TANESCO and GoT of the continuing availability of financial support for the operation of the Facility. The support of GoT for SCB HK's taking over of the loans from Danaharta is in the Tribunal's view the acceptance by GoT that SCB HK's involvement would contribute to the economic development of Tanzania. SCB

³⁴⁴ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 25, 139, 206.

³⁴⁵ HB/A/003/144-370: Respondent's Counter-Memorial, para. 9(ii).

³⁴⁶ Respondent's PHB, para. 83; In its submission, the Respondent attributed this suggestion to a member of the Tribunal in Tr. Day 4 [839-840]. A reading of the portion of the transcript referred to (Tr. Day 4 [839:6-840:10]), shows this to be incorrect. No member of the Tribunal made any such suggestion.

³⁴⁷ Respondent's PHB, para. 83.

³⁴⁸ HB/A/003/144-370: Respondent's Counter-Memorial, para. 237.

HK's support in taking over and maintaining the availability of the loans was even more critical when GoT realized that its hope of World Bank funding was not forthcoming.

246. The Tribunal is satisfied that far from being a speculative transaction, SCB HK stepped in when no others would. If the element of contribution to economic development is required to be shown, the Claimant has satisfied the same.

c. Alternative Arbitral Forum in the Implementation Agreement

(i) Parties' Submissions

247. The Respondent in its Counter-Memorial adds to its challenge that the presence of the ICC arbitration clause in Article 21.2 of the Implementation Agreement reinforces the notion that the Tribunal does not have jurisdiction under the ICSID Convention in this case.³⁴⁹

248. Article 21.2 of the Implementation Agreement provides after the reference to ICSID arbitration that –

... If for any reason the Dispute cannot be settled in accordance with the ICSID Rules, whether if the GOT fails to implement the Convention, or if the Company should not be agreed to be a foreign controlled entity, or if the request for arbitration proceedings is not registered by the Centre, or if the Centre fails or refuses to take jurisdiction over such Dispute, or otherwise, any 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.

249. The Respondent submits that the provision of such an alternative arbitral forum was included because the Parties had doubts as to whether their transaction would qualify as an investment, especially in view of the possibility that the rights could be assigned, upon approval of the Respondent, to other entities.³⁵⁰ The Claimant responds that there is a hierarchy established in Article 21.2 of the Implementation Agreement between the “*ICSID arbitration clause and the ICC arbitration clause*” wherein the former applies to any dispute

³⁴⁹ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 242-245.

³⁵⁰ HB/A/005/604-827: Respondent's Rejoinder, paras. 231-232; Respondent's PHB, para. 82; HB/A/003/144-370: Respondent's Counter-Memorial, paras. 243-244 - The Respondent cited a passage from HB/G/118/10560-10569 at pg. 10569: Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *THE ICSID CONVENTION: A COMMENTARY* (2nd ed., Cambridge University Press 2009) (excerpts).

or difference between the Parties and the latter is “*subsidiary*” and applicable only when for any reason the Dispute cannot be settled by ICSID Rules.³⁵¹

(ii) Tribunal’s Analysis

250. The Tribunal agrees that parties have made this proviso in anticipation that certain disputes may not fall within the general jurisdiction of ICSID and, if that should happen, those should then be referred to ICC arbitration. The text of the proviso sets out the various scenarios contemplated by the parties namely, *viz.* Tanzania fails to implement the ICSID Convention, or if IPTL is not a foreign-controlled entity, or if ICSID fails to register the dispute or a tribunal refuses to take jurisdiction. There is, however, no room to infer by reverse reasoning that the parties have by making such a proviso accepted or anticipated that an assignment of rights would trigger a reference to the alternative arbitral forum. The Tribunal’s reading is simple, the proviso is an expression of the parties’ intention to have their disputes referred to institutional arbitration and not to a national court such that if for any reason this Tribunal declined jurisdiction, the Claimant would be at liberty to seek relief from the alternative forum. The proviso in Article 21.2 of the Implementation Agreement does not therefore add support the Respondent’s argument in any manner.

(3) Tribunal’s Decision on Jurisdiction under Article 25 of the ICSID Convention

251. Following the Tribunal’s consideration of the various elements of the Claimant’s undertaking, including maintaining the loans for the benefit of IPTL and the Facility, the Tribunal finds that this is a legal dispute arising out of an investment and that it has jurisdiction under Article 25 of the ICSID Convention. Neither the Project, nor its individual elements, ceased to be an investment merely because the identity of the Lender under the Facility Agreement has changed or that no further drawdown of funds were made following the transfer. The fact is that the Facility continued to enjoy the use of the funds earlier disbursed following the change of the Lender. The Tribunal is also satisfied that the Claimant is the rightful party to maintain such claim as an absolute assignee who is entitled to enforce the rights thereunder in its own name. Being a Chinese entity, it is indisputably a “*National of another Contracting State.*”

252. In these circumstances, the Tribunal therefore holds that the *ratione personae* and *ratione materiae* jurisdiction elements under Article 25 of the Convention are fully satisfied.

³⁵¹ HB/A/004/371-603: Claimant’s Reply, paras. 402-403.

VI. LIABILITY

A. EXPROPRIATION CLAIM UNDER ARTICLE 16 OF THE IMPLEMENTATION AGREEMENT

253. The Claimant's claim for expropriation hinges on the undertaking given by GoT in Article 16 of the Implementation Agreement.
254. Under Article 16.1 of the Implementation Agreement, GoT is expressly prohibited from certain specific actions, namely:

16.1 Assurance Against Discriminatory Action

*The GOT shall not take any discriminatory action which materially and adversely affects the Project or the performance of the Company's obligations or the enjoyment of its rights or the interests of the Investors under the Security Package or expropriate or, except as hereinafter provided, acquire the Facility or the Company, whether in whole or in part. Nothing in the foregoing shall apply to any actions taken by the GOT, TANESCO, or any Governmental Authority pursuant to their respective rights and obligations arising under this Agreement, the Power Purchase Agreement and the other documents comprising the Security Package.*³⁵²

255. Under Article 16.2 of the Implementation Agreement, GoT undertook not to expropriate or nationalise the assets of the IPTL:

16.2 Acquisition of Shares or Assets

*Subject to Article 20. 1, the GOT undertakes to the Company that neither it nor TANESCO or any Governmental Authority will expropriate, compulsorily acquire, nationalise, or otherwise compulsorily procure any Ordinary Share Capital or assets of the Company [...].*³⁵³

(1) Scope of Expropriation Under Article 16.2 of the Implementation Agreement

a. Parties' Submissions

256. The Claimant submits that the term "expropriate" in Article 16.2 of the Implementation Agreement should be given the meaning as understood under international investment law. According to the Claimant, the term must be read in the context of the factual background, including that: (i) the Implementation Agreement was part of a suite of agreements entered

³⁵² HB/C/005/192-267 at pg. 219: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995, para 16.1(emphasis added).

³⁵³ HB/C/005/192-267 at pg. 219: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995, para 16.2 (emphasis added).

into to support a significant foreign investment in Tanzanian infrastructure; (ii) the purpose of the Implementation Agreement was to provide investment protection to IPTL and its debt and equity investors; (iii) the language of Article 16.2 of the Implementation Agreement is broad and there is no definition of “*expropriation*”, albeit there is a prohibition of the same by any “*Governmental Authority*”, which is defined by Article 1.1. of the PPA, and could include executive, legislative, administrative or judicial acts; and (iv) as there is an ICSID arbitration clause, there was an intent that the term “*expropriate*” would have the meaning attributed to it by ICSID tribunals.³⁵⁴

257. The Claimant similarly submits that the Parties’ agreement on the meaning of “*expropriate*” under the Implementation Agreement is not prohibited by Tanzanian Law, and expropriation can have a meaning independent of the statutory protection in Section 22 of *The Tanzanian Investment Act, 1997*. Furthermore, according to the Claimant, claims for indirect, creeping expropriation and measures tantamount to expropriation are contemplated by *The Tanzanian Investment Act, 1997* and the *National Investment (Promotion and Protection) Act, 1990*, as they reference investment treaties, which commonly encompass such broad notions of expropriation.³⁵⁵ Moreover, the Claimant underscores that it is not bringing a claim under domestic legislation, so the only matter that the Tribunal needs to determine is the meaning of “*expropriation*” under the Implementation Agreement.³⁵⁶

258. The Claimant submits, in the alternative, that even if Article 16.2 is construed to give the term “*expropriate*” a narrow meaning, the Tribunal should nonetheless consider international investment law protections against expropriation, which the Claimant contends cannot be disregarded.³⁵⁷ As support for this premise, the Claimant cites *Caratube v Kazakhstan*, for example, where the tribunal concluded that protections under international investment law could not be ignored even when parties have chosen domestic law to apply.³⁵⁸

³⁵⁴ HB/A/004/371-603: Claimant’s Reply, paras. 537-539; Claimant’s PHB, para. 119.

³⁵⁵ Claimant’s PHB, paras. 123-126.

³⁵⁶ Claimant’s PHB, para. 127.

³⁵⁷ HB/A/004/371-603: Claimant’s Reply, paras. 544-545.

³⁵⁸ HB/A/004/371-603: Claimant’s Reply, paras. 546-547.

259. With respect to the elements of expropriation, citing prior ICSID cases,³⁵⁹ the Claimant submits that expropriation does not require a benefit to accrue to the State.³⁶⁰ Moreover, the Claimant contends that judicial acts may constitute expropriation. The Claimant submits that Article 16.2 of the Implementation Agreement anticipates expropriation through judicial acts as it explicitly prohibits expropriation by any “*Government Authority*”, which, according to Article 1.1 of the PPA, includes any “*court, judicial or administrative body.*”³⁶¹
260. In the Claimant’s view, the test for judicial expropriation is the same as any other form of expropriation: expropriation occurs when the act complained of results in a substantial deprivation of a property right or benefit of a property right.³⁶² The Claimant underscores that the expropriation standard is distinct from a denial of justice and that there is consequently no requirement for judicial acts to be “*tainted by a denial of justice.*”³⁶³ Similarly, the Claimant contends that there is no requirement to exhaust local remedies before pursuing a claim for expropriation by the judiciary.³⁶⁴
261. With regard to the Respondent’s argument that the Claimant did not possess property rights that could be subject to expropriation, the Claimant explains that the Implementation Agreement is different from a bilateral investment treaty and that its claims are not for any property rights which it or Mechmar holds. Rather the Claimant is claiming a breach of the contractual undertaking not to expropriate the Ordinary Share Capital and assets of IPTL as listed in Article 16.2 of the Implementation Agreement.³⁶⁵
262. GoT submits that Article 16.2 of the Implementation Agreement is subject to Tanzanian law, and it must therefore be interpreted and construed in accordance with Tanzanian law.³⁶⁶ Under the Law of Tanzania, the concept of “*expropriation*” is limited to a form of “*lawful expropriation, enacted through a legislative act, entailing a dispossession of the expropriated*

³⁵⁹ HB/G/003/034-068: *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103; HB/G/004/069-149: *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 113; HB/G/005/150-328: *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 604.

³⁶⁰ HB/A/004/371-603: Claimant’s Reply, paras. 554-562.

³⁶¹ HB/A/004/371-603: Claimant’s Reply, paras. 563-571.

³⁶² Claimant’s PHB, para. 134.

³⁶³ Claimant’s PHB, paras. 136-138.

³⁶⁴ Claimant’s PHB, paras. 139-142; HB/A/004/371-603: Claimant’s Reply, paras. 572-577.

³⁶⁵ Claimant’s PHB, paras. 116-118.

³⁶⁶ Respondent’s PHB, para. 114.

party and a correspondent taking of the property by the State against compensation of the expropriated party".³⁶⁷ Moreover, although the Claimant argues that the definition of "Governmental Authority" in the Implementation Agreement includes any "court, judicial or administrative body", this definition must still be interpreted in light of Tanzanian law, which does not recognize judicial expropriation.³⁶⁸

263. GoT says that the Constitution of Tanzania protects personal rights to property, and that special Tanzanian laws in particular Section 22 of *The Tanzania Investment Act, 1997* and Section 28 of the *National Investment (Promotion and Protection) Act, 1990* speak only to this form of legal expropriation and no other form such as "indirect, judicial or creeping expropriation to the benefit of third private parties and with no benefit whatsoever accruing to the State."³⁶⁹

264. The provisions relied upon by the Respondent are:

i. *National Investment (Promotion and Protection) Act, 1990, Section 28:*

*28.-(1) No approved enterprise, or any property belonging to any person shall be compulsorily taken Possession of, and no interest in a right over such enterprise or property shall be compulsorily acquired except for public interest and after due process of the law.*³⁷⁰

ii. *The Tanzania Investment Act, 1997, Section 22:*³⁷¹

22(1) [...] (a) no business enterprise shall be nationalised or expropriated by the Government, and

(b) no person who owns, whether wholly or in part, the capital of any business enterprise shall be compelled by law to cede his interest in the capital to any other person.

(2) There shall not be any acquisition, whether wholly or in part of a business enterprise to which this Act applies by the State unless the

³⁶⁷ Respondent's PHB, para. 115.

³⁶⁸ HB/A/005/604-827: Respondent's Rejoinder, para. 268.

³⁶⁹ Respondent's PHB, para. 115.

³⁷⁰ HB/G/182/13157-13193 at pg. 13178: *The National Investment (Promotion and Protection Act) (Tanzania)*, Part V, 19 June 1990.

³⁷¹ HB/G/176/12866-12886 at pg. 12881: *The Tanzania Investment Act 1997*, Official Gazette No. 40, Vol. 78, Acts Supplement No.7, 3 October 1997.

*acquisition is under the due process of law which makes provision for -
(a) payment of fair adequate and prompt compensation [...]*

265. The Respondent further refutes the Claimant's submission that Section 23 of *The Tanzania Investment Act, 1997*, which references bilateral investment treaties, was meant to incorporate the wider concept of expropriation under those instruments as that provision merely states the obvious: that investors with bilateral investment treaties have access to arbitration; but Section 23 does not purport to incorporate the bilateral investment treaties definition of expropriation.³⁷²
266. The Respondent submits that Article 16.2, read with Article 20.1 of the Implementation Agreement, presupposes a direct taking of the Facility by GoT³⁷³ and that in all such cases, compensation would be payable by GoT in accordance with the formulae set out in Schedule 2 thereof, which corresponds with the value of the Facility taken over. GoT concedes that there is no specific reference to a "*transfer of the Facility*" to GoT specified under Article 20.1(d) of the Implementation Agreement ("*expropriation*"), but says that it would be unfair to GoT to have to pay compensation for the value of the Facility without the transfer of the Facility to GoT and therefore it must be inferred that GoT must have already acquired the Facility. It therefore concludes that in all situations, GoT must have directly acquired possession of the Facility, *viz.* that GoT has taken over the Facility or acquired shares in IPTL, neither of which have in fact occurred as the Facility remains owned by IPTL, a private legal entity.³⁷⁴
267. The Respondent also submits that because the compensation for expropriation, which is under row 4 of Schedule 2 of the Implementation Agreement, is less than compensation for contractual breaches under Row 2 of Schedule 2, the remedy contemplated under Article 20.1(d) of the Implementation Agreement must be a reference to "*lawful expropriation*" otherwise "*it would make no sense for the Government to escape the obligation to pay a higher compensation as ordinarily due in case of breaches of the Implementation Agreement.*"³⁷⁵

³⁷² Respondent's PHB, para. 115.

³⁷³ Respondent's PHB, para. 117. Except in the situation under Article 20.1(d), Implementation Agreement.

³⁷⁴ Respondent's PHB, paras. 113, 117.

³⁷⁵ Respondent's PHB, para. 118.

268. The Respondent objects to the Claimant's attempt to incorporate international law, ignoring the specific applicable law clause that designates Tanzanian law. The Respondent counters that scholars have confirmed international law cannot be imported where there is a specific municipal law in the contract. Moreover, the Respondent points out that in addition to the ICSID clause, there is also an ICC clause in the contract.³⁷⁶ The Respondent similarly rejects the Claimant's argument based on Article 42 of the ICSID Convention to take into account international law, as this provision only applies where there is no party agreement, and in this case the Parties agreed to the application of Tanzanian law.³⁷⁷ The Respondent argues that not taking Tanzanian law into account would be a ground for annulment.³⁷⁸
269. In addition, the Respondent contends that even under an international law standard, the Claimant's case fails as the State has not received either a direct or indirect benefit from the alleged expropriation. The Respondent further argues that another flawed aspect of the Claimant's case is that the Claimant only holds security rights, which do not constitute property rights that can be expropriated.³⁷⁹
270. The Respondent submits that even if international investment law were applicable, the Claimant's case on judicial expropriation would fail as its case relates only to a few judicial decisions, not to the judiciary as a whole.³⁸⁰ In the Respondent's view, under international law, for a judicial act to constitute expropriation it "*cannot simply be illegal but the proceedings leading up to said act must amount to denial of justice*", which necessitates the exhaustion of local remedies.³⁸¹ Moreover, the Respondent asserts that there can be no judicial expropriation when the "*frustrations suffered by the investors in local courts were due to their own procedural errors*", which the Respondent submits is the case here.³⁸²

³⁷⁶ Respondent's PHB, paras. 120-121.

³⁷⁷ Respondent's PHB, para. 122.

³⁷⁸ HB/A/005/604-827: Respondent's Rejoinder, para. 262.

³⁷⁹ HB/A/005/604-827: Respondent's Rejoinder, paras. 264-265.

³⁸⁰ HB/A/005/604-827: Respondent's Rejoinder, para. 267; HB/A/003/144-370: Respondent's Counter-Memorial, para. 307.

³⁸¹ HB/A/005/604-827: Respondent's Rejoinder, para. 270; HB/A/003/144-370: Respondent's Counter-Memorial, paras. 306-307.

³⁸² HB/A/003/144-370: Respondent's Counter-Memorial, para. 307.

b. Tribunal's Analysis

271. The term “*expropriate*” was used twice in Article 16 of the Implementation Agreement, but it has not been specifically defined. As the Implementation Agreement is expressly subject to Tanzanian law,³⁸³ the Tribunal has some difficulty accepting the logic of GoT’s argument, that Tanzanian law recognises only legal expropriation with compensation and therefore what was allegedly done by GoT could not be “*expropriation*” as contemplated in Article 16 of the Implementation Agreement. In other words, GoT appears to contend that Article 16 of the Implementation Agreement is an undertaking by GoT not to expropriate legally and not a prohibition against expropriating illegally. Perhaps, realising the strained logic in its submission, the Respondent subsequently accepted that “[t]his does not mean that cases of unlawful expropriation would be unable to give rise to the Government’s liability but simply that IPTL or its valid assignees would have no action under the Implementation Agreement for any event of unlawful expropriation [...]”³⁸⁴
272. The Tribunal does not consider it plausible that the parties would have entered into the Implementation Agreement with protections for IPTL that went no further than lawful expropriation under Tanzanian law. In the Tribunal’s view, this argument is obviously flawed and must be rejected.
273. The Constitution of Tanzania provides in Article 24 that –
- (1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.*
- (2) Subject to the provisions of subarticle (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.*³⁸⁵
274. The Constitutional position is that to deprive someone of its property, whether for purposes of “*nationalization or any other purposes*”, “*fair and adequate compensation*” must be provided to the person so deprived. This overarching protection is extended to foreign businesses under specific Tanzanian legislation (*viz. The Tanzania Investment Act, 1997 and National*

³⁸³ HB/C/005/192-267 at pg. 251: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995, Article 24.8.

³⁸⁴ Respondent’s PHB, para. 118.

³⁸⁵ HB/G/175/12775-12865 at pg. 12794: The Constitution of the United Republic of Tanzania, 1977, Article 24.

Investment (Promotion and Protection) Act, 1990), which provide that “no interest in a right over such [...] property shall be compulsorily acquired [...]” and any acquisition of a “business” [...] “whether wholly or in part”, of a foreigner by GoT is permitted³⁸⁶ only after due process of law and with adequate compensation being given. The law also expressly provides protection for an investor against being “compelled by law to cede his interest in the capital to any other person.”³⁸⁷ This means that any form of interference with the rights of foreign investors, whether by dispossessing or disempowering them of their lawful exercise over the investment or related security, would be unlawful expropriation and expressly prohibited. The granting of protection to foreign investment is in the interest of Tanzania. GoT’s acceptance of the prohibition against expropriation (which it is in any event legally bound not to do under Tanzanian law) under Article 16.1 of the Implementation Agreement and its undertaking not to expropriate under Article 16.2 of the Implementation Agreement, do not violate and is in fact fully consistent and compliant with the Tanzanian Constitution and the investment laws.

275. The Preamble in the Implementation Agreement sets out clearly that it was given to encourage the public-private sectors’ cooperation to build the Facility for generating electricity for the national grid. The Implementation Agreement speaks of foreign investors, lenders, foreign currency, etc. The reference by GoT, to the use of the notion of “*expropriation*” in *The Tanzania Investment Act, 1997* and the *National Investment (Promotion and Protection) Act, 1990* shows that the term is intended as a protection against compulsory acquisition given in relation to foreign investments in Tanzania. Both pieces of legislation make specific reference to ICSID. In the Tribunal’s view, both Tanzanian legislations are clearly intended to reflect what is usually understood and accepted in international law, in particular in the application of the ICSID Convention and investment treaties, which was the context in which these laws on foreign investment were enacted. Similarly, the term “*expropriate*” as used in the text of Article 16, not being qualified in any manner must be given its ordinary meaning *viz.* it includes both direct and indirect expropriation as understood in international law.

³⁸⁶ This requirement under the National Investment (Promotion and Protection) Act 1990, Section 28 was omitted under the later The Tanzania Investment Act 1997, Section 22; HB/G/182/13157-13193 at pgs. 13178-13179; The National Investment (Promotion and Protection Act) (Tanzania), Part V, 19 June 1990; HB/G/176/12866-12886 at pg. 12881: The Tanzania Investment Act 1997, Official Gazette No. 40, Vol. 78, Acts Supplement No.7, 3 October 1997, Section 22.

³⁸⁷ HB/G/176/12866-12886 at pg. 12881: The Tanzania Investment Act 1997, Official Gazette No. 40, Vol. 78, Acts Supplement No.7, 3 October 1997, Section 22.

276. The right to be protected against expropriation in the international context is a right given by host States to ensure foreign investors enjoy protection against involuntary deprivation or dispossession of an investor's property or property rights. Expropriation may be expressly permitted and thereby lawful if it is made pursuant to Tanzanian law, for public purposes, and subject to due process and adequate compensation. The clearest example of a direct expropriation is when a host State takes over the project, the facility, or its management directly and runs it as a State enterprise; or when the host State compulsorily acquires the controlling shares of the investor company. Expropriation can also be achieved indirectly, where no actual outright seizure or taking of property by the State occurs but actions attributable to a host State (whether directly or indirectly) result in the investor being deprived of the "*economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way.*"³⁸⁸
277. There is a body of decisions both in ICSID and non-ICSID investor-State arbitrations relating to claims for indirect expropriation. Many of these arose from a change to the regulatory regime of the host State that negatively impacted the investment at issue.³⁸⁹ In essence, to establish expropriation, the Claimant needs only show that the rights that it would otherwise enjoy have been substantially impacted or that it has been deprived of control over or access to the economic use of its investment. There is also no requirement that GoT must have directly acquired possession of the Facility, by itself taking over the Facility or the shares in IPTL. Tanzanian law recognises that "*expropriation*" could be founded upon the actions of GoT which lead to the acquisition by "*any other person.*"³⁹⁰
278. The Respondent, in its argument against indirect expropriation, takes the view that expropriation must only mean expropriation by GoT executed by way of an act of the legislature and that therefore the actions or omissions of all other arms of the State, whether the judiciary or government linked entities could never be attributable to the GoT. In the first place, nothing in the Tanzanian Constitution supports the suggestion that expropriation

³⁸⁸ HB/G/108/10292-10472 at pg. 10312: UNCTAD Series on Issues in International Investment Agreements II, "*Expropriation*", UN Doc (UNCTAD/DIAE/IA/2011/7), 2012.

³⁸⁹ These may be in form of change in areas of taxation, local shareholding, licensing, etc. See HB/G/003/034-068: *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; HB/G/004/069-149: *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; HB/G/012/809-851: *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006.

³⁹⁰ HB/G/176/12866-12886 at pg. 12881: The Tanzania Investment Act 1997, Official Gazette No. 40, Vol. 78, Acts Supplement No.7, 3 October 1997, Section 22(1)(b).

could only take place by way of a Tanzanian legislation. In the Tribunal's view, there is no justification for this limitation. The State is compendious and may act through different agencies which actions are nevertheless attributable to the State because these actions carry out State functions. The acts of the State must necessarily include the acts of organs of State, the executive and judicial arms of the State and any entity given public powers to act on behalf of the State. The Tanzanian Constitution also does not exclude any specific arm of government the judiciary as a possible player in the act of expropriation.

279. The Tribunal does not disagree with the Respondent that the judiciary should not be implicated, or its acts be described as "*judicial expropriation*" simply because judicial decisions were taken in error or may be considered aberrant. However, judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its, property or property rights, can still amount to expropriation. While denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice.
280. As for other possible actors in the alleged expropriation, the Respondent has pointed out that the Administrator General and Official Receiver's office when acting in its capacity as liquidator (provisional or otherwise) or receiver was acting as an agent of the company in or pending liquidation. That is indeed the proper role. However, the office of the Administrator General and Official Receiver remains an arm of GoT; it is at all times a part of the Ministry of Justice and Constitutional Affairs. Insofar as discharging its duties in the interest of the company in liquidation, it is expected to hold a high standard of integrity and impartiality. If the office of the Administrator General and Official Receiver acts beyond the boundaries granted by the law, such improper acts could not be attributable to the Company as its principal. The Administrator General and Official Receiver must be liable for its own actions and not that of the Company. This is all the more so if it acted in a manner that favoured the GoT to the detriment of other persons with an interest in the company in liquidation. The Respondent cannot hide behind the argument that the Administrator General and Official Receiver was merely acting as an agent of the company.
281. In this context, the Tribunal notes that the undertaking given against expropriation under Article 16.2 of the Implementation Agreement is made in respect of the actions of "*GOT*",

“TANESCO”, or “any Governmental Authority”, The term “Governmental Authority”³⁹¹ is defined as –

Any state, municipal or local government or regulatory department, body, political subdivision, commission, instrumentality, agency, ministry, court, judicial or administrative body, taxing authority or other relevant authority having jurisdiction over either Party, the Facility.

282. There is no question that the office of the Administrator General and Official Receiver is a Government Authority, which could exercise authority over the parties. Its action or inaction beyond that permitted by law must therefore be attributable to GoT.
283. The Respondent’s submission that the Claimant has no property interest but merely security rights is also quite misplaced. Firstly, the Claimant is not claiming a breach of the Constitution where the term “property” is used. The Claimant’s claim is based on the contractual terms of Article 16 under which GoT, is prohibited from expropriating or acquiring the Facility or IPTL, and undertook that it (and TANESCO, and any Government Authority) would not “*expropriate, compulsorily acquire, nationalise, or otherwise compulsorily procure any Ordinary Share Capital or assets of the Company.*” The Claimant’s interest in the Facility and shares of the IPTL may have come through the Security Package. That itself does not mean the Claimant’s interest are merely security rights and not property rights. The Claimant as absolute assignee has all the rights in and of IPTL and IPTL’s assets for which the Respondent undertook not to expropriate or compulsorily acquire or otherwise procure. There is no question that these are property rights and not mere security rights.
284. The Tribunal therefore holds that the contractual prohibition in Article 16 of the Implementation Agreement against expropriation and the undertaking not to expropriate given by GoT are compliant and consonant with the Tanzanian Constitution. The Respondent is therefore bound by its terms not to do anything which would deprive the Claimant’s interest in IPTL and the assets of IPTL. Whether the Respondent through its various “*instrumentality, agency, ministry, court, judicial or administrative body*” acted in a manner that amount to a breach of Article 16 is a matter of fact that the Tribunal needs to hereafter examine.

³⁹¹ HB/C/005/192-267 at pg. 196: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995; HB/C/002/013-128 at pg. 024: PPA, 26 May 1995.

(2) Claimant's Expropriation Allegations

285. In the discussion that follows, the Tribunal will consider the allegations made against GoT that the Claimant asserts are steps which either individually or collectively violate the prohibition against expropriation.
286. The principal actors identified by the Claimant that had roles in this regard were:
- i. TANESCO;
 - ii. the Tanzanian courts (particularly the actions of Utamwa J in handing down the Utamwa J Order);
 - iii. the provisional liquidators appointed over IPTL and the Administrator General;
 - iv. BRELA;
 - v. the Minister of Energy and Minerals and the PS MEM;
 - vi. the Attorney General; and
 - vii. the Bank of Tanzania.
287. The Respondent on the other hand says that the real parties involved in the entire affair were several different entities, mostly private ones, such as IPTL, VIP, Mechmar, PAP and others, but not the Government.³⁹² Additionally, the Respondent submits that as a factual matter neither IPTL nor SCB HK was ever nationalised or expropriated by the Government. IPTL has always been a private company and its rights and assets have remained with its shareholders, albeit they have changed. In addition, the Respondent submits that the Tariff Dispute was eventually negotiated between TANESCO and IPTL, the Escrow Account was released upon IPTL's instructions, the top up payments were paid to IPTL, and the Facility remained in IPTL's possession.³⁹³
288. The Claimant lists the following actions as constituting expropriation of the Facility, IPTL's other assets and IPTL's Ordinary Share Capital by the GoT, TANESCO and Governmental Authorities in breach of Articles 16.1 and 16.2 of the Implementation Agreement:³⁹⁴
- i. TANESCO's failure to make payments to IPTL or SCB HK under the PPA;
 - ii. the steps taken to frustrate the Interpretation Proceedings by TANESCO, the Tanzanian courts and the First PL;

³⁹² HB/A/003/144-370: Respondent's Counter-Memorial, para. 10.

³⁹³ Respondent's PHB, paras. 113,126.

³⁹⁴ HB/A/002/035-143: Claimant's Memorial, para. 194; Claimant's PHB, para. 130.

- iii. the First PL's failure, in breach of his duty to preserve and protect IPTL's assets, to take any steps to enforce TANESCO's obligation to pay the tariff under the PPA;
- iv. the steps taken by TANESCO, the Second PL and the Tanzanian courts to frustrate the PPA Arbitration;
- v. the Second PL and Administrator General's countersignature of the VIP-PAP-SPA which purported, wrongly, to recognise PAP as owner of Mechmar's shares in IPTL;
- vi. the Utamwa J Order;³⁹⁵
- vii. the actions of TANESCO, the Minister of Energy, the PS MEM, the Attorney General and the Bank of Tanzania in the period September to December 2013 facilitating the release of the Escrow Account funds to PAP; and
- viii. the Minister of Energy and the PS MEM's refusal to consider the evidence submitted by SCB HK, following the Utamwa J Order, concerning its rights over IPTL's Ordinary Share Capital. This was followed by BRELA's subsequent registration of PAP as the owner of all of the shares in IPTL, which constitutes an expropriation of IPTL's Ordinary Share Capital.

289. The Respondent submits that there was no breach of Article 16.2 of the Implementation Agreement. In summary, the Respondent disputes the Claimant's expropriation claims as follows:

IPTL's rights under the PPA: payments under the PPA were delayed by TANESCO's decision to dispute invoices issued by IPTL. This decision was justified by IPTL overcharging TANESCO, as eventually recognised by the PPA Tribunal. In not pursuing the Interpretation Proceedings (which were eventually withdrawn by Mechmar) the first provisional liquidator of IPTL, Mr Rugonzibwa (even assuming that he may be considered a Government official in his function as provisional liquidator, which is denied), exercised his discretion as granted to him by the law. In any case, TANESCO and IPTL eventually reached an agreement to end the Tariff Dispute and restore payments to IPTL, which now renders Claimant's complaint in this respect moot and untimely.

The Ordinary Share Capital of IPTL: This was transferred by Mechmar and VIP, the original shareholders of IPTL, to PAP. To the extent that said transfers violated SCB HK's rights as a secured creditor, VIP and Mechmar are the entities responsible for said violation. To the extent that the Utamwa J Order recognised said transfers, SCB HK did not take the necessary actions to counter said finding or to have its rights otherwise judicially recognised in Tanzania and is thus now barred from

³⁹⁵ See para. 39 above.

bringing a claim of expropriation by the judiciary. Furthermore, Claimant cannot complain about Mr Saliboko, the second provisional liquidator of IPTL (assuming that he may be considered a Government official in his function as provisional liquidator, which is denied) countersigning the VIP/PAP SPA as Mr Saliboko was entitled to have doubts on SCB HK's standing as a secured creditor, given that the PwC Report noted that the Security Deed had not been registered or stamped at BRELA. In any case, as provisional liquidator, Mr Saliboko's actions were subject to the scrutiny of the High Court of Tanzania, before which Claimant failed to adequately challenge them. Finally, Claimant can neither complain about Government officials or BRELA recognising the transfer of the Ordinary Share Capital of IPTL as they could not reverse the findings of the judiciary made through the Utamwa J Order.

The Facility: The same considerations made with respect to the Utamwa J Order in relation to the transfer of the Ordinary Share Capital of IPTL apply to the transfer of the Facility to PAP.

IPTL's interest in the Escrow Account and top-up payments: further to the Utamwa J Order transferring the affairs of IPTL to PAP and to TANESCO and IPTL reaching an agreement for the release of the Escrow Account funds, the Government could not refuse to transfer said funds to IPTL. While the Escrow Agreement expressly prohibits payments being made to creditors of IPTL (such as SCB HK) – and contains no such prohibition with respect to shareholders or managers of IPTL – the Government released the funds on the basis of IPTL's instructions. The Government played no role with respect to the top-up payments, which were agreed exclusively between TANESCO and IPTL in October 2013 and were directly paid by TANESCO to IPTL in the years thereafter.³⁹⁶

290. The Tribunal analyses the Claimant's expropriation allegations, in turn, below.

a. TANESCO's Failure to Make Payments under the PPA, and the Interpretation Proceedings frustrated by the Tanzanian Courts, TANESCO and GoT officials

(i) Tribunal's Analysis

291. The ICSID 1 Award³⁹⁷ resolved some of the initial disputes between IPTL and TANESCO by incorporating a new financial model agreed to by TANESCO and IPTL, which would be used by the parties to calculate the capacity and energy tariffs after the start of commercial operation. The ICSID 1 Tribunal also trimmed down certain costs incurred and ordered them to be borne by IPTL.

³⁹⁶ Respondent's Reply PHB, para. 60 (emphasis in original).

³⁹⁷ HB/D/002/066-299: ICSID 1 Award, 12 July 2001.

292. Differences between Mechmar and VIP thereafter arose when VIP took the position that Mechmar should bear the additional expenses disallowed to be recoverable by the ICSID 1 Tribunal, instead of accounting for them as expenses to be borne by IPTL. This led to VIP petitioning for the liquidation of IPTL in the Tanzanian High Court³⁹⁸ on 25 February 2002. Against this background, Mechmar commenced the LCIA Arbitration based on the PSA of 28 September 1994, and eventually obtained the LCIA Award³⁹⁹ directing VIP to discontinue its Petition for Winding Up and application for appointment of a provisional liquidator in Misc. Civil Cause No. 49 of 2002 before the Tanzanian courts.
293. Meanwhile, TANESCO began payment of the tariffs following the commencement of commercial operations of the Facility in 2001. But in 2004, TANESCO started raising issue over certain tariff payments. TANESCO continued paying IPTL on the urging of GoT.⁴⁰⁰ These payments flowed down to enable repayments of the loan by IPTL (first to Danaharta and later to SCB HK). TANESCO stopped doing so in May 2007.
294. In May 2007, TANESCO raised the issue of Mechmar's contribution to the capital of IPTL which was made principally by way of a shareholder loan rather than paid-up share capital. TANESCO argued that this was inconsistent with the PPA and the ICSID 1 Award. TANESCO however made payments to the Escrow Account.
295. The differences between IPTL and TANESCO relating to the tariff payment led IPTL (the majority shareholders Mechmar were supported by SCB HK) in June 2008, to commence the Interpretation Proceedings under Article 50 of the ICSID Convention in relation to the ICSID 1 Award. IPTL's action was challenged by TANESCO as lacking a valid corporate act on the basis that VIP had not authorised the commencement of the Interpretation Proceedings. Mechmar sought to rely on its LCIA Award to assert its authority to maintain the Interpretation Proceedings. The LCIA Award was never given effect, and, although an application for setting aside was made in September 2003 and an application for enforcement was made in November 2004, they were not heard until 31 October 2008 when the LCIA

³⁹⁸ HB/H/037/709-725: Winding Up Petition, 25 February 2002.

³⁹⁹ HB/D/007/616-639 at pgs. 626-628: LCIA Award, 26 August 2003, paras. 54-59.

⁴⁰⁰ HB/H/056/845-846: Letter from Ministry of Energy and Minerals to Tanesco, 8 July 2004.

Award was eventually refused enforcement by Oriyo J⁴⁰¹ on the basis that Mechmar had not complied with the court's direction to serve submissions as directed earlier.

296. In November 2008, to establish IPTL's position to pursue the Interpretation Proceedings, SCB HK applied to the Tanzanian courts to restrain VIP from continuing the Winding Up proceedings against IPTL.⁴⁰² This application was never heard.
297. On 15 December 2008, in the exercise of its power granted to it under the Charge of Shares, SCB HK appointed a receiver over VIP's shares in IPTL to order use of those shares to vote in favour of continuation of the Interpretation Proceedings.⁴⁰³
298. On 16 December 2008, the Receiver appointed for the VIP Shares applied to the High Court of Tanzania in the same Misc. Civil Cause No. 49 of 2002 asking that "*the petition for the winding up, and the application for the appointment of a provisional liquidator [...be] withdrawn and/or abandoned.*"⁴⁰⁴
299. On that same day, 16 December 2008, which was also the day the tribunal in the Interpretation Proceedings was set to sit to hear the Parties in London, the High Court of Tanzania (Oriyo J)⁴⁰⁵ dismissed IPTL's application for a stay, granted VIP's application for the appointment of a provisional liquidator and appointed the Administrator General/Official Receiver as First PL. The written decision of Oriyo J does not suggest any hearing was held before the matters were decided. In relation to the stay application, the Learned Judge, while accepting that the application for appointment of a provisional liquidator should not be decided before considering IPTL's application for stay of the proceedings, went on to dismiss the application for stay saying it "*does not serve any useful purpose*":⁴⁰⁶

[...] It will be unfair to determine the petition to wind up IPTL before its applications for stay is determined. However, due to intervening factors since March, 2002 to date, a decisions on application for stay may not serve any useful purpose [...] And as correctly stated by the applicant the application for stay of proceedings has been overtaken by events and is now redundant. It has become obsolete; it does not serve any useful

⁴⁰¹ HB/H/097/1020-1030 at pgs. 1026-1028: Judgment of Oriyo J in the Tanzanian Court, 31 October 2008.

⁴⁰² HB/H/098/1013-1048: Application by SCB HK before the High Court of Tanzania, 21 November 2008.

⁴⁰³ HB/H/102/1076-1100 at pgs. 1097-1098: Letter from RHB Bank Berhad to ICSID, 15 December 2008.

⁴⁰⁴ HB/H/105/1139-1146 at pg. 1140: Application by Share Receiver before the High Court of Tanzania, 16 December 2008.

⁴⁰⁵ HB/H/104/1122-1138: High Court of Tanzania's Appointment of PL, 16 December 2008.

⁴⁰⁶ HB/H/104/1122-1138 at pgs. 1127-1128: High Court of Tanzania's Appointment of PL, 16 December 2008.

purpose. In the circumstances, the application for stay of proceedings pending arbitration is accordingly dismissed. [...].

300. It is unclear what circumstances convinced Oriyo J that the stay application could serve no useful purpose. What is clear is that the LCIA Award though not enforced remains a valid arbitral award, unless it had been set aside by the court of the seat of arbitration (*viz.* the English courts). It should be noted that in her decision of October 2008, Oriyo J did not in fact set aside the award, because she took the view that “[*h*]aving dismissed the *Petition to Enforce Award, the application to set aside the Award is rendered obsolete.*”⁴⁰⁷
301. In relation to VIP’s application for a provisional liquidator, Oriyo J stressed that Mechmar and IPTL’s written submissions were “*limited to points of law*” and “*have not countered the affidavits in the petition by the applicant; those averments stand uncontroverted and are accordingly adopted by the court.*” Relying on that, the court ruling appeared to have accepted that:

On the degree of urgency; its relevancy here cannot be overstated because the oppressive acts, fraud, etc of Mechmar against VIP has been in a continuous process since 2001; that is, for a period of over seven years [...]

*The need for the appointment of a Provisional Liquidator pending winding up has in no doubt been adequately established by VIP through the affidavits of James Burchard Rugemalira filed on 25.2.2002 and 24.9.2003. [...].*⁴⁰⁸

302. The court also remarked that the appointment of a provisional liquidator is justified in the public interest in that:

*It is intended to serve interests of groups like those doing business with IPTL including TANESCO and the government of Tanzania.*⁴⁰⁹

303. Urgency, potential detriment and public interest are of course sound factors that should be considered by a court to appoint a provisional liquidator. It is curious that Oriyo J did not in her written decision explain what had informed her of the sudden urgency that prompted her to revive an application made in 2002 and relying on affidavits made some five years ago to

⁴⁰⁷ HB/H/097/1020-1030 at pg. 1029: Judgment of Oriyo J in the Tanzanian Court, 31 October 2008.

⁴⁰⁸ HB/H/104/1122-1138 at pg. 1132: High Court of Tanzania’s Appointment of PL, 16 December 2008.

⁴⁰⁹ HB/H/104/1122-1138 at pg. 1133: High Court of Tanzania’s Appointment of PL, 16 December 2008.

hold that an immediate appointment would be necessary and in the public interest without calling upon the parties involved to be heard substantively.⁴¹⁰ In making this observation, the Tribunal is assuming that the application⁴¹¹ by the VIP Share Receiver made on the same day was received by the court *after* the release of the Learned Judge's decision. If the situation was, otherwise, a further question arises as to why the Learned Judge did not consider the application for the withdrawal of the provisional liquidator application and the abandonment of the liquidation petition.

304. The appointment of the First PL halted the Interpretation Proceedings scheduled for 16 December 2008, as the authority to maintain any action on behalf of IPTL rested with the First PL. As provisional liquidator, the First PL's duty is to gather in and safeguard the assets of IPTL. On this understanding, SCB HK wrote to the First PL seeking his consent to continue the Interpretation Proceedings, as well as an undertaking to bear the costs incurred in doing so and only seeking to recover them from IPTL in the event a favourable decision be made in IPTL's favour.⁴¹² This was followed up on 8 January 2009 by SCB HK's lawyers⁴¹³ repeating the same request and offering similar costs outlay. No response was forthcoming from the First PL.
305. On the application of SCB HK on 23 January 2009, the Tanzanian High Court made an order for the appointment of an Administrator for IPTL on 27 January 2009.⁴¹⁴ Unlike a provisional liquidator, whose role is to preserve assets for creditors in anticipation of liquidation, the role of an Administrator is to attempt a possible rescue of the company. Mihayo J saw a "new ground" in Tanzanian company law through an Administrator, in that it would give IPTL an opportunity to navigate on a new and firm direction. The Learned Judge was conscious that such an order would dislodge the order made by Oriyo J appointing the First PL –

But what has taxed my mind a great deal is whether my granting of the prayer for appointing an administrator has the effect of torpedoing, cancel[ing] or over ruling my sister Judge which powers I do not have. I am aware that Oriyo, J. was seeking to protect the assets of the Company without more. An application like the present one was not before the court then. After giving the question serious thought, in my considered

⁴¹⁰ HB/H/106/1147-1149: Email from Joe Casson to Wilman Leung, 16 December 2008 – It appears that Oriyo J did ask for parties to attend on 16 December 2008 (based on the Claimant's understanding, it was to schedule a hearing of the applications, but the judge instead delivered her decision).

⁴¹¹ HB/H/105/1139-1146: Application by Share Receiver before the High Court of Tanzania, 16 December 2008.

⁴¹² HB/H/108/1152-1154 at pg. 1153: Letter from SCB HK to the Provisional Liquidator of IPTL, 22 December 2008.

⁴¹³ HB/H/109/1155-1157: Letter from Ringo & Associates to the Provisional Liquidator of IPTL, 8 January 2009.

⁴¹⁴ HB/A/004/371-603: Claimant's Reply, paras. 132-136.

opinion, this court has if it grants the application, an opportunity to take matters further in a positive way, by rescuing the company. Under the provisions of section 250 of the Act, an administration order protects a company from its creditors and also protects the creditors. [...]

I am persuaded that the powers as provided are far more than those of a provisional liquidator and are capable of rescuing the company and protecting the creditors. This means the 100mw the company is capable of generating, and was actually generating, will not go down the drain.⁴¹⁵

306. Mihayo J made his order without hearing the First PL, a procedural error that led to the First PL's complaint to the Chief Justice and placed the matter *suo motu* on revision to the Court of Appeal, which heard the same on 19 March 2009.
307. On 24 March 2009, the Administrator confirmed his instruction for the Interpretation Proceedings to proceed.⁴¹⁶ The tribunal in the Interpretation Proceedings decided then to proceed. However, on 9 April 2009, the Court of Appeal made its ruling revoking the appointment of the Administrator. In doing so, it roundly condemned Mihayo J for failing to hear the First PL and IPTL before making the order appointing the Administrator: “[...] *there can be no equal justice when one, for no compulsive reason, is condemned unheard.*”⁴¹⁷
308. On 15 April 2009, the First PL informed the tribunal in the Interpretation Proceedings to stay the proceedings.⁴¹⁸
309. On 17 September 2009, SCB HK re-applied⁴¹⁹ for the appointment of an administrator. This matter remained unheard and was eventually withdrawn in 2013.
310. In December 2009, SCB HK sought to intervene directly in the Interpretation Proceedings, exercising its rights as assignee of the PPA pursuant to the Security Deed. The Interpretation Proceedings did not proceed much further save for the challenge brought against Judge

⁴¹⁵ HB/H/112/1185-1195 at pgs. 1193-1194: Order of the High Court of Tanzania, 27 January 2009.

⁴¹⁶ HB/H/116/1201-1204: Letter from the Interpretation Tribunal, 3 April 2009.

⁴¹⁷ HB/H/117/1205-1231 at pg. 1230: Ruling of the Court of Appeal of Tanzania, 9 April 2009.

⁴¹⁸ HB/H/119/1234-1236 at pg. 1235: Letter from the Provisional Liquidator to the ICSID 1 Tribunal, 15 April 2009.

⁴¹⁹ HB/H/122/1242-1252: Petition by SCB HK in Misc. Civil Cause No. 112 of 2009 before the High Court of Tanzania, 17 September 2009.

Brower, who resigned and was replaced by Mr Makhdoom Ali Khan on 23 April 2010.⁴²⁰ Mr Rokison, the president of the tribunal was also challenged on 25 June 2010 and the proceedings were thereby suspended.

311. The ICSID public case record⁴²¹ shows that IPTL requested the discontinuance of the Interpretation Proceedings on 7 July 2010,⁴²² to which TANESCO agreed on 13 July 2010.⁴²³ The ICSID 1 Interpretation Proceeding finally ended on 19 August 2010 by the discontinuance order of the tribunal.
312. SCB HK relies upon this sequence of litigation to show that TANESCO, GoT officials and the Tanzanian courts acted to frustrate IPTL's efforts to progress the Interpretation Proceedings.⁴²⁴ The Tribunal will consider whether these interventions sought to deprive IPTL or SCB HK of their investment or their rights in the investment.
313. Although TANESCO failed to terminate the PPA in the ICSID 1 arbitration, it succeeded in reducing the cost of the project from USD 163.5 million to USD 127.2 million, with a senior debt of USD 89 million (further reduced to USD 85.3 million) and the remainder (approximately USD 38 million) in equity.⁴²⁵ This impacts the calculation of the tariff. The ICSID 1 Award also disallowed certain EPC costs, thereby reducing the EPC costs from USD 114 million to USD 98 million.⁴²⁶ This had the impact of reducing the capacity charges payable by TANESCO. The ICSID 1 Award was based on a financial model of 70% debt and 30% shareholders' equity. Upon realising that IPTL's shareholding had been financed largely by shareholders' loans, TANESCO took the position that it could not be bound by the formula for the calculation of the capacity charges as agreed.
314. In the Tribunal's view, whatever the merits of TANESCO's position, TANESCO did appear to have a concern that permitting a review of the ICSID 1 Award in the Interpretation Proceedings risked weakening its bargaining position to insist on a reduction of capacity

⁴²⁰ HB/H/144/2089-2090 at pg. 2090: Letter from the ICSID Interpretation Proceedings Tribunal to IPTL and Tanesco, 26 May 2010.

⁴²¹ See: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/98/8> (as last accessed on 27 June 2019).

⁴²² HB/H/145/2091-2093 at pg. 2093: Letter from ICSID to IPTL and Tanesco, 8 July 2010.

⁴²³ HB/H/146/2094: Letter from Hunton & Williams to ICSID, 13 July 2010.

⁴²⁴ HB/A/002/035-143: Claimant's Memorial, paras. 73-90.

⁴²⁵ HB/D/002/066-299 at pg. 271: ICSID 1 Award, 12 July 2001.

⁴²⁶ HB/D/002/066-299 at pgs. 217, 219: ICSID 1 Award, 12 July 2001.

charges. Adopting a litigation or negotiation strategy to protect one's economic financial or commercial interest is the right of any party. The various challenges launched by TANESCO to the Interpretation Proceedings against IPTL's standing, refusing SCB HK's participation as intervener and disqualification challenges against members of the tribunal may seem unhelpful and obstructionist, nevertheless they were part of their litigation strategy. This alone, does not deprive IPTL of the benefits of its investment.

315. The only government official implicated in this scenario was the First PL. SCB HK's complaint is that he did nothing to progress the Interpretation Proceedings and had frustrated attempts to move the Interpretation Proceedings even when SCB HK had offered to fund the proceedings on a cost-recovery basis should IPTL succeed against TANESCO. No explanation was forthcoming from the First PL to explain the position he had taken. It is the duty of the provisional liquidator, to gather in and preserve the assets of IPTL. Why then the inaction? Counsel for GoT suggested that the First PL must have considered that the potential benefits to be gained in the Interpretation Proceedings were outweighed by the costs of continuing them and the risk that they could be unsuccessful. SCB HK's offer that it would bear the costs and seek costs recovery only upon successful recovery from TANESCO would appear to have taken away much of the risk. Arguably, if IPTL failed in the Interpretation Proceedings, there could be cost exposure, but failing to take up SCB HK's invitation to discuss funding would appear to be imprudent. It is unexplained why no steps were taken to protect the interests of IPTL.
316. Unlike TANESCO which was protecting its own financial interest, the First PL has the primary responsibility of preserving the assets of IPTL. SCB HK, as a substantial creditor and successor lender, is an investor protected under the Implementation Agreement. The First PL's inaction could well have put the investor at risk. However, it is uncertain and somewhat speculative to suggest that had the First PL decided to proceed with the Interpretation Proceedings, the outcome would be one that favours the IPTL. As such, the Tribunal is not prepared to hold that this lapse by the First PL is sufficient to meet the threshold of expropriation.
317. Looking then at the role of the courts, the Tribunal does find Oriyo J's refusal of the stay of the liquidation proceeding and the application for the appointment of the provisional liquidator, troubling. Oriyo J came to a view that was not explained and perhaps inexplicable: that the stay application no longer served any purpose and was obsolete; that the appointment of a provisional liquidator was urgent; and that it would be in the public interest

(with specific mention of TANESCO and the Government) to appoint a provisional liquidator. She did so without calling upon any of the parties concerned to address her. In doing so, Oriyo J did exactly (if not more) than what the Court of Appeal said in its judgment of 9 April 2009⁴²⁷ with regard to Mihayo J's order appointing the administrator. Oriyo J was fully aware that the interested parties were all represented and yet did not call upon them to address her. Instead she chose to make a decision on the same day that she had scheduled a meeting for directions. It appears too coincidental that the judge decided to deliver her decision on the day (16 December 2008) the share receivers appointed over VIP (the petitioner for liquidation and for appointment of a provisional liquidator) applied to withdraw the Petition and application, which was also the same day the Interpretation Proceedings were scheduled to begin in London.

318. Oriyo J's primary justification for the order appointing the provisional liquidator lacked substance and was flawed in procedure and the appointment of a provisional liquidator had a direct impact on IPTL as a going concern.
319. The Court of Appeal was of course correct to have set aside Mihayo J's order appointing the Administrator for breach of due process. The Court of Appeal however declined to consider the merits of the application to appoint the administrator, and simply said that there were "*no compelling reasons to discuss the remaining issues*" relating to the appointment of an administrator, suggesting that if parties still wished to pursue such an appointment, they could do so in the High Court. SCB HK then filed a new application⁴²⁸ on 17 September 2009 in Misc. Cause 112 of 2009 for the appointment of an administrator, serving it on the Provisional Liquidator of IPTL, VIP, IPTL and the creditors of IPTL. This application was noted by the court on several occasions (*e.g.* Kaijage J on 6 November 2009,⁴²⁹ 9 February 2011,⁴³⁰ Mwaikugile J on 11 August 2011,⁴³¹ and again by Kaijage J on 24 August 2011,⁴³² 19 January

⁴²⁷ HB/H/117/1205-1231: Ruling of the Court of Appeal of Tanzania, 9 April 2009.

⁴²⁸ HB/H/122/1242-1252: Petition by SCB HK in Misc. Civil Cause No. 112 of 2009 before the High Court of Tanzania, 17 September 2009; An application for the removal of the provisional liquidator was also filed on the same day: HB/H/123/1253-1254: Application to remove Provisional Liquidator, 17 September 2009.

⁴²⁹ According to SCB HK, this was adjourned "*by consent*" by Kaijage J on 6 November 2009 "*pending the position of parties becoming known in regard to IPTL*" in Winding-up Petition No. 5 of 2002. SCB HK's lawyers wrote in to clarify that no such consent was given, HB/H/133/1294-1295: Letter from Ringo & Associates Advocates to the High Court of Tanzania, 11 November 2009.

⁴³⁰ HB/H/175/2304-2306: DLA Piper attendance note of hearing (redacted), 9 February 2011.

⁴³¹ HB/H/188/2556-2558: Order of Mwaikugile J in the High Court of Tanzania, 11 August 2011.

⁴³² HB/H/190/2562-2565: DLA Piper attendance note of hearing, 24 August 2011.

2012 and on 16 March 2012.⁴³³ The Court of Appeal noted this lapse in its decision of 17 December 2012.⁴³⁴

320. The Tribunal accepts that divergence of views by the courts is to be expected and is very much part of the legal system in many jurisdictions. Poor decisions or decisions without proper justifications do not rise to the standard of expropriation. With regard to the actions and inaction of the Tanzanian courts in relation to attempts by the Claimant to revive the ICSID 1 Award by the Interpretation Proceedings, the Tribunal finds that the Tanzanian judiciary as a whole, had not acted to deprive IPTL or SCB HK of the economic value of their investments.

b. PPA Arbitration: TANESCO, the Second PL and the Tanzanian courts; VIP, Mechmar Share transfers and control of IPTL; and Utamwa J Order

(i) PPA Arbitration

321. SCB HK's inability to proceed with the Interpretation Proceedings to resolve IPTL's differences with the capacity charges and tariff payments as set out in paragraphs 293 to 312 above, led SCB HK (as IPTL's assignee) to commence the PPA Arbitration in September 2010. The PPA Arbitration was concerned with issues of IPTL's actual "equity" participation, the tariff calculations and the amount outstanding due to the IPTL. These were finally disposed by the PPA Decision in February 2014,⁴³⁵ the PPA Award in September 2016⁴³⁶ and confirmed by the *ad hoc* Annulment Committee in 2018.⁴³⁷

322. Numerous adverse findings were made by the tribunal in the PPA Decision⁴³⁸ and in the PPA Award, and TANESCO was eventually found liable for not making payments of the tariff to IPTL and SCB HK.

323. The Tribunal has considered the PPA Decision and the PPA Award and noted that while there were allegations and suggestions that through some improper dealings GoT "took over

⁴³³ HB/H/207/2794-2805: *Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited and others*, High Court of Tanzania, Misc. Civil Cause No. 112 of 2009, Orders (Kaijage J), 19 January 2012 and 16 March 2012.

⁴³⁴ HB/H/258/3725-3752 at pgs. 3748-3749: Decision of the Court of Appeal of Tanzania, 17 December 2012.

⁴³⁵ HB/D/004/367-479: PPA Decision, 12 February 2014.

⁴³⁶ HB/D/005/480-586: PPA Award, 12 September 2016.

⁴³⁷ Exhibit CL-216: *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018.

⁴³⁸ HB/D/004/367-479: PPA Decision, 12 February 2014.

control” of the Facility,⁴³⁹ the disputes were essentially contractual in nature and, in fact, the PPA Tribunal was rightly conscious that an expropriation claim would not be within its jurisdiction.⁴⁴⁰ The case that TANESCO offered as the basis of its refusal to make payment to IPTL and SCB HK was found by the PPA Tribunal to be wrong and not sufficient to absolve it from its liability to SCB HK. Standing alone, the factual background that gave rise to those disputes and the findings⁴⁴¹ of liability in respect of payments due under the PPA could not, in the Tribunal’s view, sustain a claim for expropriation or discrimination against SCB HK by GoT. The fact that TANESCO had not honoured the PPA Award, on its own would also not constitute an expropriatory act as they were but mere commercial disputes and/or non-compliance with obligations under the contract or award.

(ii) Sale of Mechmar Shares and control of IPTL

324. At a meeting on 8 June 2010⁴⁴² with the PS MEM of Tanzania, Mr David Kitundu Jairo at his office, SCB HK’s legal counsel, Mr Charles Morrison, and Mr Joseph Wesley Casson were informed that Mechmar had approached GoT to sell its majority shareholding in IPTL, and that GoT had decided to buy the shares. Mr Jairo requested that Mr Morrison and Mr Casson

⁴³⁹ HB/D/004/367-479: PPA Decision, 12 February 2014, para. 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”). 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.”

⁴⁴⁰ HB/D/004/367-479: PPA Decision, 12 February 2014, paras. 247-248 –

“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. 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.”

⁴⁴¹ HB/D/005/480-586 at pgs. 584-585: PPA Award, 12 September 2016, para. 414 – The Tribunal ordered payment to and release of the Escrow Account did not discharge TANESCO’s liability under the PPA; payments to PAP-controlled IPTL after August 2013 did not discharge amount due; adjudged that TANESCO was to pay USD 148.4 million plus interest to SCB HK under the PPA.

⁴⁴² HB/F/004/052-125: Casson WS, 15 November 2017, para. 67.

attend a meeting with himself and Datuk Baharuden Bin Abd Majid, representing Mechmar, to discuss the Charge of Shares and determine who had the right to sell the 70% of shares in IPTL held by Mechmar to the GoT. A meeting with Datuk Baharuden was held the next day in which Mr Nimrod Mkono and Mr Karel Daele, lawyers for the GoT,⁴⁴³ were also present. Mr Casson and Mr Morrison reminded all that Mechmar Shares in IPTL were charged to SCB HK and that a receiver had been appointed, and it was acknowledged in Mechmar's Annual Report that:

*On 3rd February, 2009, SCBHK exercised its lien over the Company's shares in IPTL and appointed a Receiver & Manager over these said shares. As such, the Company also lost control to govern the on-going legal proceedings against TANESCO and the Government of Tanzania in the capacity of a shareholder of IPTL.*⁴⁴⁴

325. Meanwhile on 7 July 2010, Datuk Baharuden wrote to ICSID withdrawing the Interpretation Proceedings on behalf of IPTL.⁴⁴⁵ On 13 July 2010, TANESCO confirmed that it had no objection to the discontinuance.⁴⁴⁶
326. On 19 July 2010, SCB HK wrote to Mr Jairo, setting out SCB HK's security interest in the Mechmar Shares, reiterating its position that sale of the Mechmar Shares could not be made by Mechmar but by the Receiver.⁴⁴⁷ On that same day, ICSID informed SCB HK of the withdrawal of the Interpretation Proceedings by IPTL and invited comments to be received by 23 July 2010.⁴⁴⁸ It is SCB HK's case that it was unaware that Mechmar had initiated the withdrawal of the Interpretation Proceedings. Mr Casson said that he thought it was the First PL who had instigated the withdrawal.⁴⁴⁹ The communication from ICSID to SCB HK indeed made no mention of who initiated the "discontinuation" of the proceedings. The Interpretation Proceedings came to an end on 19 August 2010.
327. The fact that GoT was in discussions to purchase the Mechmar Shares in or around July 2010 cannot be denied. In its letter of 11 August 2010 to the PS MEM, Mechmar referred to the

⁴⁴³ HB/F/004/052-125 at pgs. 070-071: Casson WS, 15 November 2017, para. 69.

⁴⁴⁴ HB/H/143/1975-2088 at pg. 2076: 2009 Annual Report of Mechmar, 29 April 2010.

⁴⁴⁵ HB/H/145/2091-2093: Letter from ICSID to IPTL and Tanesco, 8 July 2010.

⁴⁴⁶ HB/H/146/2094: Letter from Hunton & Williams to ICSID, 13 July 2010.

⁴⁴⁷ HB/H/150/2100-2101: Letter from SCB HK to the Permanent Secretary of the Ministry of Energy and Minerals, 19 July 2010.

⁴⁴⁸ HB/H/149/2099: Email from ICSID to Herbert Smith LLP, 19 July 2010.

⁴⁴⁹ HB/F/004/052-125: Casson WS, 15 November 2017, para. 77.

earlier discussions and stating “as desired by you” (Mr Jairo), submitted its proposal to sell its stake of 70 % shares together with an assignment of its loan under its Shareholders Loan Agreement to IPTL to GoT and promising that:

*Mechmar Corp will take such steps and execute such documents or may be required to assuage the concerns of the Government of Tanzania in relation to claims of other parties. Mechmar Corp will also give an irrevocable undertaking to co-operate and assist the Government of Tanzania as well as TANESCO in resisting and defending against any such claims and to assert its own claims.*⁴⁵⁰

328. Mr Jairo then wrote to the Attorney-General and, referring to the specific undertaking made by Mechmar set out in paragraph 327 above, sought advice to –

*draw up a negotiation strategy for GOT's approval to be used in the negotiations with Mechmar Corp for the final buying of the shares.*⁴⁵¹

329. GoT was therefore on full notice⁴⁵² and aware of the interests of SCB HK in the Mechmar Shares and was clearly intent on acquiring the Mechmar Shares.

330. With no assurance from Mechmar that it would not proceed with the intended sale, SCB HK commenced court proceedings in Malaysia on 9 August 2010, to enforce its charge over the Mechmar Shares. SCB HK's application for an interim injunction to prevent Mechmar from selling the Mechmar Shares was granted on 4 October 2010.⁴⁵³ The court also ordered that the share certificates be delivered to SCB HK within 7 days from date of the order. However, on 12 October 2010, Mechmar's solicitors informed SCB HK that Mechmar had sold its shares in IPTL on 9 September 2010 and delivered the share certificates to the (undisclosed) purchaser *i.e.*, while the injunction application was pending.⁴⁵⁴

331. Following another order of the Malaysian Court (High Court of Malaya) on 19 October 2010,⁴⁵⁵ Mechmar disclosed that the Mechmar Shares were sold to Piper Link Investments

⁴⁵⁰ HB/H/154/2220: Letter from Mechmar to the Permanent Secretary of the Ministry of Energy and Minerals, 11 August 2010 (emphasis added).

⁴⁵¹ HB/H/155/2221-2222 at pg. 2221: Letter from the Permanent Secretary of the Ministry of Energy and Minerals to the Attorney-General, 1 September 2010.

⁴⁵² HB/H/150/2100-2101: Letter from SCB HK to the Permanent Secretary of the Ministry of Energy and Minerals, 19 July 2010.

⁴⁵³ HB/D/008/640-642: Interlocutory Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 4 October 2010.

⁴⁵⁴ HB/H/159/2232: Letter from Teh & Associates to M/s SK Yeoh & Partners, 12 October 2010.

⁴⁵⁵ HB/D/010/647-654: Ex parte Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 19 October 2010.

Ltd,⁴⁵⁶ a BVI company that was incorporated only on 2 September 2010. The sale price was USD 6 million, with USD 1.2 million paid as a deposit.

332. By letter dated 2 November 2010, Mechmar's solicitors disclosed a letter from a Mr Issa Mohamed Al Rawahy, who was said to be the "owner" of Piper Link explaining that the sum of USD 1.2 million supposed to have been paid as deposit by Piper Link was "*paid to my good friend Mr. Omar Mohamed AlBusaidy of Dubai for introducing us [...].*"⁴⁵⁷
333. SCB HK obtained an order from the High Court of Malaya on 8 November 2010⁴⁵⁸ appointing "Receivers" of Mechmar. On the same day, Ms Renju commenced action as Share Receiver of IPTL in the BVI Court and obtained an *ex-parte* freezing order⁴⁵⁹ against Piper Link to deliver the share certificates to the BVI Court and to take no steps to dispose of the shares pending a trial of the action. The shares were eventually delivered to the BVI Court by Piper Link.⁴⁶⁰
334. Martha Renju obtained a final summary judgment from the BVI Court on 11 April 2011⁴⁶¹ and the court ordered the release of the share certificates to Martha Renju forthwith. On 20 April 2011, Mr Casson informed the PS MEM of the outcome in the BVI Court (enclosing a copy of the judgement) and copied the same to the Minister for Energy and Minerals and sought an audience with the PS MEM.⁴⁶² From these events, the Mechmar Shares reached the hands of SCB HK in April 2011 and PS MEM and the Minister were so informed.
335. On 18 May 2012, the Malaysian Court (High Court of Malaya) made a winding up order in respect of Mechmar to be wound up⁴⁶³ and the receivers earlier appointed were appointed as liquidators. There could be no doubt that the proper persons to represent Mechmar in any

⁴⁵⁶ HB/H/165/2249-2258 at pgs. 2251-2258: Letter from Teh & Associates to SK Yeoh & Partners (enclosing the Share Sale Agreement between Mechmar and Piper Link Investment Ltd dated 9 September 2010), 28 October 2010.

⁴⁵⁷ HB/H/167/2261-2263 at pg. 2262: Letter from Teh & Associates to SK Yeoh & Partners (enclosing Letter from Issa Mohamed Al Rawahy dated 10 September 2010), 2 November 2010.

⁴⁵⁸ HB/H/168/2264.1-2264.6: Ex parte application to appoint a receiver in *SCB HK v Mechmar* before the High Court of Malaya, 4 November 2010; HB/D/011/655-659: Ex parte Order appointing a receiver in *SCB HK v Mechmar* before the High Court of Malaya, 8 November 2010.

⁴⁵⁹ HB/D/014/665-671: Freezing and Custody Order of the High Court of British Virgin Islands in *Renju v Piper Link*, 8 November 2010.

⁴⁶⁰ HB/H/174/2303: Letter from Issa Mohamed Al Rawahy to Mechmar, 1 December 2010.

⁴⁶¹ HB/D/015/672-674: BVI proceedings (*Renju v Piper Link*) Order for Summary Judgment, 11 April 2011.

⁴⁶² HB/H/181/2317-2320: Letter from SCB HK to the Permanent Secretary of the Ministry of Energy and Minerals, 20 April 2011.

⁴⁶³ HB/D/012/660-661: Order of the High Court of Malaya, 18 May 2012.

transaction relating to the assets of Mechmar would be the Mechmar's liquidators or persons authorised by them and no other.⁴⁶⁴

336. It should also be recalled that the holder of the other 30% of the shareholding in IPTL was VIP, who had executed by deed under seal a Charge of Shares over the same to the Security Agent for the benefit of the secured creditors on 28 June 1997.⁴⁶⁵ The Security Agent, RHB Bank, for and on behalf of the successor lender, SCB HK, had on 15 December 2008 appointed a receiver over the shares pursuant to its power under the Charge of Shares and the appointment was notified in the register of VIP on 19 December 2008.⁴⁶⁶
337. By the VIP-PAP-SPA dated 15 August 2013, VIP purported to have sold to PAP its 30% shares in IPTL for USD 75 million.⁴⁶⁷ The VIP-PAP-SPA in its preamble cited a litany of events relating to VIP's claim that "SCB"⁴⁶⁸ had interfered in VIP's winding-up proceedings which it said had caused VIP loss and damage amounting to USD 465 million and that both VIP and PAP had reached "*the conclusion that SCB is not a Creditor of IPTL*"⁴⁶⁹ and had therefore decided to resolve their differences by VIP selling its 30% stake in IPTL to PAP without prejudice to VIP's claim against SCB for more than USD 485 million.⁴⁷⁰
338. The VIP-PAP- SPA also mentioned that–

(t) PAP has represented and warranted to VIP that it indirectly bought MECHM[A]R's Shares in IPTL from PIPER LINKS INVESTMENTS LIMITED as a bonafide purchaser since the year 2011 and that transaction was not only sanctioned but validated by MECHMAR; and SCBHK being cognizant of that fact, several times signed Agreements with PAP (copies of which PAP exhibited to VIP) attempting to sell to

⁴⁶⁴ This was also later directed by the High Court of Malaya: HB/D/013/662-664: Directions from the High Court of Malaya, 16 April 2013.

⁴⁶⁵ HB/C/010/458-473: Charge of Shares between (1) Mechmar Corporation (Malaysia) Berhad, (2) VIP engineering and Marketing Limited and (3) Sime Bank Berhad, 28 June 1997.

⁴⁶⁶ HB/H/107/1150-1151: (Amended) Notice of appointment of receiver or manager Pursuant to Section 106(1) of the Companies Act 2002, 19 December 2008.

⁴⁶⁷ HB/H/283/4422-4445: VIP-PAP-SPA dated 15 August 2013 but signed on 19 August 2013.

⁴⁶⁸ HB/H/283/4422-4445 at pg. 4424 *et seq*: VIP-PAP-SPA, 15 August 2013. The VIP-PAP SPA defines the term "SCB" in its preamble at para. (g) as – "[...] *Standard Chartered Bank Plc., a public company incorporated under the laws of England and Wales, and with its corporate seat in London (UK) and branches located, inter alia, in New York (USA), claimed to have entered into an agreement, through its subsidiary and agent Standard Chartered Bank (Hong Kong) Limited, a company incorporated under the laws of Hong Kong, China, (hereinafter: SCB) [...]*".

⁴⁶⁹ HB/H/283/4422-4445 at pg. 4428: VIP-PAP-SPA, 15 August 2013, preamble para. (u).

⁴⁷⁰ HB/H/283/4422-4445 at pg. 4428: VIP-PAP-SPA, 15 August 2013, preamble para. (v).

*PAP for US\$ 75.0million the debt which SCBHK purports that it is owed by IPTL.*⁴⁷¹

339. The VIP-PAP-SPA however seems to acknowledge that the “*rightful owner of MECHMAR’S 70% Shares in IPTL*” still required to be resolved.⁴⁷² The VIP-PAP-SPA was signed on behalf of PAP by Harbinder Singh Sethi as its Managing Director and Manraj Singh Bharya as its Director. The VIP-PAP-SPA was “[w]itnessed and [e]ndorsed” by the Mr Philip Saliboko, the Official Receiver and Provisional Liquidator of IPTL.⁴⁷³
340. From the documents disclosed, the Tribunal notes that there were two documents that have traced PAP’s claim to the Mechmar Shares *viz*:
- i. Agreement for Sale of Shares between Piper Link and Mr Sethi dated 21 October 2010;⁴⁷⁴ and
 - ii. Deed of Assignment of Shares between Piper Link and PAP dated 21 October 2011.⁴⁷⁵
341. Mr Issa Al Rawahy signed both these documents on behalf of Piper Link even though an injunction against the sale by Mechmar of its IPTL shares to Piper Link was issued on 4 October 2010 by the Malaysian Court (High Court of Malaya)⁴⁷⁶ and the share certificates were said to have already been surrendered to the BVI Court and subsequently into the hands of SCB HK in April 2011 (see paragraphs 332 to 334 above) following the judgment having been granted against Mechmar.
342. On any interpretation of these documents and the factual scenario surrounding their execution, Piper Link could have no title to the Mechmar Shares sold, transferred or assigned to PAP or Mr Sethi. That said, it could not be suggested that GoT was working in concert with Mr Sethi or PAP in the VIP-PAP-SPA. Standing alone, this transaction did not directly involve the GoT and could not be said to have committed any breach of Article 16 of the Implementation Agreement.

⁴⁷¹ HB/H/283/4422-4445 at pg. 4427: VIP-PAP-SPA, 15 August 2013, preamble para. (t) (emphasis in original).

⁴⁷² HB/H/283/4422-4445 at pg. 4429: VIP-PAP-SPA, 15 August 2013, preamble para. (z) (emphasis in original).

⁴⁷³ HB/H/283/4422-4445 at pgs. 4444-4445: VIP-PAP-SPA, 15 August 2013.

⁴⁷⁴ HB/H/164/2240-2248: Agreement for Sale of Shares between Piper Links Investments Ltd and Harbinder Singh Sethi, 21 October 2010.

⁴⁷⁵ HB/H/193/2571-2573: Deed of Assignment between Piper Link and PAP, 21 October 2011.

⁴⁷⁶ HB/D/008/640-642: Interlocutory Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 4 October 2010.

(iii) The Utamwa J Order⁴⁷⁷

343. The Winding up Petition, Misc. Civil Cause No. 49 of 2002 brought by VIP against IPTL, came before Utamwa J on 3 and 5 September 2013 on the application made by VIP applying for a withdrawal of the petition seeking winding-up of IPTL in the following terms:

1. That this court marks the petition as duly withdrawn with no order as to costs.

2. That the appointment of the Provisional Liquidator be terminated.

3. That the Provisional Liquidator shall hand over all the affairs of IPTL including the IPTL Power Plant (the plant) to PAP, which has committed to pay off all legitimate Creditors of IPTL and to expand the plant capacity to about 500 MW and sale power to TANESCO at a Tariff of between Us Cents 6 and 8/Unit in the shortest possible time after taking over in the public interests.

4. That parties are free to commence new independent claims in any court with competent jurisdiction against any party should they fail to reach amicable settlement out of court on any issue which arose in IPTL.

5. That the court has taken judicial notice of the agreement between VIP and PAP.⁴⁷⁸

344. The application was supported by the provisional liquidator and “Mechmar” as understood by the court (represented by Mr Lutema, “**Lutema/Mechmar**”). It should be noted that prior to this application, the provisional liquidator had made arrangements to pay off some creditors mostly the lawyers (including those who were representing or represented VIP, IPTL and Lutema/Mechmar) and other service providers,⁴⁷⁹ but excluded SCB HK from the arrangement. The payments were expected to be made from the monies being released from the Escrow Account held at the BoT.

345. Based on the written ruling made by Utamwa J, there was general consensus that the withdrawal of the winding-up petition should be permitted, except that an objection was raised by Law Associates who said that the release/discharge of the Second PL should be allowed only after all their fees are paid in full from the Escrow Account and for other

⁴⁷⁷ HB/H/311/4733-4748: Utamwa J Order, 5 September 2013.

⁴⁷⁸ HB/H/311/4733-4748 at pg. 4736: Utamwa J Order, 5 September 2013.

⁴⁷⁹ HB/H/285/4452-4468: Compromise Agreement between the Provisional Liquidator and Uncontested Creditors of IPTL, 20 August 2013.

restraining orders. The court recorded Mechmar's liquidators as not opposing the withdrawal but objecting to the other prayers sought, as VIP and PAP had no mandate to execute the agreement and prayed for the orders.

346. Utamwa J in his ruling dealt primarily with the objections raised by Law Associates about the outstanding legal fees owed and the prayer for injunction against BoT, until these fees were paid, and that the Second PL be restrained from handing over IPTL to PAP. The judge disposed of the objection on the procedural footing that the application was made under the wrong rule, was fatal and could not be cured. The court added that the creditors would, in any event, not be prejudiced as the withdrawal of the winding up would not mean that creditors have no recourse as on the contrary, the arrangement permitted parties to take action to pursue their claims.
347. In relation to the Mechmar's liquidators' objection, the court ruled that they lacked *locus standi* as their application to intervene was not before the court, and even if it was, no order having been made permitting their intervention, they could not be heard in relation to objections to any of the prayers sought.
348. Having understood the underlying history that led to this application to withdraw the petition, the Tribunal has sympathy for granting the withdrawal. With the winding-up petition out of the way, the long-standing matters relating to IPTL would come to an end and the Facility would then be able to operate. But the real issue lies not with the withdrawal of the winding-up petition of IPTL. The most disturbing aspect of the decision is that the court had sanctioned the share transfer and allowed the Facility to be transferred to PAP.
349. Utamwa J's decision that the Mechmar's liquidators had no standing and could not be heard is inexplicable. There is no clearer principle common to all corporate insolvency law than that when a company is in liquidation, the liquidator stands in the shoes of the company in liquidation. This was the law applied to IPTL when it was in liquidation, hence the First PL, the Liquidator and lastly the Second PL were heard as the voice of IPTL. Yet, Utamwa J seemed to have ignored Mechmar's liquidators who had been expressly given the direction by the Malaysian Court to represent the interest of Mechmar in Tanzania.
350. Utamwa J was given a copy of the draft order of the prayers sought in advance and presumably the supporting documents which included the VIP-PAP SPA. He would have noted that that very document pointed to a dispute as to 70% of the ownership of the shares

in IPTL (see the preamble (s) and (z)) , yet he took “*judicial notice*” of the same and ordered that “*all the affairs of IPTL including the IPTL Power Plant (the plant) be handed over to PAP*”. By doing so, the court sanctioned the handing over of IPTL and the Facility to PAP. This order was subsequently interpreted as including the monies held in the Escrow Account, which were also to be released to PAP.

351. Quite clearly Utamwa J either failed to read or simply chose to ignore the contents or consider the implications of such an order. Even a cursory glance at the VIP-PAP-SPA would have shown that there was another interest that the court ought to have been concerned about, that is the interests of SCB HK, the successor lenders of the Facility as well as the majority shareholders, Mechmar’s liquidators.
352. Unfortunately, Utamwa J denied SCB HK and Mechmar’s liquidators any speaking rights; and instead purportedly taking “*judicial notice*” of the VIP-PAP-SPA arrangement and proceeded to adopt the draft order crafted by the Second PL, VIP, Lutema/Mechmar to open wide the door for PAP to enter IPTL without restrictions to do whatever PAP had planned. In doing so, the court effectively shut out all of SCB HK’s rights and interest in the Facility and deprived it of its right to control IPTL, and its interest in the investment.
353. In the Tribunal’s view, the Utamwa J Order was quite a thoughtless and reckless act made without regard to the consequences that would follow. This had the immediate effect of imperilling SCB HK’s economic rights and control over the Facility and assets assigned to it by IPTL. SCB HK and Mechmar’s liquidators were left out as if they had no interest and no contribution to the Facility, save only to witness the subsequent emptying of the Escrow Account. The Utamwa J Order had gone beyond merely being a wrong judicial decision, rather it is an egregious error amounting to abject failure of justice.

c. Release of the Escrow Account Funds

354. The Respondent does not dispute the facts relied upon by the Claimant and how the funds from the Escrow Account were released and eventually dissipated. It nevertheless relies on the following to deny any responsibility for the losses allegedly suffered by SCB HK by stating that:
 - i. the decision to settle the Tariff Dispute was triggered by the Utamwa J Order;

- ii. once the Tariff Dispute was settled, the relevant Governmental Authorities could not resist the release of the funds in the Escrow Account;⁴⁸⁰
 - iii. the Escrow funds were released to IPTL and it was for IPTL to repay creditors;⁴⁸¹
 - iv. IPTL's non-payment of SCB HK was beyond GoT's control;⁴⁸²
 - v. it had been advised to satisfy itself that PAP had acquired Mechmar's shares and was given an indemnity by IPTL against adverse claims;⁴⁸³
 - vi. the Attorney-General's advice that "*Any decision to release the Tegeta Escrow Account is safeguarded, protected and cushioned by the decision of the High Court (Utamwa, J)*";⁴⁸⁴
 - vii. the funds from the Escrow Account were released to IPTL and therefore there could not be any expropriation; and
 - viii. the responsibility for the losses allegedly suffered by the Claimant lies with Mr Sethi who after receiving the funds failed to settle with SCB HK. Further, that Mr Sethi was not an agent of the GoT.⁴⁸⁵
355. As the Tribunal has earlier remarked, the Utamwa J Order opened the door wide for PAP (and Mr Sethi its Managing Director) to do whatever it liked, and PAP/Mr Sethi moved in very quickly.
356. Mr Sethi convened a "*first board [of directors] meeting*" on 6 September 2013 and confirmed himself and a Dr Magesvaran Subramaniam and Mr Manraj Singh Bharya as directors. Mrs Leong Oi Mooi was removed as the company secretary and replaced with Mr Joseph Makandegé. The minutes also sought to confirm that the transfers of VIP's 3 shares and Mechmar's 7 shares in IPTL be confirmed. In relation to the Mechmar Shares, the minutes recorded that the transfer was from Mechmar to Piper Link and then on to PAP. The minutes declared that the effect of the Utamwa J Order was that "*The IPTL Power Plant and all other IPTL properties and assets legally became vested to NOBODY ELSE but PAP.*"⁴⁸⁶

⁴⁸⁰ Respondent's PHB, para. 103.

⁴⁸¹ Respondent's PHB, para. 106.

⁴⁸² Respondent's PHB, para. 106.

⁴⁸³ HB/A/003/144-370: Respondent's Counter-Memorial, para. 99; Respondent's PHB, para. 104.

⁴⁸⁴ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 96-98; HB/H/331/4850-4851: Memo from the Attorney General of Tanzania, 2 October 2013 (emphasis in original).

⁴⁸⁵ Respondent's PHB, para. 110.

⁴⁸⁶ HB/H/313/4758-4760 at pg. 4759: Minutes of IPTL Board Meeting, 6 September 2013.

357. Mr Saliboko (Official Receiver/Provisional Liquidator of IPTL) handed control of IPTL to PAP/Sethi on 10 September 2013.⁴⁸⁷
358. On 13 September 2013,⁴⁸⁸ IPTL (Mr Sethi) wrote to TANESCO demanding payment of all outstanding monies owed to IPTL and the release of the funds in the Escrow Account.
359. On 16 September 2013, PS MEM (then Mr E. C. Maswi) sought advice from the Attorney - General on PAP's request "*to release the money in the [...] Escrow Account to PAP*"⁴⁸⁹ and received a reply on the same day that as the Utamwa J Order was not appealed against and there was no injunction against compliance, the Escrow Account should be handed over subject to resolving the "*Invoice Notice*" dispute. The Attorney-General also advised that GoT's "*Guarantee under the PPA should be re-negotiated given the changed circumstances and the risks that it potentially expose the Government.*"⁴⁹⁰
360. On 20 September 2013, PS MEM (then Mr E. C. Maswi), informed Mr Sethi that the Escrow Account would be released subject to "*Submission of evidence that you have legally purchased 70% shares of Mechmar in IPTL [..]*."⁴⁹¹
361. On 18 September 2013, IPTL (Mr Sethi) wrote to TANESCO appealing for release of the funds from the Escrow Account and to pend any claims until later.⁴⁹²
362. On 19 September 2013, the TANESCO board discussed the release and decided to hold the release until the claims due to TANESCO had been sorted out.⁴⁹³
363. GoT did indeed set up a team of officials from Ministry of Minerals and Energy, Ministry of Finance ("**MOF**"), Attorney General Chambers, TANESCO and the BoT (the "**GoT team**"). They

⁴⁸⁷ HB/H/312A/4757.1-4757.51 at pg. 4757.3: Handing over report by the Provisional Liquidator of IPTL, Mr Phillip G. Saliboko: 16.12.2008 to 05.09.2013, 5 September 2013.

⁴⁸⁸ HB/H/321/4811-4813: Letter from Mr Sethi to Tanesco (attachment 6 to the PAC Report), 13 September 2013.

⁴⁸⁹ HB/H/323A/4819.1-4819.2 at pg. 4819.1: Letter from the Permanent Secretary of the Ministry of Energy and Minerals to the Attorney General of Tanzania, 16 September 2013.

⁴⁹⁰ HB/H/324/4820-4821: Letter from the Attorney General to the Permanent Secretary of the Ministry of Energy and Minerals, 16 September 2013.

⁴⁹¹ HB/H/328/4840-4841: Letter from Mr Maswi to Mr Sethi (attachment 19 to the PAC Report), 20 September 2013.

⁴⁹² HB/H/325/4822-4833: Letter from IPTL to TANESCO (copied to the Ministry of Energy and Minerals), 18 September 2013.

⁴⁹³ HB/H/326/4834-4835: Minutes of Board of Directors of Tanesco, 19 September 2013.

met for 5 days and submitted a report on 30 September 2013 to the Permanent Secretary Treasury.⁴⁹⁴ In its report the team observed that:

- i. PAP had yet to register its ownership of the VIP shares with BRELA, because PAP had yet to pay for the same in full;
- ii. there was a potential claim by SCB HK;
- iii. SCB HK was not a party to the “**Compromise Agreement**”;⁴⁹⁵
- iv. there were pending actions commenced by IPTL Administrator Receiver, Martha Renju in Commercial Case No. 123 of 2013⁴⁹⁶ seeking declaration of SCB HK’s interest and injunction restraining releasing assets in the Escrow Account and seeking control of the IPTL Power plant;
- v. SCB HK had no plausible claims;
- vi. Martha Renju’s documents were executed outside Tanzania and would be inadmissible as evidence; and
- vii. IPTL (Mr Sethi) had agreed to consider a 10-15% discount off TANESCO’s outstanding debts.

364. Based on these observations, the GoT team took the view that the SCB HK and Martha Renju’s claims were unlikely to succeed. The GoT team’s concerns were focused only on any possible exposure to GoT when the monies were released to PAP-controlled IPTL. They concluded with the recommendation that GoT, BoT and TANESCO be freed from any obligation after the release of the Escrow Account and to re-negotiate the PPA on “*PAP’s commitment in terms [of] generation and pricing [...]*.”⁴⁹⁷

365. The GoT team that was tasked to consider the validity of the sale of the Mechmar’s 70% shares to PAP, simply stated that the “*Share Purchase Agreement of [the] IPTL Shares, (30 per cent of the VIP and 70 per cent of Mechmar) has been executed.*”⁴⁹⁸ Attached to the report was

⁴⁹⁴ HB/H/330/4849-4849.167: Letter from Mr Likwelile to the Permanent Secretary of the Ministry of Energy and Minerals attaching Report on the Delivery of Funds in the Tegeta Escrow Account (with annexes) (“**Letter enclosing Delivery of Funds Report**”), 30 September 2013.

⁴⁹⁵ HB/H/285/4452-4468: Compromise Agreement between the Provisional Liquidator and Uncontested Creditors of IPTL, 20 August 2013.

⁴⁹⁶ HB/H/315/4775-4785: Plaint by Martha Renju in Commercial Case 123 of 2013, 6 September 2013.

⁴⁹⁷ HB/H/330/4849-4849.167 at pg. 4849.24: Letter enclosing Delivery of Funds Report, 30 September 2013.

⁴⁹⁸ HB/H/330/4849-4849.167 at pg. 4849.22: Letter enclosing Delivery of Funds Report, 30 September 2013.

a copy of the Deed of Assignment of Shares dated 21 October 2011.⁴⁹⁹ The report made no mention of the fact that the Malaysian Court had prior to that date issued several orders relating to Mechmar, particularly against the disposal of its 70% shares in IPTL. These orders included an injunction⁵⁰⁰ (which SCB HK had forwarded to PS MEM on 14 October 2010)⁵⁰¹ and an order appointing “Receivers” made on 8 November 2010.⁵⁰² It was also well known that Mechmar was eventually ordered to be wound up and liquidators were appointed by the Malaysian Court. The orders and court actions in the BVI Court were not mentioned despite the fact that on 20 April 2011,⁵⁰³ PS MEM was informed of the BVI Court judgment of 11 April 2011 that had ordered the Mechmar Shares be returned to SCB HK.

366. The GoT team had no reason to disregard the orders made by the Malaysian Court in relation to Mechmar, a Malaysian company, but instead took the view that they were inadmissible in Tanzania. This is an incomprehensible position to take. The ability of Mechmar (in liquidation) to execute a sale of its assets must necessarily be dependent upon its ability under Malaysian law and the directions of the Malaysian courts. As regards the BVI Court ruling, the GoT team’s silence is indeed baffling.
367. The team’s confidence that SCB HK had no plausible claim is clearly misplaced. Unfortunately, the GoT team was not alone. The Attorney-General⁵⁰⁴ too took a similarly disdainful view in much stronger terms:

On the issue of indemnity against futuristic claims against the Government, I do earnestly think, that is farfetched and illusory. Talking about on-going wrangles, none of them will negate what has already been decided by the High Court (Utamwa J). I am thus of the firm view that the only issue of substance relates only to funds in ‘permitted investment.’ This is the issue given that TANESCO invoices and other claims are out of the way.

⁴⁹⁹ HB/H/330/4849-4849.167 at pg. 4849.147: Letter enclosing Delivery of Funds Report, (Refer the Annexed Deed of Assignment of Shares dated 21 October 2011), 30 September 2013.

⁵⁰⁰ HB/D/008/640-642: Interlocutory Injunction Order of the High Court of Malaya in *SCB HK v Mechmar*, 4 October 2010.

⁵⁰¹ HB/H/161/2234-2237 at pg. 2234: Letter from SCB HK to the Permanent Secretary of the Ministry of Energy and Minerals, 14 October 2010.

⁵⁰² HB/D/011/655-659: Ex parte Order appointing a receiver in *SCB HK v Mechmar* before the High Court of Malaya, 8 November 2010.

⁵⁰³ HB/H/181/2317-2320: Letter from SCB HK to the Permanent Secretary of the Ministry of Energy and Minerals, 20 April 2011.

⁵⁰⁴ HB/H/331/4850-4851: Memo from the Attorney General of Tanzania, 2 October 2013 (emphasis in original).

368. Strangely, the final push to release the Escrow Account seems to have come from the Attorney-General, who saw this as an opportunity to negotiate out of its guarantee or take unilateral action. In his words “[t]he soonest this is done the best” since–

*The government should not be seen to be waffling in implementing what the court decided. This decision saves wider public interests that the never-ending wrangles over funds in escrow account. Any decision to release the Tegeta Escrow Account is **safeguarded, protected and cushioned** by the decision of the High Court (Utamwa, J). There is no obstruction or injunction to deal with the account as of now.*

[...]

The Government should use this golden opportunity to disentangle herself from unwarranted litigation. The High Court has given us a summons of relief. We should act now instead of acting as a devil's Advocate. Time is of essence.

369. The Attorney-General’s advice taken on its face urged the immediate “[t]ime is of essence” direction for the release of the Escrow Account, dismissing SCB HK’s interest as totally “illusory”. He also ignored the question of whether PAP owned Mechmar’s 70% shares in IPTL. He was content to hide under the cover of the Utamwa J Order and to do so before anything that changed this situation occurred.

370. The Tribunal could understand why GoT saw the “golden opportunity” to extricate itself from what they perceived as a difficult situation and a problematic project which it had guaranteed and committed to but doing so by ignoring the rights of SCB HK and imperilling its investment must necessarily entail consequences. With Utamwa J’s Order opening the door, and the Attorney-General pointing the way that it could hide behind that door, there was no longer any impediment against the PAP-controlled IPTL from putting its hands on the funds.

371. The Attorney-General had also assured GoT that the “corporate veil” of IPTL could justify its action. In this regard, the Attorney-General probably thought that so long as the escrow funds were released to “IPTL”, regardless who was in control, GoT would be free from any adverse claims by other creditors, in particular SCB HK. This same line was followed by GoT’s counsel in this arbitration.

372. The Attorney-General’s advice and view was unfortunate and had emboldened the other GoT officials to hasten the release of the funds, despite a pending application for stay of execution

of the Utamwa J Order by SCB HK,⁵⁰⁵ for order against preventing Martha Renju from taking possession of IPTL assets in Commercial Case No 100 of 2013⁵⁰⁶ and for an order not to release funds from the Escrow Account in Commercial Case 123 of 2013 by Martha Renju.⁵⁰⁷

373. Following further negotiations, TANESCO, IPTL (PAP controlled) and GoT (through PS MEM) agreed to release the full sum in the Escrow Account and to pay a negotiated discounted top-up amount of USD 45,485,719.97 or US\$ 79,049,724.50.⁵⁰⁸
374. In the Tribunal's view, the steps which GoT took, as set out in paragraphs 358 to 373 above, were taken to minimise its exposure to possible adverse claims. None of them could justify depriving SCB HK of its investment. The actions of GoT officials facilitated the transfer of control in IPTL to PAP, viz. by the Second PL entering into the Compromise Agreement, endorsing the VIP-PAP-SPA, and appearing before Utamwa J to consent to the adoption of the draft order presented by VIP and PAP. The Attorney-General then, relying on Utamwa J's "judicial notice" of the VIP-PAP-SPA, saw the "golden opportunity" to extricate itself from the guarantees and assurances given to the Project and directed that the Escrow Account be released "soonest." The end result is that the Escrow Account was emptied in haste and paid to PAP-controlled IPTL.
375. GoT having facilitated the taking-over of IPTL by PAP cannot now be permitted to say that the release of the funds to IPTL discharges GoT and TANESCO's responsibility. GoT knew well that the funds did not go into IPTL but into the account of PAP. This is evidenced by the very terms of the "AGREEMENT FOR DELIVERY OF FUNDS TO INDEPENDENT POWER TANZANIA LIMITED,"⁵⁰⁹ where the funds were directed to be sent to PAP's bank account and not to IPTL:

Beneficiary Name: INDEPENDENT POWER TANZANIA LIMITED
C/O PAN AFRICA POWER SOLUTIONS (T)
LIMITED

Bank Name: UBL BANK (TANZANIA) LTD
[...]

Account Number: TZS-010-0016-6

Account Number: USD-060-0016-1

⁵⁰⁵ This was indicated in the GoT team's Report at – HB/H/330/4849-4849.167 at pg. 4849.15: Letter enclosing Delivery of Funds Report, para. 4.1.2.

⁵⁰⁶ HB/H/317/4789-4799: Application by Ms Martha Renju in Miscellaneous Commercial Case No. 100 of 2013, 11 September 2013.

⁵⁰⁷ HB/H/315/4775-4785: Plaintiff by Martha Renju in Commercial Case 123 of 2013, 6 September 2013.

⁵⁰⁸ HB/H/338/4877-4882: Agreement between GoT and IPTL for delivery of escrow funds, 21 October 2013.

⁵⁰⁹ HB/H/338/4877-4882 at pg. 4878: Agreement between GoT and IPTL for delivery of escrow funds, 21 October 2013.

Swift Code: UNILTZTZ

376. Mr Sethi eventually directed BoT on 28 November 2013⁵¹⁰ to transfer the monies from the Escrow Account directly to the PAP Account in Stanbic Bank–

Account Name: *Pan Africa Power Solutions (T) Ltd*
TZS account number: *9120000125294*
USD account number: *9120000125324*
Swift Code *SBICTZTX*

377. In that same letter, he asked that all the Treasury Bills held in the BoT Escrow Account be transferred to “*PAN AFRICA POWER SOLUTIONS (T) LTD c/o IPTL*”.

378. The fact that GoT was fully mindful that by recognising that paying to a PAP-controlled IPTL GoT would be subject to the potential exposure to SCB HK is reflected in the Deed of Indemnity executed by PAP-controlled IPTL in favour of GoT as condition precedent for the release, which in part started unequivocally in its preamble that –

The Government and the Escrow Agent being cautious of the pending and potential disputes against IPTL in connection with the escrow monies including the remnants of the Standard Chartered Hong Kong's claims pending in Courts, are minded to have the Government and the Escrow Agent indemnified by IPTL against all present and future claims, charges, actions, proceedings that may arise against or may be submitted to the Government consequent upon the release and payment of the funds in the Tegeta Escrow Account to IPTL.⁵¹¹

379. Having accepted this risk and the mitigation thereof offered by the PAP-controlled IPTL indemnity, GoT should not now be heard to say that that it has no responsibility, merely by saying that the monies were paid to IPTL and not PAP. The transfer to PAP’s account was done with the full knowledge of GoT, TANESCO and the BoT. GoT cannot deny that it knew that the monies did not reach IPTL, but PAP’s account. To suggest that GoT did not obtain direct or indirect benefit from the arrangement ignores the fact that GoT had, through this scheme, extricated itself (or so it believed) from its obligations under the Implementation Agreement and, at the same time, its national electricity grid managed by TANESCO was then able to deal with the PAP-controlled IPTL to resolve their claims to its advantage.

⁵¹⁰ Exhibit C-414: Letter from Mr. Sethi to the Bank of Tanzania, 28 November 2013 (submitted at the Hearing).

⁵¹¹ HB/H/340/4884-4887 at pg. 4886: Letter from IPTL to the Permanent Secretary of the Ministry of Energy and Minerals and to the Governor of the Bank of Tanzania, attaching a “Deed of Indemnity”, 28 October 2013.

(3) Tribunal's Decision on Expropriation

380. The Tribunal therefore finds that GoT, through MEM, TANESCO, Utamwa J, the Attorney-General and BoT, facilitated the improper transfer of control of IPTL to PAP and/or Mr Sethi, without due regard to the interests of IPTL and SCB HK as successor lender and assignee pursuant to the Implementation Agreement. Utamwa J most injudiciously decided to “*take judicial notice*” of the illicit and fictitious sale of Mechmar Shares in IPTL and recklessly ordered IPTL and the Power Plant to be handed to PAP. GoT through its agencies, as stated above, further aided and abetted the improper release of the Escrow Account, disregarding the legitimate interest of IPTL and SCB HK as successor lender and assignee, by enabling PAP and Sethi to receive the full release of the monies and assets in the Escrow Account thereby depriving IPTL and SCB HK of the right to properly exercise their rights of control and economic benefits of their investment. Such acts are clear acts of expropriation expressly prohibited, and to which GoT had solemnly promised to abide by under Article 16 of the Implementation Agreement. The Tribunal therefore find that GoT is in breach of Article 16.2 of the Implementation Agreement.

B. DISCRIMINATION CLAIM UNDER ARTICLE 16.1 OF THE IMPLEMENTATION AGREEMENT

381. The basis of the Claimant's discrimination claim is Article 16.1 of the Implementation Agreement, which provides as follows:

*The GOT shall not take any discriminatory action which materially and adversely affects the Project or the performance of [IPTL's] obligations or the enjoyment of its rights or the interests of the Investors under the Security Package or expropriate or, except as hereinafter provided, acquire the Facility or [IPTL], whether in whole or in part. Nothing in the foregoing shall apply to any actions taken by the GOT, TANESCO, or any Governmental Authority pursuant to their respective rights and obligations arising under this Agreement, the Power Purchase Agreement and the other documents comprising the Security Package.*⁵¹²

382. The Claimant claims that the Respondent breached Article 16.1 of the Implementation Agreement in:

⁵¹² HB/C/005/192-267: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

- i. *“favouring PAP and VIP (IPTL’s minority shareholder)”, which are “two Tanzanian entities [...] over Mechmar (IPTL’s majority shareholder)” and the Claimant which was “(IPTL’s lender and secured creditor)”;*⁵¹³ and
 - ii. *“favouring IPTL when it wrongly came into Tanzanian hands, while mistreating IPTL when it was legitimately owned/controlled by foreign entities”.*⁵¹⁴
383. The Claimant argues that the Respondent’s discriminatory actions materially and adversely affected the Project and performance of IPTL’s obligations, the enjoyment of IPTL’s rights and the Investor’s interests under the Security Package. Further, that those actions of the Respondent led to IPTL’s inability to discharge the PPA Award and IPTL could not consequently earn and apply income that would otherwise be earned pursuant to the PPA from September 2013, which in turn could then be applied to reduce its loan outstanding under the Facility Agreement which, as of August 2018, stood at over USD 187 million.⁵¹⁵
384. The Respondent asserts that the Claimant’s claim is devoid of merit. It submits that the Claimant’s case does not meet the requirements of Article 16.1⁵¹⁶ arguing that:
- i. only IPTL can bring a claim under Article 16.1;
 - ii. any purported discriminatory action must be between companies with similar projects;
 - iii. the discriminatory action must issue from the *“Government”* and not any other *“Governmental Authority”*; ⁵¹⁷
 - iv. a discriminatory intent is required, which is absent in the present case;⁵¹⁸ and
 - v. there was no evidence that any of the alleged acts caused material and adverse effects on IPTL.

⁵¹³ Claimant’s PHB, para. 174.

⁵¹⁴ Claimant’s PHB, para. 174.

⁵¹⁵ Claimant’s PHB, para. 175.

⁵¹⁶ Respondent’s PHB, paras. 131-133.

⁵¹⁷ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 255.

⁵¹⁸ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 256.

(1) Is SCB HK Entitled to Bring a Discrimination Claim under Article 16.1 of the Implementation Agreement?

a. Parties' Submissions

385. The Respondent maintains that the undertaking against discrimination given under Article 16.1 is addressed to IPTL, and IPTL is, as such, the only party that can benefit from the protection given. The Respondent argues that this position is confirmed by Article 24.6 of the Implementation Agreement, which excludes third party beneficiaries, and Article 16.1 is not among the exceptions stated in the provision.⁵¹⁹

386. Article 24.6 of the Implementation Agreement reads:

24.6 No Third Party Beneficiaries

*This Agreement shall not confer any right of suit or action whatsoever on any third party, except for the specific rights granted to the Lenders pursuant to Articles 15.2, 18.2 and 19.4.*⁵²⁰

387. The Respondent states that the Claimant cannot rely on the second part of Article 16.1 of the Implementation Agreement, including the wording "*Investors under the Security Package*", as only IPTL could bring an action and investors cannot bring an action in their own name. Any other approach would be an excessively wide interpretation of the meaning of discrimination in this provision. Furthermore, even if investors could bring an action based on this wording, the Claimant could still not bring an action as it is not an investor or shareholder of IPTL and does not have standing to bring an action on behalf of IPTL. The Respondent submits that only IPTL can bring a claim for breaches under Article 16.1 of the Implementation Agreement related to the Project which are contended for by the Claimant, including the performance of IPTL's obligations, the enjoyment of IPTL's rights or the investors interests under the Security Package.⁵²¹

b. Tribunal's Analysis

388. Consistent with the Tribunal's finding that the Claimant is the lawful assignee under Article 15.2 of the Implementation Agreement and has title and interest to pursue its claims against GoT for any breach of the Implementation Agreement in its own name [see paragraph 172

⁵¹⁹ Respondent's PHB, para. 132.

⁵²⁰ HB/C/005/192-267 at pg. 250: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995 (emphasis in original).

⁵²¹ Respondent's PHB, para. 133.

above], the Respondent's argument that the Claimant cannot claim protection against discrimination must fail.

389. The Respondent's argument reads into Article 16.1 of the Implementation Agreement that any discriminatory action must be directed against IPTL. Article 16.1 of the Implementation Agreement is not limited in this way. The prohibition concerns actions of the GoT that could affect or impact "*the Project or the performance of [IPTL's] obligations or [...] the interests of the Investors under the Security Package.*" This must therefore mean that persons apart from IPTL, *viz.* IPTL's actual shareholders, lenders and investors under the Security Package whose interests are materially and adversely affected by GoT's actions, are included.
390. In any event, Article 24.6 of the Implementation Agreement itself specifically creates the exception for "*specific rights granted to the Lenders pursuant to Articles 15.2, [...]*" which means that Lenders are not the "*third party*" intended under it and as such are not prohibited from exercising their specific security rights created under the Implementation Agreement, of which Article 16.1 of the Implementation Agreement is one. The Tribunal therefore finds that the Claimant as assignee and lender, is entitled to seek the benefit of GoT's undertaking against discrimination specifically created under Article 16.1 of the Implementation Agreement.

(2) Does the Discriminatory Action Require a Comparator?

a. Parties' Submissions

391. The Respondent's argument is that to sustain an action for discrimination, a comparison with an entity discriminated against is necessary and that this approach is confirmed by contractual interpretation and international law, which provides that such comparison must be done with other similar projects or categories or companies in "*like circumstances.*"⁵²² The Respondent submits that on a plain analysis of the ordinary meaning of Article 16.1 of the Implementation Agreement, the discriminatory action intended is not to cover discrimination that as between shareholders, lenders or investors, but rather between companies with similar projects or similar circumstances.⁵²³

⁵²² Respondent's PHB, para. 134; Respondent's Reply PHB, para. 88; HB/A/003/144-370 at pgs. 291-297; Respondent's Counter-Memorial; HB/A/005/604-827 at pgs. 767-771; Respondent's Rejoinder.

⁵²³ HB/A/003/144-370: Respondent's Counter-Memorial, para. 253.

392. The Respondent says that the Claimant's theory that the Respondent favoured VIP and PAP over Mechmar and the Claimant, and favoured IPTL when under PAP's control compared to IPTL under Mechmar's control, is not within the scope of the discrimination contemplated in Article 16.1 of the Implementation Agreement.
393. Further, the Respondent contends, such discrimination must mean the imposition of obligations, conditions or standards that are unduly and materially more onerous than those persons in like circumstances. In support of this, the Respondent refers to (i) the World Bank's Model Implementation Agreement which contains a similar clause to Article 16.1 of the Implementation Agreement; (ii) other implementation agreements; and (iii) international investment case law generally, including *LG&E Energy Corp and others v Argentina*,⁵²⁴ wherein the tribunal decided that for a measure to be discriminatory it must be *inter alia* "that is not taken under similar circumstances against another national".⁵²⁵
394. The Claimant's position is that there is no such qualification in Article 16.1 of the Implementation Agreement that the discriminatory action must be directed against IPTL itself or that it must be between similar projects, and that there is no requirement that discrimination must relate to IPTL *vis-à-vis* competitors. It submits that the only qualification is that the discriminatory action must materially and adversely affect certain matters relating to IPTL and the Project, which shows that the objective of the provision is to protect IPTL.⁵²⁶ Further, the Claimant argues that the description of "discrimination" in other implementation agreements or the World Bank's Model Implementation Agreement is not relevant to the inquiry of what discrimination means in the Implementation Agreement, as both contain inclusive, rather than exhaustive descriptions of discriminatory action.

b. Tribunal's Analysis

395. The Tribunal agrees with the Respondent that in order for conduct to be considered discriminatory, there must be a comparator that permits comparison against which the suspect conduct can be measured. The conduct that is discriminatory is a separate matter from the consequences of such conduct. Thus, discrimination ordinarily requires that another

⁵²⁴ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

⁵²⁵ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 253-254.

⁵²⁶ Claimant's PHB, para. 179.

person, in like circumstances, has been given more favourable treatment. If IPTL as a company was treated less favourably than other companies in like circumstances during that same period, such would generally constitute discrimination. In *LG&E Energy Corp and others v Argentina*,⁵²⁷ a dispute arose out of a bilateral investment treaty between the United States and Argentina, which provided that "[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."⁵²⁸ The claimants in that case had complained that they "received treatment different from that accorded to similarly situated public utilities, including electricity and water distribution companies."⁵²⁹

396. The Tribunal does not agree with the Claimant's suggestion that "*discrimination*" in the context of this Implementation Agreement, requires only the qualification that the discriminatory action "*materially and adversely affects the Project or the performance of the Company's obligations or the enjoyment of its rights or the interests of the Investors under the Security Package*". In other words, according to the Claimant, there need not be a comparative disadvantage, so long as it could be shown that GoT had taken action which could cause IPTL (*viz.* its assigns as we have so found) to suffer "*materially and adversely*". This would collapse the discriminatory conduct and its effects and is not warranted on a reading of the provision. In the Tribunal's view, the requirement for "*material and adverse*" effect is a separate requirement of liability. The action taken by GoT must first be discriminatory, and only if such discriminatory action gives rise to material and adverse effect could it sustain a cause for breach of the undertaking.
397. As observed earlier, Article 16.1 of the Implementation Agreement extends its application to all persons who might be affected by actions of GoT in their enjoyment of the rights and interest in the Project or IPTL or the Security Package. The Tribunal does not therefore accept the Respondent's argument that the discrimination under Article 16.1 of the Implementation Agreement is limited to IPTL alone. In any event, the manner of treatment meted out by GoT to IPTL when it was under the control of foreign entities (IPTL's shareholders and the

⁵²⁷ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

⁵²⁸ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 140.

⁵²⁹ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 141.

Claimant) and when it became a PAP-controlled IPTL also needs to be considered.⁵³⁰ The primary purpose of GoT giving the undertaking against discrimination was to assure the Investor (including the Lenders) that their interest would not be affected by any discriminatory action taken by GoT. How GoT treated IPTL before and after the change of control, are the best signs of whether GoT had complied with its undertaking not to take discriminatory action which could adversely affect the interests of the Project, the performance of the Company, the Investor and the Lenders.

(3) Meaning of the Reference to “GOT” in Article 16.1 of the Implementation Agreement

a. Parties’ Submissions

398. The Respondent argues that Article 16.1 of the Implementation Agreement contemplates only acts of the Respondent as it refers to “GOT” and not the actions of any other “Governmental Authority.”⁵³¹

399. The Implementation Agreement at Article 1 provides:

“Governmental Authority” bears the meaning attributable thereto in the Power Purchase Agreement.

400. The PPA provides the definition of “Governmental Authority” at Article 1.1 as:⁵³²

“Governmental Authority”: Any state, municipal or local government or regulatory department, body, political subdivision, commission, instrumentality, agency, ministry, court, judicial or administrative body, taxing authority or other relevant authority having jurisdiction over either Party, the Facility.

401. The Respondent therefore argues that the Claimant’s complaint against the acts of the Tanzanian Courts and First PL and Second PL cannot be attributed to the GoT.⁵³³

402. The Claimant’s response to this is that the definition of “Government of Tanzania” is narrower than “Governmental Authority” as defined in Article 1.1 of the PPA and the issue is which

⁵³⁰ See paras. 412, 423 and 427 to 429 below.

⁵³¹ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 255.

⁵³² HB/C/002/013-128 at pg. 024: Power Purchase Agreement, 26 May 1995 (emphasis in original).

⁵³³ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 255.

elements of “*Governmental Authority*” fall within the meaning of “*GOT*”.⁵³⁴ It says that the ordinary meaning of the term “*government*” would include acts by the judicial, executive and legislative branches of the Respondent, including acts by the Tanzanian Courts, First PL, Second PL, other government officials involved in the release of the funds in the Escrow Account.⁵³⁵ Alternatively, the Claimant submits that even if the words “*Government of the United Republic of Tanzania*” do not include the judicial branch, they should at the minimum cover the executive branch of the national government and this is clear from the references in the Implementation Agreement to the “*GOT*” such as Article XI⁵³⁶ (granting immigration approvals), Article XII⁵³⁷ (controlling and directing security forces), Article 18.4⁵³⁸ (confirming the grant of tax exemptions) and Article 24.7⁵³⁹ (waiving sovereign immunity). The Claimant submits that this is relevant as the key discriminatory actions were carried out by executive authorities.⁵⁴⁰

b. Tribunal's Analysis

403. The Tribunal has little hesitation in disagreeing with the position taken on behalf of the Respondent. The term “*Government*” is not specifically defined in the Implementation Agreement, and it is generally understood that the term is the embodiment of the entire administration of a State and has generally the authority to act on behalf of the State and not limited to constitutional arms of government, *viz.* the legislature, the executive and the judiciary (see discussion earlier in paragraphs 280 to 281). The Implementation Agreement was in fact signed by the GoT “*acting through its Ministry of Water, Energy and Minerals*”. It was then signed on its behalf by the Principal Secretary of the “*Ministry of Water, Energy and Minerals*”. By using the term “*Governmental Authority*” and ascribing to it the specific meaning given to it in the PPA, the Government has expressly intended to act through the Governmental Authority so defined, which include the actions of the Office of the Administrator General and Official Receiver, “*court*”, and “*judicial*” arms of the Government. Their actions or inactions must be attributable to the GoT.

⁵³⁴ HB/A/004/371-603: Claimant’s Reply, para. 512.

⁵³⁵ HB/A/004/371-603: Claimant’s Reply, paras. 511-514.

⁵³⁶ HB/C/005/192-267 at pg. 212: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

⁵³⁷ HB/C/005/192-267 at pg. 213: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

⁵³⁸ HB/C/005/192-267 at pg. 232: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

⁵³⁹ HB/C/005/192-267 at pg. 250: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

⁵⁴⁰ HB/A/004/371-603: Claimant’s Reply, paras. 515-516.

(4) Intention to Discriminate

a. Parties' Submissions

404. The Respondent has also suggested that for GoT's actions to be considered discriminatory, it must be shown to have been done with such intent. It referred to the *LG&E Energy Corp and Others v Argentina*⁵⁴¹ where the tribunal stated at paragraph 146:⁵⁴²

[I]n order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.

405. The Claimant, on the other hand, submits that Article 16.1 of the Implementation Agreement does not require subjective intent to discriminate. It only requires that the action be discriminatory. It points out that the element of intent was held by some other tribunals as not to be essential.⁵⁴³ As to the Respondent's reliance on *LG&E Energy Corp and others v Argentina*, the Claimant points out that the tribunal there had preceded the portion quoted by the Respondent, at paragraph 146, by stating that discriminatory effect may also constitute a discriminatory measure *viz.*:

*146. In the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.*⁵⁴⁴

406. The Claimant nevertheless asserts that GoT's actions were in fact intentional as it knew that the Claimant was a secured lender and that the Escrow Account should have been used to pay the PPA Award and reduce IPTL's debt, but wrongfully preferred PAP and VIP's interests.⁵⁴⁵

⁵⁴¹ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 146.

⁵⁴² HB/A/003/144-370: Respondent's Counter-Memorial, para. 256 (Referring to *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 146 in footnote - emphasis in original).

⁵⁴³ HB/A/004/371-603: Claimant's Reply, para. 524; HB/G/035/3377-3453: *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467 (Award), 1 July 2014, para. 177; (cited but not exhibited) *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 321; HB/G/038/3732-3803: *Eastern Sugar B.V. (Netherlands) v Czech Republic*, SCC Case No. 088/2004 (Partial Award), 27 March 2007, para. 338.

⁵⁴⁴ HB/G/062/6556-6641: *LG&E Energy Corp and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 146.

⁵⁴⁵ HB/A/004/371-603: Claimant's Reply, paras. 523-527.

b. Tribunal's Analysis

407. There appears weak support from other tribunals for the proposition that intention to disfavour or discriminate is an essential element to establish less favourable treatment or discrimination. The tribunal in *LG&E Energy Corp and others v Argentina*, as correctly pointed out by the Claimant, did not take the position that intention is an essential element to discriminate. Other cases, suggest that “*intent is not necessarily decisive*”⁵⁴⁶ and in one case, the absence of intention to disfavour a party but “*to favor newcomers and preserve [their] jobs[...], the result is still [...] a violation [...] [if] the effect [...] was a discriminatory and unreasonable measure*”.⁵⁴⁷ In another case, an act done not “*with the intent of discriminating against*” another is discriminatory so long the party seeking such redress has “*received less favourable treatment*” than that accorded to another.⁵⁴⁸
408. The Tribunal takes the view that Article 16.1 of the Implementation Agreement does not support a requirement of intent; what is addressed is the discriminatory action and its consequences. Intent is a distinct element and one that is burdensome to prove and should not be readily implied since it would reduce the scope of protection without explicit mention.
409. The question of whether it is a breach of the Respondent’s undertaking requires a consideration of the impact each of the alleged discriminatory actions. This requires a factual inquiry of the four specific complaints raised by the Claimant which it says are discriminatory actions by applying the aforesaid tests. The Tribunal will consider each of these complaints and see if any of these are discriminatory actions, and, if so, consider whether they “*materially and adversely affects the Project or the performance of the Company's obligations or the enjoyment of its rights or the interests of the Investors under the Security Package.*”

(5) The Factual Basis of the Discrimination Claim: Alleged Discriminatory Actions

410. The Claimant alleges four categories of discriminatory actions. The facts of each of them have been narrated in the earlier discussion on the Claimant’s claim for expropriation. The Tribunal will in this section make brief reference to the same for the purpose of considering

⁵⁴⁶ HB/G/074/7626-7708: *S. D. Myers, Inc v Government of Canada*, NAFTA/UNCITRAL, Partial Award, 13 November 2000, para. 254.

⁵⁴⁷ HB/G/038/3732-3803: *Eastern Sugar B.V. (Netherlands) v Czech Republic*, SCC Case No. 088/2004 (Partial Award), 27 March 2007, para. 338.

⁵⁴⁸ HB/G/035/3377-3453: *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467 (Award), 1 July 2004, para. 177.

this issue of whether they amount to discriminatory actions and if so, the material impact on the Project, IPTL and the Claimant.

a. *The Respondent Frustrated the Pursuit by IPTL of the Interpretation Proceedings*⁵⁴⁹

(i) *Parties' Submissions*

411. The Claimant alleges that Oriyo J and the First PL discriminated against the Claimant and Mechmar in favour of VIP (which is a Tanzanian entity) by taking steps which frustrated the continuation of the Interpretation Proceedings. More specifically, this relates to Oriyo J's decision of 16 December 2008 to dismiss IPTL's stay application as being "[...] *redundant*" and stated that "[i]t has become obsolete; it does not serve any useful purpose."⁵⁵⁰
412. The Claimant says that the Interpretation Proceedings were supported by Mechmar but opposed by VIP. By the order refusing the stay application and appointing the First PL, Oriyo J discriminated against Mechmar as she vested the power over IPTL to the First PL, who acted in accordance with VIP's wishes and declined to continue the Interpretation Proceedings. According to the Claimant, the inability to continue the Interpretation Proceedings materially and adversely affected IPTL's enjoyment of its rights under the PPA as they prevented the Tariff Dispute from being resolved, which consequently prevented payments to be made under the PPA and thus preventing IPTL's debts from being reduced.⁵⁵¹
413. The Respondent however argues that the First PL acted in his capacity as provisional liquidator of the company and as such his actions cannot be attributed to the Respondent. Furthermore, the withdrawal of the Interpretation Proceedings was initiated by Mechmar. The Respondent adds that the Interpretation Proceedings were not "*easy straightforward*" proceedings and would not have "*quickly resolved*" the Tariff Dispute and as such no material and adverse effect could be derived from the discontinuation of the Interpretation Proceedings. In its view, the First PL had taken a rational decision by balancing the cost of the proceedings and the risks of an unsuccessful outcome.⁵⁵²

⁵⁴⁹ See paras. 292 to 308 above.

⁵⁵⁰ HB/H/104/1122-1138 at pgs. 1127-1128: High Court of Tanzania's Appointment of PL, 16 December 2008.

⁵⁵¹ Claimant's PHB, para. 187.

⁵⁵² Respondent's Reply PHB, para. 92.

(ii) Tribunal's Analysis

414. The Tribunal recalls its discussion on Oriyo J's decision [see paragraphs 299 to 303 above] and its observations that the judge's decision was unclear as to what had convinced her that the stay application could serve no useful purpose, and she could have on a date fixed for the hearing of an application for a stay of those proceedings; instead, she proceeded to make a substantive order appointing a provisional liquidator, relying on affidavits filed by VIP some five years earlier, and to hold that an immediate appointment would be necessary and in the public interest without calling upon the parties involved to be heard substantively. Oriyo J tried to justify her reliance on those affidavits by saying that -

For reasons not on record it is apparent that the first and second respondents did not file any counter affidavits to oppose the petition for winding up IPTL. [...]

As stated earlier, the 1st and 2nd respondents do not have much by way of affidavits in reply/opposition; so their written submissions are limited to points of law. Otherwise they are mere statements from the bar. Since the respondents have not countered the affidavits in the petition by the applicant; those averments stand uncontroverted and are accordingly adopted by the court.⁵⁵³

415. On the merits of the application, Oriyo J also appeared to have taken the view that fraud had been committed by Mechmar and continuing viz. -

On the degree of urgency; its relevancy here cannot be overstated because the oppressive acts, fraud, etc of Mechmar against VIP has been in a continuous process since 2001; that is, for a period of over seven years. [...]

The need for the appointment of a Provisional Liquidator pending winding up has in no doubt been adequately established by VIP through the affidavits of James Burchard Rugemalira filed on 25.2.2002 and 24.9.2003. And on the basis of the said affidavits, both VIP and IPTL (the company) stand to suffer irretrievably if a Provisional Liquidator is not appointed. But for Mechmar; if the appointment of a Provisional Liquidator is not immediately made; it does not stand to suffer or lose anything except prolong the period of corporate waste, diversion of funds, conversion of ass[e]ts, fraud, deadlock etc.⁵⁵⁴

⁵⁵³ HB/H/104/1122-1138 at pgs. 1125-1126: High Court of Tanzania's Appointment of PL, 16 December 2008.

⁵⁵⁴ HB/H/104/1122-1138 at pgs. 1132-1133: High Court of Tanzania's Appointment of PL, 16 December 2008.

416. Even more unintelligible was Oriyo J's observation that the appointment of a provisional liquidator would serve the interests of some others including TANESCO viz. –

*On the issue of public interest considerations; it calls for urgent action towards appointment of a Provisional Liquidator. It is intended to serve interests of groups like those doing business with IPTL including TANESCO and the government of Tanzania.*⁵⁵⁵

417. Bearing in mind that IPTL's application for a stay of the petition was to enable IPTL to proceed in the Interpretation Proceedings in an attempt to seek further compensation from TANESCO under the PPA, Oriyo J's reasoning is indeed difficult to comprehend.

418. Taking a generous view of the thinking behind Oriyo J's decision, the Tribunal would say that the decision of 16 December 2008 is both puzzling and inexplicable. Her actions suggested that she was distracted by other unexplained considerations.

419. The immediate consequence of Oriyo J's decision was that the Interpretation Proceedings did not proceed on the day it was set for hearing. The First PL decided not to proceed further despite SCB HK's repeated offers to undertake to bear the costs incurred in doing so and only to seek recovery from IPTL in the event a favourable decision be made in IPTL's favour.⁵⁵⁶

420. As for the complaint made against the First PL's decision not to proceed with the Interpretation Proceedings, the Tribunal finds it curious that the First PL did not respond to the Claimant's offer to fund the Interpretation Proceedings. To the extent that there is a possibility (whatever may be the probability) of recovery of more compensation for IPTL, and its creditors from TANESCO, it would appear that the First PL should have considered the offer.

421. The Tribunal notes, however, that it could not be said that if the Interpretation Proceedings had proceeded, the outcome would have been a favourable one for IPTL. There is every possibility that the PPA Tribunal might have made an interpretative ruling in favour of IPTL, or for TANESCO or made "no order". In other words, there is nothing before this Tribunal to enable it to foresee the likely outcome of the Interpretation Proceedings. There is no evidence to support any suggestion that the Claimant or Mechmar or IPTL had suffered any loss or had

⁵⁵⁵ HB/H/104/1122-1138 at pg. 1133: High Court of Tanzania's Appointment of PL, 16 December 2008.

⁵⁵⁶ HB/H/108/1152-1154 at pg. 1153: Letter from SCB HK to the Provisional Liquidator of IPTL, 22 December 2008; HB/H/109/1155-1157 at pg. 1155: Letter from Ringo & Associates to the Provisional Liquidator of IPTL, 8 January 2009.

been “*materially and adversely affected*”. With this burden undischarged by the Claimant, the Tribunal cannot find that consequences of the actions complained of were detrimental within the meaning of Article 16.1 of the Implementation Agreement.

b. The Respondent Procured the Power Plant to be Operated by the First PL under the Interim PPA

(i) Parties’ Submissions

422. The Claimant alleges that the First PL had through various actions favoured VIP over the Claimant and Mechmar. These actions include resuming operations of the power plant under the Interim PPA in July 2009 under the directions of the Respondent, as well as entering the Interim PPA, which covered only running costs and prejudiced IPTL’s ability to maintain the Facility at its highest standards, and prevented IPTL from having means to provide a return to Mechmar (which was the majority shareholder) and repay the debt owed to the Claimant.⁵⁵⁷
423. The Claimant argues that these actions materially and adversely affected the ownership, operation of the Power Plant, and therefore the Project, IPTL’s enjoyment of its rights to full payment under the PPA, and the Claimant’s and Mechmar’s interests under the Security Package.⁵⁵⁸
424. The Respondent’s response is that the emergency measures to restore operations in the Facility taken by the First PL were within his authority and were made in order to preserve IPTL’s assets, and that none of the measures operated in favour of VIP but rather were taken solely in the interest of IPTL.⁵⁵⁹

(ii) Tribunal’s Analysis

425. The Tribunal sees little basis for the Claimant’s complaint. Entering into an arrangement to operate the plant to generate power for TANESCO could not of itself be favouring any party. IPTL was under an obligation to operate the Plant to generate power. Even without the imposition of the First PL, and even when the parties were in disagreement over how the tariffs and expenses had to be calculated, IPTL, whether under the control of the original shareholders or the Claimant, would have the duty to operate it, whether to generate positive

⁵⁵⁷ Claimant’s PHB, para. 187.

⁵⁵⁸ Claimant’s PHB, para. 187.

⁵⁵⁹ Respondent’s Reply PHB, para. 92.

revenue or mitigate losses. In any case, VIP as a shareholder of IPTL stands in the same position as Mechmar and would suffer the same detriment had the arrangement by the First PL increased liability for IPTL.

426. The Tribunal therefore finds that the actions of the First PL in this regard are not discriminatory and no breach of the undertaking under Article 16.1 of Implementation Agreement could arise.

c. Transfers of IPTL and the Power Plant, and Payment Out of the Escrow Account

427. The factual narration relating to this issue is set out in the Tribunal's discussion on "Expropriation" in paragraphs 324 to 373 above.

(i) Parties' Submissions

428. The Claimant argues that the Second PL, Utamwa J, BRELA, the Minister for Energy and Minerals, and the PS MEM acted in favour of VIP and PAP, disregarding the interests of the Claimant in IPTL through its ownership of the Mechmar shares. The discriminatory actions included: (i) the Second PL's recognition of the purported sale of Mechmar's shares and planned sale of VIP's shares to PAP by countersigning the VIP-PAP-SPA and supporting VIP's application for PAP to take over IPTL's affairs; (ii) Utamwa J's refusal to hear the Claimant's submissions or the Share Receiver, and instead taking "*judicial notice*" of the purported sale of Mechmar's shares in IPTL and handing over affairs to PAP despite the knowledge of the Claimant's rights; (iii) BRELA's registration of the transfer of shares to PAP despite having seen documents that put PAP's ownership of Mechmar's shares in doubt; and (iv) the Permanent Secretary Maswi's signing of the agreement to release the Escrow funds despite being aware of the Claimant's rights and that PAP could not have purchased Mechmar's shares.⁵⁶⁰
429. The Claimant asserts that these actions materially and adversely affected the ownership and operation of the Power Plant, and therefore the Project; IPTL's enjoyment of its rights to full payment under the PPA; and the Claimant's and Mechmar's interests under the Security Package.⁵⁶¹

⁵⁶⁰ Claimant's PHB, para. 187.

⁵⁶¹ Claimant's PHB, para. 187.

430. In relation to the actions of the Second PL, the Respondent says that the Administrator General and Official Receiver's office when acting in his capacity as liquidator (provisional or otherwise) or receiver was acting as an agent of the company in or pending liquidation. He was therefore not acting as a government official and therefore his actions could not be attributable to the Respondent.⁵⁶² As the provisional liquidator, he had the right to hold doubts over the Claimant's standing, especially when viewed in the light of the PwC Report, which referred to the Claimant as an "*unsecured creditor*".⁵⁶³ In any case, as provisional liquidator, the Second PL's actions were subject to the High Court's scrutiny and the Claimant failed to adequately challenge them.⁵⁶⁴
431. As regards Utamwa J's Order of 5 September 2013, directing that the affairs of IPTL be vested on PAP, the Respondent relies on the principle of separation of powers set out in Articles 107A and 107B of the *Constitution of the United Republic of Tanzania*,⁵⁶⁵ that executive officials could not take account of documents submitted by private parties (such as the Claimant) conflicting with the findings of a court (Utamwa J Order) and were bound to follow the Utamwa J Order.⁵⁶⁶ In other words, GoT was merely complying with the orders given by the court and could do little more.
432. As to the subsequent release of the Escrow Account, the Respondent says that this was a consequence of the agreement between TANESCO and IPTL to end the Tariff Dispute and their agreement acknowledged that the proceeds in the Escrow Account would be released to enable it to pay off its legitimate creditors. The Respondent relies heavily on the Utamwa J Order.
433. The Respondent also submits that it released the proceeds of the Escrow Account upon IPTL's instructions⁵⁶⁷ to IPTL and not to IPTL's creditors, and the fact that IPTL indicated different bank accounts for the money to be released to does not change the fact that payment was made to IPTL.⁵⁶⁸

⁵⁶² Respondent's PHB, para. 107.

⁵⁶³ HB/H/220/3140-3213 at pg. 3180: Price Waterhouse Cooper's Report entitled "IPTL Creditor Claim Assessment", 29 April 2012.

⁵⁶⁴ Respondent's Reply PHB, para. 92.

⁵⁶⁵ HB/G/175/12775-12865 at pg. 12836: The Constitution of the United Republic of Tanzania, 1977.

⁵⁶⁶ Respondent's Reply PHB, para. 92.

⁵⁶⁷ Respondent's Reply PHB, para. 92.

⁵⁶⁸ Respondent's Reply PHB, para. 92; HB/H/338/4877-4882 at pg. 4878: Agreement between GoT and IPTL for delivery of escrow funds, 21 October 2013; Exhibit C-414: Letter from Mr. Sethi to the Bank of Tanzania, 28 November 2013.

(ii) Tribunal's Analysis

434. The Tribunal accepts the Respondent's argument that the Administrator General and Official Receiver's office when acting in his capacity as liquidator (provisional or otherwise) or receiver was acting as an agent of the company. However, this does not negate the fact that the Administrator General and Official Receiver's office remain a Governmental Authority within the definition given in the Implementation Agreement read with the PPA. It has the public duty to act fairly and abide by the obligations required under the Implementation Agreement not to discriminate against IPTL and its lawful shareholders when discharging its responsibility as Second PL. The Second PL had in his Compromise Agreement dated 20 August 2013⁵⁶⁹ agreed to pay some USD 14.6 million to "*uncontested creditors*" including fees of ASYLA ATTORNEYS for USD 500,000 being the legal services "*supplied to [...] PAP*" in relation to the "*Agreement for the Sale and Purchase of VIP Shares in IPTL dated 15th August 2013 between VIP and PAP*".⁵⁷⁰
435. As regards the role of BRELA in registering the transfer of shares in favour of PAP despite knowledge of the possible discrepancy in the chain of transfer, the Tribunal accepts that BRELA was merely complying with the Utamwa J Order and its acts were purely administrative and could not of themselves be considered as discriminating against the Claimant, Mechmar or IPTL.
436. As for the Utamwa J Order, the Tribunal is conscious that its role is not that of an appellate body to review Utamwa J's decision. It has no jurisdiction to do so and is not doing so. The Tribunal is nevertheless bound to consider whether Utamwa J acted judiciously, and not capriciously in the discharge of his functions. As observed in paragraphs 347 to 352 above, Utamwa J had acted without regard to the interest of Mechmar and the Claimant in IPTL, made no inquiry as to whether PAP's purported transfer was a genuine transaction and blessed it with "*judicial notice*" and directed that IPTL and the Power Plant be handed over to PAP's control. The court attendance extracts show that these were made in the absence of SCB HK's counsel.⁵⁷¹ Counsel representing the Malaysian liquidators of Mechmar (in

⁵⁶⁹ HB/H/285/4452-4468: Compromise Agreement between the Provisional Liquidator and Uncontested Creditors of IPTL, 20 August 2013.

⁵⁷⁰ HB/H/285/4452-4468 at pg. 4459: Compromise Agreement between the Provisional Liquidator and Uncontested Creditors of IPTL, 20 August 2013, para. 2.7 (emphasis added).

⁵⁷¹ HB/H/302/4631-4659 at pg. 4658: Court record of hearing before Utamwa J, 30 August 2013-5 September 2013.

liquidation) (the majority shareholders of IPTL) who objected was also not heard after the court ruled that he had no *locus standi*.⁵⁷²

437. The Utamwa J Order deprived the Claimant as lender, secured creditor and shareholders of IPTL (through its control of Mechmar) of its assets. The Order was then relied upon by MEM, who wished to get out of its obligations in the Project; by the Attorney General who advised the this provided a “*golden opportunity*”⁵⁷³ for GoT to extricate itself from its involvement in the Project; by TANESCO to settle its claims with the PAP-Controlled IPTL and enable BoT to release payment out of the Escrow Account. The cumulative force of Utamwa J’s Order, the MEM action, the Attorney General’s advice, TANESCO’s settlement agreement with PAP and BoT’s cooperation clearly discriminated against IPTL, Mechmar and the Claimant in favour of PAP. IPTL, Mechmar and the Claimant were materially and adversely affected in their “*performance of the Company's obligations or the enjoyment of its rights or the interests of the Investors under the Security Package*” and GoT is accordingly in breach of its obligation not to discriminate under Article 16.1 of the Implementation Agreement.
438. The Respondent has argued that the Claimant could have appealed and sought recourse against Utamwa J Order as it was aware of the course of action to take as it did so in relation to the challenging the winding-up order of IPTL in 2012.⁵⁷⁴ To this the Tribunal needs to firstly point out that as the Claimant (SCB HK) was not a party to that action, it could not be in any position to appeal against the order. The Tribunal notes that following the Utamwa J Order the Claimant did by itself and through IPTL’s receivers (and later its liquidators) attempt to intervene by taking the following steps:
- i. The Administrative Receiver of IPTL filed a plaint against IPTL before the High Court (Commercial Division) at Dar Es Salaam on 11 September 2013 in Original Commercial Case No. 124 of 2013 seeking *inter alia* a “*perpetual injunction order restraining the Defendant [IPTL] [...] from preventing the Plaintiff [Administrative Receiver] from entering the Plant and exercising the lawful right to take possession and control of IPTL and its assets; [...]*”.⁵⁷⁵

⁵⁷² HB/H/302/4631-4659 at pg. 4656-4657: Court record of hearing before Utamwa J, 30 August 2013-5 September 2013.

⁵⁷³ HB/H/331/4850-4851 at pg. 4851: Memo from Attorney General of Tanzania, 2 October 2013.

⁵⁷⁴ Respondent’s PHB, paras. 98-100.

⁵⁷⁵ HB/H/318/4800-4806 at pg. 4803: Plaint by Martha Renju in Commercial Case 124 of 2013, 11 September 2013.

- ii. On 11 September 2013, the Administrative Receiver of IPTL filed for an *ex parte* interim injunction to restrain IPTL from “*committing breach of contract by preventing the Applicant [Administrative Receiver] from taking possession of the power plant*”, pending determination of the permanent injunction application on an *inter partes* basis.⁵⁷⁶
- iii. On 12 September 2013, the Claimant’s application for a Revision from the Proceedings, Ruling and Orders of Utamwa J’s earlier order of 24 April 2013, came up for hearing before the Court of Appeal. SCB HK attempted to bring to the court’s attention Utamwa J’s order of 5 September 2013 transferring the affairs of IPTL to Pan Africa Power Solutions (T) Limited. The Court of Appeal declined to consider the matter adding that:

*[The] Court cannot on the basis of the Notice of Motion journey into what the applicant anticipates from subsequent decisions of the High Court [...] At any rate, we were not availed with any copy of the proceedings to see for ourselves what Utamwa, J. ordered in September, 2013.*⁵⁷⁷

- iv. On 6 September 2013, the Administrative Receiver of IPTL (Ms Martha Renju) filed a plaint against PAP, VIP and BoT before the High Court (Commercial Division) at Dar Es Salaam in Commercial Case No. 123 of 2013 seeking “*inter alia a perpetual injunction order restraining the Defendants or any person under or acting pursuant to the Defendants order, control, or instructions whether as employee, agent or trustee from taking possession of, releasing, transferring or dealing with all or any of the proceeds of the Escrow Account [...]*”.⁵⁷⁸
- v. On 6 September 2013, the Administrative Receiver of IPTL also filed a plaint against PAP, VIP and BoT before the High Court (Commercial Division) at Dar Es Salaam in Misc. Commercial Case No. 98 of 2013 (originating from Civil Case No. 123 of 2013) seeking *inter alia* an interim injunction to maintain ‘*status quo*’ and restrain VIP and

⁵⁷⁶ HB/H/317/4789-4799 at pgs. 4791-4792: Application by Ms Martha Renju in Miscellaneous Commercial Case No. 100 of 2013, 11 September 2013.

⁵⁷⁷ HB/H/337/4866-4876 at pg. 4874: *Standard Chartered Bank (Hong Kong) Limited v VIP Engineering and Marketing Ltd and others*, Court of Appeal (Tanzania), Civil Application No. 130 of 2013, Ruling, 18 October 2013.

⁵⁷⁸ HB/H/315/4775-4785 at pg. 4781: Plaint by Martha Renju in Commercial Case 123 of 2013, 6 September 2013.

PAP or any other person from taking possession or exercising control on the proceeds in the Escrow Account until the “*hearing and final determination of the main suit*”.⁵⁷⁹

vi. On 4 November 2013, the liquidators of Mechmar applied to the Court of Appeal to quash Utamwa J’s order of 5 September 2013.⁵⁸⁰ This application was filed before the funds in the Escrow Account were transferred out. The appeal remains unheard.

439. The Tribunal notes that it is quite evident from these steps that the Claimant and Mechmar had made several attempts to seek recourse against the Utamwa J Order but to little avail.

440. The Respondent has also submitted that there could never be any discrimination by its decision to release the funds in the Escrow Account to IPTL as the funds were paid to IPTL and as IPTL had directed it.⁵⁸¹ Such an argument ignores the reality that the control of IPTL was wrested from Mechmar and the Claimant pursuant to the purported Agreement for the Sale of Shares made between Piper Link and PAP dated 21 October 2010⁵⁸² when the Mechmar Shares in IPTL had already been surrendered by Mechmar and deposited with the BVI Court and subsequently released to SCB HK, making such a sale impossible. The release of the funds to PAP-controlled IPTL is clearly not a release of funds to IPTL. This argument is artificial and contrived.

(6) Tribunal’s Decision on Discrimination

441. By giving credence to the transaction and relying solely on the Utamwa J Order, GoT, through MEM, TANESCO, the Attorney-General and BoT, acted in a manner that consciously ignored the interest of the Claimant and IPTL in favour of PAP, aiding and abetting the release of the funds in the Escrow Account to PAP. In the Tribunal’s view, these are discriminatory actions which materially and adversely affected the enjoyment of the rights and interests of SCB HK and IPTL and were thereby in breach of Article 16.1 of the Implementation Agreement.

⁵⁷⁹ HB/H/314/4761-4774 at pg. 4764: Application by Ms Martha Renju in Miscellaneous Commercial Case No. 98 of 2013, 6 September 2013.

⁵⁸⁰ HB/H/343/4983-4910: Civil Application No. 190 of 2013 in the Tanzanian Court of Appeal brought by Mechmar against VIP, IPTL, the Administrator General and PAP, 4 November 2013.

⁵⁸¹ Respondent’s Reply PHB, para. 92.

⁵⁸² HB/H/164/2240-2248: Agreement for Sale of Shares between Piper Links Investments Ltd and Harbinder Singh Sethi, 21 October 2010.

C. CLAIM UNDER ARTICLE 15.3 OF THE IMPLEMENTATION AGREEMENT: FAILURE TO PROVIDE SECURITY

(1) Parties' Submissions

442. The Claimant argues that the Respondent is in breach of Article 15.3 of the Implementation Agreement which provides that:

In the event TANESCO fails to provide the security for payment required by Article 6.6 of the Power Purchase Agreement, the GOT shall within 10 Days after receipt of a notice from the Company to GOT, that states that TANESCO have [sic] failed to provide the security for payment required by Article 6.6 of the Power Purchase Agreement, provide directly to the Company [IPTL] the security for payment on the same terms and conditions as required under the Power Purchase Agreement[...].

443. The Claimant submits that Article 6.6 of the PPA requires TANESCO to provide security, either in the form of a letter of credit or funds paid into an Escrow Account, equal to an aggregate of two months of capacity payments and energy payments, and in the event the security was drawn, TANESCO was required to reinstate the full required amount within 30 days. Further, that Article 15.3 of the Implementation Agreement requires the Respondent to provide this security if TANESCO fails to do so.⁵⁸³

444. The Claimant submits that on 5 February 2014, the Claimant wrote to the Respondent referring to Article 15.3 and stating that following the dissipation of the monies that were in the Escrow Account with Bank of Tanzania, TANESCO has failed to provide security for its payment obligations as required by Article 6.6 of the PPA and demanding that the Respondent provide such security within 10 days from receipt of the notice.⁵⁸⁴ The Claimant contends that the Respondent failed to provide such security and so it breached Article 15.3 of the Implementation Agreement.⁵⁸⁵

445. The Respondent's pleaded case is that it is unclear whether the alleged breach of Article 15.3 of the Implementation Agreement arises from TANESCO or the Government not having established the security referred to in Article 6.6 of the PPA in the form of a letter of credit or Escrow Account for the "required amount" under that Agreement (i.e. two months of capacity payments and energy payments) or whether the breach of Article 15.3 is caused by the

⁵⁸³ HB/A/002/035-143: Claimant's Memorial, paras. 204-207.

⁵⁸⁴ HB/A/002/035-143: Claimant's Memorial, paras. 206-207.

⁵⁸⁵ HB/A/002/035-143: Claimant's Memorial, paras. 206-207.

Government not having reinstated the amount formerly held in the Escrow Account after its contents were paid to IPTL in 2013.⁵⁸⁶ Furthermore, the Respondent states that funds were withdrawn from the Escrow under Article 6.8 of the PPA in relation to the Tariff Dispute and not Article 6.6 of the PPA. It submits that consequently there is no obligation to reinstate any money into the Escrow, as they were only there due to the Tariff Dispute.⁵⁸⁷

446. Finally, the Respondent submits that in any event, even if the Claimant is correct, it would only be entitled to a declaratory judgment as it suffered no loss for the alleged violation of Article 15.3 of the Implementation Agreement. Alternatively, the Claimant would be entitled the equivalent to the security required to be as per Article 6.6 of the PPA.⁵⁸⁸

(2) Tribunal's Analysis

447. The Tribunal notes that the Parties did not in their Post-Hearing Briefs address this claim in any detail. The Claimant only mentioned it as part of its prayer for relief that a declaration be made on GoT's breach of Article 15.3⁵⁸⁹ and the Respondent criticises it as being "*brought by SCB HK with the sole intent of unduly multiplying its chances of recovery.*"⁵⁹⁰
448. It is clear to the Tribunal that this claim was made on the basis that the dissipation of the monies formerly held in escrow by the BoT meant that there was no security in place for TANESCO's payment obligations required by Article 6.6 of the PPA. Relying on that, the Claimant then made a demand on 3 December 2013 and 5 February 2014⁵⁹¹ that the security be replenished as a remedy to prevent an Event of Default under Article 19.1(b)(vii) of the Implementation Agreement. Based on the Tribunal's findings that the dissipation of the Escrow Account was an act of expropriation as well as the consequence of the discriminatory action by GoT, the Claimant's demand for its remedy is justified. The Tribunal therefore finds that Article 15.3 of the Implementation Agreement was breached by the Respondent.

⁵⁸⁶ HB/A/003/144-370: Respondent's Counter-Memorial, para. 322.

⁵⁸⁷ HB/A/003/144-370: Respondent's Counter-Memorial, para. 324.

⁵⁸⁸ HB/A/005/604-827: Respondent's Rejoinder, paras. 288 -289.

⁵⁸⁹ Claimant's PHB, para. 227.

⁵⁹⁰ Respondent's PHB, para. 137.

⁵⁹¹ HB/H/360/5116-5118 at pg. 5118: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 5 February 2014.

D. TERMINATION

449. The Claimant asserts that the Respondent's actions amount to "*GOT Event[s] of Default*" as set out in Article 19.1(b) of the Implementation Agreement, which entitle the Claimant as an assignee of IPTL to terminate the Implementation Agreement.⁵⁹² It argues that pursuant to Article 20.1(b), if IPTL elects to terminate the Implementation Agreement due to a "*GOT Event of Default*", it may elect to transfer the Facility to the Respondent, and the Respondent must pay compensation calculated in accordance with the formula in Row 2 of Schedule 2 of the Implementation Agreement.⁵⁹³
450. The Claimant states in its Memorial that by the time of filing its Memorial, it had notified the Respondent of seven Events of Default committed by GoT many of which gave it the right to terminate the Implementation Agreement, which right it had expressly reserved and that it intended to terminate the Implementation Agreement by the time of the hearing which was scheduled to be heard in April 2018.⁵⁹⁴ It also states in its Memorial, that there were two other GoT Events of Default that entitled it to terminate the Implementation Agreement, but it had not at the time of filing the Memorial notified the Respondent regarding the same. During the Hearing, the Claimant stated that it had terminated the Implementation Agreement through a ("**Termination Notice**") dated 6 July 2018,⁵⁹⁵ following the expiration of the time for remedy.
451. The Termination Notice, which was presented to the Tribunal during the Hearing, summarised the notice process followed for each of the eight Events of Default that formed the basis of the termination.⁵⁹⁶ The Claimant says that if it succeeds on any one of the Events of Default it has relied upon it will be entitled to terminate the Implementation Agreement.⁵⁹⁷
452. The Respondent's case is that: (i) first, the Claimant is not a party to the Implementation Agreement or a valid assignee of IPTL, so its intention to terminate the Implementation Agreement does not carry any material substance;⁵⁹⁸ (ii) second, its acts do not constitute

⁵⁹² Claimant's PHB, para. 188.

⁵⁹³ HB/A/002/035-143: Claimant's Memorial, para. 209.

⁵⁹⁴ HB/A/002/035-143: Claimant's Memorial, paras. 210-212.

⁵⁹⁵ HB/J/Tab 1.

⁵⁹⁶ Claimant's PHB, para. 189; Tr. Day 2 [487:5-495:19].

⁵⁹⁷ Claimant's PHB, para. 194.

⁵⁹⁸ HB/A/003/144-370: Respondent's Counter-Memorial, para. 328.

"GOT Event[s] of Default" under the Implementation Agreement;⁵⁹⁹ (iii) third, that the Claimant has not met the necessary steps required to terminate the Implementation Agreement including the notice provisions;⁶⁰⁰ and (iv) fourth, even in case the Tribunal decides that the Claimant has satisfied the necessary notice requirements, the Claimant cannot claim compensation upon termination without satisfying the pre-condition of transferring the Facility to the Respondent, as compensation is calculated as being the consideration for the acquisition of the Facility by the Respondent.⁶⁰¹

(1) GoT Events of Default and Notice Requirements

a. Parties' Submissions

453. In its claim for termination under the Implementation Agreement, the Claimant relies on Article XIX and XX of the IMA, specifically Articles 19.1(b), 19.2 and 20.1(b), which are reproduced below:⁶⁰²

19.1 Termination for Default [...]

(b) Termination by the Company

Each of the following events shall be an event of default by the GOT (each a "GOT Event of Default"), which, if not cured within the time period permitted (if any) to cure shall give rise to the right on the part of the Company to terminate this Agreement pursuant to Article 19.2; provided, however, that no such event shall be an Event of Default by the GOT (aa) if it results from a breach by the Company of the Power Agreement or this Agreement or; (bb) if it occurs as a result of a Force Majeure Event during the period provided pursuant to Article 17.4:

(i) The expropriation, compulsory acquisition, or nationalization by the GOT or any Governmental Authority of (i) any Ordinary Share Capital, or (ii) any material asset or right of the Company (except as contemplated by the Security Package);

[...]

(vi) Any material breach by the GOT of this Agreement that is not remedied within ninety (90) Days after notice from the Company to the GOT stating that a material breach of the Agreement has occurred that

⁵⁹⁹ HB/A/003/144-370: Respondent's Counter-Memorial, paras. 328, 329-333.

⁶⁰⁰ HB/A/005/604-827: Respondent's Rejoinder, paras. 296-298.

⁶⁰¹ Respondent's PHB, para. 137.

⁶⁰² HB/C/005/192-267 at pg. 235 *et seq*: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

could result in the termination of this Agreement, identifying the material breach in reasonable detail, and demanding remedy thereof;

(vii) Any material breach by TANESCO of the Power Purchase Agreement including but not limited to the failure by TANESCO to provide the security for payment required by Article 6.6 of the Power Purchase Agreement, that is not remedied within thirty (30) Days after the receipt of a notice from the Company to TANESCO that states that a material breach of the applicable agreement has occurred that could result in the termination of that agreement, identifies the breach in reasonable detail, and demands remedy thereof or the failure of the GOT to provide the security for payment required under Article 15.3 [...].

19.2 Termination Notices

(a) Upon the occurrence of a GOT Event of Default or a Company Event of Default, as the case may be, that is not cured within the applicable period (if any) for cure, the non-defaulting Party may, at its option, initiate termination of this Agreement by delivering a notice (a "Notice of Intent to Terminate") of its intent to terminate this Agreement to the defaulting Party: The Notice of Intent to Terminate shall specify in reasonable detail the Company Event of Default or the GOT Event of Default, as the case may be, giving rise to such notice.

(b) Following the delivery of a Notice of Intent to Terminate, the Parties shall consult for a period of up to thirty (30) Days in case of a failure by either Party to make payments when due, and up to sixty (60) Days with respect to any other Event of Default (or such longer period as the Parties may mutually agree), as to what steps shall be taken with a view to mitigating the consequences of the relevant Event of Default taking into account all the circumstances. During the period following the delivery of the Notice of the Intent to Terminate, the Party in default may continue to undertake efforts to cure the default, and if the default is cured at any time prior to the delivery of a Termination Notice in accordance with Article 19.2(c), then the non-defaulting Party shall have no right to terminate this Agreement in respect of such cured default.

(c) Upon expiration of the consultation period described in Article 19.2(b) and unless the Parties shall have otherwise agreed or unless the Event of Default giving rise to the Notice of Intent to Terminate shall have been remedied, the Party having given the Notice of Intent to Terminate may terminate this Agreement by delivering a Termination Notice to the other Party, whereupon this Agreement shall immediately terminate and Article XX shall apply.

[...]

20.1 Compensation Upon Termination [...]

b) GOT Event of Default

In the event the Company terminates this Agreement pursuant to Article 19.1(b) as a result of GOT Event of Default, the Company may elect to transfer the Facility to the GOT or its designee and, upon such transfer, the GOT or its designee shall pay the Company the compensation amount set forth in Row 2 of Schedule 2. [...]

454. The Respondent in its Counter-Memorial contends that at the time of the filing of its Counter-Memorial, the Claimant had not met the notice requirements; had not yet terminated the Implementation Agreement; and did not have the right to do so, and as such Article 20.1 and Schedule 2 of the Implementation Agreement could not be triggered.⁶⁰³
455. The Respondent also contends that the different steps required in Article 19.2 of the Implementation Agreement show that there has to be a “*sufficient connection in content and time*” between the Notice of Intent to Terminate and the Termination Notice in order to terminate the Implementation Agreement. It refers to decisions in *Architectural Installation Services Ltd v James Gibbons Windows Ltd* and *Mvita Construction Co Ltd v Tanzania Harbours Authority*⁶⁰⁴ to support its proposition that in contracts of this nature with complex notice requirements, “*the validity of those notices depends on the precise observance of the specified conditions*” and that there “*has to be a necessary sufficient connection between the various notices for them to be valid.*”⁶⁰⁵
456. The Respondent submits that due to the fact that many of the Claimant’s Notices of Intent to Terminate⁶⁰⁶ were issued more than four years from April 2018, they lack sufficient connection with the Termination Notice that the Claimant intended to issue at the time of the Hearing and the Notices of Intention to Terminate did not convey certainty of intent to terminate.⁶⁰⁷

⁶⁰³ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 334-339.

⁶⁰⁴ HB/G/284/14781-14787 at pgs. 14784-14786: *Architectural Installation Services Ltd v James Gibbons Windows Ltd*, 16 ConLR 68, Judgment, 14 June 1989; HB/G/285/14788-14809 at pgs. 14804-14805: *Mvita Construction Co Ltd v Tanzania Harbours Authority, Court of Appeal (Tanzania)*, 46 BLR 19, Judgment, 26 February 1988.

⁶⁰⁵ HB/A/005/604-827: Respondent’s Rejoinder, para. 297.

⁶⁰⁶ HB/H/477/7112-7113, Letter from SCB HK to TANESCO, 13 October 2017.

⁶⁰⁷ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 337-341.

457. The Claimant summarised the various steps leading to its Termination Notice⁶⁰⁸ as follows:

<p><u>Event A:</u>⁶⁰⁹</p> <p>Expropriation of the Facility and of IPTL's shares by Governmental Authorities (Article 19.1(b)(i))</p>	<ul style="list-style-type: none"> • On 3 December 2013, the Claimant served a notice on the Respondent notifying it that the expropriation of the Facility and Mechmar's shareholding in IPTL amounted to a GoT Event of Default.⁶¹⁰ • On 5 February 2014, the Claimant served a notice on GoT notifying it that the 60-day consultation and remedy period had elapsed without the Respondent remedying the Event of Default and that the Claimant reserved its right to terminate the Implementation Agreement without further consultation.⁶¹¹ • As there is no cure period under Article 19.1(b)(i), the Claimant immediately issued Notice of Intention to Terminate under Article 19.2(a) of the Implementation Agreement, triggering a 60-day consultation and remedy period and reserved its right to terminate the Implementation Agreement should the Respondent not remedy its default within the 60 days. • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2(c) based on this GoT Event of Default.⁶¹²
<p><u>Event B:</u></p> <p>Material breach of the PPA by TANESCO in failing to pay undisputed sums (Article 19.1(b)(vii))</p>	<ul style="list-style-type: none"> • On 3 December 2013, the Claimant notified the Respondent of the Event of Default that TANESCO had failed, despite the Claimant's demands, to pay undisputed sums under the PPA, and of its failure to remedy the breach within 30 days of being notified. It also triggered a 60-day consultation period to remedy the Default pursuant to Article 16.2(b) of the Implementation Agreement.⁶¹³ • On 5 February 2014, the Claimant noted that the Respondent had failed to remedy its Event of Default and gave notice of Intent to Terminate under Article

⁶⁰⁸ HB/J (Bundle J was submitted by the Claimant at the Hearing).

⁶⁰⁹ Numbering of the Events of Default adopted here are the same as in the Termination Notice at HB/J.

⁶¹⁰ HB/J Tab 2/pg. 5; HB/H/352/4948-4953: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 3 December 2013.

⁶¹¹ HB/H/360/5116-5118: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 5 February 2014.

⁶¹² HB/J/Tab 1, para. 6.

⁶¹³ HB/H/352/4948-4953: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 3 December 2013.

	<p>19.2(a) of the Implementation Agreement based on the default.⁶¹⁴</p> <ul style="list-style-type: none"> • On 9 April 2014, the Claimant notified the Respondent that the 60-day consultation and remedy period initiated by the Notice of Intention to Terminate was over.⁶¹⁵ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2(c) based on this GoT Event of Default.⁶¹⁶
<p><u>Event C:</u></p> <p>Expropriation of the Facility and of Ordinary Share Capital of IPTL in material breach of Articles 16.1 and 16.2 of the Implementation Agreement by the GoT (Article 19.1(b)(vi))</p>	<ul style="list-style-type: none"> • On 3 December 2013, the Claimant notified the GoT regarding this event of default.⁶¹⁷ • On 10 March 2014, the Claimant served a notice on the Respondent informing it that the material breaches of Article 16.1 and 16.2 had not been remedied within the 90-day period and gave Notice of Intention to Terminate triggering a 60-day consultation and remedy period.⁶¹⁸ • On 1 June 2018, the Claimant notified the Respondent that the 60-day consultation and remedy period initiated by the Notice of Intention to Terminate was over and that it was entitled to terminate the Implementation Agreement under Article 19.2(c) and reserved its right to do so without further consultation.⁶¹⁹ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2(c) based on this GoT Event of Default.⁶²⁰
<p><u>Event D:</u></p>	<ul style="list-style-type: none"> • On 5 February 2014, the Claimant served a notice on the GoT notifying it that given the dissipation of the

⁶¹⁴ HB/H/360/5116-5118: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 5 February 2014.

⁶¹⁵ HB/J/Tab 2/pgs. 15-16: Schedule to Termination Notice titled "SCHEDULE - NOTICES IN RELATION TO IMPLEMENTATION AGREEMENT" ("**Schedule**"), paras. 4-6; HB/H/370/5304-5305: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 9 April 2014.

⁶¹⁶ HB/J/ Tab 1, para. 10.

⁶¹⁷ HB/H/352/4948-4953: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 3 December 2013.

⁶¹⁸ HB/H/365/5125-5126: Letter from SCB HK to Principal Secretary, Ministry of Energy and Minerals, 10 March 2014.

⁶¹⁹ HB/J/Tab 2/pgs. 24-25: Schedule, enclosing letter dated 1 June 2018.

⁶²⁰ HB/ J/Tab 1, para. 14.

<p>Failure of GoT to provide security for TANESCO's payment obligations (Article 19.1(b)(vii))</p>	<p>Escrow Account monies, TANESCO had failed to provide a security in accordance with Article 6.6 of the PPA.⁶²¹</p> <ul style="list-style-type: none"> • On 25 February 2014, the Claimant served a notice on the Respondent notifying it that it had failed to provide the “<i>replacement security</i>” under Article 15.3 of the Implementation Agreement, and that this constituted a GoT Event of Default, and gave Notice of Intention to Terminate under Article 19.2 (a) of the Implementation Agreement.⁶²² • On 1 June 2018, the Claimant notified the Respondent that the 60-day consultation and remedy period initiated by the Notice of Intent to Terminate was over and that it was entitled to terminate the Implementation Agreement under Article 19.2(c) and reserved its right to do so without further consultation.⁶²³ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2 (c) based on this GoT Event of Default.⁶²⁴
<p><u>Event E:</u> Expropriation in relation to the Escrow Account (Article 19.1(b)(i))</p>	<ul style="list-style-type: none"> • On 5 February 2014 the Claimant notified the Respondent that it had failed to remedy this Event of Default due to expropriation relating to the Escrow Account. It also noted that there is no cure period under Article 19.1(b)(i) and gave Notice of Intention to Terminate under Article 19(2)(a) of the Implementation Agreement.⁶²⁵ • On 9 April 2014, the Claimant notified the GoT that the 60-day consultation and remedy period initiated by the Notice of Intention to Terminate was over and that the Claimant was entitled to terminate the Implementation Agreement and expressly reserved the right to do so without further consultation.

⁶²¹ HB/H/360/5116-5118: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 5 February 2014.

⁶²² HB/J/Tab 2/pg. 12: Schedule, enclosing letter dated 25 February 2014.

⁶²³ HB/J/Tab 2/pg. 25: Schedule, enclosing letter dated 1 June 2018.

⁶²⁴ HB/ J/Tab 1, para. 18.

⁶²⁵ HB/H/360/5116-5118: Letter from SCB HK to Principal Secretary, Ministry of Water, Energy and Minerals, 5 February 2014.

	<ul style="list-style-type: none"> • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2 (c) based on this GoT Event of Default.⁶²⁶
<p><u>Event F:</u></p> <p>Dissipation of Escrow Account in material breach of Articles 16.1 and 16.2 of the Implementation Agreement by the GoT (Article 19.1(b)(vi))</p>	<ul style="list-style-type: none"> • On 5 February 2014, the Claimant gave notice of an Event of Default under Article 19.1(b)(vi) of the Implementation Agreement due to the escrow monies being dissipated and demanded that the Respondent remedy the same within 90 days. • On 29 January 2018, the Claimant noted that the Respondent had failed to remedy its Event of Default and gave Notice of Intention to Terminate under Article 19.2(a) of the Implementation Agreement.⁶²⁷ • On 1 June 2018, the Claimant notified the Respondent that the 60-day consultation and remedy period intimated by the Notice of Intent to Terminate was over and that the default had not been remedied so the Claimant had the right to terminate the Implementation Agreement pursuant to Article 19.2(c) and expressly reserved the right to terminate the Implementation Agreement without further consultation.⁶²⁸ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2(c) based on this GoT Event of Default.⁶²⁹
<p><u>Event G:</u></p> <p>Failure by TANESCO to provide replacement security in material breach of the PPA (Article 19.1(b)(vii))</p>	<ul style="list-style-type: none"> • On 7 February 2014, the Claimant's legal representatives wrote to the Respondent's legal representatives noting the release of funds in the Escrow Account and asking TANESCO to provide replacement security within 30 days in accordance with Article 6.6 of the PPA. A copy was given to the Respondent.⁶³⁰ • On 10 March 2014, the Claimant notified the Respondent of its the failure to replace the security in material breach of Article 6.6. and 6.8 of the PPA and that the default had not been remedied within 30 days

⁶²⁶ HB/J/Tab 1, para. 21.

⁶²⁷ HB/J/Tab 2/pg. 21: Schedule, enclosing letter dated 29 January 2018.

⁶²⁸ HB/J/Tab 2/pg. 25: Schedule, enclosing letter dated 1 June 2018.

⁶²⁹ HB/J/Tab 1, para. 25.

⁶³⁰ HB/J/Tab 2/pgs. 10-11: Schedule, enclosing letter dated 7 February 2014.

	<p>of being notified of the same. The Claimant demanded that the respondent remedy the default within the 90-day cure period given to TANESCO under Article 16.2(c) of the PPA.⁶³¹</p> <ul style="list-style-type: none"> • On 29 January 2018 the Claimant noted in its letter that the Respondent had not remedied the Event of Default and gave Notice of Intent to Terminate under Article 19.2(a) of the Implementation Agreement.⁶³² • On 1 June 2018, the Claimant notified the Respondent that the 60-day consultation and remedy period initiated by the Notice of Intention to terminate was over and that the Respondent had not remedied the Event of Default, so the Claimant would be entitled to terminate the Implementation Agreement under Article 19.2(c) and expressly reserved its right to terminate the Implementation Agreement without further consultation.⁶³³ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2(c) based on this GoT Event of Default.⁶³⁴
<p><u>Event H:</u></p> <p>Material breach of the PPA by TANESCO in failing to pay the amount under the PPA Award (Article 19.1(b)(vii))</p>	<ul style="list-style-type: none"> • On 13 October 2017, the Claimant informed TANESCO that it had failed to pay the sums owed under the PPA (USD 163,384,358.40), thereby materially breaching the PPA, and asked TANESCO to remedy the same in 30 days. A copy was given to the Respondent.⁶³⁵ • On 20 November 2017, the Claimant notified Respondent of this Event of Default due to TANESCO's failure to pay the sums owed under the PPA in material breach of the PPA, and its failure to remedy this within 30 day of being notified, and gave a Notice of Intention to Terminate pursuant to Article 19.2(a) of the Implementation Agreement.⁶³⁶ • On 29 January 2018, the Claimant noted that the Respondent had not remedied the default and it also

⁶³¹ HB/J/Tab 2/pgs. 13-14: Schedule, enclosing letter dated 10 March 2014.

⁶³² HB/J/Tab 2/pg. 22: Schedule, enclosing letter dated 29 January 2018.

⁶³³ HB/J/Tab 2/pgs. 25-26: Schedule, enclosing letter dated 1 June 2018.

⁶³⁴ HB/J/Tab 1, para. 30.

⁶³⁵ HB/J/Tab 2/pgs. 17-18: Schedule, enclosing letter dated 13 October 2017.

⁶³⁶ HB/J/Tab 2/pgs. 19-20: Schedule, enclosing letter dated 20 November 2017.

	<p>gave a Notice of Intention to Terminate under Article 19.2(a).⁶³⁷</p> <ul style="list-style-type: none"> • On 1 June 2018, the Claimant notified the Respondent that the 60-day consultation and remedy intimated by the Notice of Intention to Terminate was over and the default was not remedied so the Claimant would be entitled to terminate the Implementation Agreement under Article 19.2(c) and expressly reserved its right to terminate the Implementation Agreement without further consultation.⁶³⁸ • The Claimant in its Termination Notice gave notice of the exercise of its termination right pursuant to Article 19.2 (c) based on this GoT Event of Default.⁶³⁹
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458. The Respondent categorises all of the Claimant’s alleged “*GOT Event[s] of Default*” into 3 categories as, according to it, they are based on the same underlying facts *viz.*: (i) first, “*alleged expropriation of the Facility and of IPTL’s assets*” which include Events A, C, E and F listed above; (ii) second, alleged “*failure of GoT to provide security for TANESCO’s payment obligations*” which include Events D and G; and (iii) third, alleged “*material breach of the PPA by TANESCO by failing to pay undisputed sums*” which is Event B (and the Respondent submits that Event H falls in this category).⁶⁴⁰

459. In relation to the first category, the Respondent submits that there has been no expropriation, compulsory acquisition or nationalisation by the Respondent or any Governmental Authority of the Facility or IPTL’s shares and that the dissipation of the Escrow Funds was not a material breach of the Implementation Agreement as the account was established under Articles 6.6 and 6.8(b) of the PPA to deposit disputed sums in relation to the Tariff Dispute with IPTL and the money was released once the dispute was settled in October 2013.⁶⁴¹

460. In relation to the second category, the Respondent argues that the Claimant confuses the scope of Articles 6.6 and 6.8 of the PPA as the Claimant alleges a violation of Article 15.3 of the Implementation Agreement by failing to provide security for TANESCO’s payment

⁶³⁷ HB/J/Tab 2/pg. 22: Schedule, enclosing letter dated 29 January 2018.

⁶³⁸ HB/J/Tab 2/pg. 26: Schedule, enclosing letter dated 1 June 2018.

⁶³⁹ HB/J/Tab 1, para. 35.

⁶⁴⁰ HB/A/003/144-370: Respondent’s Counter-Memorial, paras. 329-333; HB/A/005/604-827: Respondent’s Rejoinder, para. 294.

⁶⁴¹ HB/A/003/144-370: Respondent’s Counter-Memorial, para. 330.

obligations as per Article 6.6, whereas the monies in the Escrow Account were deposited pursuant to the Tariff Dispute and thus fell under Article 6.8(b) of the PPA. Further it submits that IPTL did not need to withdraw monies from the Escrow Account because TANESCO had paid Tariff since October 2013.⁶⁴²

461. Regarding the third category and related Event H, the Respondent argues that this cannot be an Event of Default as TANESCO's failure to make payments under the PPA was justified on the ground that IPTL had breached the PPA and the Implementation Agreement.⁶⁴³ Again, the Claimant's response is that the PPA Award had determined that TANESCO owed USD 148.4 million as at 30 September 2015 along with interest.⁶⁴⁴
462. The Respondent also argues that the compensation payable under Schedule 2 would be invalid for some GoT Events of Default, as it would constitute a penalty clause and not a genuine pre-estimate of the damages of the breach for damages of the Implementation Agreement. The Claimant maintains that Schedule 2 is not a liquidated damages clause, but a formula calculated to provide compensation when the Implementation Agreement is terminated, and the elements are appropriate pre-estimate of loss.⁶⁴⁵

b. Tribunal's Analysis

463. In the Tribunal's view, to entitle the Claimant (as assignee of IPTL) to terminate the Implementation Agreement, the Claimant needs only to show that an Event of Default had occurred. As the GoT had committed clear and direct acts of expropriation [see paragraph 380 above] and discrimination [see paragraph 441 above] expressly prohibited under Article 16 of the Implementation Agreement, the right of Termination has accrued in favour of the Claimant in respect of events A, C, E and F as described above, which the Respondent terms as the first category [see paragraph 458 above]. These Events of Default require no cure period.
464. The Tribunal is satisfied that the Claimant has adhered faithfully to the procedural steps to terminate the Implementation Agreement. These are matters of facts and of the record and require no further discussion.

⁶⁴² HB/A/003/144-370: Respondent's Counter-Memorial, para. 330.

⁶⁴³ HB/A/003/144-370: Respondent's Counter-Memorial, para. 330.

⁶⁴⁴ HB/A/004/371-603: Claimant's Reply, para. 622.

⁶⁴⁵ Claimant's PHB, para. 198; HB/A/005/604-827: Respondent's Rejoinder, paras. 293, 302.

465. With regards to the second category,⁶⁴⁶ Article 6.6 of the PPA requires that TANESCO or GoT provides security for payments due to IPTL by way of a letter of credit or payment into an Escrow Account. Any amount drawn down from the account must then be reinstated within 30 days. The intent behind this arrangement was to provide assurance of payment by TANESCO of any amounts due to IPTL under the PPA. The Respondent's criticism that the Claimant was wrong to have relied on Article 6.6 of the PPA and should instead be relying on Article 6.8 of the PPA, would make little difference. Article 6.8 merely provides for a situation where there is a dispute as to whether such sums are due to IPTL, it nevertheless refers to the same Escrow Account mentioned in Article 6.6 of the PPA and withdrawal must be made only when the amount is undisputed with disputed sums remaining in account. There was no error or confusion that the GoT has the joint responsibility under Article 6.6 of the PPA to reinstate the amounts so withdrawn from the Escrow Account. The Tribunal therefore reaffirms that the failure to do so is an Event of Default as it is a "*material breach*" specifically identified in Article 19.1(b)(vii) of the Implementation Agreement and for which GoT is obliged to provide security under Article 15.3 of the Implementation Agreement.
466. The Respondent's criticism of the third category⁶⁴⁷ also lacks merit. The Claimant has since obtained the PPA Award in its favour, but TANESCO has failed to make payment and the Claimant remains unable to recover any sum under the PPA Award. Any suggestion that the PPA Award was subject to appeal has since been put to rest when the ICSID *ad hoc* Annulment Committee rendered its final decision in August 2018.⁶⁴⁸ There is no doubt in the Tribunal's mind that TANESCO's breach of the PPA in failing to make payments that were due and failing to abide by the PPA Award constitute a "*material breach by TANESCO*" under Article 19.1(b)(vii) of the Implementation Agreement, entitling the Claimant to terminate the Implementation Agreement.

⁶⁴⁶ As defined in para. 458 above.

⁶⁴⁷ As defined in para. 463 above.

⁶⁴⁸ Exhibit CL-216: *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018.

(2) Whether the Claimant is Entitled to Claim Compensation under Row 2 of Schedule 2 of the Implementation Agreement without Transferring the Facility to the Respondent?

a. Parties' Submissions

467. The Claimant claims that upon Termination it is entitled to be compensated in accordance with Schedule 2 of the Implementation Agreement as provided in Article 20.1(b) of the Implementation Agreement.

468. The Respondent rejects the Claimant's claims, maintaining that compensation upon termination by the IPTL (the Company) requires as a pre-condition, a transfer of the Facility to the Government.

469. Article 20.1(b) of the Implementation Agreement reads:

In the event the Company terminates this Agreement pursuant to Article 19.1(b) as a result of GOT Event of Default, the Company may elect to transfer the Facility to the GOT or its designee and, upon such transfer, the GOT or its designee shall pay the Company the compensation amount set forth in Row 2 of Schedule 2.

470. The Claimant's position is: (i) first, that the proper reading of Article 20.1(b) of the Implementation Agreement is that the requirement that the Facility be transferred to the Respondent is not applicable in case the Facility has been expropriated and this is apparent as the first Event of Default as listed in Article 19.1(b) includes expropriation of a material asset of IPTL; and (ii) second, that in general the Claimant's inability to transfer the Facility to the Respondent is due to the Respondent's wrongful conduct i.e. expropriation of the Facility and IPTL's shares and thus violates the principle that a party cannot benefit from its own wrong.⁶⁴⁹

b. Tribunal's Analysis

471. It is difficult to see how this provision could be interpreted otherwise than that it provides for the Company (*viz.* IPTL or the Claimant in this instance) to "*elect to transfer the Facility to the GOT.*" Admittedly, SCB HK is in no position to, and has not suggested it could, effectively do so. The Tribunal therefore agrees with the Respondent that the Claimant is not entitled to compensation under Row 2 of the Second Schedule to the Implementation Agreement. This,

⁶⁴⁹ HB/A/004/371-603: Claimant's Reply, paras. 653-654; Claimant's PHB, para. 197.

however, does not mean that the Claimant is left with no remedy upon termination. The Tribunal therefore considers that the Respondent's discriminatory actions (in breach of Article 16.1) and the Respondent's failure to provide security (in breach of Article 6.6 of the PPA and Article 15.3 of the Implementation Agreement), the actions of Oriyo J, Utamwa J, MEM and PAP all culminated in the expropriation of the shares in IPTL and depletion of the Escrow Account. It is this ultimate event of expropriation that the Claimant should get proper compensation upon termination.

472. The Implementation Agreement provides specifically for such an event in Article 20.1(d) viz:

In the event the GOT or TANESCO expropriate, compulsorily acquire, nationalise, or otherwise compulsorily procure any Ordinary Share capital or assets of the Company, the GOT shall pay the Company the compensation amount set forth in Row 4 of the Compensation Table in schedule 2.

473. Article 20.1(d) of the Implementation Agreement requires no transfer of the Facility. The situation the Claimant is found in fits squarely into this category of compensation and should in principle be entitled to compensation according to Row 4 of Schedule 2 of the Implementation Agreement and not Row 2 of Schedule 2.

VII. QUANTUM

474. The Claimant submits that as a statutory assignee it is entitled to recover all damages and compensation payable under the Implementation Agreement and is not limited to the amount of loans, subject to the excess being accounted. It relies on the Chivers and Zervos Expert Reports⁶⁵⁰ to substantiate this proposition.⁶⁵¹

475. The Claimant asserts that as an assignee of IPTL it is entitled to recover damages for the following loss and damages resulting from the breaches of Implementation Agreement. The Claimant claims a total of USD 352,514,258 in damages which comprise of:⁶⁵²

⁶⁵⁰ HB/E/004/149-198: Expert Report of David Chivers QC, 8 November 2017; HB/E/002/022-062: Second Expert Report of Nicholas Zervos, 10 November 2017.

⁶⁵¹ Claimant's PHB, para. 202; Claimant's Reply PHB, para. 122.

⁶⁵² Claimant's PHB, paras. 207-216.

- i. Damages of USD 176,291,811 for breach of the Implementation Agreement relating to the PPA tariff for the period up to September 2013: dissipation of the Escrow and failure to use the top-up payment to discharge IPTL's debts.⁶⁵³
- ii. Damages of USD 176,227,447 for breach of the Implementation Agreement in relation to losses arising from the transfer of IPTL's affairs to PAP and relating to the period after September 2013 which includes:
 - a) Damages of USD 120,733,915 for October 2013 to 31 August 2018;⁶⁵⁴ and
 - b) Damages of USD 55,488,533 for 31 August 2018 to January 2022.⁶⁵⁵

476. The Respondent's primary case is that the Claimant should not be awarded any damages or compensation. It argues that this is because it would be against the principle of multiple recovery to do so as the Claimant has already been awarded substantial amounts by the 2016 Flaux J Judgement and the PPA Award. Alternatively, it submits that should the Tribunal find that the Claimant is entitled to terminate the Implementation Agreement and seek compensation under Schedule 2 of the Implementation Agreement, it should not be allowed to be awarded both compensation and damages. In its PHB, the Respondent has also provided alternative calculations to the Claimant's expert's calculations of compensation.⁶⁵⁶

477. The Tribunal notes that the Claimant has succeeded on its claim for expropriation for which it is entitled to termination and compensation under Article 20.1(d) of the Implementation Agreement.⁶⁵⁷ The Claimant as assignee of IPTL had also suffered loss and damage during the period leading up to the expropriation. It is quite incorrect therefore to suggest that the Claimant should only be limited to a claim for compensation under the Implementation Agreement and no claim for damages. They are distinct heads of claim, and the Claimant should be entitled to the damages it can prove.

478. The Tribunal's finding against GoT on discriminatory action and breach of Article 16.1 however has no impact on the damages that the Claimant could seek. This is because these

⁶⁵³ Updated Expert Report of Mr Colin Johnson updated at 7 September 2018 ("**Updated Johnson Expert Report**"), para. 8.3; Claimant's PHB, paras. 207-210, 216(i).

⁶⁵⁴ Updated Johnson Expert Report, para. 5.18; Claimant's PHB, paras. 211-213, 216(ii)(a).

⁶⁵⁵ Updated Johnson Expert Report, paras. 5.22-5.23; Claimant's PHB, paras. 211-212, 214.

⁶⁵⁶ Respondent's PHB, paras. 189-191.

⁶⁵⁷ See paras. 471 to 473 above.

same actions have also been earlier found to be acts of expropriation for which damages will be awarded and quantified below.

A. CALCULATION OF DAMAGES

479. The Claimant seeks damages for breach of the Implementation Agreement under the following heads:⁶⁵⁸

i. Damage related to the amounts covered by the PPA Award (tariff payments for the period up to September 2013)-

a) by calculating the amount, including any interest earned, that would have been available in the Escrow Account as at September 2016 (PPA Award) and therefore available to satisfy the PPA Award and in turn reduce IPTL's debt to SCB HK, had the Escrow Account not been paid out to PAP in late 2013;

b) alternatively, on the assumption that the funds withdrawn from the Escrow Account in November and December 2013 (plus the top-up sum paid by TANESCO) should, having been withdrawn, have been paid to SCB HK in USD, and should have been used to reduce the amount outstanding under the SCB HK loan, to calculate the damage to IPTL as at 31 August 2018 resulting from the non-payment of these sums to SCB HK; and

c) alternatively, and assuming no payments before September 2016, to calculate the damage to IPTL as at 31 August 2018 from TANESCO's failure to pay the PPA Award as at September 2016.

ii. Damages incurred for the period October 2013 to January 2022-

a) Loss of capacity payments between October 2013 and 31 August 2018; and

b) Loss of capacity payments between 31 August 2018 and January 2022.

480. The Claimant submitted, together with its PHB, an updated Expert Report by Mr Johnson.⁶⁵⁹ There is no issue raised as regard the amount in the Escrow Account when converted to USD in December 2013, it was USD 125,719,064. Reference to the Johnson Expert Report hereafter is a reference to the latest updated version.

⁶⁵⁸ Claimant's PHB, paras. 207-216.

⁶⁵⁹ Updated Johnson Expert Report.

481. The substance of Mr Johnson's Report remained the same as when it was first submitted, but it updates the calculation of damages and compensation up to 31 August 2018. The Updated Report uses an updated loan balance under the Facility Agreement rather than a projected loan balance; updates the calculations for the effects of hypothetical payments on IPTL's indebtedness; updates the applicable interest to the past hypothetical payments; updates the discounting in case of future hypothetical payments; applies a discount rate of 17.96% rather than 19.73%; uses the actual date rather than projected figures for the United States Consumer Price Index ("CPI"), LIBOR and exchange rates of the period of October 2016 to August 2018; and calculates compensation under the Implementation Agreement based on the contract termination on 6 July 2018.⁶⁶⁰
482. Using these figures, Mr Johnson shows how, if the payment from the Escrow Account had been made in December 2013 together with the top-ups between March 2015 and July 2015, it would reduce IPTL's indebtedness in December 2013 to 2015 by USD 176,291,811.⁶⁶¹ Alternatively, without taking into consideration the top-up payment, if the Escrow Account was used to pay the loan following the PPA Award in September 2016, IPTL's debt would have been reduced by USD 144,868,181 and if used to repay the loan in December 2013 IPTL's debt would have been reduced by USD 147,039,707.⁶⁶²
483. The Respondent asserts that its primary case is that the Claimant is not entitled to any compensation or damages. In the event that the Tribunal finds in favour of the Claimant, the Respondent's position is that the Claimant should not succeed beyond USD 41.33 million as compensation for the undertaking against expropriation or up to USD 95.55 million as compensation should the Tribunal find in the Claimant's favour on its other claims for breach justifying termination.⁶⁶³ The Respondent takes the position that the Claimant should not be awarded both compensation and damages. If, however, the Tribunal were to award damages alone and were to find in Claimant's favour on issues relating to the release of the Escrow Account, these damages should not exceed USD 144.87 million⁶⁶⁴ as quantified by the Claimant in its PHB.⁶⁶⁵ Further, should the Tribunal find the Respondent to be fully liable of all

⁶⁶⁰ Claimant's PHB, para. 200.

⁶⁶¹ Updated Johnson Expert Report, para. 4.23.

⁶⁶² Claimant's PHB, para. 131.

⁶⁶³ Respondent's Reply PHB, para. 118.

⁶⁶⁴ Respondent's Reply PHB, para. 119.

⁶⁶⁵ Claimant's PHB, para. 209.

the Claimant's claims the aggregate sum should not exceed USD 156.62 million or USD 187.27 million depending on whether enforcement costs of USD 30.65 million incurred by the Claimant ought to be deducted as unrecoverable.⁶⁶⁶

484. In the following sections, the Tribunal will discuss the quantification of each of these claims.

(1) Damage Related to the Amounts covered by the PPA Award (Tariff Payments for the Period up to September 2013)

a. Parties' Submissions

485. The Claimant claims to be entitled to damages in relation to losses during the period up to September 2013, arising from the improper release of funds from the Escrow Account and the making of the top-up payment to PAP-controlled IPTL, which funds should have been used to reduce IPTL's indebtedness under the Facility Agreement. It submits that the loss suffered under this head is the difference between the outstanding loan balance under the Facility Agreement as of 31 August 2018 and the outstanding loan balance had the Escrow Account funds, which were released in November – December 2013, been used to reduce IPTL's indebtedness, or alternatively, if the Escrow Account had been used to pay the PPA Award issued in September 2016.⁶⁶⁷

486. The Respondent argues that the Claimant in its PHB claims for the amount based on the estimated reduction of IPTL's indebtedness in case Escrow funds would have been used to pay the PPA Award in September 2016, and the Respondent submits that the amount of USD 176.29 million, which is the Claimant's proposed amount, is inappropriate, because had IPTL and TANESCO not reached an agreement for the release of the Escrow Account, they would also not have agreed on top-up payments. The Respondent also argues that it is inappropriate to consider IPTL's indebtedness as being reduced by the payment of the Escrow Account in December 2013 as the Claimant was not entitled to the Escrow Account funds until the PPA Award was issued.⁶⁶⁸

b. Tribunal's Analysis

487. The Tribunal accepts that IPTL had suffered loss of revenue that could have been used to assist it to pay down the outstanding loans, and the fact that the Claimant only obtained the

⁶⁶⁶ Respondent's Reply PHB, para. 120.

⁶⁶⁷ Claimant's PHB, paras. 207-210; Claimant's Reply PHB paras. 129-131.

⁶⁶⁸ Respondent's Reply PHB, para. 119.

PPA Award in September 2016 does not mean that its entitlement to payment became due and payable only thereafter. The purpose of the Escrow Account was to pay IPTL who in turn had financial obligations to the Claimant. The Tribunal also accepts the Respondent's argument that, had there not been agreement for the release of funds from the Escrow, TANESCO would not have agreed to make any top-up of the funds and, as such, it would not be reasonable to add the top-up amount in reckoning the loss.

488. The loss of these funds to pay down the loan is best ascertained by the difference between the outstanding loan balance under the Facility Agreement as at 31 August 2018 and what the outstanding loan balance would have been had the Escrow Account been used to reduce IPTL's indebtedness upon its release in November and December 2013. No account should, however, be taken of the top-up amount for if there was no such agreement to release the funds in the Escrow Account, no top-up payment would have been made by TANESCO. The Tribunal finds that based on Mr Johnson's calculations as at 31 August 2018 (without taking into account the top-up sum) IPTL's indebtedness would have been reduced by **USD 144,868,181**. The Respondent has in its Reply PHB also accepted this as the more proper quantification of the Claimant's loss under this head.⁶⁶⁹

(2) Damages Relating to the PPA tariff for the Period after September 2013: October 2013 to January 2022

a. Parties' Submissions

489. The Claimant submits that the transfer of IPTL to PAP in breach of the Implementation Agreement deprived IPTL of the ability to earn and apply income under the PPA from September 2013, which would have reduced its debt to the Claimant and other creditors. The loss suffered in relation to this is calculated based on the loss of capacity payments and bonuses that IPTL would have expected to receive from TANESCO during the continuing operation of the Facility under the PPA.⁶⁷⁰ The figures provided in Mr Johnson's calculations amount to USD 176.22 million, as summarised in the table below:

Period	Description	Claimant's Amount
October 2013 to 31 August 2018	Net Capacity Charges that IPTL would have earned under the PPA (taking into account the costs of earning those charges).	USD 105,974,522 ⁶⁷¹

⁶⁶⁹ Respondent's Reply PHB, para. 119.

⁶⁷⁰ Claimant's Reply PHB, paras. 132-138.

⁶⁷¹ Updated Johnson Expert Report, paras. 5.7-5.8.

	Bonus Payments that IPTL might reasonably have expected to earn.	USD 2,891,983 ⁶⁷²
	Had these proceeds been properly applied so as to reduce IPTL's indebtedness under the Facility Agreement, IPTL would have avoided interest and penalties.	USD 11,867,410 ⁶⁷³
	As at 31 August 2018, the overall loss suffered by IPTL for this period.	USD 120,733,915⁶⁷⁴
31 August 2018 to January 2022	The net Capacity Charges that IPTL would have earned under the PPA (taking into account the costs of earning those charges)	USD 71,847,199 ⁶⁷⁵
	Bonus Payments that IPTL might reasonably have expected to earn.	USD 3,254,711 ⁶⁷⁶
	Applying a discount rate of 17.96% to these amounts, the overall loss suffered by IPTL for the period	USD 55,488,533⁶⁷⁷

490. The Respondent criticised Mr Johnson's calculation of bonus payments, the exclusion of applicable taxes, and improper interest rate selection for bringing forward historical damages calculated between October 2013 and 31 March 2018.⁶⁷⁸ It provides an alternative calculation by removing the bonus payments from 2013 onwards, takes into account corporate income taxes and applies a risk-free interest rate to cash flows from October 2013 to August 2018 which it submits should reduce the Claimant's claimed damages under this head to USD 142.39 million. The Respondent prepared the following comparative table of this calculation *viz*:⁶⁷⁹

	Claimant's Calculations (USD mil)	Respondent's Calculations (USD mil)
Loss of capacity payments between October 2013 and August 2018	120.73	99.26
Loss of capacity payments between August 2018 and January 2022	55.49	43.13
Total	176.22	142.39

⁶⁷² Updated Johnson Expert Report, paras. 5.11-5.13.

⁶⁷³ Updated Johnson Expert Report, para. 5.16.

⁶⁷⁴ Updated Johnson Expert Report, para. 5.18.

⁶⁷⁵ Updated Johnson Expert Report, para. 5.20.

⁶⁷⁶ Updated Johnson Expert Report, para. 5.21.

⁶⁷⁷ Updated Johnson Expert Report, paras. 5.22-5.23.

⁶⁷⁸ Respondent's PHB, paras. 171-181; Respondent's Reply PHB, paras. 113-116.

⁶⁷⁹ Respondent's Reply PHB, pg. 37 Table 7.

b. Tribunal's Analysis

491. The Tribunal agrees that providing for bonus payments may be speculative as the same are subject to agreement to be reached between IPTL and TANESCO based on previous year transactions.⁶⁸⁰ Mr Johnson had calculated bonus payment based on Equivalent Availability Factor (“**EAF**”) being greater than the threshold of 0.90. His calculation of lost cashflows from 2013 thereafter assumes that EAF would be achieved beyond 0.90 and had therefore worked out bonus payments as annually payable from 2013. Mr Johnson had in fact used the EAF of 2007 of 0.93 to support his theory that EAF would be achieved from 2013 at the same rate. In this regard, the Tribunal agrees that this would indeed be speculative and should be disallowed. The element of bonus payments should therefore be disregarded in the calculations together with the VAT thereon of 18%. By removing all bonus payments from October 2013 to January 2022, using Mr Johnson’s model, would reduce the damages sought from USD 176.22 million to USD 170.71 million.
492. The Respondent also points out that Mr Johnson had made several other errors in his computation *viz.* the exclusion of applicable taxes and the improper interest rate selection for bringing forward historical damages calculated between October 2013 and 31 March 2018. On taxes, Mr Johnson had used “**EBITDA**” (Earnings Before Interest, Taxes, Depreciation and Amortization) to quantify the cashflow loss. The omission of corporate tax would have reduced the damages by 21.9%.
493. It was also pointed out by the Respondent that the interest rate used by Mr Johnson was LIBOR +2% plus, and additional 1% as penalty interest, when the Loan Facility Agreement stipulated USD – 6 month LIBOR +2.5% which was later reduced to LIBOR +2%⁶⁸¹ after the restructuring.⁶⁸²
494. The Respondent has in its Reply PHB adjusted these using Johnson’s native Excel spreadsheet submitted as directed by the Tribunal and arrived with the following results:⁶⁸³

	Claimant's Calculations (USD mil)	Respondent's Calculations (USD mil)
Loss of capacity payments between	120.73	99.26

⁶⁸⁰ HB/C/002/013-128 at pg. 37: PPA, 26 May 1995, Article 6.5(b).

⁶⁸¹ HB/C/008/280-365 at pgs. 293, 306, 333-334: Facility Agreement, 28 June 1997.

⁶⁸² Respondent’s PHB, para. 179; HB/H/034/631-637 at pg. 633: Letter from Danaharta to IPTL, 29 October 2001.

⁶⁸³ Respondent’s Reply PHB, pg. 37 Table 7.

October 2013 and August 2018		
Loss of capacity payments between August 2018 and January 2022	55.49	43.13
Total	176.22	142.39

495. The Tribunal agrees with the observations made by the Respondent with regard to Mr Johnson’s omission of corporate taxes and the application of default penalty interest in the reckoning of future cashflows. The Tribunal therefore accepts the Respondent’s quantification as a better and proper approach under this head of claim and fixes the Claimant’s loss of capacity payments at **USD 142,387,737** only.

496. The loss and damage that the Claimant and IPTL would have suffered works out to **USD 287,255,918** (being USD 144,868,181 [paragraph 488 above] + USD 142,387,737 [paragraph 495 above]).

B. COMPENSATION FOR TERMINATION

497. The Claimant contends that it has terminated the Implementation Agreement on 6 July 2018 and is thus also entitled to recover compensation as provided in Row 2 of Schedule 2, pursuant to Article 20.1(b) of the Implementation Agreement. In accordance with the Tribunal’s ruling that the Claimant is entitled only to compensation for termination based on expropriation,⁶⁸⁴ the relevant computation formula is Row 4 of Schedule 2 of the Implementation Agreement, which incorporates only elements (a) + (b) + (e).

498. These elements are defined under Part 2 of Schedule 2 of the Implementation Agreement as:⁶⁸⁵

a= Sum of (i) the total amount outstanding to the Lenders under the Financing Documents (including interest during the original construction period through the earlier of the date of termination of this Agreement or the Scheduled Commercial Operations Date) plus (ii) the total amount outstanding under any loan agreements for capital improvements to the Facility that are required under the Power Purchase Agreement, as approved by the GOT, plus (iii) the total amount of any other outstanding debt incurred by the Company that was approved by the GOT, less any insurance proceeds available to the Company following a Force Majeure Event and not spent for Restoration.

⁶⁸⁴ See paras. 471 to 473 above.

⁶⁸⁵ HB/C/005/192-267 at pg. 266: Unsigned copy of Implementation Agreement (including Schedules), 8 June 1995.

b= The initial equity investment by the shareholders of the Company multiplied by a fraction, the numerator of which is the number of years remaining in the initial term of the Power Purchase Agreement and the denominator of which is the initial term of the Power Purchase Agreement.

[...]

e= The summation of the products of (i) any additional equity amounts that are contributed by the shareholders of the Company for any of the events that are described under Article 17.5 plus any such equity contributions approved by the GOT, times (ii) a fraction, the numerator of which is the number of years remaining in the initial term of the Power Purchase Agreement and the denominator of which is the number of years remaining in the initial term of the Power Purchase Agreement at the time of such contribution or approval for each such additional equity amount.

499. Both Parties agree that there was no additional equity contribution and as such the value for element (e) is zero.⁶⁸⁶ The Tribunal therefore needs only to consider the values of elements (a) and (b).

(1) Element (a) – Outstanding Loan

500. Mr Johnson performed calculations under three scenarios based on the Scheduled Commercial Operations Date (“**SCOD**”) which was 28 October 1999 as the Financing Documents were signed on 28 June 1997 and SCOD is defined as 28 months following Financial Closing.⁶⁸⁷

501. In Scenario 1, Mr Johnson took “the loan principal and interest outstanding at SCOD plus interest and penalties that accrued to July 2018 (i.e. date of termination) less payments made by IPTL against the outstanding amounts during this period. This is the actual amount outstanding under SCB HK’s loan to IPTL.”⁶⁸⁸ In Scenario 2, he adjusted Scenario 1 by capping it at “the lowest of the amount of the loan principal and interest outstanding at SCOD or any lower level of principal and interest outstanding that is achieved at any time (which happens

⁶⁸⁶ Claimant’s PHB, para. 219; HB/A/002/035-143: Claimant’s Memorial, para. 285; HB/A/003/144-370: Respondent’s Counter-Memorial, para. 387; HB/A/004/371-603: Claimant’s Reply, para. 736.

⁶⁸⁷ See HB/C/002/013-128 at pg. 027: PPA, 26 May 1995, Article 1.1 provides: “***Scheduled Commercial Operations Date:*** *The date that is 28 months after Financial Closing, as such date is extended for Force Majeure Events in accordance with provisions of Article XV.*” (emphasis in original); Updated Johnson Expert Report, para. 7.4.

⁶⁸⁸ Updated Johnson Expert Report, para. 7.5.

in the period immediately prior to 31 January 2007)".⁶⁸⁹ In Scenario 3, the amount of "the loan principal and interest that was outstanding at SCOD less payments made by IPTL against the outstanding amounts through to 31 January 2007.". Under Scenario 3, he ignored the "additional interest that in fact accrued under the loan after SCOD, and for the purposes of the compensation formula assume that all payments made by IPTL to its lenders are applied against the principal and interest outstanding at SCOD".⁶⁹⁰

502. These calculations yield amounts of USD 182,782,152 (Scenario 1), USD 88,290,092 (Scenario 2) and USD 41,325,329 (Scenario 3).⁶⁹¹ Mr Johnson did not include capital improvements to the Facility, or any other outstanding debt incurred by the Company that was approved by the GoT.⁶⁹²
503. The Parties are both in agreement that Scenario 2 is not appropriate.⁶⁹³
504. The Claimant insists that Scenario 1 is most appropriate as "it is closest to the language of the contract (which is inclusive) and according to Mr Johnson "is typical in terms of project financing".⁶⁹⁴ The Respondent disagrees, maintaining that the approach in Scenario 1 violates the definition given to element (a) of Schedule 2.⁶⁹⁵ According to the Respondent, Mr Johnson had used the amount outstanding to the lenders as the theoretical balance of the SCB HK loan as of 31 March 2018, based on a principal equivalent to the sum of the drawdowns made by IPTL before October 1999, the Scheduled Commercial Operations Date, i.e., USD 84 million.⁶⁹⁶ The Respondent submits that, in doing so, Mr Johnson excluded the last drawdown of USD 1.86 million made by IPTL in January 2000⁶⁹⁷ and calculated the interest and penalty on the basis of the principal as of SCOD of USD 84 million. Interest and penalties post-SCOD were added together with insurance costs and enforcement costs, which were all incurred after the SCOD.⁶⁹⁸

⁶⁸⁹ Updated Johnson Expert Report, para. 7.5.

⁶⁹⁰ Updated Johnson Expert Report, para. 7.5.

⁶⁹¹ Updated Johnson Expert Report, para. 7.12.

⁶⁹² Updated Johnson Expert Report, paras. 7.7-7.8.

⁶⁹³ Claimant's PHB, para. 220; Respondent's PHB, para. 152.

⁶⁹⁴ Claimant's PHB, para. 220

⁶⁹⁵ Respondent's PHB, paras. 147-149.

⁶⁹⁶ Respondent's PHB, para. 148; HB/E/003/063-148: Expert Report of Colin Johnson, 16 December 2016, Appendix 21, "Loan amounts" tab, column B.

⁶⁹⁷ Respondent's PHB, para. 148.

⁶⁹⁸ Respondent's PHB, para. 148.

505. The Tribunal sees the force of the Respondent's criticisms. Indeed, element (a) speaks only of "the total amount outstanding to the Lenders under the Financing Documents (including interest during the original construction period through the earlier of the date of termination of this Agreement or the Scheduled Commercial Operations Date)". On a plain and simple reading, this limits the amount of principal and interest outstanding as at the date of SCOD and requires that any payments made by IPTL be applied to reduce this loan, disregarding interest accruing after the SCOD. The Tribunal therefore agrees that Mr Johnson's Scenario 3 is the maximum that can be awarded under element (a) and finds that this is the correct and appropriate approach for calculating element (a), which amounts to **USD 41.33 million**.

(2) Element (b) – Initial Capital

506. For element (b) Mr Johnson considered 2 scenarios –
- i. Scenario A - the actual initial equity investment of USD 60 million is used. This is on the basis that a shareholder's loan represents equity because the shareholder was taking equity risk and calculated this amount as USD 10,594,521.
 - ii. Scenario B – an initial equity investment of USD 41.4 million is used, which was the deemed amount of equity for the purposes of calculating the tariff in the ICSID 1 Award. Mr Johnson had calculated this amount as USD 7,310,219.⁶⁹⁹
507. The Respondent does not agree to either of the positions suggested. The Respondent argues that the original shareholders did not put in equity (save for USD 100) as required but had instead extended a Shareholder's Loan of USD 60 million, which was eventually partially paid down to Mechmar. It suggests that this element is a simple zero.⁷⁰⁰
508. The Claimant disagrees with the suggestion that a shareholder loan could not constitute its equity contribution. The Claimant submits that by extending a loan, Mechmar was taking an equity risk. It also observed that the tribunal in the PPA Award made no such finding that Mechmar's funding was not "*equity*" for the purposes of the project documents. It argues that, in any event, even if this funding was not "*equity*" within the meaning of element (b), it would fall instead within outstanding debt advanced by lenders under element (a).⁷⁰¹

⁶⁹⁹Claimant's PHB, para. 220(ii); Updated Johnson Expert Report, paras. 7.9, 7.12-7.13.

⁷⁰⁰ Respondent's PHB, paras. 155-157.

⁷⁰¹ Claimant's PHB, paras. 220-221; Claimant's Reply PHB, paras. 150-151.

509. The Tribunal agrees with the Respondent that while Mechmar may have extended loans to IPTL, it is nevertheless not equity as generally understood. Whereas equity remains the asset of the company, a loan is a liability of the company and an asset of the lender. As lender, there is a right to demand repayment, and in fact there was repayment. The Claimant's suggestion that as lender, the amount could then be considered under element (a) is also flawed as the "*Lender*" referred to in element (a) refers only to the Lender as defined in the Implementation Agreement, which would not include shareholders.
510. The Tribunal therefore finds that the compensation available to the Claimant under Article 20.1(d) of the Implementation Agreement is element (a) only, which the Tribunal determined to be **USD 41.33 million**.

C. POTENTIAL OVERLAP BETWEEN DAMAGES AND COMPENSATION

511. The Tribunal's finding against GoT on discriminatory action and breach of Article 16.1 of the Implementation Agreement, however, has no impact on the damages that it could seek. This is because these same actions have also been earlier found to be acts of expropriation for which the Tribunal is awarding compensation and damages.
512. The Respondent states that there is an overlap between Claimant's claim for damages calculated under breach of the Implementation Agreement and compensation arising from the termination of the Implementation Agreement.⁷⁰² During the Hearing, Mr Johnson agreed that there were two elements of overlap⁷⁰³ and this was agreed to by the Claimant in its Closing presentations. They are:
- i. Element (a) in the compensation formula which is the amount outstanding to the lenders may overlap with the damages for breach of the Implementation Agreement because the damages reflect the loss suffered by IPTL due to its indebtedness not being reduced. The Claimant proposes that in case the Tribunal goes against its primary case then the amount awarded under element (a) could be deducted from the damages award; and
 - ii. Element (d) of the compensation formula which is the net cash flows following termination could overlap with damages in relation to Net Capacity Charges and bonuses earned after 31 August 2018 and the Claimant proposes that should the

⁷⁰² Respondent's PHB, paras. 184-186.

⁷⁰³ Tr. Day 5 [1043: 15 - 1049:10].

Tribunal decided against its primary case, the amount awarded under element (d) could be deducted from the damages in relation to the net Capacity Charges and bonuses for the aforementioned period.⁷⁰⁴

513. As the Tribunal has found that element (d) is not relevant in reckoning computation of compensation under Row 4 of Schedule 2 of the Implementation Agreement, there is no overlap with the damages awarded as net cash flow loss quantified based on the Net Capacity Charges projected for after 31 August 2018.
514. The Tribunal notes that as for element (a), which the Tribunal has fixed at USD 41.33 million, this should be deducted from the final reconciling of damages and compensation due to the Claimant.
515. Additionally, the Claimant notes that such overlap will not take place in the case where the Tribunal decides to award only termination or compensation (but not both), or alternatively agrees to the Claimant’s proposal at paragraph 517 below. The Respondent further states that there is an additional area of double counting in between the initial equity contribution *i.e.* element “b” and the discounted net cash flows as calculated by Mr Johnson under breach of the Implementation Agreement from October 2013 onwards. However, as the Tribunal has given a zero factor for element (b), this overlap would not in fact feature.
516. The Tribunal summarises below the quantification of the claims amounting to **USD 287.26 million** which it has reached, as follows:

	Calculations (USD mil)	Overlap (USD mil)
Tariff payments for the period up to September 2013	144.87	
Loss of capacity payments between October 2013 and August 2018	99.26	
Loss of capacity payments between August 2018 and January 2022	43.13	
Compensation under Article 20.1(d)		41.33
Total	287.26	

517. During the Hearing and in its PHB, the Claimant stated that it was amenable to the Tribunal making the following order in relation to the sum in excess of the outstanding bank loan amount and restricting its recovery to amount due under the Facility Agreement:

⁷⁰⁴Claimant’s PHB, para. 225.

i. making a declaration as to the total amount of damages and compensation due under the Implementation Agreement (or a declaration that this is greater than the sum due under the Facility Agreement, if this is the case); and

ii. ordering that the GoT pay to SCB HK the full amount due under the Facility Agreement, comprising:

(a) US\$187,269,605, being the current amount due under the Facility Agreement; plus

(b) additional interest and other sums due in relation to the period after August 2018, as calculated by the Facility Agent; less

(c) any amounts recovered by SCB HK or SCB Malaysia from IPTL or Tanesco prior to the Tribunal's award.⁷⁰⁵

518. The Claimant submits that the loan balance under the Facility Agreement as at 31 August 2018 stood at **USD 187,269,605** and that this includes additional interest, penalties and enforcement costs, since 16 November 2016 when USD 168,800,063.87 was found outstanding by Flaux J.⁷⁰⁶ The breakdown of the outstanding loan balance as per the Updated Loan Model at Appendix 8 of the Updated Johnson Expert Report is given in tabular form in the Johnson Expert Report at paragraph 4.13 and reproduced below:

Projected Balance At 31 August 2018	USD
Enforcement Costs	30,652,893
Insurance	5,637,070
Penalties	14,022,940
Interest	49,899,729
Principal	87,056,972
Total	187,269,605

519. The rationale behind the Claimant's proposal is that it had originally proposed in its Opening that it would account to IPTL for any sum in excess of its stake in the Project. It then realised that this would be cumbersome and perhaps unworkable and therefore withdrew the original proposal.

520. The Tribunal is conscious that while SCB HK has stepped into the shoes of IPTL and claiming rights as an assignee, it should nevertheless not be entitled to enjoy a windfall. For GoT, the possibility of being exposed to a claim by the very same PAP-controlled IPTL for the amount

⁷⁰⁵ Claimant's PHB, para. 203.

⁷⁰⁶ Claimant's PHB, para. 201.

so adjudged or declared is an unhappy one. Unfortunately, as the Tribunal has found that it had committed discriminatory actions against the Claimant/Mechmar and wrongly expropriated IPTL's assets, and imperilled SCB HK's security interest, this is a consequence it has to face. In fact, if the Tribunal declines to make such a declaration as proposed by the Claimant, GoT could well have to bear and make full and immediate payment of the adjudged amount to SCB HK. Making the declaration as sought by the Claimant would ring-fence or limit GoT's current exposure. Should PAP-controlled IPTL attempt to rely on this Award, the Tribunal is confident that GoT would be more than able to raise a strong defence.

521. In relation to the final amount to be adjudged as payable to the Claimant, the Respondent has suggested that the costs of enforcement should be deducted from the loan outstanding because GoT should not pay for "*Claimant's abusive and convoluted litigation strategy over the years, including for other claims that were unsuccessfully brought against the Government such as the BIT Arbitration.*"⁷⁰⁷
522. The Claimant's response to this is that the enforcement costs incurred by it were sums due as damages under the Implementation Agreement because GoT's breaches of the Implementation Agreement have prevented the sums under the Facility Agreement from being repaid. The Claimant says it is entitled to add enforcement costs to the sum due pursuant to Clause 24(C) of the Facility Agreement, which provides that IPTL shall pay "*on demand, all costs and expenses (including Taxes thereon and legal fees) incurred [...] in protecting or enforcing any rights under the Financing Documents.*"⁷⁰⁸ In the proceedings before the English court, Faux J had in his judgment ruled that the loan outstanding as USD 168,800,063.87 which included enforcement costs of USD 24.19 million.⁷⁰⁹ Further, the Claimant states that the enforcement costs were also incurred in attempts at recovery in courts in Malaysia, BVI, New York, English, and Tanzanian proceedings, and four ICSID arbitrations.⁷¹⁰
523. While the Tribunal takes note of GoT's observation that the Claimant should not be allowed to recover costs for its "*convoluted and abusive*" litigation strategy,⁷¹¹ the Tribunal is

⁷⁰⁷ Respondent PHB, para. 140.

⁷⁰⁸ HB/C/008/280-365: Facility Agreement, 28 June 1997, Clause 24(C).

⁷⁰⁹ HB/D/018/755-793 at pg. 792: Faux J Judgment, 16 November 2016, para. 152.

⁷¹⁰ Claimant's Reply PHB, para. 125.

⁷¹¹ Respondent's PHB, para. 140.

nevertheless conscious that but for the discriminatory actions and expropriation, none of these costs would ever have been incurred. In the Tribunal's view, all of these are proper heads of losses and should be allowed, save and except the Claimant's costs incurred for the BIT Arbitration which was dismissed for want of jurisdiction. The Tribunal will deduct from the amount finally adjudged the sum of **USD 1,820,164.95**.⁷¹²

524. Taking all these into consideration the Tribunal will make the declaration sought and limit the recovery of the Claimant in this award to USD 187,269,605 less USD 1,820,164.96, *i.e.* **USD 185,449,440.04** being the amount suffered to discharge the indebtedness due to the Claimant under the Facility Agreement.
525. The Tribunal notes that the sum of USD **185,449,440.04** included interest accrued up to end August 2018. The Claimant in its Post-Hearing Brief⁷¹³ sought "*additional interest and other sums due in relation to the period after August 2018, as calculated by the Facility Agent*". Until the sum of USD 185,449,440.04 is fully paid, the Claimant should be compensated for the loss of use of such funds and be entitled to interest thereon at the same rate as that provided for in the Facility Agreement *viz.* 6-month LIBOR +2%⁷¹⁴ and payable as from 1 September 2018 until full and final payment.
526. The Tribunal is also urged by the Respondent to order a set-off of whatever amount that Tribunal is awarding to the Claimant in this arbitration against the claims they had succeeded in the 2016 Flaux J judgment⁷¹⁵ (USD168.8 million) and the PPA Award⁷¹⁶ (USD148.4 million). It should be noted that there is no identity of parties in this matter with those other proceedings; the respondent in the PPA Arbitration was TANESCO and the respondents in the Flaux J's judgment were IPTL, VIP and PAP. Further, as neither the award nor the judgment has been satisfied in whole or in part, there is no basis to suggest that the Claimant has obtained double recovery or has such intention to do so. An enforcement court will in the normal course require disclosure of parallel enforcement proceedings. An award-debtor could easily bring this to the attention of the relevant forum to resist any enforcement action

⁷¹² HB/D/003/300-366: Final Award ICSID Case No. ARB/10/12 (BIT Award), 2 November 2012, paras. 192, 278.

⁷¹³ Claimant's PHB, para. 203

⁷¹⁴ HB/C/008/280-365 at pgs. 293, 306, 333-334: Facility Agreement, 28 June 1997; HB/H/034/631-637 at pg. 633: Letter from Danaharta to IPTL, 29 October 2001; HB/C/014/552-557 at pg. 557: Form of Deed of Assignment made between Danaharta Managers (L) Ltd and SCB HK, 17 August 2005.

⁷¹⁵ HB/D/018/755-793 at pg. 792: Flaux J Judgment, 16 November 2016.

⁷¹⁶ HB/D/005/480-586: PPA Award, 12 September 2016.

which could lead to double recovery. In this regard, the Claimant shall not seek recovery beyond the amount adjudged in this Award. In all attempts at enforcing this Award, the Claimant shall make full and proper account of the aggregate sums recovered and the balance still remaining due.

VIII. COSTS

A. PARTIES' SUBMISSIONS

527. The Claimant submits that the Tribunal has power to award costs as it deems appropriate and is not bound to follow decisions of previous ICSID Tribunals.⁷¹⁷ The Claimant relies upon the following provisions:

i. Article 61(2) of the ICSID Convention which provides:

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

ii. ICSID Arbitration Rule 47(1) (j) which provides:

(j) any decision of the Tribunal regarding the cost of the proceeding.

528. The Claimant submits that the Tribunal should award costs on the principle “*costs follow the event*” and should take into consideration conduct of the parties and nature of the case they advanced. It relies on the decision in *Caratube v Kazakhstan*⁷¹⁸ to support this position.⁷¹⁹ It asserts that the “*cost follow the event*” rule should be followed as it is common practice in international arbitration and a norm in investment arbitration. It also submits that the rule is desirable from a policy perspective as well.⁷²⁰ The Claimant asserts that there are various reasons which justify an award of costs against the Respondent.

⁷¹⁷ Claimant's Cost Submissions, paras. 4-6.

⁷¹⁸ HB/G/39/3804-4215 at pg. 4199: *Caratube International Oil Company LLP and Devinci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. Arb/13/13, Award, 27 September 2017, para. 1253.

⁷¹⁹ Claimant's Cost Submissions, paras. 7-11.

⁷²⁰ Claimant's Cost Submissions, paras. 7-11.

529. First, the Claimant submits that the Respondent's procedural conduct has caused delay, inefficiency and increased costs, and points out three instances, which include: (i) the Respondent's delay in filing its Rejoinder; (ii) the Respondent's defective document production and delay in complying with the Tribunal's orders concerning the Respondent's document production; and (iii) the Respondent's non-attendance at the first procedural hearing.⁷²¹
530. Second, the Claimant contends that the Respondent raised several factual allegations, which were without merit, and the Claimant had to present a large amount of witness and documentary evidence to demonstrate why these allegations were incorrect.⁷²²
531. Additionally, the Claimant also submits that due to unequal payments by the Respondent and the Claimant towards the advance on costs of arbitration (i.e. USD 87,500 paid by the Claimant towards the Respondent's half of the first advance and USD 150,000 towards the Respondent's half of USD 300,000 that the Parties were asked to pay on 5 June 2018 by ICSID). The Claimant submits that it has paid a total of USD 712,764.33 to ICSID and the Respondent has paid USD 150,000.00. Thus, if the Tribunal decides to order that costs of arbitration be shared equally, it should order a balance payment of USD 268,882.16 to be paid by the Respondent to the Claimant.⁷²³
532. The Claimant also submits that in case the Tribunal orders the Respondent to pay the Claimant damages and/or compensation sufficient to pay off the sum due under the Facility Agreement, then it does not separately require costs for this arbitration from the Respondent as those costs would already have been paid off by the Claimant under the Facility Agreement. Thus, the Claimant is seeking payment of its costs only to the extent that damages and/or compensation which the Tribunal orders to be paid to the Claimant are "*insufficient to pay off the amount due under the Facility Agreement, as updated by [Claimant] at the date of the Award.*"⁷²⁴
533. The Claimant claims its costs for this arbitration as incurred up to 19 September 2018 and any additional costs incurred in connection the arbitration arising after that date. It provides

⁷²¹ Claimant's Cost Submissions, paras. 13-14.

⁷²² Claimant's Cost Submissions, paras. 15-16.

⁷²³ Claimant's Cost Submissions, paras. 17-22.

⁷²⁴ Claimant's Cost Submissions, paras. 23-25.

the breakdown of its costs in Annexures to its Costs Submissions and summarises its costs in a table which is reproduced below:⁷²⁵

Description	Total incurred
Herbert Smith Freehills LLP – legal services and disbursements	£2,145,668.15
Linklaters LLP – legal services and disbursements	£142,835.15
Payments to ICSID	US\$712,764.33
Witness costs	US\$41,876.44; HK\$66,784.49; TZS30,627,410
Expert costs	£249,925.58; and US\$37,170
Other costs	£1,716.00
Total costs (to 19 September 2018):	£2,540,144.88; US\$791,810.77; HK\$66,784.49; TZS30,627,410

534. At current exchange rate, the Claimant’s costs incurred amounts to about USD 4,130,000.
535. The Respondent submits that it seeks costs pursuant to Article 61(2) of the ICSID Convention (see paragraph 527(i) above) and Rule 28 of the ICSID Arbitration Rules.
536. The Respondent submits that the “*loser pays*” principle is not followed strictly by ICSID tribunals and rather a variety of factors are considered including the relative success of the parties’ claims and the good faith of the unsuccessful party in making those claims. It relies on the decision *Noble Ventures, Inc v Romania*⁷²⁶ to support this submission.⁷²⁷
537. The Respondent characterises the Claimant’s litigation strategy as abusive and cites various circumstances which include:
- i. that the Claimant’s parent company started the BIT Arbitration, and, even though claims were rejected for lack of jurisdiction, the tribunal, ordered each party to bear their own costs and half the ICSID fees each. The Respondent adds that the Claimant is now attempting to recover its part of the BIT Arbitration costs by including them in the calculation as enforcement costs in the claimed outstanding loan amount;

⁷²⁵ Claimant’s Cost Submissions, para. 28, Annexure 1- 3.

⁷²⁶ Exhibit RL-163: *Noble Ventures, Inc v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 234-235 (submitted as additional legal authorities along with Respondent’s Reply PHB).

⁷²⁷ Respondent’s Reply PHB, para. 125.

- ii. that various procedural errors were made by the Claimant before the Tanzanian Courts which included missing relevant deadlines;
- iii. that the Claimant’s withdrawal from the Tanzanian court proceedings and its failure to properly challenge Utamwa J Order shows that its litigation strategy was not genuine;
- iv. the fact that the Claimant bringing this arbitration after obtaining the PPA Award and 2016 Flaux J Judgment, which shows that its intention is to pressurise the Respondent; and
- v. finally, that the Claimant has inflated its relief which was reflected: (a) in its own admission that there many areas of overlap in the Claimant’s calculations; (b) Claimant originally claiming a payment order under the Loan Facility Agreement which was changed once challenged by the Respondent on the illogical nature of such an order; and (c) the claim for declaratory relief on behalf of IPTL for amounts which IPTL would not be entitled is irrational.⁷²⁸

538. Thus, the Respondent submits that in line with the reasons stated above, the Tribunal should award costs to the Respondent or if it finds in favour of the Claimant’s case then to apportion costs in a manner that does not “*unfairly overburden*” the Respondent.⁷²⁹

539. The Respondent claims the following as costs:⁷³⁰

Item No.	Category	Amount
1	Fees and Expenses of the Tribunal and the Charges of ICSID	USD 175,000
2	Counsel Fees (Legal fees paid to Curtis, Mallet-Prevost, Colt & Mosle LLP)	USD 4,000,000
3	Counsel Expenses (total)	USD 529,607.94
3.1	Expenses incurred by Curtis, Mallet-Prevost, Colt & Mosle LLP	USD 429,877.70
3.2	Expenses incurred by Crax Law Partners in Association with RK Rweyongeza and Co. Advocates	TZS 227,686,000 (approximately USD 99,730.24)
	Total	USD 4,704,607.94

⁷²⁸ Respondent’s Reply PHB, para. 126.

⁷²⁹ Respondent’s Reply PHB, para. 126.

⁷³⁰ Respondent’s Reply PHB, paras. 128-131.

B. TRIBUNAL’S ANALYSIS

540. The Tribunal accepts that in ICSID arbitration, the principle of “*loser pays*” is not followed strictly. The Tribunal is also aware that in many cases where the merits of each party’s case are mixed, determining who is the successful party may be difficult. In this case, the Tribunal has found that the Respondent committed acts of expropriation and taken discriminatory actions against the Claimant. The clear conclusion is that the Claimant has succeeded substantially in its claims, albeit its monetary awards have been moderated. The Tribunal does not see how the actions taken by the Claimant were abusive when they were genuinely attempting to legally assert their rights through whatever available legal course but had thus far not been successful in doing so. The Tribunal therefore takes the view that the Respondent must bear its own costs, the cost of this arbitration (*i.e.* the costs paid or payable to ICSID’s administration, and the Tribunal’s fees and expenses) and the costs incurred by the Claimant in prosecuting this matter.

541. The amount sought by the Claimant is approximately USD 4.13 million as compared to the Respondent’s costs claim of USD 4.7 million. Given the work that had to be undertaken, the Claimant’s costs appear to be fair and reasonable and would in normal circumstances be recoverable.

542. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, amount to (in USD):

Arbitrators’ fees and expenses	
Prof Lawrence Boo (President)	251,812.18
Justice David Unterhalter SC (Co-arbitrator)	254,164.53
Dr Kamal Hossain (Co-arbitrator)	216,718.04
Mr Stanley Burnton (Co-Arbitrator)	3937.50
ICSID’s administrative fees	148,000.00
Direct expenses (estimated)	128,243.56
Total	1,002,875.81

543. As of the date of this Award, the Claimant had paid as advances towards the cost of ICSID and the fees and expenses of the Tribunal, amounting to USD 937,764.33, including a portion of the Respondent’s advances, whereas the Respondent has paid USD 175,000.00. As the Claimant has stated in its Submission of Costs (see paragraph 532 above), it would not be

seeking any order for cost of arbitration should the damages and compensation awarded herein be sufficient to discharge the Respondent's indebtedness under the Facility Agreement, the Tribunal will make no order on the costs of arbitration or reimbursement of any advances made.

IX. AWARD

For the reasons set out above,

The Tribunal hereby **Declares** –

- I. That the Tribunal has jurisdiction over the Parties and the dispute:
 - a. The Claimant is the lawful assignee under Article 15.2 of the Implementation Agreement and has the title and interest to pursue its claims against the Respondent for any breach of the Implementation Agreement in its own name; and
 - b. under Article 25 of the ICSID Convention.
- II. that the United Republic of Tanzania has breached Articles 15.3, 16.1 and 16.2 of the Implementation Agreement;
- III. the Implementation Agreement was terminated on 6 July 2018 in accordance with the Claimant's Termination Notice; and
- IV. the Claimant is entitled to compensation pursuant to termination under Article 20.1(d) of the Implementation Agreement and damages for the Respondent's breaches of the Implementation Agreement.

And the Tribunal therefore, Adjudges, Awards, Orders and Directs that–

The United Republic of Tanzania shall:

- V. Pay to the Claimant the sum of **USD 185,449,440.04** together with interest thereon at the rate of LIBOR (6-month) +2% from the 1 September 2018 until the date of full and final payment; and
- VI. Bear its own legal costs and expenses.

[signed]

David Unterhalter
Arbitrator

25 SEP. 2019

[signed]

Kamal Hossain
Arbitrator

30 SEP. 2019

[signed]

Lawrence G S Boo
President of the Tribunal

Date: **08 OCT. 2019**