

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

In the arbitration proceeding between

**STANDARD CHARTERED BANK**

Claimant

and

**UNITED REPUBLIC OF TANZANIA**

Respondent

**ICSID Case No. ARB/10/12**

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**AWARD**

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*Members of the Tribunal*

Prof. William W. Park, President

Mr. Barton Legum

Prof. Michael C. Pryles

*Secretary of the Tribunal*

Ms. Aurélia Antonietti

*Date of dispatch to the Parties:* November 2, 2012

## REPRESENTATION OF THE PARTIES

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Mr. Iain Maxwell  
Mr. Ben Jolley  
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Representing the United Republic of  
Tanzania:

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Dr. Wilbert B. Kapinga  
Capt. Audax K. Kameja  
Mr. Ajit M. Kapadia  
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## **I. Introduction**

### **A. Summary of Dispute**

1. Claims were submitted to the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments dated 7 January 1994, which entered into force on 2 August 1994 (the “BIT”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (the “ICSID Convention”).
2. The dispute relates to Claimant’s alleged investment in Tanzania, by way of a loan acquired by its subsidiary, Standard Chartered Bank (Hong Kong) Limited (“SCB HK”), made to Independent Power Tanzania Limited (“IPTL”) in order to finance a Power Plant in Tanzania located in Tegeta, approximately 25 kilometers north of Dar es Salaam.
3. Claimant is Standard Chartered Bank (“SCB” or “Claimant”), a company incorporated by Royal Charter in the United Kingdom of Great Britain and Northern Ireland, with its registered office at 1 Basinghall Avenue, London EC2V 5DD.
4. Respondent is the United Republic of Tanzania (“Tanzania”, “GoT” or “Respondent”) represented in this arbitration by the Chambers of the Attorney General and the Ministry of Mines and Electricity and the law firms listed above.
5. Claimant and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above.

### **B. The Tribunal’s Mission in this Phase of the Arbitration**

6. During the first session, by telephone conference on 23 November 2010, the Parties agreed on the sequence of the proceedings, which were confirmed in Minutes signed by the Presiding Arbitrator on 17 December 2010 and by the Secretary to the Tribunal on 20 December 2010.

7. The Parties' Agreement provided for a jurisdictional stage pursuant to which the Tribunal would address only its competence to hear the dispute. See paragraph 14, item 17, Minutes of 17 December 2010.

### **C. Frequently Used Abbreviations and Acronyms**

8. For the ease of expression, the Tribunal sets forth abbreviations and acronyms for the following frequently used terms.

BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments dated 7 January 1994 which entered into force on 2 August 1994
Cl. CM	Claimant's Counter-Memorial of 14 August 2011
Cl. Rej.	Claimant's Rejoinder of 2 December 2011
Cl. PHB	Claimant's Post-Hearing Brief of 27 January 2012
Cl. Reply PHB	Claimant's Reply Post-Hearing Brief of 27 February 2012
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 Award	Award dated 12 July 2001 issued in ICSID Case No. ARB/98/8 (TANESCO v. IPTL)
GoT or Respondent	Government of Tanzania
Implementation Agreement	Implementation Agreement dated 8 June 1995 entered into between IPTL and the GoT
IPTL	Independent Power Tanzania Limited
Loan	The loan made pursuant to the 1997 Loan Facility Agreement
Loans	Two loans of "Term Loans I and II" which replaced Loan in 2001

Loan Agreement	Loan Facility Agreement entered into on 28 June 1997 by IPTL and a consortium of Malaysian Banks
Mechmar	Mechmar Corporation (Malaysia) Berhad
PPA	Power Purchase Agreement dated 26 May 1995 entered into by IPTL and TANESCO
Project	The original project, the 100 megawatt power facility to be located in Tegeta
Resp. Objections	Respondent Statement of Jurisdictional Objections of 14 January 2011
Resp. Mem.	Respondent Memorial of 23 June 2011
Resp. Reply	Respondent Reply Memorial of 10 October 2011
Resp. PHB	Respondent Post-Hearing Brief of 27 January 2012
Resp. Reply PHB	Respondent Responsive Post-Hearing Brief of 27 February 2012
Security Deed	Security Deed dated 28 June 1997 entered into by IPTL and a Security Agent
SCB or Claimant	Standard Chartered Bank
SCB HK or SCB Hong Kong	Standard Chartered Bank (Hong Kong) Limited
SC Sherwood	Standard Chartered Sherwood (Hong Kong) Limited
Share Pledge Agreement	Share Pledge Agreement dated 28 June 1997 entered into by Mechmar and VIP with the Security Agent
SPA	The Sale and Purchase Agreement between SCB HK and Danaharta in August 2005 through which SCB purchased Loans for US\$76.1 million
TANESCO	Tanzania Electric Supply Company Limited
TIA	Tanzania Investment Act

## **II. Procedural History**

### **A. The Request for Arbitration**

9. On 7 May 2010, ICSID received a request for arbitration dated 5 May 2010 (“Request” or “RfA”) from SCB against the United Republic of Tanzania.

10. On 11 June 2010, the Secretary-General of ICSID sent the Parties a Notice of Registration in accordance with Article 36(3) of the ICSID Convention. In issuing the Notice, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

#### **B. The Constitution of the Tribunal**

11. The Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and pursuant to the following method:
  - i. The Tribunal was to be made up of 3 arbitrators, one appointed by each of the parties and the third, the President, to be agreed between the two party-appointed arbitrators;
  - ii. SCB was to appoint an arbitrator and notify ICSID and Respondent of its appointment by 6 July 2010;
  - iii. Respondent was to appoint an arbitrator and notify ICSID and Claimant of its appointment by 7 September 2010;
  - iv. Each of Claimant and Respondent was to provide its appointee and each other with the names of 3 possible candidates as President of the Tribunal no later than 13 September 2010;
  - v. During the 30 days following the provision of the lists of possible candidates, the two party-appointed arbitrators were to confer in order to appoint the third arbitrator, who would act as President of the Tribunal, from the lists provided by the Parties.
  - vi. The Parties had also agreed on a default method of appointment in the event that the two co-arbitrators could not find an agreement.
12. By letter of 6 July 2010, SCB appointed Professor Michael C. Pryles, a national of Australia, who accepted his appointment. By letter of 7 September 2010, Tanzania appointed Mr. Barton Legum, a national of the United States of America, who accepted his

appointment. Messrs. Legum and Pryles further appointed Professor William W. Park, a national of the United States of America, as President of the Tribunal, who also accepted his appointment. The Tribunal was constituted on 27 September 2010. Ms. Aurélia Antonietti, ICSID Counsel, was designated to serve as Secretary of the Tribunal.

### **C. First Session of the Tribunal**

13. The Tribunal held a first session by telephone with the Parties on 23 November 2010. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed inter alia that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceedings shall be London, England. The Parties agreed on a schedule for the jurisdictional phase of the proceedings, including production of documents. The agreement of the Parties was embodied in Minutes signed by the President and the Secretary of the Tribunal and circulated to the Parties.

### **D. Parties' Submissions and Hearing on jurisdiction**

14. As agreed at the first session, Respondent filed jurisdictional objections on 14 January 2011. Further to a hearing on production of documents held with the Parties in London on 17 March 2011, the Tribunal issued a procedural order on the production of documents on 25 March 2011 and two procedural orders on matters relating to confidentiality on 29 April 2011 and 4 May 2011. A further procedural order on production of documents was issued on 17 June 2011.
15. The schedule for the filing of the Parties' written submissions was modified at the Parties' request through various procedural orders that the Tribunal need not to recall in detail here. Suffice to note that Respondent filed its Memorial on jurisdiction on 23 June 2011; Claimant filed a Counter-Memorial on jurisdiction on 14 August 2011; Respondent filed a Reply on jurisdiction on 10 October 2011 and; Claimant filed a Rejoinder on jurisdiction on 2 December 2011.
16. In connection with an expert report filed by Claimant on 17 November 2011, Respondent requested the report to be excluded for untimeliness and it requested alternatively the

postponement of the forthcoming hearing on jurisdiction. The Tribunal issued two procedural orders on 24 November 2011, and 2 December 2011 dismissing Respondent's request for postponement of the hearing while taking measures to accommodate the examination of experts and the filing of rebuttal supplemental submissions. The President held a pre-organizational telephone conference with the Parties on 7 December 2011. The Tribunal further issued a procedural order on 8 December 2011, regarding the organization of the forthcoming hearing.

17. A hearing on jurisdiction took place at the IDRC in London from 13 to 15 December 2011. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimant:

Mr. Matthew Weiniger	Herbert Smith Freehills LLP
Mr. Iain Maxwell	Herbert Smith Freehills LLP
Mr. Ben Jolley	Herbert Smith Freehills LLP
Ms. Louise Barber	Herbert Smith Freehills LLP
Mr. Giulio Giannini	Herbert Smith Freehills LLP
Mr. James Denham	Standard Chartered Bank

For Respondent:

Hon. Nimrod E. Mkono, M.P	Mkono and Co Advocates
Dr. Wilbert B. Kapinga	Mkono and Co Advocates
Mr. Karel Daele	Mkono and Co Advocates
Ms. Sia Mrema	Principal State Attorney, Attorney General Chambers
Ms. Anjela Shila	Principal State Attorney, Ministry of Energy and Minerals
Mr. John Jay Range	Hunton & Williams LLP
Mr. Thomas C. Goodhue	Hunton & Williams LLP

18. The following persons were examined:

On behalf of Claimant:

Dr. Tunde Ogowewo

Mr. Terry Skippen, SCB Company Secretary

On behalf of Respondent:

Mr. David Ehrhardt

Prof. Florens Luoga

Mr. David Mabb, QC

19. The Parties filed simultaneous Post-Hearing Briefs on 27 January 2012, and simultaneous Reply Post-Hearing Briefs on 27 February 2012.
20. The Parties filed simultaneous Submissions on Costs on 3 May 2012 and Reply Submissions on Costs, together with Claimant's Amended Submission on Costs, on 30 May 2012.
21. Claimant's counsel, via e-mail dated 1 October 2012, informed the Secretary of the Tribunal that the name of the law firm has changed to Herbert Smith Freehills LLP as a result of the merger between Herbert Smith LLP and Freehills LLP.

### **III. Factual and Procedural Background**

22. The Tribunal will now provide a brief description of the factual and procedural background that has led to this dispute as far as it needs to set the background of the dispute to examine Respondent's objections to jurisdiction.

#### **A. The Original Project**

23. This dispute has its origins in a Power Purchase Agreement ("PPA") dated 26 May 1995, entered into between the Tanzanian Electric Supply Company ("TANESCO"), wholly owned by the United Republic of Tanzania, and Independent Power Tanzania Limited ("IPTL"), whereby IPTL agreed to design, construct, own, operate and maintain an electricity generating facility with a nominal net capacity of 100 megawatts, to be located in Tegeta, Tanzania. In response to the power shortage in Tanzania in the early 1990's, and pursuant to the PPA, and the related Implementation Agreement and Guarantee Agreement executed between IPTL and the GoT, IPTL was to deliver electricity generated by the plant to TANESCO for a period of 20 years.

24. Pursuant to the PPA, TANESCO was obliged to pay IPTL and for a term of twenty years, capacity payments, energy payments and test energy payment, the latter were to be applied before the commercial operation date of the plant. Capacity payments were payable in return for maintaining the power plant in a state of readiness to produce electricity if required, and to provide debt and equity investors in the project company to recover their capital and a reasonable rate of return.<sup>1</sup>
25. An Addendum No. 1 to the PPA, dated 9 June 1995, was further negotiated and provided a new basis for calculating the Reference Tariff in the PPA.
26. In addition to the PPA, the primary deal documents also included an Implementation Agreement dated 8 June 1995 (“Implementation Agreement”) between IPTL and the GoT, and a Guarantee Agreement of the same date that was appended to the Implementation Agreement. Together, these transaction documents formed one fully integrated agreement where the PPA set out the rights and responsibilities of TANESCO, and the Implementation Agreement reflected the rights and responsibilities of the GoT.
27. IPTL had been formed by Mechmar Corporation (Malaysia) Berhad (“Mechmar”), a Malaysian corporation, and VIP Engineering and Marketing Ltd. (“VIP”), a Tanzanian engineering company. VIP controlled 30% of the issued and subscribed and paid up capital of IPTL and Mechmar held the remaining 70%.<sup>2</sup>
28. IPTL raised funds to establish the power plant by means of a credit facility (“Loan”) extended to it by a consortium of Malaysian banks under a US\$105 million 1997 Loan Facility Agreement (“Loan Agreement”) to be repaid over 8 years. The Facility Agent was Bank Bumiputra Malaysia Berhad, succeeded by Bumiputra Commerce Bank Berhad. IPTL entered in a Security Deed on 28 June 1997 (“Security Deed”), which provided securities to the lenders including right, title and interest to various contracts including the PPA. Under the 1997 Security Deed and the Loan Agreement, Sime Bank Berhad from

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<sup>1</sup> RfA, para. 15.

<sup>2</sup> RfA, para. 12.

Malaysia (and later its successor RHB Bank Berhad)<sup>3</sup> was appointed as the Security Agent.<sup>4</sup>

29. On 28 June 1997, Mechmar and VIP also pledged their shares to the Security Agent as security for the loan under a Charge of Shares (“Share Pledge Agreement”). On the same day, Mechmar and VIP together with IPTL and the Security Agent entered into a Shareholder Support Deed (“Shareholder Support Deed”).

## **B. The Earlier ICSID Proceedings**

30. In 1998, TANESCO submitted to ICSID a request for arbitration against IPTL asserting in short that TANESCO was entitled to terminate the PPA or, alternatively, to obtain a material reduction of the tariff. IPTL submitted a damage counterclaim against TANESCO. A Tribunal composed of Mr. Kenneth S. Rokison, a national of England (President), the Honorable Charles N. Brower, a national of the United States of America, and Mr. Andrew Rogers, a national of Australia, issued an Award on 12 July 2001 (the “ICSID Award”).
31. The Tribunal decided that the PPA was and remained valid and took note of the Reference Tariff agreed upon by the parties as of 26 May 1995. Based on the Tribunal’s initial rulings, the parties had adjusted the financial model that would be used to calculate the capacity and energy tariffs after commercial operation started. That financial model was submitted to the Tribunal pursuant to a Stipulation and Agreement between TANESCO and IPTL for incorporation into the Award as Appendix F. The 2001 ICSID Award reduced the cost of the facility from \$163.5 million to \$127.2 million, with a senior debt of \$ 89 million (further reduced to \$85.3 million) and the remainder in equity. These data were input into the Financial Model to calculate the tariff payable by TANESCO to IPTL.
32. The commercial operation of the facility started in 2002, after the ICSID proceeding, although the plant was completed in 1998.

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<sup>3</sup> Exhibit RfA, 40.

<sup>4</sup> Resp. Mem., para. 32.

33. As a dispute arose with respect to the calculation of invoices, TANESCO stopped making payment from January 2007 onwards. IPTL filed with ICSID in 2008 an Application for Interpretation of the ICSID Award. The above Tribunal was recomposed and reconstituted following the resignation of one of the Members of the original Tribunal. The Tribunal composed of Mr. Kenneth S. Rokison, Mr. Makhdoom Ali Khan, a national of Pakistan, and Mr. Andrew Rogers, issued an order for discontinuance of the case on 19 August 2010, pursuant to ICSID Arbitration Rule 44.

### **C. IPTL's Debt Restructurings – 2001-2003**

34. The Parties are at odds as to the consequences of the ICSID Award on the amounts due to IPTL's lenders.
35. In 2001 and 2003, a refinancing of the 1997 Loan Agreement took place. The Parties are also at odds as to whether this refinancing was properly authorized by IPTL's Board of Directors, but it is not disputed that the restructurings took place.
36. According to Respondent, "Mechmar, purporting to act in IPTL's name, and Danaharta Managers (L) Ltd. ("Danaharta")—a Malaysian company created to remove non-performing loans from the Malaysian financial system—replaced the 1997 Loan Agreement with two new loans, Term Loans 1 and 2 ("Loans"). The new loans purported to increase the debt on the Facility from the \$89 million authorized by the Tribunal to more than \$120 million."<sup>5</sup>
37. For the GoT,

The record shows that after—and on account of—the restructuring, IPTL's debt consisted of (a) a short term loan from Danaharta to Mechmar for \$5.2 million; (b) amounts of over \$30 million owed to Wartsila [a Netherlands company that was the operations and maintenance contractor during the construction of the plant]; and (c) Term Loans 1 and 2.<sup>6</sup>

Danaharta's short term loan of \$5.2 million to Mechmar was given preference over the senior debt. Once that debt was paid, the waterfall of payments was shared between

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<sup>5</sup> Resp. Mem., para. 4.

<sup>6</sup> Resp. Reply PHB, para. 18.

Danaharta and Wartsila on a 60%/40% basis. This sharing arrangement was already in place well before SCB HK purchased IPTL's debt in 2005, but remained unwritten to avoid the consequences of a winding-up suit filed by IPTL. Those arrangements—orchestrated and approved by Danaharta, but never disclosed to the GoT or TANESCO—are part and parcel of what SCB HK knowingly acquired when it purchased IPTL debt in 2005.<sup>7</sup>

38. It is Respondent's position that "[a]s part of the unauthorized refinancing of the 1997 Loan Agreement, Mechmar diverted money from TANESCO's Reference Tariff payments to pay costs that were subordinate to the Loan Agreement."<sup>8</sup> According to Respondent, "[a]s a result, by October 2006, TANESCO had made over \$150 million in payments, but the senior debt on the Facility was still \$90.6 million..... Under the Final Award and the parties' agreements implementing that Award, the senior debt on the Facility in 2006 should have stood at \$17.1 million. As a result, GoT's liability in the event of a default by TANESCO—which was directly tied to the Facility's senior debt—did not decrease as quickly or in the manner envisioned by the PPA, the Implementation Agreement, and the Tribunal's award."<sup>9</sup>
39. For its part, SCB considers that "[e]ven after the ICSID Award, IPTL's debt obligation to its lenders remained unchanged."<sup>10</sup> For SCB, "the 2001 and 2003 'restructurings' with Danaharta represented a substantial benefit to both IPTL and TANESCO (and therefore the GoT), in that without the alteration of the repayment schedule, reduction in interest rate and conditional waiver of US\$8 million in interest, IPTL would almost certainly have been unable to continue as a going concern."<sup>11</sup>

#### **D. SCB's Involvement**

40. SCB contends in this arbitration that it acquired through its subsidiary SCB HK the Loans from the original Malaysian lenders in August 2005 by concluding the SPA and became the sole lender of IPTL. Under that transaction, SCB HK was assigned a number of

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<sup>7</sup> Resp. Reply PHB, para. 22.

<sup>8</sup> Resp. Mem., para. 5.

<sup>9</sup> Resp. Mem., para. 5.

<sup>10</sup> Cl. CM, para. 26.

<sup>11</sup> Cl. CM, para 36.

contracts, including the 1997 Security Deed, the Implementation Agreement and the Guarantee Agreement concluded between IPTL and the GoT. SCB Malaysia succeeded to the Facility Agent.<sup>12</sup> SCB HK also became the Security Agent under the Share Pledge Agreement and the Shareholder Support Deed.

41. Respondent argues that SCK HK “paid Danaharta (the Malaysian entity created to remove non-performing loans from the Malaysian financial sector) \$76.1 million to acquire the restructured 1997 Loan Agreement. By that time, Term Loans 1 and 2 included in their princip[al]<sup>13</sup> balances (1) amounts that an ICSID Tribunal had ruled were not authorized Plant costs; and (2) amounts that would have been paid down had all of the monthly payments by TANESCO been properly applied, rather than diverted to unauthorized uses. SCB HK was well aware of the problems with the restructured 1997 Loan Agreement when it purchased the debt.”<sup>14</sup> According to Respondent, “SCB HK went ahead with its purchase of Term Loans 1 and 2, paying \$76.1 million for a loan that purportedly had a face value of over \$101.7 million.”<sup>15</sup>
42. From 2006 onwards, IPTL failed to pay the amounts due towards its interest and principal repayments under the Loan Agreement.
43. In 2009, IPTL and TANESCO were notified of the occurrence of an Event of Default by the Facility Agent appointed under the Loan Agreement – namely Standard Chartered Bank Malaysia. Subsequently, the Facility Agent directed SCB HK, which is also the Security Agent under the Loan Facility Agreement and the Security Deed, to take steps to enforce the security interests created by IPTL in favor of the Security Agent.<sup>16</sup>
44. According to SCB, under Clause 8 of the Security Deed, upon the occurrence of an Event of Default under the Loan Agreement, IPTL is no longer authorized to exercise and enforce the rights, discretions and remedies conferred on it under the PPA. Those rights, discretions and remedies are instead exercisable by the Security Agent acting as agent for

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<sup>12</sup> Exhibit RfA, 37.

<sup>13</sup> Perhaps by inadvertence, Respondent’s Memorial (paragraph 6) uses the term “principle” rather than principal.

<sup>14</sup> Id. para 7.

<sup>15</sup> Resp. Mem., para. 99.

<sup>16</sup> RfA, para. 36, Exh. RfA 39.

and on behalf of the lenders. Subsequent to the occurrence of the Events of Default, SCB argues that SCK HK has exercised the step-in rights conferred on it. It therefore considers that IPTL's contractual rights under the PPA have been vested in SCB HK.<sup>17</sup>

45. In addition, SCB argues that SCB HK's charge over the shares pledged by VIP and Mechmar also became enforceable. As a result, it contends that SCB (through SCB HK) is effectively the sole shareholder of IPTL.
46. The Tribunal notes here that SCB HK, Claimant's subsidiary, has initiated a separate ICSID arbitration proceeding against TANESCO in ICSID Case No. ARB/10/20 to recover payments due to IPTL from TANESCO under the PPA.

#### **E. IPTL Shareholders' Dispute and IPTL's Status**

47. On or around 2001, certain disputes arose between the Malaysian majority shareholder of IPTL, Mechmar, and the Tanzanian minority shareholder, VIP.<sup>18</sup>
48. According to Respondent, "Mechmar sought to require IPTL to bear all of the costs rejected by the [ICSID] Tribunal. VIP argued that these costs were incurred because of Mechmar's wrongful acts and omissions and hence should be for Mechmar's account, not IPTL's".<sup>19</sup> According to Claimant, "VIP began a course of conduct that was inconsistent with its obligations under the Promoters/Shareholders Agreement"<sup>20</sup>, Claimant recalls that VIP contended at the time that some costs, which the ICSID arbitral tribunal had disallowed for the purpose of tariff calculations, "should not be included when calculating VIP's profits to be earned from IPTL" and "should be counted only against Mechmar".<sup>21</sup>

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<sup>17</sup> RfA, para. 36.

<sup>18</sup> In this connection, the Tribunal acknowledges Respondent's contention that Mr. James Rugemalira, VIP's CEO, was unaware until February 2002 of the agreement between Mechmar and Wartsila to restructure the \$5.2 million short term loan. For Respondent, this event allegedly affected the lawfulness of the financial restructurings of IPTL's debt, thus causing some elements of the dispute to have ripened in 2002.

<sup>19</sup> Resp. Objections, para. 37.

<sup>20</sup> Cl. CM, para. 55.

<sup>21</sup> Cl. CM, para. 55.

49. On 25 February 2002, VIP petitioned the High Court of Tanzania for the winding up of IPTL. VIP also requested various forms of provisional relief including that the Court appoint a provisional liquidator over IPTL.
50. Mechmar also commenced an arbitration under the rules of the London Court of International Arbitration (“LCIA”) to decide the dispute between Mechmar and VIP pursuant to the Promoters/Shareholders Agreement. An award was issued on 26 August 2003 (“LCIA Award”) directing VIP to discontinue the winding up proceedings it had initiated against IPTL before the High Court of Tanzania.<sup>22</sup> Mechmar’s attempt to enforce the LCIA Award in Tanzania are said to have been to no avail.
51. On 21 November 2008, SCB HK applied to the High Court of Tanzania seeking an order to restrain VIP from continuing with the winding up. Pursuant to its rights under a Charge of Shares of VIP in IPTL, SCB HK appointed a Receiver over those shares. On 15 December 2008, the Receiver filed to no avail an application seeking to withdraw the winding up petition filed by VIP.<sup>23</sup>
52. Notwithstanding Mechmar’s objection that the shareholders’ dispute was covered by the arbitration clause in the Promoters/Shareholders Agreement, the Tanzanian High Court appointed a provisional liquidator on 16 December 2008, an appointment to which Mechmar objected.
53. Upon SCB HK’s request, the High Court of Tanzania appointed an administrator over IPTL on 27 January 2009. At the provisional liquidator’s objection, the appointment of an administrator was set aside by the Tanzanian Court of Appeal on 9 April 2009.<sup>24</sup>

#### **IV. SCB’s Case on the Merits**

54. Although the current phase of these proceedings addresses only jurisdictional matters in accordance with the Parties’ agreement, the Tribunal hereby sets forth a brief summary of Claimant’s case on the merits to the extent it provides background useful in considering Respondent’s objections to jurisdiction.

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<sup>22</sup> RfA, para. 43.

<sup>23</sup> RfA, paras. 45-46.

<sup>24</sup> RfA, paras. 50 and 52.

55. In its Request for Arbitration, SCB considers that the acts and measures of various organs of the GoT, which are described in the paragraphs below, are constitutive of: i) an expropriation of its investment contrary to Article 5 of the BIT; ii) a failure to accord fair and equitable treatment (including denial of justice) to SCB and its investment contrary to Article 2(2) of the BIT; iii) a breach of Tanzania's obligation of non-discrimination and to provide national treatment under Articles 2 and 3 of the BIT; and iv) a breach of the observation-of-obligations clause under Article 2(2) of the BIT.
56. SCB's case is that TANESCO's non-payments are in breach of the PPA, which rights are vested in SCB HK. SCB further alleges that, around October 2009, the GoT took control over the power plant. IPTL's liquidator is said to operate the power plant since November 2009 without SCB HK's consent.
57. In addition, SCB contends that the failure of the liquidator (a state official) to continue the ICSID Interpretation proceedings deadlocked the proceedings and prevented SCB HK from getting its investment back.
58. SCB alleges that the Tanzanian courts refused to enforce the LCIA Award and refused to hear SCB's various applications in relation to IPTL's status. Taken altogether, the actions of the Tanzanian courts are said to constitute a denial of justice.
59. Of relevance to this Decision (and to better understand Respondent's objections) is how Claimant defines its investment, namely:
- a. SCB's loan to IPTL, made through its subsidiary SCB HK, which falls within the specific category of investment at Article 1(a)(iii) of the BIT.
  - b. The various security interests granted by IPTL as security for the loan, referred to in paragraphs 16-23 of the Request for Arbitration, which fall within the specific category of investment at Article 1(a)(i) of the BIT.
  - c. As a result of those security interests, SCB, through SCB HK, has exercised its rights over the shares in IPTL in order to appoint a receiver over those shares. The shares in IPTL fall within the specific category of investment at Article 1(a)(ii).
  - d. In addition, SCB also possesses "investments" under the BIT by virtue of its contractual rights under which it has "*claims to money and performance under contract having a financial value*" within the meaning of Article 1(a)(ii) of the BIT. SCB's interests in the Facility Agreement, the PPA, the Security Deed, the Charge of Shares, the Implementation Agreement and all other instruments that

form part of the suite of project finance agreements have a financial and economic value and are entitled to the substantive protections of the BIT.<sup>25</sup>

60. Also of relevance for this Decision, is that SCB's case is that, as of May 2010, it owns and controls SCB HK through a minority ownership interest (38.8%) in SCB HK's shares, and indirectly (61.2%) through its ownership of the entire shares in SC Sherwood (HK), a Hong Kong company, which in turn owns the remaining shares in SCB HK. SC Sherwood is pledged to hold SCB HK shares in trust for SCB.<sup>26</sup>

61. Claimant's prayer for relief as contained in its Request for Arbitration is:

- a. A declaration that Tanzania has breached Article 5 of the BIT by taking measures depriving SCB of its investment without due process of law and provision for prompt, adequate and effective compensation;
- b. A declaration that Tanzania has breached Article 2 of the BIT by failing to ensure the fair and equitable treatment of SCB's investment;
- c. A declaration that Tanzania has breached Article 2 of the BIT by taking unreasonable and/or discriminatory measures that have impaired SCB's management, maintenance, use and/or enjoyment of its investment;
- d. A declaration that Tanzania has breached Article 3 of the Treaty by failing to provide SCB treatment no less favourable than that which it accords to its own nationals or companies;
- e. A declaration that Tanzania has breached Article 2 of the Treaty by failing to observe obligations entered into with regard to SCB's investment;
- f. An order that Tanzania pay to SCB compensation in an amount no less than US\$118,609,392.31 being the value of SCB's investment as at 30 April 2010 in the form of the loan to IPTL, inclusive of interest and costs;
- g. An order that Tanzania pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon;
- h. An order that Tanzania pay all other costs incurred by SCB as a result of its breaches of the BIT and interest thereon in accordance with the BIT.<sup>27</sup>

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<sup>25</sup> Cl. CM, para. 127.

<sup>26</sup> RfA, para. 9, Cl. Rej., paras 58-74.

<sup>27</sup> RfA, para. 117.

## **V. Parties' Positions on Jurisdiction**

### **A. Organizational Observations**

62. In summarizing the Parties' positions on jurisdiction, the Tribunal has been guided largely by the contentions in their two Post-hearing Briefs of 27 January and 27 February 2012. These submissions would normally represent the Parties' final thinking on the various controverted matters.
63. In this connection, difficulties arise from the fact that Respondent did not always follow the same structure for its objections throughout its memorials. Moreover, Claimant often used an organizational framework that failed to track Respondent's objections on a one-to-one basis.
64. A comparison of the Post-Hearing Briefs of both Claimant and Respondent reveals that for each side, the first and second rounds follow different organizational structures.
65. Consequently, the Tribunal has sought to consolidate and systematize the various arguments in a way that promotes analytic clarity. To the extent positions vary from one brief to another, such variations have generally been noted.

### **B. Respondent's Position on Jurisdiction**

66. Although Respondent's Reply Post-Hearing Brief of 27 February 2012 addressed eleven (11) substantive objections to jurisdiction (in addition to an initial point about burden of proof), Respondent's Post-Hearing-Brief of 27 January 2012 summarized its objections in six (6) parts as follows: (1) investment made, funded, owned and controlled by a Hong Kong entity; (2) debt restructured in a deceitful manner; (3) breach of Tanzania Investment Act ("TIA") by SCB; (4) restructuring not authorized by IPTL; (5) distressed Malaysian debt not beneficial to, and not located in, Tanzania; and (6) no compliance with BIT cooling off period.<sup>28</sup>

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<sup>28</sup> Headings I through VI, Respondent's Brief of 27 January.

67. For good order, the Tribunal notes that the Introduction to that first brief (27 January) contained a five-part summary which at paragraphs 2-7 listed objections which, while overlapping in some respects, did not always coincide with the formulation or structure of the objections set forth later in the brief. These five introductory iterations were as follows: (1) no ownership or control of SCB Hong Kong; (2) restructuring not consistent with earlier ICSID Award, PPA and Implementation Agreement; (3) no corporate authority for restructured debt; (4) no Tanzanian situs for investment; (5) no compliance with six-month “cooling-off” period.
68. For completeness, the following discussion of Respondent’s jurisdictional objections generally adopts the formulations and structure of Respondent’s Reply Post-Hearing Brief (27 February), although separating some matters that appeared distinct even though listed together in the briefing.
69. Consequently, the Tribunal presents the following iteration of thirteen (13) items. Each of six substantive grounds presented in Post-Hearing Brief of 27 January (with a seventh rubric on costs) and the eleven substantive grounds of Reply Post-Hearing Brief of 27 February (to which a separate rubric on costs was not added), are now categorized (to the extent not redundant) into thirteen separate items in this Award. For example, Respondent’s contention on restructuring of the debt in allegedly deceitful manner, which appeared in its Post-Hearing Brief of 27 January 2012 but not in its Reply Post-Hearing Brief of 27 February, now appears as an independent item in Section V.B.2 of this Award. Also, the assertion in Section V (SCB HK Has Purchased A Distressed Malaysian Debt That Provided No Benefit To Tanzania And Is Not Sited In Tanzania) of its Post-Hearing Brief of 27 January 2012 is now divided into two categories (V.B.12 and V.B.13).

### **1. Alleged Investment by Hong Kong Corporation**

70. Respondent notes that Article 8(1) of the BIT grants the Tribunal jurisdiction over a dispute “arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.” Emphasis added. Respondent interprets the language of the BIT such that it covers only

those investments in Tanzania that were “actually made or directly owned by a national or company of the United Kingdom.”<sup>29</sup>

71. Respondent claims that Claimant has failed to meet the burden of proving direct or indirect ownership of SCB HK’s shares. Respondent rejects the witness testimony of Mr. Skippen, asserting that it is insufficient to establish Claimant’s “indirect” investment and that Claimant consequently fails to meet the jurisdictional requirement under the BIT.<sup>30</sup>
72. Respondent contends that SCB’s position that it indirectly holds an investment in Tanzania cannot be reconciled with the requirement “of” contained in Article 8, and with the language of other provisions of the BIT.<sup>31</sup> According to Article 8(a), an arbitral tribunal may have jurisdiction over legal disputes between one “Contracting Party and a national or company of the other Contracting Party concerning an investment *of* the latter in the territory of the former.” Emphasis added.
73. According to Respondent, Claimant’s investment consists of “(a) loans to IPTL that SCB HK purchased from Danaharta, (b) security interests that IPTL granted as security for the loans, (c) shares of IPTL, over which a receiver has been appointed pursuant to the security interests in the loans, and (d) claims to money and performance under the PPA, the Security Deed, the Charge of Shares, the Implementation Agreement, and “all other instruments” that form part of the project finance agreements for the Tegeta Power Plant project.”<sup>32</sup>
74. The GoT submits that SCB bears the burden of proving its alleged investment and has failed to do so.
75. Respondent argues that Claimant blurs the distinction between an indirectly *made* investment and an indirectly *held* investment.<sup>33</sup> Respondent distinguishes an “indirect investment” where a claimant invests its own funds through the use of a third-party conduit from instances where a claimant has not made any contribution to the investment but

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<sup>29</sup> Resp. Reply PHB, para. 57.

<sup>30</sup> Resp. Reply PHB, paras. 40-41.

<sup>31</sup> Resp. PHB, paras. 56-58

<sup>32</sup> Resp. PHB, para. 13.

<sup>33</sup> Resp. PHB, paras. 42-45.

merely has some form of ownership interest in another entity that made the investment.<sup>34</sup> Respondent argues that Claimant has not shown its contribution of any funds to the alleged investment and rejects Claimant's view that one need not have a direct, controlling ownership for an indirect investment. In fact, according to Respondent, the record establishes that SCB does not exercise *any* control over the alleged investment.<sup>35</sup>

76. Respondent contends that SCB HK, not SCB, made, owns and controls the investment at issue, as shown inter alia by the 2005 SPA documenting the sale and purchase of the "Sale Assets" by SCB HK from Danaharta. According to the GoT, this is also evident from SCB HK's statements submitted in Malaysian courts and in the other pending ICSID arbitration.<sup>36</sup>
77. According to Respondent, the record establishes that SCB did not contribute any of the funds used to make the alleged investment, and does not exercise any control over the alleged investment.<sup>37</sup>
78. Respondent emphasizes the significance of the lack of evidence regarding Claimant's exercise of control over the alleged investment or over SCB HK. Respondent argues that SCB failed to prove that "it owns a minority interest in SCB HK, that it owns shares in SC Sherwood, or that SC Sherwood owns shares of SCB HK."<sup>38</sup> The evidence adduced by SCB to that effect is internal documents not corroborated by source documents and competent testimony.<sup>39</sup>
79. Respondent distinguishes the present case from *Aguas del Tunari* because in that case, the claimant had ownership of a majority of the voting rights, and Respondent claims that Claimant here has not proven that it owns any shares of SCB HK.<sup>40</sup> Even if it is proven that Claimant does own shares of SCB HK, Respondent argues that Claimant would in fact directly own only a minority of the shares, the rest being indirectly or beneficially owned through a trust arrangement with SC Sherwood. Therefore, Respondent argues that SCB

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<sup>34</sup> Id.

<sup>35</sup> Id., paras. 18-22.

<sup>36</sup> Id., paras. 14-15.

<sup>37</sup> Id., paras. 18-22.

<sup>38</sup> Resp. PHB, para. 55.

<sup>39</sup> Id., paras. 23-52.

<sup>40</sup> Resp. Reply PHB, para. 66

has no right to exercise the associated voting rights because SCB HK's articles of incorporation specifically state that SCB HK does not recognize any rights supposedly held in trust.<sup>41</sup>

80. For Respondent, SCB attempts to assert claims “based entirely on an ‘investment of’ SCB HK, a Hong Kong corporation that has no right under the UK-Tanzania BIT.”<sup>42</sup> According to Respondent, SCB HK authorized SCB to initiate this arbitration on SCB HK's behalf, while SCB HK is simultaneously pursuing a separated arbitration concerning its rights in the very same investment.<sup>43</sup>

## **2. Loan Restructured in Deceitful Manner**

81. In its Post-Hearing Brief of 27 January 2012, Respondent contends that jurisdiction should also be denied because SCB's purported investment is based on misrepresentations and deceitful conduct.
82. The Tribunal notes that Respondent's allegation of deceitfulness of restructuring is closely related to unlawfulness presented in the section below. The allegation of deceitfulness is withdrawn and integrated into the contention on unlawfulness in Respondent's Reply Post-Hearing Brief dated 27 February 2012. For good order, however, the Tribunal summarizes Respondent's position related to its allegation of a loan restructured in deceitful manner to the extent not redundant.
83. Citing various cases including *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 and *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2009, Respondent contends that an investment made through deceitful conduct should not be protected.<sup>44</sup>
84. In this connection, Respondent asserts that Claimant's asset which is the subject matter of the present case is based on deceit and misrepresentation, and is accordingly unlawful under Tanzania law, the BIT, and international law.

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<sup>41</sup> Resp. Reply PHB, para. 66.

<sup>42</sup> Id. Resp. PHB, para. 53

<sup>43</sup> Resp. Reply PHB, para. 38.

<sup>44</sup> Resp. PHB, paras 82-83.

85. Respondent's description of (i) how IPTL concealed its debt restructuring from the GoT during the negotiations to establish the tariff in the fall of 2001, (ii) how the GoT was prejudiced by the concealment of the restructuring while IPTL was benefited by paying for costs not attributable to the GoT and TANESCO in preference to senior debt, (iii) SCB's complicity in a continuing fraud on the GoT, and (iv) the inseparability of the restructured debt into lawful and unlawful portions will be described in detail in relevant parts below.

### **3. IPTL's Debt Contrary to the Tanzania Investment Act**

86. Respondent argues that the failure to report the changes in IPTL's debt to the Tanzania Investment Centre ("TIC") violates the TIA, and therefore the debt is not an "asset admitted in accordance with the legislation of Tanzanian law for purposes" of the BIT.<sup>45</sup>
87. Respondent notes that IPTL obtained a Certificate of Approval in 1997 and an amended certificate in 1999, noting certain changes to the financing of the investment.<sup>46</sup> In this connection, the GoT's position is that IPTL had an obligation to report any enlargement or substantial variation in the investment, including any change in the loan structure (Term Loans 1 and 2 are said to exceed the amount approved by the TIC by \$35 million and Danaharta and Wartsila were not approved lenders), its terms (8 to 10 years, while the Certificate authorized 9 years) and the interest rate.<sup>47</sup>
88. Respondent rejects Claimant's argument that no basis exists to connect the registration requirement to the BIT, asserting that Claimant's reliance on the testimony of Dr. Tunde Ogowewo is weak, as he is not an expert in Tanzanian law.<sup>48</sup> Rather, Respondent claims that a violation of the requirement under the TIA is contrary to the BIT's requirement that the investment be "admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party."
89. Respondent further emphasizes that SCK HK had access to the 1997 Certificate of Approval, and that it "should have known that its purported investment was contrary" to the original certificate and that the terms and condition of the loan stated on the Certificate

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<sup>45</sup> Resp. Reply PHB, para. 84.

<sup>46</sup> Id. at para. 78.

<sup>47</sup> Resp. PHB, para. 142. Resp. Reply PHB, paras. 78-79, para. 87, para. 19. Resp. Reply, para. 117.

<sup>48</sup> Resp. Reply PHB, para. 82.

were no longer accurate and were not anticipated by the Certificate.<sup>49</sup> SCB, Respondent contends, failed to notify the changes to its investment to the TIC.

90. Respondent asserts that SCB HK's prior knowledge of the failure to report changes imposes on it the same responsibility as that of IPTL.<sup>50</sup> Criminal liability attaches under the TIA to investors and anyone misrepresenting their investment and defrauding the Government.
91. According to the GoT, SCB knew or should have known when it made its investment that the alleged investment was in violation of the TIA because the information was not accurate and because it failed to correct the misrepresentations.<sup>51</sup>

#### **4. Restructured Loan Never Authorized by IPTL**

92. It is Respondent's position that IPTL's restructuring in 2001 and 2003 was not authorized by IPTL.
93. Respondent's view is that the Sale and Purchase Agreement ("SPA") between SCB HK and Danaharta did not transfer rights in the original 1997 Facility Agreement but in newly formed Term Loans 1 and 2.<sup>52</sup> In addition, Danaharta's oral agreements with Wartsila and Mechmar do not reflect contemplation of the original loan facility.<sup>53</sup> Rather, Respondent argues, through the restructuring agreements, the parties involved replaced and rescinded the terms of the 1997 Facility Agreement.<sup>54</sup> Therefore, Respondent submits that regardless of whether Mechmar had corporate authority to restructure IPTL's debt with Danaharta, it is not possible to rescind the Term Loans and to reinstate the original facility.
94. The GoT argues that IPTL's purported Managing Director, Datuk Majid, had not been validly appointed as IPTL Managing Director and even if he was, there is no evidence that he had the authority to restructure all of IPTL's debt.<sup>55</sup> For Respondent, Datuk Majid did not have actual authority to restructure the loan agreement with Danaharta on behalf of

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<sup>49</sup> Resp. PHB, paras. 162-164, and para. 169.

<sup>50</sup> Id. para. 167.

<sup>51</sup> Id. paras. 175-176.

<sup>52</sup> Resp. Reply PHB, para. 92.

<sup>53</sup> Id., at paras. 99-100.

<sup>54</sup> Id., at para. 101.

<sup>55</sup> Resp. PHB, paras. 191-195.

IPTL and did so without the approval of VIP's directors on IPTL's Board.<sup>56</sup> Respondent also posits that Mechmar did not have the actual or ostensible authority to restructure all of IPTL's debt as its agent under the Shareholders' Agreement.<sup>57</sup>

95. The GoT contends, contrary to what SCB claims, that Danaharta did not rely on Datuk Majid's ostensible authority.<sup>58</sup> Similarly, Respondent disputes that Danaharta could have reasonably relied on a defective circular resolution dated 28 November 2001 signed by three Mechmar directors on IPTL's Board and on an abstract of a board resolution dated 28 October 2001, to enter into the restructuring, as claimed by SCB.<sup>59</sup> According to the GoT, Danaharta was on actual and inquiry notice that VIP had not approved the loan restructuring offer. Respondent's position is that, having asked for a Board Resolution, Danaharta was bound, pursuant to applicable case law, to act in good faith on the information it received and could not ignore evidence that the director who purported to act on behalf of the company in fact lacked authority to do so.<sup>60</sup> In this connection, Respondent contends that SCB failed to satisfy its burden of proof. According to Respondent, the fact that the 2001 and 2003 restructurings (i.e., Term Loans 1 and 2) were not authorized by the GoT or TANESCO defeats jurisdiction.<sup>61</sup>
96. Respondent rejects SCB's assertion that in the event that the restructurings were invalid, it acquired the original 1997 Loan, arguing that under the 2005 Sale and Purchase Agreement SCB HK only acquired from Danaharta the Term Loans 1 and 2, not the original Loan.<sup>62</sup>

## **5. Restructuring Circumventing ICSID Award**

97. Respondent contends that the ICSID Award between IPTL and Respondent is binding on SCB as well as IPTL, arguing that if Claimant stepped into IPTL's shoes through SCB HK, then it must assume not only IPTL's rights but also its obligations, including the ICSID Award.<sup>63</sup>

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<sup>56</sup> Resp. Reply PHB, paras. 109-114.

<sup>57</sup> Id., para. 89, paras. 145-149.

<sup>58</sup> Resp. PHB, paras. 178-182.

<sup>59</sup> Resp. PHB, paras. 183-190. Resp. Reply PHB, paras. 115-135.

<sup>60</sup> Resp. Reply PHB, para. 143.

<sup>61</sup> Resp. PHB, paras. 196-199.

<sup>62</sup> Resp. Reply PHB, paras. 91-108.

<sup>63</sup> Resp. Reply PHB, paras. 154-155.

98. Through the restructurings, Respondent claims, IPTL attempted to reverse the ICSID Award, by seeking to make the GoT liable for amounts that TANESCO was not required to pay, namely (i) unreasonable projects costs, (ii) costs not incurred, and (iii) disallowed interests.<sup>64</sup>
99. Respondent asserts that neither the disallowed interest nor the disallowed costs is an investment in Tanzania. With respect to the disallowed interest from ICSID Award, Respondent's interpretation of such Award is that IPTL's failure to provide documents and other information to TANESCO during the negotiation of the tariff showed a lack of good faith, and thus TANESCO was not liable for the interest that had accrued on 1997 Loan Facility due to the delay in commercial operations.<sup>65</sup> As to the disallowed costs, Respondent contends that such costs should not be considered an investment in Tanzania because neither SCB nor IPTL could connect the disallowed costs to the Loan Facility.
100. As to Claimant's assertion on the tariff payments, Respondent's position is that the tariff payments were themselves based on a fraud because IPTL failed to disclose a change to one of the fundamental assumptions, the amortization period for the loan, upon which the tariff was based. Moreover, Respondent contends that the validity of the tariff payments is the subject of the previous ICSID proceedings.

## **6. Debt Contrary to Implementation Agreement and PPA**

101. According to Respondent, by paying off disallowed costs in preference to other costs, IPTL prejudiced both TANESCO and the GoT, as guarantor of TANESCO's tariff obligations. Respondent asserts that TANESCO's payments were meant to purchase electricity and reducing the Facility's senior debt, which was to be paid before other debts according to the amortization table included in the ICSID Award and thereby decrease the GoT's liability in the event of a Termination Event under the Implementation Agreement.<sup>66</sup> Therefore, according to Respondent, the restructuring of IPTL's debt violated both the Implementation Agreement and the PPA, and thus the alleged investment is not admitted in accordance with Tanzanian legislation and regulations.

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<sup>64</sup> Resp. PHB, para. 103.

<sup>65</sup> Id. para. 157.

<sup>66</sup> Resp. Mem., paras. 110-111. Resp. Reply PHB, para. 169.

102. In this connection, Respondent contends that pursuant to Article 1(a) of the BIT the jurisdiction of the Tribunal arises only from assets that are “admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party.”
103. According to Respondent, IPTL restructured its debt by (i) obtaining for Mechmar a short-term loan from Danaharta; (ii) creating Term Loans 1 and 2; (iii) creating a term loan for Wartsila; and (iv) altering the waterfall of payments to pay the Mechmar short-term loan in priority to all other loans, and to pay the Wartsila term loan more quickly than Term Loans 1 and 2. The result is that the purchase price of the Facility, in the event of a GoT or IPTL default, or of an expropriation or force majeure event, is significantly higher for the GoT than it otherwise would have been, had the debt been repaid in accordance with the Implementation Model.<sup>67</sup>
104. As a result, the GoT argues, \$5.2 million was diverted to pay down Danaharta’s short term loan to Mechmar/IPTL, \$4.1 million was diverted to repay a shareholder loan, and approximately \$20.6 million was diverted to pay down a loan to Wartsila.<sup>68</sup>
105. Respondent submits that IPTL concealed its debt restructuring from the GoT during the negotiations with TANESCO to establish the Tariff in 2001 in violation of the PPA and Addendum No. 1 to the PPA, making the restructuring illegal per se.<sup>69</sup>
106. The GoT contends that the mere failure to disclose the creation of Term Loans 1 and 2 was unlawful because it created a different amortization schedule than that anticipated by the financial model, and different from the parties’ original assumptions. By concealing the changes, IPTL ensured that the GoT and TANESCO could not object to IPTL’s debt restructuring and that they could not protect their own rights and interests.<sup>70</sup> The restructuring benefited IPTL and was detrimental to the GoT and TANESCO.
107. Respondent asserts that IPTL thus altered the allocation of risks to their benefit without notification in violation of the PPA and the Implementation Agreement. While the senior

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<sup>67</sup> Resp. Reply PHB, para. 173.

<sup>68</sup> Resp. Mem., para. 268.

<sup>69</sup> See paras. 85-101

<sup>70</sup> Resp. Mem., paras. 100-101.

debt in mid-2005 should have been about \$43.5 million, it was \$107 million because of IPTL's changes to the waterfall of payment and the restructuring.<sup>71</sup>

108. Contrary to what SCB asserts, Respondent contends that the Implementation Agreement did limit IPLT's ability to restructure the debt.<sup>72</sup>
109. Because the restructuring of IPTL's debt violated both the Implementation Agreement and the PPA, the GoT does not agree that it can be considered an investment "admitted in accordance with the legislation and regulations in force" in Tanzania and constituted a breach of contract.<sup>73</sup> By violating the ICSID Award, there was a violation of Tanzanian and international law and the investment arising from such a violation cannot be an investment for the purpose of the BIT.<sup>74</sup>
110. Furthermore, Respondent asserts that the lenders induced IPTL to breach the contracts.<sup>75</sup>
111. For the GoT, it is not possible to divide the restructured debt into a lawful portion on the one hand and an unlawful portion on the other hand. According to the GoT, a court will not protect a purchaser who is on actual or constructive notice that the asset it is purchasing is based on deceitful or fraudulent conduct.<sup>76</sup> In addition, the GoT contends that SCB is subject to the same defenses – including fraud – to which IPTL and SCB HK are subject.<sup>77</sup> Under the BIT, an asset must be examined as a whole to see whether it was admitted in accordance with the legislations and regulations.<sup>78</sup>
112. Finally, because the assets purchased are so far removed from the 1997 Loan Agreement, the GoT argues that such a purchase does not constitute an investment; instead, the original loan has been replaced with something altogether different, with new parties and new components.<sup>79</sup>

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<sup>71</sup> Resp. Mem., para. 117.

<sup>72</sup> Resp. Reply, PHB, paras. 182-183.

<sup>73</sup> Resp. Reply PHB, para. 170. Id. paras. 175-180.

<sup>74</sup> Resp. Reply PHB, para. 152.

<sup>75</sup> Resp. Reply PHB, paras. 184-186.

<sup>76</sup> Resp. PHB., para. 131.

<sup>77</sup> Id., para. 133.

<sup>78</sup> Id. para. 134.

<sup>79</sup> Id. paras. 136-137.

## **7. Good Faith Requirement**

113. The GoT contends that an investment must be made in good faith to qualify for the protection under a BIT pursuant to international law.<sup>80</sup>
114. For Respondent, the multiple restructurings of the 1997 Loan and the unauthorized changes in the waterfall payments as explained above violate the duty of good faith and fair dealing.<sup>81</sup>
115. Respondent asserts that SCB was complicit in a continuing fraud on the GoT, as SCB HK “should have known that IPTL’s debt was restructured in violation of IPTL’s obligations and TANESCO’s and GoT’s rights”<sup>82</sup> and did not notify TANESCO and the GoT. In doing so, SCB HK failed to act in accordance with the international principle of good faith.<sup>83</sup>

## **8. Unregistered Security Interests Not Investments**

116. Respondent argues that the security interests granted by IPTL in conjunction with the 1997 Loan Agreement (Mortgage of the Right of Occupancy, Security Deed, Charge of shares and Mortgage of Occupancy) are invalid and cannot be considered as investments.<sup>84</sup> Pursuant to the Tanzanian Companies Ordinance, those charges were supposed to be registered within 42 days of their creation, which was not the case.<sup>85</sup>
117. Respondent claims that the security interests are illusory and unenforceable, and therefore do not constitute an “asset” under Article 1(a) of the BIT. Second, the security interests were not admitted in accordance with Tanzanian legislation—in this case the Tanzanian Companies Ordinance—and therefore do not fall within the BIT’s definition of an “investment.”<sup>86</sup>

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<sup>80</sup> Resp. Mem., para. 265.

<sup>81</sup> Resp. Mem., para. 267.

<sup>82</sup> Resp. Mem., para. 127.

<sup>83</sup> Resp. Mem., para. 273.

<sup>84</sup> Resp. Mem., para. 296.

<sup>85</sup> Resp. Mem., paras. 296-310.

<sup>86</sup> Resp. Mem., para. 309.

118. According to the GoT, the security interests in IPTL, a company in liquidation, cannot be considered an investment as they have no value separate and apart from the underlying loan.<sup>87</sup>

### **9. Distressed Malaysian Debt Not Investment in Tanzania**

119. Respondent argues that SCB HK's purchase of Term Loans 1 and 2 does not qualify as an investment under the BIT and for the purpose of the ICSID Convention as the loans did not contribute to Tanzania's development.<sup>88</sup> Respondent emphasizes that not every loan constitutes an investment within the meaning of the BIT and the ICSID Convention.<sup>89</sup>

120. Respondent contends that the new restructured debt's situs was in Malaysia, not in Tanzania,<sup>90</sup> and therefore no investment exists for the purpose of the BIT.

121. In addition, Respondent submits that SCB HK could not have had any expectation of regularity of profit and return on Term Loan 2. It was a mere contingent liability that would provide no return or profit unless the borrower defaulted on Term Loan 1. Such a contingent liability cannot be an investment within the meaning of the ICSID Convention.<sup>91</sup>

### **10. Cooling-off Period**

122. Respondent argues that SCB did not satisfy the 6-month cooling-off period required by Article 8(3) of the BIT, and that therefore consent of the GoT is lacking.

123. In this connection, the GoT points out that according to SCB's best case scenario, the cooling-off period was to run as of a letter dated 17 December 2009, and the Request was submitted to ICSID on 10 May 2010. According to the GoT, the Request was registered less than 6 months after SCB informed the GoT of a dispute arising from the BIT.<sup>92</sup>

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<sup>87</sup> Resp. Reply PHB, para. 194.

<sup>88</sup> Resp. Mem., para. 287.

<sup>89</sup> Resp. Reply, para. 221.

<sup>90</sup> Resp. PHB, paras. 204-205.

<sup>91</sup> Resp. Mem. paras. 293-294.

<sup>92</sup> Resp. PHB, paras. 205-210.

## **11. Breach of Contract Claims Proper on Different Forum**

124. Respondent contends that SCB's claims are at best contractual in nature and cannot be considered investment under the ICSID Convention or the BIT. SCB's claim under the BIT arises from the GoT's role as a guarantor.<sup>93</sup> Alleged failure to abide by the terms of a contract does not give rise to an expropriation claim, and there is no jurisdiction to proceed under the BIT.<sup>94</sup>
125. Furthermore, the GoT asserts that SCB's claims are all based on rights and interests that SCB HK allegedly acquired from Danaharta, which purportedly include IPTL's contract rights under the PPA, Implementation Agreement and Guarantee, which all contain dispute resolution provisions.
126. According to the GoT, SCB HK, the entity that actually holds the rights obtained from Danaharta, has relied on the dispute resolution provisions of the PPA and Implementation Agreement to initiate a separate arbitration for breach of contract based on the same facts that SCB alleges here. Respondent states, "[a]ny effort by this Tribunal to resolve the breach of contract issues would therefore be a duplicative and inefficient exercise, and would create an inappropriate risk of inconsistent decisions."<sup>95</sup>

## **12. Restructured Loan Not of Benefit to Tanzania**

127. The GoT asserts that what SCB HK purchased merely constitutes a contractual right to receive money, which should not be considered a bona fide purchase investment in Tanzania, because Danaharta disclaimed all warranties accompanying the debt.<sup>96</sup> According to Respondent, the country which was benefited by the restructured loan was Malaysia, because Danaharta, a Malaysian company successfully removed debt from its books.

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<sup>93</sup> Resp. Mem., para. 279.

<sup>94</sup> Resp. Mem., para. 280.

<sup>95</sup> Resp. Reply, para. 209.

<sup>96</sup> Resp. PHB, paras. 200-203.

### **13. Restructured Loan Not Sited in Tanzania**

128. According to Respondent, the new restructured debt was not sited in Tanzania, but rather was sited in Malaysia, and thus is not an investment for purposes of the BIT and the ICSID Convention.
129. Respondent's position is that IPTL was run by Mechmar from 2001 without appropriate authorization. Mechmar worked closely with the Malaysian bank that the Malaysian government established to liquidate bad debt. In this connection Respondent contends that Danaharta facilitated the efforts of Mechmar, which is based and headquartered in Malaysia, to restructure IPTL's debt without authority or approval of IPTL, and all business of IPTL was conducted in Malaysia by Mechmar after restructuring.<sup>97</sup>
130. Respondent also asserts that the alleged investment should not be viewed as sited in Tanzania in light of *Abaclat v. The Argentine Republic*, ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, 4 August 2011. According to the Respondent, that tribunal established two criteria for situs of a debt: "(1) where; and (2) for whom the funds are ultimately used."<sup>98</sup> With respect to the restructured debt, Respondent argues that both criteria point to a site outside of Tanzania. Unlike in *Abaclat*, where the debt merely changed hands, because the Loan was replaced by an entirely new debt, the Loans. Respondent contends that the Loan and the Loans are not "part of one and the same economic operations."<sup>99</sup>

#### **C. Claimant's Position on Jurisdiction**

131. The Tribunal notes that Claimant's first and second Post-Hearing Briefs do not follow the same organization.
132. In Claimant's Post-Hearing Brief of 27 January 2012 listed eight (8) grounds for objection purportedly in response to Respondent's Memorial on Jurisdiction dated 23 June 2011. In its Reply Post-Hearing Brief of 27 February, however, Claimant ultimately settled on six (6) categories.

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<sup>97</sup> Id. at para. 204.

<sup>98</sup> Resp. Reply PHB, para. 204.

<sup>99</sup> Resp. Reply PHB, para. 205.

133. This Award breaks down Claimant’s contentions into twelve (12) arguments below in its effort to consider every issue raised by Claimant.
134. For the sake of good order, the Tribunal notes that the number of Claimant’s actual contentions (13 items under V.B) does not exactly match the number of Respondent’s grounds for objections (12 items under V.C). Although following its own organization, Claimant ended up addressing the substance of Respondent’s objections, albeit through a structure different from that of Respondent.
135. For example, V.C.9 below provides Claimant’s views countering Respondent’s contention addressed in V.B.12 and V.B. 13 of the Award.
136. Claimant observes that there is no challenge to three of the five jurisdictional requirements under the ICSID Convention – that there is a “legal dispute”, that Tanzania is a Contracting State to the Convention, and that SCB is a national of another Contracting State to the Convention. For Claimant, the only issues that the Tribunal needs to satisfy itself of for the purposes of jurisdiction are therefore whether (i) there is an investment and whether (ii) the Parties have consented in writing to submit the dispute to the Centre.

#### **1. Claimant’s Factual Assertions**

137. Claimant objects to the factual presentation made by Respondent, setting forth *inter alia* the following assertions.
- The fact that the amount drawn down under the Facility Agreement (US\$85,862,022.06) is approximately the amount later included as Senior Debt in the ICSID Award and the Implementation Model (US\$85,238,033) is a coincidence and has no factual relevance.
  - The amounts assumed in the Implementation Model as allocated to the repayment of the US\$85m Senior Debt in the eight-year amortization period would not have been sufficient to repay the actual US\$120m outstanding under the loan facility; there is no evidence that the seven-year amortization was assumed to be front-loaded; and the GoT accepts that even under its interpretation of the ICSID Award, a substantial part of the loan from the project lenders would still be outstanding.

- The additional US\$35 million included in the loan by 2002 reflected interest and penalties under the loan, not the inclusion in the loan facility of amounts “disallowed” under the ICSID Award.
- It is not disputed that the most significant elements of the “disallowed” costs were for the purpose of the ICSID Award actually incurred by IPTL in order to construct the Power Plant, and remained debts of IPTL.
- In 2001 and 2003 the lenders and IPTL were restructuring the actual loan, not the lower Senior Debt assumed in the Implementation Model for the purposes of tariff calculation.
- The GoT presents a misleading picture of the impact of the restructuring by comparing restructured debt with the assumed Senior Debt rather than with the real debt before restructuring.
- The GoT conflates the amendments to the 1997 Facility Agreement with the wider debts of IPTL, and conflates IPTL with its shareholders and lenders; the GoT also seeks to conflate the actions of Danaharta with those of SCB. Each of these parties is distinct, and in particular the actions of Danaharta (or indeed IPTL) prior to SCB’s purchase of the loan are not attributable to SCB.
- The GoT does not explain how the ICSID Award binds non-parties, in particular the lenders.
- Restructuring of the loan was to the benefit of both TANESCO and the GoT.
- SCB’s claim is not brought pursuant to the Implementation Agreement, but under the BIT; this is a treaty claim, not a contract claim.<sup>100</sup>

138. At the appropriate portions of this Award, the Tribunal will address such of those of these factual controversies as necessary to decide its jurisdiction in this case.

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<sup>100</sup> Cl. PHB, paras. 6-45.

## 2. Investment Held Through a Subsidiary in Another Jurisdiction

139. Claimant's main contention is that the UK-Tanzania BIT should be read to allow jurisdiction over "indirectly" owned investments. The phrase "investment of" in Article 8(1), according to Claimant, should be broadly interpreted as to cover both directly and indirectly held investments.<sup>101</sup>
140. In this connection, unlike Respondent, Claimant also finds relevant Article 8(2) in determining jurisdiction, which it claims would permit IPTL, if a majority of its shares are owned by UK nationals or companies, to bring a claim in its own name, as distinct from Article 8(1) which permits SCB to bring claims with respect to its indirectly held investments in Tanzania.<sup>102</sup>
141. SCB also emphasizes that it satisfies the definition of a qualifying "company" of the BIT.<sup>103</sup> According to Claimant, SCB owns through an intermediate company a valid investment over which the Tribunal has jurisdiction. Claimant interprets the BIT such that it covers indirect investments, and that interposed companies between the investor and the investment are allowed under the BIT.<sup>104</sup> SCB posits that the BIT does not require control, but only ownership of an investment.<sup>105</sup>
142. According to Claimant, it owns SCB HK's investment by way of its direct, indirect, and beneficial interest in the subsidiary. SCB explicitly disavows reliance on control of SCB HK or its assets. SCB states its position as follows: "SCB's shareholdings alone are sufficient for the purposes of jurisdiction under the UK/Tanzania BIT. SCB has not therefore advanced any evidence, and does not rely, on actual control."<sup>106</sup>
143. Following the chain of ownership, Claimant notes that, as of the filing and registration of the request for arbitration in mid-2010, it holds directly 36% of SCB HK and indirectly owns the remaining shareholding over which it exercises 100% of the voting rights.<sup>107</sup>

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<sup>101</sup> Cl. Reply PHB, para. 78.

<sup>102</sup> Cl. Reply PHB, para. 81.

<sup>103</sup> Cl. Rej., para. 53.

<sup>104</sup> Cl. CM, para. 93.

<sup>105</sup> Cl. PHB, para. 68.

<sup>106</sup> Cl. PHB, para. 56.

<sup>107</sup> Cl. PHB, para. 52.

When SCB HK purchased the loan from Danaharta in 2005, SCB owned and controlled 100% of the share capital and beneficial interest in SCB HK and on 5 May 2010, 100% of the shares in SCB HK were still held by SCB and its subsidiary SC Sherwood, according to Claimant.

144. Claimant's description is that SCB at all relevant times has been the beneficial owner of 64% of the SCB HK shares, and as of November 2011, SCB was also the legal owner of 21% of the SCB HK shares, with a remaining 15% held by SCB Holdings, SCB's parent company.<sup>108</sup>
145. Claimant further asserts that the BIT does not require showing of a direct flow of funds for the purpose of finding jurisdiction.<sup>109</sup>
146. With respect to Respondent's challenge to Claimant's ownership and beneficial interest in SCB HK, Claimant rejects it as meritless.<sup>110</sup> It contends that Mr. Skippen's testimony should not be discounted and is sufficient to establish Claimant's position. Claimant argues that Mr. Skippen's testimony satisfies the burden of proof in establishing direct and indirect "shareholdings" in SCB HK.<sup>111</sup>
147. Therefore, Claimant concludes that it has established its ownership of SCB HK and can bring claims under the BIT.<sup>112</sup>

### **3. IPTL's Debt Not Contrary to the Tanzanian Investment Act**

148. Claimant submits that no basis for connection exists between the TIA and any alleged requirement under the BIT.<sup>113</sup> Article 1(1) of the UK-Tanzania BIT does not explicitly require the procurement of an "investment certificate", and thus Claimant finds the TIA irrelevant to jurisdiction.<sup>114</sup>

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<sup>108</sup> Id. Cl. PHB, paras. 50-55.

<sup>109</sup> Cl. CM, para. 124.

<sup>110</sup> Cl. Reply PHB, paras. 42-43.

<sup>111</sup> Cl. Reply PHB, paras. 42-43.

<sup>112</sup> Cl. Reply PHB, para. 109.

<sup>113</sup> Cl. Reply PHB, para. 199.

<sup>114</sup> Cl. Reply PHB, para. 200.

149. Claimant asserts that IPTL did not any breach provision under the TIA.<sup>115</sup> Furthermore, Claimant’s position is that IPTL’s purported obligations cannot extend to SCB given that SCB HK is not a holder of a certificate under the TIA.<sup>116</sup>
150. Claimant argues that the focus of this arbitration should be with regard to SCB’s purchase of the loan in 2005. According to Claimant, Respondent attempts to impute IPTL’s purported obligations under the TIA onto SCB by conflating SCB’s investment acquired in 2005 with the enterprise covered by the Certificate of Investment.<sup>117</sup> Claimant notes that the lenders never sought to register the loan under the TIA in the first place, let alone qualify as a “business enterprise” for incentives under the statute.<sup>118</sup>
151. Highlighting that the TIA does not impose obligations on someone with no investment certificate, Claimant’s view is that the TIA establishes only a discretionary regime and imposes no compulsory or binding obligations on investors.<sup>119</sup>
152. Furthermore, Claimant argues that IPTL is still the owner of the plant and no notification from SCB HK (or Danaharta) was required.<sup>120</sup> In addition, according to SCB, no notifiable changes took place, and thus IPTL did not violate any reporting provision.<sup>121</sup>
153. In sum, SCB states that the GoT cannot invoke its own domestic law on registration to avoid its international obligations, as national law would then override the provisions of the BIT. Even if SCB was required to register its investment, that would not deprive the Tribunal of its jurisdiction under the BIT as the phrase “in accordance with the legislation and regulations in force” only pertains to the validity of the investment and not to its definition, and the BIT does not contain any explicit registration requirement.<sup>122</sup>

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<sup>115</sup> Cl. Reply PHB, para. 210.

<sup>116</sup> Cl. Reply PHB, para. 204.

<sup>117</sup> Cl. Reply PHB, para. 214.

<sup>118</sup> Cl. Reply PHB, para. 206.

<sup>119</sup> Cl. CM, paras. 162-165.

<sup>120</sup> Cl. Rej., para. 131. Cl. PHB, para. 88.

<sup>121</sup> Id.

<sup>122</sup> Cl. CM, paras. 166-173.

154. The GoT is said to conflate SCB's investment acquired in 2005 with the enterprise covered by the certificate of investment and to attempt to impute purported obligations of IPTL under the TIA onto SCB.<sup>123</sup>

#### **4. Restructuring Authorized by IPTL**

155. Claimant contends that the 2001 and 2003 restructurings were authorized by IPTL. It characterizes them as interest forgiveness in order to reduce the interest repayment and the financial strain on IPTL.<sup>124</sup>

156. From Claimant's perspective, this issue is not determinative of jurisdiction, and Respondent fails to carry its burden to show that the 2001 and 2003 restructurings were not authorized by IPTL.<sup>125</sup>

157. According to Claimant, the restructurings did not illegally reincorporate costs which had been disallowed under the ICSID Award,<sup>126</sup> but rather benefited the GoT and TANESCO, in that without the alteration of the repayment schedule, IPTL would have been unable to continue as a going concern, disrupting the production of power at the plant.<sup>127</sup>

158. Claimant contends that this issue is not determinative of jurisdiction in any event and underscores that the burden of proof lies with the GoT.<sup>128</sup>

159. Claimant alternatively asserts that, even if the restructurings were improperly authorized, IPTL and SCB would remain bound by the 1997 Loan Agreement, and thus the jurisdiction would stand.<sup>129</sup>

160. SCB's position is that VIP and the GoT had knowledge of the restructurings and the restructurings are recorded in detail in each set of IPTL's accounts which were provided to the GoT and TANESCO.<sup>130</sup>

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<sup>123</sup> Cl. CM, para. 179.

<sup>124</sup> Cl. CM, para. 179.

<sup>125</sup> Cl. Reply PHB, para. 219.

<sup>126</sup> Cl. CM, para. 179.

<sup>127</sup> Cl. CM, para. 183.

<sup>128</sup> Cl. CM, paras. 187-203. Cl. Reply PHB, paras. 220-223.

<sup>129</sup> Cl. CM, paras. 187-203. Cl. Reply PHB, paras. 220-223.

<sup>130</sup> Cl. Reply PHB, paras. 160-165.

161. Claimant submits that, in any event, the restructuring was a valid corporate act of IPTL, as Mechmar had valid authority to act as the agent of IPTL. Claimant contends that Datuk Majid as Managing Director of IPTL, exercised actual or ostensible authority to bind IPTL to the agreement with Danaharta. In the alternative, Claimant argues that only IPTL could void the transaction.<sup>131</sup>

### **5. Restructuring in Compliance with the ICSID Award**

162. SCB contends that the GoT misapplies the ICSID Award because SCB's investment does not include costs disallowed by the previous ICSID tribunal.<sup>132</sup> SCB's interpretation of the ICSID Award is that the award did not authorize any debt or purport to freeze the level of IPTL's indebtedness; it only ascribed a value to the loan for the purpose of the tariff calculation.<sup>133</sup> Claimant posits that the capitalization of interest did not breach the ICSID Award, and thus it has no relevance to the question of whether SCB has made an investment.<sup>134</sup>

163. Claimant contends that the GoT failed to explain how the effect of the ICSID Award was that IPTL or the lenders would require the approval of the GoT and TANESCO to restructure the debt.<sup>135</sup> Claimant's alternative contention is that even if the GoT's ascribed meaning is accepted, there would have been no obligation for IPTL to disclose the 2001 restructuring.<sup>136</sup>

### **6. Restructuring Not Violating PPA and Implementation Agreement**

164. SCB also asserts that the restructurings did not breach the PPA or the Implementation Agreement.<sup>137</sup> A breach of either agreement is not in any event a violation of Tanzanian law nor could such breaches result in Term Loans 1 and 2 not being made "in accordance

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<sup>131</sup> Cl. CM, para. 176, para. 251. Cl. Rej., paras. 156-173. Cl. PHB, paras. 92-124. Cl. Reply PHB, paras. 224-230.

<sup>132</sup> Cl. Reply PHB, paras. 121-126.

<sup>133</sup> Cl. CM, para. 262.

<sup>134</sup> Cl. PHB, paras. 131-135.

<sup>135</sup> Cl. CM, para. 266.

<sup>136</sup> Cl. Reply, paras. 127-136.

<sup>137</sup> Cl. CM, paras. 273-293.

with the law”.<sup>138</sup> That provision only relates to the legality of the investment itself and not unrelated acts that may be in contravention of Tanzanian law such as the Contract Act.<sup>139</sup>

165. Alternatively, Claimant argues that IPTL would be the only one to have breached the contracts, and any violation of the Contract Act could not be applied against SCB under the BIT.<sup>140</sup>

### **7. Restructurings Made in Good Faith**

166. While SCB accepts that investment must be made in good faith to qualify for the protection of a BIT, it underlines that “good faith” must be tested against the investor acquiring the investment in question. SCB negotiated and acquired the investment from Danaharta in 2005 in good faith, in absence of deceit and/or trickery.<sup>141</sup>

167. Claimant also argues that even if SCB had notice of possible issues with the restructurings in 2001 and 2003, SCB’s purchase of the debt cannot be said to be in bad faith.<sup>142</sup>

### **8. Disclosure of Restructuring to the GoT**

168. Claimant rejects Respondent’s additional allegation of fraud with regard to the restructurings.<sup>143</sup> Specifically, Claimant argues that the 2001 restructurings were not fraudulent at the time and after acquiring its investment in 2005 it did not make misrepresentations about the transaction to Respondent. In the first place, Claimant denies that it had any obligation to disclose any part of the restructuring to Respondent, so no breach of contract or fraudulent conduct occurred.<sup>144</sup> Even if IPTL did have a legal obligation to disclose the 2001 restructuring to either Respondent or TANESCO, Claimant finds no evidence to suggest that the lenders, let alone Claimant itself, were aware of any representations between IPTL and Respondent.<sup>145</sup>

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<sup>138</sup> Id., paras. 294-300.

<sup>139</sup> Cl. Rej., para. 220.

<sup>140</sup> Cl. CM, paras. 304-305.

<sup>141</sup> Id., paras. 310-319.

<sup>142</sup> Cl. Rej., para. 225.

<sup>143</sup> Cl. Reply PHB, para. 113.

<sup>144</sup> Cl. Reply PHB, para. 119.

<sup>145</sup> Id.

169. Claimant further contends that the burden of proof to prove fraud, an argument developed for the first time by the GoT in its PHB, is high,<sup>146</sup> and that Respondent does not advance any evidence to support the alleged conspiracy of IPTL and the lenders in the alleged fraudulent restructuring.<sup>147</sup> Claimant's position is that there was no fraud in which SCB was complicit.<sup>148</sup>

### **9. Not a Distressed Debt Purchased and Investment Sited in Tanzania**

170. Claimant rejects Respondent's argument that Claimant purchased a distressed debt. Instead, Claimant points out that for the four-year period prior to Claimant's purchase of the debt in 2005, there had been no default on the loan.<sup>149</sup> According to Claimant, the reason the loan has subsequently become distressed was due to TANESCO's refusal to make payments to IPTL under the PPA and the GoT's actions in preventing the payment of the amounts due.<sup>150</sup>

171. SCB posits that loans qualify as investment under the BIT and the ICSID Convention and a transfer of a loan does not deprive the loan of its characteristics if the original loan was an investment.<sup>151</sup> SCB's view is that the distressed nature of the loan at present should not prevent that loan from constituting an investment for the purpose of the BIT.<sup>152</sup>

172. Furthermore, Claimant argues that the investment is sited in Tanzania. According to Claimant, the investment contributed significantly to Tanzania's economic development, as SCB played a valuable role in financing the project crucial to Tanzania's economy, and was consistent with SCB's initiative to become a long term investor in Tanzania.<sup>153</sup> Even if it were a purchase of a debt in the secondary market, it would have direct and tangible beneficial effect for Tanzania.<sup>154</sup>

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<sup>146</sup> Cl. Reply PHB, para. 38.

<sup>147</sup> Cl. Reply PHB, para. 115.

<sup>148</sup> Id., para. 155.

<sup>149</sup> Cl. Reply PHB, para. 235.

<sup>150</sup> Cl. Reply PHB, para. 236.

<sup>151</sup> Cl. CM, para. 330.

<sup>152</sup> Cl. Rej., para. 239.

<sup>153</sup> Cl. CM, paras. 331-342.

<sup>154</sup> Cl. CM, para. 338.

173. In support of finding jurisdiction, Claimant asserts that the investment fulfills the territoriality requirement. The original loan was provided to IPTL for a project in Tanzania, no funds were repaid or advanced to IPTL in 2001, the loan was designed to be paid out of the revenues produced by the plant, and the identity of the debtor did not change prior to and after the restructurings.<sup>155</sup> The situs of the debt is to be determined by reference to the debtor, namely IPTL, i.e. in Tanzania.<sup>156</sup>
174. Claimant notes further that whether Term Loan 2 is a contingent liability has no bearing on jurisdiction. In this connection, Claimant argues that:
- a. The waiver of US\$8 million of accrued interest was not a contingent liability;
  - b. In any event, by the date that the Request for Arbitration was filed, the accrued interest had been reinstated; and
  - c. Even if the reinstatement of the waived interest were a contingent liability, this would not affect jurisdiction over SCB's investment.<sup>157</sup>

#### **10. Security Interests As Part of SCB's Valid Investment**

175. Claimant posits that the various security interests granted by IPTL as security for the loan are investments under the BIT.
176. Whether they were registered or not would only have no consequence on the validity or the enforceability of the loan under Tanzanian law and would not render them inexistent.<sup>158</sup> No creditor or liquidator has taken any steps to challenge the Mortgage Right of Occupancy or the Security Deed.<sup>159</sup>
177. In this connection, SCB notes that the Share Pledge Agreement over Mechmar's majority shareholding was registered under Tanzanian and Malaysian Law and as concerns VIP's

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<sup>155</sup> Cl. Reply PHB, para. 239.

<sup>156</sup> Cl. CM, para. 350. Cl. PHB, para. 81. Cl. Reply PHB, paras. 14-30.

<sup>157</sup> Cl. CM., para. 353.

<sup>158</sup> Cl. CM, para. 362.

<sup>159</sup> Cl. Rej., paras. 230-232. Cl. PHB, para. 181.

shareholding at least presented for registration.<sup>160</sup> Therefore, Claimant argues, it does constitute an investment for the purpose of the BIT.<sup>161</sup>

### **11. Compliance with the Cooling-Off Period**

178. Claimant disagrees with Respondent on the start and end dates for the requisite six-month cooling-off period. According to Claimant, Respondent's starting date of 17 December 2009 as "SCB's best case scenario" did not mark the start of the cooling-off period but rather was the latest of Claimant's number of attempts to achieve negotiated resolution of the dispute before it commenced arbitration beginning at least 18 months prior the filing of its request.<sup>162</sup>
179. Alternatively, Claimant argues that compliance with the cooling-off is a procedural, not a jurisdictional requirement and should not deprive the Tribunal of jurisdiction.<sup>163</sup>
180. Claimant also relies on the Most Favored Nation clause contained in the BIT, which it claims enables SCB to avail itself of more beneficial provisions contained in other BITs.<sup>164</sup>

### **12. Claim Involving Breaches of the BIT**

181. SCB contends that its claim is not a contract claim or a claim under a guarantee. Claimant alternatively asserts that even if it were so, the umbrella clause would elevate such contract claim to treaty status.<sup>165</sup>

## **D. Costs**

### **1. Respondent**

182. In its Submission on Costs dated 3 May 2012, Respondent contends that SCB should bear the costs regardless of the outcome of the jurisdictional decision because SCB produced relevant documents in an untimely manner, which resulted in inefficiencies and waste.

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<sup>160</sup> Cl. PHB, para. 182.

<sup>161</sup> Cl. PHB, para. 179.

<sup>162</sup> Cl. Reply PHB, para. 242.

<sup>163</sup> Cl. CM, paras. 136-142.

<sup>164</sup> Cl. CM, paras. 144-152.

<sup>165</sup> Cl. CM, paras. 321-326.

183. In this connection, Respondent notes that Article 61(2) of the ICSID Convention grants the Tribunal an authority to allocate (i) administrative costs of the Centre; (ii) the fees and expenses of the arbitrators; (iii) fees, travel expenses, and other disbursements reasonably incurred by a party's counsel and experts; and (iv) all travel expenses and costs incurred by a party's representatives and witnesses.
184. Respondent acknowledges that it is common that the parties share the arbitration costs equally and bear their own legal costs. Respondent, however, asserts that the Tribunal may direct one Party to bear the costs where the Party's behavior caused an increase in costs.<sup>166</sup>
185. According to Respondent, SCB's actions have substantially increased the cost of the proceedings. These actions include SCB's failure to timely produce documents and untimely witness testimony.
186. For the reasons stated above, the GoT sought the reimbursement of:
- the advances it has paid to ICSID for the fees and expenses of the arbitrators and of ICSID itself;
  - the fees and expenses of the GOT's witnesses;
  - the travel costs and other expenses for the GOT's counsel and representatives;
  - the reasonable costs for legal representation incurred in these proceedings;
  - the other disbursements.
187. In its Opposition to SCB's Submissions on Costs dated 30 May 2012, the GoT amended its requests concerning the costs in case that the Tribunal (i) denies Respondent's jurisdictional objections and (ii) sustains jurisdictional objections to dismiss the case.
188. First, should the jurisdictional objection be rejected by the Tribunal, Respondent contends that the Tribunal should deny SCB's request for costs and fees because (1) it is premature to award costs prior to the final disposition of the case on the merits and (2) SCB's behavior caused the GoT to incur additional expenses.

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<sup>166</sup> Respondent's Submission on Costs of 3 May 2012, para. 5.

189. Secondly, in the event the Tribunal dismisses the case for lack of jurisdiction, Respondent asserts that the Tribunal should award the GoT reasonable costs, taking various factors into account, including Respondent counsel' work in coordinating the testimony of expert witnesses from three continents, gathering, reviewing, and producing more than nine thousand pages of documents, and drafting hundreds of pages of briefing as well as the additional burden and expense caused by SCB's misconduct.

## **2. Claimant**

190. In its Submission on Costs of 3 May 2012, as amended as of 30 May 2012, SCB, asserting a common practice that a losing party should be ordered to bear at least a major part of the prevailing party's reasonable costs, contends that the Tribunal should allocate the costs to to reflect the relative success or failure of the Parties in the jurisdictional phase of the proceedings.

191. Accordingly, Claimant requests the Tribunal to find the GoT to be liable for SCB's costs of the jurisdictional phase, which finding is to be incorporated into the final award. SCB also notes that in none of its memorials did the GoT claim its costs and asserts that it is too late for it to do so after the final post-hearing brief.

192. In its Reply Submission on Costs dated 30 May 2012, SCB asserts that the counsel and expert costs of US\$8,606,316.25 estimated by Respondent are excessive and implausible, when compared with its costs of US\$1,820,164.95.

## **VI. Prayers for Relief**

### **A. Respondent**

193. Respondent asks the Tribunal to dismiss the arbitration for lack of jurisdiction.

### **B. Claimant**

194. Initially, SCB, in its Request for Arbitration dated 5 May 2009, requested the following reliefs:

- (1) A declaration that Tanzania has breached Article 5 of the BIT by taking measures depriving SCB of its investment without due process of law and provision for prompt, adequate and effective compensation;
- (2) A declaration that Tanzania has breached Article 2 of the BIT by failing to ensure the fair and equitable treatment of SCB's investment;
- (3) A declaration that Tanzania has breached Article 2 of the BIT by taking unreasonable and/or discriminatory measures that have impaired SCB's management, maintenance, use and/or enjoyment of its investment;
- (4) A declaration that Tanzania has breached Article 3 of the Treaty by failing to provide SCB treatment no less favorable than that which it accords to its own nationals or companies;
- (5) A declaration that Tanzania has breached Article 2 of the Treaty by failing to observe obligations entered into with regard to SCB's investment;
- (6) An order that Tanzania pay to SCB compensation in an amount no less than US\$118,609,392.31 being the value of SCB's investment as at 30 April 2010 in the form of the loan to IPTL, inclusive of interest and costs;
- (7) An order that Tanzania pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon; and
- (8) An order that Tanzania pay all other costs incurred by SCB as a result of its breaches of the BIT and interest thereon in accordance with the BIT.

195. Claimant's latest Prayer for Relief specific to this jurisdictional phase as contained in its Reply Post-Hearing Brief dated 27 February 2012 is as follows:

256. Accordingly, and for the reasons set forth above and in SCB's earlier submissions, SCB requests the following relief:

- (1) An Award dismissing each of the GoT's jurisdictional objections;
- (2) An order directing Respondent to bear Claimant's costs and legal fees for this phase of the arbitration; and

- (3) An order directing that this arbitration should expeditiously proceed to a hearing on the merits.

## **VII. The Tribunal's Analysis**

### **A. Overview**

196. A UK company, Claimant in this case, owns a Hong Kong entity holding Loans to a Tanzanian borrower.<sup>167</sup> The relevant credit was initially granted by a consortium of Malaysian banks, and then purchased by the Hong Kong entity with its own funds. With respect to the Tanzanian Loans, the UK Claimant, by virtue of its equity ownership of the Hong Kong entity, seeks the benefits of protection as an investor pursuant to the UK-Tanzania BIT.
197. No evidence presented in this arbitration demonstrates that Claimant took actions concerning the Tanzanian Loans that would confer the status of investor pursuant to the UK-Tanzania BIT. Based on the language of Article 8(1) of the UK-Tanzania BIT, the Tribunal concludes that jurisdiction depends on a finding that the Loans were investments “of” Claimant.
198. As discussed more fully below, to constitute Claimant’s status as treaty investor, so that the Loans may be considered investments “of” Claimant, implicates Claimant doing something as part of the investing process, either directly or through an agent or entity under the investor’s direction. No such actions were performed.
199. The Tribunal readily admits that an investment might be made indirectly, for example through an entity that serves to channel an investor’s contribution into the host state. Special purpose vehicles have long facilitated cross-border investment. Such indirectly-made investments, however, would involve investing activity by a claimant, even if performed at the investor’s direction or through an entity subject to investor’s control.

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<sup>167</sup> For clarity, the Tribunal has generally followed nomenclature that uses the plural “Loans” for the period when there existed Term Loans I and II, following the 2001 restructuring. We note, however, that Claimant on occasion simply used the singular “loan” to refer to the credits, although the terminology varied by submission.

200. Under the facts of the present case, Claimant made no contribution to any relevant loans, taking no action to constitute the making of an investment. Also Claimant has neither exercised any control over any credit to the Tanzanian debtor nor provided any direction to SCB Hong Kong related to the making of the Loans. Admittedly, Claimant does own a substantial equity interest in a Hong Kong company, which in turn holds Tanzanian debt acquired from Malaysian financial institutions. However, an indirect chain of ownership linking a British company to debt by a Tanzanian creditor does not in itself confer the status of investor under the UK-Tanzania BIT.
201. Consequently, having carefully considered all arguments, authorities and evidence, the Tribunal for reasons discussed below concludes that it lacks jurisdiction to consider the present claim.

#### **B. Key Provisions of the BIT**

202. For good order, the Tribunal provides the following provisions of the BIT which it finds relevant and important in deciding its jurisdiction.
203. The Preamble of the BIT states:

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania;

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.

204. Article I (a) of the BIT provides that:

- (a) “investment” means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes:
- (i) moveable and immovable property and any other property rights such as mortgages, liens or pledges;
  - (ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or any performance under contract having a financial value.

205. Article 8(1) of the BIT reads:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as the “Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

### **C. Requirement of Investor’s Active Contribution**

#### **1. General Rules of the BIT Interpretation**

206. In construing the jurisdictional provisions of the UK-Tanzania BIT, as well as the ICSID Convention to the extent relevant, the Tribunal has been guided by the rules of interpretation in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”), which is in force for both the UK and Tanzania.

207. Article 31 sets forth the general rule of interpretation, which provides in its paragraph 1 that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31 identifies specific sources that an interpreter may refer to in applying its general rule of interpretation. Article 32 permits reference to other sources, but only for specified and limited purposes.

208. The treaty text at issue is a key phrase in the jurisdictional clause in Article 8(1) of the UK-Tanzania BIT. The question presented is whether this dispute is one concerning “an investment *of* [a UK company] in the territory of [Tanzania]” within the meaning of Article 8(1). Emphasis added. The Parties have debated the significance of the term “of” as the preposition is used in Article 8(1). The Parties’ views differ notably on the type of investor/investment relationship protected pursuant to the BIT. The Parties agree, however, that for the Tribunal to possess jurisdiction over this case pursuant to Article 8(1), the investment must be one “of” Claimant, a UK entity.

209. In this connection, Claimant contends that the Loans should be considered an investment “of” SCB because they are held indirectly by its Hong Kong subsidiary, and further that an investment might be “of” an individual or a company by virtue of an ownership interest in the asset, even without day-to-day control.<sup>168</sup> Claimant also asserts that the concept of investment is “more naturally understood in terms of ownership than control.”<sup>169</sup>
210. Respondent submits that the term “of” must be read to require some “association between [the investor and the investment], typically one of belonging.”<sup>170</sup> Respondent points to common illustrations such as “the son of a friend” or “the photograph of the bride.” Respondent thus suggests that something more than indirect ownership is required.
211. Respondent contests Claimant’s position, contending that “investment” requires more than passive ownership and implicates some contribution, flow of funds, or “involvement” to meet the jurisdictional requirements of the UK-Tanzania BIT.
212. The Tribunal notes that this BIT, unlike some treaties, does not contain a definition specifying the relationship between the claimant and the investment necessary for the treaty to apply and jurisdiction to attach. As noted above, Article 31 of the 1969 Vienna Convention on the Law of Treaties directs the Tribunal consider the “ordinary meaning” of the treaty terms, in their context and in the light of its object and purpose.
213. In this connection, the Tribunal notes that the Treaty uses two principal prepositions to connect investor and investment: “of” and “by” as discussed below.

**a) Text and Context in the UK-Tanzania BIT**

214. The prepositions “of” and “by” are used in Articles 8(1) and 11 of the BIT as well as in the Preamble.
215. Article 8(1) of the BIT provides that the Contracting Parties agree to submit to arbitration “any legal dispute arising between that Contracting Party and a national or company of the

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<sup>168</sup> Cl. PHB, para. 68(5).

<sup>169</sup> Id., para. 68(4).

<sup>170</sup> Resp. PHB, para. 56.

other Contracting Party concerning *an investment of the latter* in the territory of the former.” Emphasis added.

216. The Tribunal is mindful that with respect to the preposition “of” different meanings can be adduced. Some uses indicate a contributory relationship (as in the “the plays of Shakespeare” or “the paintings of Rembrandt”), while others define ownership (as in “the house of Shakespeare” or “the hat of Rembrandt”).
217. The phrase “an investment of the latter” (Article 8 of the BIT) remains more equivocal. Neither the possessive nor the contributory connotation presents itself with the same degree of obviousness as in the examples suggested above.
218. The Tribunal has carefully considered the context of this phrase in the treaty, looking to different provisions of the BIT to provide guidance on the contemplated relationship between an investor and an investment.
219. The preposition “by” connects investor and investment in Article 11 of the BIT, addressing rules more favorable than those of the BIT in the context of “investments by investors.”<sup>171</sup> The first paragraph of the preamble of the BIT similarly refers to “investment by nationals and companies.”<sup>172</sup> Neither provision suggests a relationship different from that otherwise regulated by the BIT. On its face, each uses “investments by investors” or “investment by nationals and companies” interchangeably with the phrase “investments of a national or company” employed elsewhere in the BIT.
220. The preposition “by” can indicate the relationship between subject and object when an active sentence is converted into a passive form. “He read a book” is transformed into “A book was read by him.” “She made a contribution” becomes “A contribution was made by

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<sup>171</sup> Article 11 of the UK-Tanzania BIT provides as follows: “If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling *investments by investors* of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.” Emphasis added.

<sup>172</sup> See *id.* Preamble, para. 1 (the two States, “Desiring to create favourable conditions for greater *investment by nationals and companies* of one State in the territory of the other State; ... Emphasis added).

her.” In this formulation, the associated verb sheds useful light on the contemplated relationship between object and subject.

221. No such verb appears in the phrase in Article 8(1) at issue or, for that matter, in the other provisions noted above. This absence leaves it open to interpretation whether “by” in Article 11 and the preamble implies “investment *held/owned by*” investor, or “investment *made by*” investor, a formulation that would connote a more active relationship between investor and investment.
222. Elsewhere in its provisions, however, the treaty repeatedly uses a verb to address the relationship between investor and protected investments. Article 1(a) of the BIT defines the term “investment” for purposes of the treaty. In its first paragraph, it refers to the “territory of the Contracting State in which the investment is *made*.” Its last paragraph includes within its definition of investment “all investments, whether *made* before or after the date of entry into force of this Agreement.” Similarly, the third sentence of Article 14 extends the protections of the treaty for twenty years after termination of “investments *made* whilst this Agreement is in force.” Again, nothing in these provisions suggests that the Contracting States in these provisions contemplated a relationship between investor and investment different from that in other provisions of the treaty, including Article 8(1). As noted above, the verb “made” implies some action in bringing about the investment, rather than purely passive ownership.
223. By contrast, the BIT nowhere uses the verb “own” or “hold” in connection with an investment by or of an investor.
224. The verb “owned” does come into play in Article 8(2) of the BIT in the context of specifying the conditions when a local company can be deemed a foreign one for purposes of the ICSID Convention and therefore bring an ICSID claim against its home State under Article 25(2)(b) of the Convention. Article 5(2) of the BIT also uses the verb “own.” This provision, however, describes companies incorporated under the laws of one party to the treaty, but the shares of which are owned by nationals of the other treaty partner, thereby defined as nationals of the latter. For example, that provision would include a British

company owned by Tanzanian nationals, or vice versa. Such a situation is irrelevant to the facts of this case.<sup>173</sup>

225. For the Tribunal, the text of the BIT reveals that the treaty protects investments “made” by an investor in some active way, rather than simple passive ownership.

#### **b) Object and Purpose of the UK-Tanzania BIT**

226. The official title of the BIT is the “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the *Promotion and Protection of Investments*.” Emphasis added.

227. The Treaty’s preamble specifies that it was concluded with a desire to “create favorable conditions for greater investment by nationals and companies of one State in the territory of the other State; ...” It further states that the Treaty is based on a recognition “that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States; ...”

228. Several elements in the object and purpose set out in the preamble are instructive. First, as noted above, the Contracting Parties’ focus was on increasing “investment *by* nationals and companies of one State in the territory of the other State.” “By” here signifies that the company of the first State is the actor, and implies an active role of some kind for that company. Second, the Contracting Parties contemplated a cause-and-effect relationship between the Treaty’s “encouragement and protection ... of such investments” and the increased prosperity and individual business initiative that was the desired result. This, again, is consistent with an active role contemplated for the investor. It is difficult to see how the treaty’s protections could promote investment by nationals of a Contracting State if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made.

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<sup>173</sup> Article 5(2) of the BIT also references shares in a local company owned by nationals or companies of the other Party and requires States to enforce the obligation of compensation for expropriation imposed by Article 5(1) with respect to the taking of assets owned by such a company. While each of the Parties addressed this provision in their submissions, neither suggested that it was of relevance to the Tribunal’s decision.

229. Article 2, entitled “Promotion and Protection of Investment,” sets out in its first paragraph perhaps the most general obligation of the BIT, shedding further light on the treaty’s object and purpose. Elaborating on “promotion” of investments, Article 2(1) requires that “Each Contracting State shall encourage and create favourable conditions for nationals or companies of the other Contracting State *to invest* capital in its territory and, subject to its right to exercise powers conferred by its laws, shall admit such capital.” Emphasis supplied. It uses the active verb “to invest,” which again suggests an active relationship between investor and investment.

### **c) Tribunal’s Conclusion**

230. Having considered the ordinary meaning of the BIT’s provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment “*of*” the latter set out in Article 8(1) of the UK-Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)’s arbitration provision, a claimant must demonstrate that the investment was made at the claimant’s direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.

231. The Tribunal is not persuaded that an “investment of” a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.

232. Rather, for an investment to be “of” an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.

## **2. Supplemental Means of Interpretation: Other Treaties and Cases**

233. The Parties have presented extensive arguments based on sources that do not qualify as text or context under Article 31(1) and (2) of the Vienna Convention, or as subsequent agreement or practices of the Contracting States concerning the interpretation of the UK-Tanzania BIT or rules of international law applicable in their relations between each other under Article 31(3). Instead, these arguments are based on treaties between other Contracting States with text different from that in the UK-Tanzania BIT, and arbitral decisions interpreting this category of treaties.
234. Article 32 of the Vienna Convention permits recourse to supplementary means of interpretation such as these, but only to “confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”
235. The Tribunal addresses the Parties’ arguments based on these supplementary to the extent that the Tribunal’s interpretation according to Article 31 of the Vienna Convention leaves the meaning of the BIT ambiguous or obscure.

### **a) Preliminary Observations**

236. The Parties’ arguments based on these sources have largely centred on a debate as to whether the UK-Tanzania BIT protects “indirect” investments.
237. For the sake of analytic rigor, the Tribunal considers it useful to distinguish between (i) the concept of “indirect” as an adjective to describe a *form of ownership* implicating a chain of intermediate entities separating an asset from its ultimate shareholder (an indirect holding) and (ii) the notion of “indirectly” making an investment, with the adverbial form designating a *type of action* taken to implement an investment, when one person acts to invest through the agency of another (to invest indirectly).
238. The Tribunal notes a second distinction. Notions of “indirect” and “indirectly” often present themselves in connection with both (i) arguably relevant language in other investment treaties and (ii) arguably persuasive investor-state case law.

239. The text of other investment conventions, as well as the language of investor-state cases, sometimes press into service concepts of indirect investment distinct from the notion as relevant to the UK-Tanzania BIT. Failure to note the variation can result in distorted analogies or inappropriate invocation of authority. Thus to enhance analytic clarity, the Tribunal will examine concepts of “indirect” and “indirectly” first with respect to treaty language, followed by their usage in investor-state case law.
240. For good order, the Tribunal clarifies that it does *not* find that the UK-Tanzania BIT applies only to direct as opposed to indirect investments. Emphasis added. Such a conclusion is not necessary to the decision here. The Tribunal leaves the question to be addressed by a tribunal in a case in which the issue is essential to the decision to be made.

#### **b) Treaty Language**

241. Respondent argues that intent to preclude coverage for indirect investment can be inferred from omission in the UK-Tanzania BIT of the type of provisions expressly providing for indirect investment as found in other Tanzanian investment treaties, such as Article 1(2) of the Italy-Tanzania BIT, Article 1(b)(iii) of the Netherlands-Tanzania BIT and Article 1(2) of the Tanzania-Sweden BIT.
242. All of these treaties define the term “investor” so as to embrace a legal person of a third state controlled by a national of a party state. Such inclusion of a third state national in the definition of investor is absent in the UK-Tanzania BIT, which has no explicit protection of investments of controlled subsidiaries, but covers only disputes implicating investments of a national of the non-host Contracting State.
243. While the observation proves true, the Tribunal considers the matter quite different from the problem at hand. The absence of a broader definition of an investor, so as to include controlled subsidiary, simply means that SCB Hong Kong cannot, when dispossessed or expropriated, file arbitral proceedings in its own right under the BIT. However, the treaty language does not answer the question of whether the Claimant parent company itself can be deemed an investor.

244. For good order, the Tribunal notes that the UK-Tanzania BIT does not contain any definitional language for the term “indirect” as such which would either permit or preclude the type of investment at issue in this arbitration.<sup>174</sup> Accordingly, the Tribunal must reject the arguments based on treaties with different language as insufficiently illuminating, given the text of the UK-Tanzania BIT.

### c) Prior Cases

245. Nor do cases arising from other investor-state cases addressing different treaty text provide assistance.

246. Citing eight prior investor-state cases as persuasive authority, Claimant contends that its ownership interests in SCB Hong Kong establish an indirect investment in Tanzania.

#### (1) Cemex

247. Citing *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela*, Claimant argues that mere indirect ownership is sufficient for the purpose of jurisdiction in an ICSID case.<sup>175</sup>

248. The Tribunal is not persuaded. The definition of “nationals” pursuant to the Netherlands-Venezuela Treaty, relevant in *Cemex*, includes the following: “legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly” by legal or natural entities which are nationals under the law of such Contracting Party.

249. Consequently, pursuant to the Netherlands-Venezuela BIT an arbitral tribunal might assert competence over a dispute made through a subsidiary “controlled” by a national of a state party to the treaty. Thus *Cemex* is distinguishable from the present case in two respects: the language of the treaty and the claimant before the tribunal.

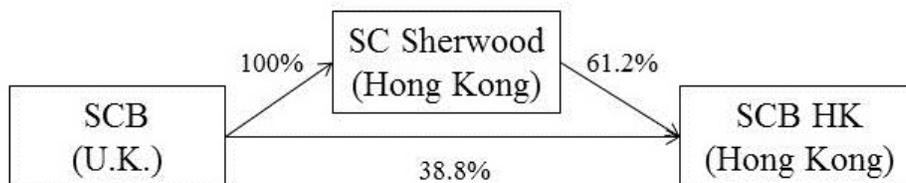
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<sup>174</sup> Likewise, in connection with Respondent’s reliance (submission of 27 February 2012) on *HICEE B.V. v. The Slovak Republic* (PCA Case No. 2009-11), 23 May 2011, the Tribunal finds no preclusive definitional language in Article 1(a) of the UK-Tanzania BIT.

<sup>175</sup> Cl. CM, para. 93. This position was re-affirmed in hearings by Claimant’s counsel. Hearings Transcript of 15 December 2011, page 194.

250. The definition of “nationals” pursuant to the UK-Tanzania BIT is narrower than in the Netherlands-Venezuela Treaty. According to Article 1(c) of the UK-Tanzania BIT, to be a national or company for purposes of treaty protection an entity must derive its status as national from the law of a BIT Contracting State, not a third country. The UK-Tanzania BIT does not extend treaty protection for an investor to controlled entities. Moreover, even the broadest reading of *Cemex* requires proof that SCB controls SCB Hong Kong, the latter entity being the holder of the alleged investment in Tanzania.
251. The Tribunal notes that the Dutch claimants in *Cemex* had 100% ownership in a Cayman Island subsidiary and intermediary which in turn held a majority stake in the allegedly dispossessed investment in Venezuela.
252. In the present case Claimant holds 100% of SC Sherwood, a Hong Kong company, which has majority share of the actual owner of the debt, SCB Hong Kong. The structure has been summarized below.

SCB HK Shareholding Structure



253. Admittedly, no bright line exists to determine how remote or near a corporate relationship should be in order to be considered relevant. The Tribunal attempts no such line-drawing, but merely indicates its hesitancy to find the type of indirect investment in *Cemex* was present in the instant case with respect to SC Sherwood. Even applying the *Cemex* standard, Claimant would fail to demonstrate its control over the relevant subsidiary.
254. For the avoidance of doubt, however, the Tribunal confirms its view that the UK-Tanzania BIT requires control of the investment process itself, which might in some cases might be demonstrated through evidence that a third country subsidiary was acting under the alleged

investor's direction. No such control or direction can be found on the basis of Claimant's evidentiary submissions.

## (2) Other Cases

255. Claimant cites seven other investment arbitration cases, each of which addresses treaty text significantly different from that presented here and none of which suggests a reading of the UK-Tanzania BIT different from that which follows from the general rule of interpretation of Article 31 of the Vienna Convention stated further above.<sup>176</sup> The cases are summarized below.

- i. *Ioannis Kardassopoulos v. Georgia* involved the Energy Charter Treaty (the "ECT") which has a broader definition of investment covering assets owned or controlled, directly or indirectly, by a national of a contracting state. Article 1(6) of the ECT.
- ii. *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* involved the Netherlands-Venezuela BIT, in which a Dutch parent company controlled Bahamian and US subsidiaries through 100% ownership. Moreover, claimants of *Mobil* include United States and Bahamian entities that would be considered Dutch nationals in accordance with the Netherlands-Venezuela BIT.<sup>177</sup>
- iii. *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, presented an issue of timing for the alleged investment. Thus the Tribunal cannot find relevance to the present dispute. Moreover, the LCIA tribunal's analysis might even bolster Respondent's position, having affirmed that "the Treaty was designed to protect only the nationals and companies of the Contracting Parties."<sup>178</sup> By contrast, a Hong Kong national cannot be entitled as such to the protection of the UK-Tanzania BIT.
- iv. *Siemens A.G. v. The Argentine Republic* involved a German claimant that actually exercised its control over the alleged investment.
- v. *Tza Yap Shum v. The Republic of Peru* implicated claimant control over the alleged investment.<sup>179</sup> The tribunal in that case noted that control over the investment would be needed to entitle claimant to treaty protection.<sup>180</sup>
- vi. *Franz Sedelmayer v. The Russian Federation* involved a claimant with both ownership and control to the investment.

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<sup>176</sup> Cl. CM, para. 94.

<sup>177</sup> Paragraph 153 of CLA-03.

<sup>178</sup> Paragraph 106 of CLA-04.

<sup>179</sup> See paragraph 89 of the award.

<sup>180</sup> Award paragraph 93.

vii. *Waste Management, Inc. v. United Mexican State* noted in paragraph 85 that claimant’s ownership or control over the investment was undisputed, and the treaty at issue there expressly covered investments “owned or controlled, directly or indirectly.”

256. None of these cases speaks to either the facts or the treaty text at issue in this case. None is sufficiently pertinent either to confirm or to determine the meaning of the disputed treaty text in accordance with Article 32 of the Vienna Convention.

#### **D. Application of BIT to Facts of the Case**

##### **1. Article 8(1): Investment “Of” Contracting Party’s National**

257. As discussed above, the Tribunal has concluded that protection of the UK-Tanzania BIT requires an investment *made* by, not simply *held* by, an investor. To be considered to have made an investment, SCB must have contributed actively to the investment.

258. The facts of the case indicate no action by Claimant contributing to the Loans or to the 100 megawatt power facility in Tegeta that remains at the origin of this arbitration.

259. Claimant’s connection to the Loans derives only from passive ownership relationships. Claimant owns SC Sherwood; Claimant and SC Sherwood co-own SCB Hong Kong. SCB Hong Kong purchased assets from a Malaysian company Danaharta, which in turn purchased assets from the Malaysian banks that made the original loan to the Tanzanian entity IPTL.

260. For a putative investor to have valid rights pursuant to the UK-Tanzania BIT, that investor should have “made” the investment in an active sense, even if operating through the agency of a company under its control. The activities qualified as relevant investment under the BIT would include the activity of purchasing debt, which was done by SCB Hong Kong, not Claimant.

261. Here, however, the record reflects no action by Claimant itself concerning the investment and Claimant has explicitly disavowed any reliance on control of SCB HK or its assets.<sup>181</sup>

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<sup>181</sup> “SCB’s shareholdings alone are sufficient for the purposes of jurisdiction under the UK/Tanzania BIT. SCB has not therefore advanced any evidence, and does not rely, on actual control.” Cl. PHB, para. 56.

Absent any such control, it is difficult to perceive in this record any evidence that could serve to show that the investment process was actually made at the direction of Claimant as investor.

262. Of course, failure to demonstrate control does not necessarily mean that control never existed. However, the Tribunal must decide this question of fact based on the record.<sup>182</sup> The Tribunal cannot accept that the possibility that control might have existed will relieve Claimant from making that showing. Were such an approach acceptable, litigants would win cases by simply asserting that some element of their case might well have been true.
263. Respondent requested proof of Claimant's control over SCB Hong Kong from the initial stage of the proceedings. The issue of control does not relate to alleged fraud or allegedly invalid restructuring, issues as to which Respondent arguably bears the burden of proving its assertions.
264. Rather, control on these facts forms part of an element necessary to establish jurisdiction, by showing that the Loans were an investment "of" Claimant and made by Claimant. Failure to demonstrate such control inevitably leads the Tribunal to conclude that Claimant has been unable to demonstrate its active participation in the investing process with respect to the Loans.
265. Having failed to demonstrate its control over the transactions relating to the Loans, Claimant has not established an investment in the territory of Tanzania that would justify a finding of jurisdiction by this Tribunal.
266. For clarity, the Tribunal stresses that it takes no position on whether jurisdiction would have existed had Claimant actually engaged in the process of making an investment by funneling funds through an intermediary such as a special purpose vehicle. Claimant's case, however, can support no such contention, given that SCB Hong Kong, not Claimant, actually purchased the Loans on its own initiative.

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<sup>182</sup> See Cl. Reply PHB, para. 12. See also para. 37 of the submission of 27 February 2012, acknowledging that Claimant bears a general burden to prove most requirements to establish jurisdiction, with the exception of fraud or the validity of restructuring.

## **2. Reciprocal Nature of the BIT: Treaty Object and Purposes**

267. To test its conclusion, the Tribunal notes the reciprocal nature of the treaty, which is expressly mentioned in the Preamble of the UK-Tanzania BIT.
268. Could one imagine an executive in SCB Hong Kong deciding to purchase the IPTL loan with the expectation that it would get the protection of the BIT between the UK and Tanzania? Perhaps under that scenario, the UK-Tanzania BIT could be said to encourage the investment.
269. However, such encouragement works only in one direction. The UK-Tanzania BIT imposes no liability on Hong Kong or China to protect investors from Tanzania, by providing mutual benefits to Tanzanians investing in Hong Kong. Moreover, the decision in such a case would have been made by someone in Hong Kong, not in Britain, the Contracting State under the relevant BIT.
270. In the absence of text in the BIT expressing a contrary intent and on a record indicating no involvement or control of the UK national over the investment, it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities. The BIT preamble says “reciprocal protection” and “reciprocal” must have some meaning.

### **E. Respondent’s Other Jurisdictional Arguments**

271. As summarized above and elaborated below, Claimant lacks the status of an investor under to the UK-Tanzania BIT because the record evidences no contribution to, or control over, the Loans acquired from the Malaysian financial institutions. In making this determination, the Tribunal has considered all points necessary to address the question before it: whether it has jurisdiction over the claim asserted.
272. Given its conclusion that Claimant lacks the status of investor for want of having actively participated in making, or exercising control over, the Loans the Tribunal need not address other objections made by Respondent in support of its contention that the Tribunal lacks jurisdiction. Questions not reached in the present instance include inter alia the following:

- (i) The Loan was restructured in deceitful manner,
- (ii) IPTL's debt violates the Tanzania Investment Act,
- (iii) The Loans were not authorized by IPTL,
- (iv) Restructuring circumvented ICSID Award,
- (v) Loans violated the Implementation Agreement and PPA,
- (vi) The alleged investment was not made in good faith,
- (vii) The security interests granted by IPTL are invalid for not being registered,
- (viii) Purchasing distressed debt from Malaysian banks is not an investment in Tanzania,
- (ix) SCB failed to comply with the jurisdictionally required "cooling-off" period,
- (x) SCB's claims are based on breach of contract,
- (xi) Loans did not benefit Tanzania, and
- (xii) Loans are not sited within the territory of Tanzania.

273. The Tribunal notes that ICSID Convention Article 48(3) provides that the award shall deal with "every question submitted" to the Tribunal. This does not mean, however, that an arbitral tribunal must, or should, comment on arguments with no impact on the award. The Tribunal agrees with other ICSID tribunals that Article 48(3) does not require comment on arguments without impact on the award, and that such questions are better left to cases where a need exists to address them.<sup>183</sup>

274. Strong policy considerations argue against an expectation that arbitrators in investor-state cases should address factually and legally complex questions not essential to a decision that rests on other grounds. Arbitrators in an investment treaty case not infrequently have a role as arbitrator, counsel or expert in other such cases. Gratuitous resolution of unnecessary issues might present an appearance of impropriety, suggesting (rightly or wrongly) that members of a tribunal succumbed to the temptation of making needless decisions simply to create dictum persuasive in other cases in which they have a role.

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<sup>183</sup> In this respect, the Tribunal notes the position taken by an ad hoc Committee in another ICSID case: "[I]t would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide .... [T]he tribunal must address all the parties' "questions" (pretensiones) [in Spanish] but is not required to comment on all arguments when they are of no relevance to the award." *M.C.I. Power Group L.C. & New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Annulment Proceeding, Decision of 19 October 2009, paragraph 67, page 30.

275. Having given Claimant every benefit of the doubt on all objections related to jurisdiction, the Tribunal finds that it lacks competence over this dispute for the reasons summarized above and explored more fully below. Consequently, it becomes unnecessary for the Tribunal to speculate on matters not pertinent to its conclusion.

### **VIII. Costs**

276. Having considered the Parties' arguments, the Tribunal finds that both sides have presented some plausible arguments in good faith. The Tribunal thus finds appropriate to direct each side to bear its own legal expenses, including fees for attorneys and experts. The costs of arbitration, including the fees of the arbitrators and the administrative expenses of the Centre, shall be divided on an equal (50/50) basis.

### **IX. Disposition**

#### **A. Jurisdiction**

277. The Tribunal dismisses this arbitration for lack of jurisdiction.

#### **B. Costs**

278. Each side shall bear its own legal and related expenses, including fees for attorneys and experts.

279. The costs of arbitration, including the fees of the arbitrators and the administrative expenses of the Centre, shall be divided on an equal (50/50) basis.

[Signed]

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Barton Legum  
Arbitrator  
Date: [29 October 2012]

[Signed]

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Michael C. Pryles  
Arbitrator  
Date: [25 October 2012]

[Signed]

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William W. Park  
President  
Date: [31 October 2012]