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

In the arbitration proceeding between

STANDARD CHARTERED BANK (HONG KONG) LIMITED

Claimant

and

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED (TANESCO)

Respondent

ICSID Case No. ARB/10/20

AWARD

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

Secretary of the Tribunal
Ms. Aurélia Antonietti

Date of dispatch to the Parties: September 12, 2016

REPRESENTATION OF THE PARTIES

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Addendum No. 1	Addendum No. 1 to the PPA dated June 9, 1995 (Exhs. C-39/R-2)
Calculations and Forecasting Agreement	Calculations and Forecasting Agreement in relation to the Tegeta Power Project dated June 28, 1997 (Exh. C-208)
Capacity Payment	The Capacity Payment is reimbursement for the cost of capital in the construction of the plant, *i.e.* the loans, the taxes to be paid and the dividends on equity.
CAG Report	Controller and Auditor General Report dated November 14, 2014 (Exh. C-363)
Cl. Costs Sub.	Claimant's Costs Submission of November 16, 2015
Cl. Reply Costs Sub.	Claimant's Reply Costs Submission of December 22, 2015
Cl. Mem.	Claimant's Memorial of February 3, 2012
Cl. PHB	Claimant's Post-Hearing Brief of February 19, 2013
Cl. PHB2	Claimant's Post-Hearing Brief of November 2, 2015
Cl. Rep.	Claimant's Reply of November 7, 2012
Cl. Tariff Sub.	Claimant's Tariff Submission of November 11, 2014
Cl. Tariff Rep.	Claimant's Tariff Reply of March 26, 2015
Danaharta	Danaharta Managers (L) Limited, a company incorporated in Malaysia and set up by the Malaysian Government to purchase loans from financial institutions in distress
Decision	The Tribunal's Decision on Jurisdiction and Liability of February 12, 2014
Deed of Assignment	Deed executed by Danaharta on August 17, 2005 further to the SPA (Exhs. C-56/R-114)
DSCR	Debt Service Cover Ratio
DSRA	Debt Service Reserve Account
EBIT	Earnings Before Interest and Tax
GoT	Government of Tanzania

ICSID 1 award	Award dated July 12, 2001, issued in ICSID Case No. ARB/98/8, *TANESCO v. IPTL* (Exhs. C-10/R-8)
ICSID 1 tribunal	Tribunal constituted in ICSID Case No. ARB/98/8, *TANESCO v. IPTL*
ICSID award model	Financial model in Appendix F to the ICSID 1 award
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Implementation Agreement	Implementation Agreement dated June 8, 1995, entered into between IPTL and the GoT (Exhs. C-28/R-90)
Implementation Model	The 2002 financial model used by IPTL to prepare and submit invoices to TANESCO on an ongoing basis (Exh. R-44)
IPTL	Independent Power Tanzania Limited
IRR	Internal Rate of Return
[CLA] [RLA]	Legal Authority [Claimant] [Respondent]
Loan Agreement (also Facility Agreement)	Loan Facility Agreement entered into on June 28, 1997 by IPTL and a consortium of Malaysian banks (Exhs. C-11/R-47)
Mechmar	Mechmar Corporation (Malaysia) Berhad
MRA	Maintenance Reserve Account
PAP	Pan Africa Power Solutions (T) Limited
PAC Report	Public Accounts Committee Report dated November 17, 2014 (Exh. C-367)
PPA	Power Purchase Agreement dated May 26, 1995, entered into by IPTL and TANESCO (Exhs. C-4/R-1)
Promoters/Shareholders Agreement	Agreement dated September 28, 1994, entered into by Mechmar and VIP (Exhs. C-48/R-45)
Reference Tariff	The Reference Tariff is the amount payable by TANESCO under the PPA calculated initially in Appendix B to the PPA and then recalculated in the ICSID award model and the Implementation Model.
Resp. Costs Sub.	Respondent's Costs Submission of November 16, 2015
Resp. Reply Costs Sub.	Respondent's Reply Costs Submission of December 22, 2015

Resp. CM.	Respondent's Counter-Memorial of August 24, 2012
Resp. Mem. Juris.	TANESCO's Memorial filed on April 13, 2012
Resp. PHB	Respondent's Post-Hearing Brief of February 19, 2013
Resp. PHB2	Respondent's Post-Hearing Brief of November 2, 2015
Resp. Rej.	Respondent's Rejoinder of November 21, 2012
Resp. Tariff Sub.	Respondent's Tariff Submission of February 13, 2015
Resp. Tariff Rej.	Respondent's Tariff Rejoinder of May 21, 2015
RfA	Request for Arbitration of September 15, 2010
2013 Settlement Agreement	Settlement Agreement dated October 3, 2013 entered into by TANESCO and IPTL (Exh. C-314)
SCB	Standard Chartered Bank
SCB HK or Claimant	Standard Chartered Bank (Hong Kong) Limited
Security Deed	Security Deed dated June 28, 1997, entered into by IPTL and a Security Agent (Exhs. C-16/R-68)
Share Pledge Agreement	Share Pledge Agreement dated June 28, 1997, entered into by Mechmar and VIP with the Security Agent (Exh. C-18)
Shareholder Support Deed	Share Pledge Agreement dated June 28, 1997, entered into by Mechmar, VIP and IPTL with the Security Agent (Exh. C-40)
SPA	Sale and Purchase Agreement dated August 4, 2005, entered into between SCB HK and Danaharta (Exhs. C-55/R-15)
Utamwa J Order	Order issued by Judge Utamwa of the High Court of Tanzania on September 5, 2013
TANESCO or Respondent	Tanzania Electric Supply Company Limited
Tr. [date] [page] [line]	Transcript of the hearings
VIP	VIP Engineering and Marketing Ltd.
VIP-PAP SPA	Share Purchase Agreement dated August 15, 2013 entered into by VIP and PAP (Exh. C-316)

I. Introduction

1. This case originates from a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 (the "ICSID Convention"), arising out of a Power Purchase Agreement dated May 26, 1995 (the "PPA"), entered into by Tanzania Electric Supply Company Limited, the Respondent in this proceeding, and Independent Power Tanzania Limited ("IPTL").

2. The Claimant is Standard Chartered Bank (Hong Kong) Limited ("SCB HK" or the "Claimant"), a company organized under the laws of Hong Kong with its principal place of business in 32nd Floor, Standard Chartered Bank Building, 4-4a Des Voeux Road Central, Hong Kong. It is a subsidiary of Standard Chartered Bank ("SCB"), which is incorporated in the United Kingdom.

3. The claim is brought on the basis of the arbitration clause contained in the PPA which refers to ICSID arbitration. The Claimant brought its claim in its capacity of Security Agent as assignee of IPTL's rights, further to the occurrence of an event of default under IPTL's loan. SCB HK originally requested, *inter alia*, from the Tribunal a declaration that TANESCO owed it outstanding payments under the PPA in the sum of US$ 258.7 million or alternatively a declaration that it owed it a sum sufficient to discharge SCB HK's loan to IPTL in full, and an order to pay US$ 138 million to discharge its loan or alternatively to pay the amount under the PPA.[1]

4. The Respondent, the Tanzania Electric Supply Company Limited ("TANESCO" or the "Respondent"), is an entity wholly owned by the United Republic of Tanzania ("Tanzania" or the "GoT") and designated as an agency of Tanzania pursuant to Article 25(1) of the ICSID Convention. TANESCO's address is P.O. Box 9024, Dar es Salaam, Tanzania. Oversight of TANESCO is exercised through the Ministry of Energy and Minerals.

[1] SCB HK's request for relief, Cl. PHB, para. 611, and *see* the Tribunal's position on the various requests put forward by the Claimant (Decision on Jurisdiction and Liability dated February 12, 2014, paras. 195-199).

5. The Claimant and the Respondent are hereinafter collectively referred to as "the Parties." The Parties' respective representatives and their addresses are listed above.

6. In its Decision on Jurisdiction and Liability of February 12, 2014 (the "Decision"), the Tribunal decided that IPTL's rights had been validly assigned to SCB HK under the PPA and that the Tribunal had jurisdiction over the Parties and the dispute.[2] It specified that it lacked jurisdiction over the relationship between SCB HK and IPTL which arises under the Facility Agreement.[3] The Tribunal considered that Clause 3.2.1 of the Security Deed between IPTL and Sime Bank (the then Security Agent) created a charge over future book debts and thus had to be registered pursuant to Section 79 of Tanzania's Companies Ordinance, but that the arbitration agreement in Article 18.3 of the PPA was severable from the charge on future book debts, and therefore did not need to be registered. Therefore, the issue of registration of the assignment under Tanzanian law was irrelevant to the Tribunal's jurisdiction.[4] The Tribunal limited its decision to making a declaration of the amount owing by TANESCO to IPTL under the PPA.[5]

7. As to issues of liability, the Tribunal found that:[6]

- The tariff should be recalculated to reflect the fact that IPTL's 30% equity contribution was not in the form of paid-up share capital but by way of shareholder loan. The Tribunal gave some guidance to the Parties in this respect;

- The restructuring of IPTL's loans did not constitute a breach of the PPA and TANESCO has no claim in this regard;

- The exchange rate losses claimed by the Claimant were not recoverable by virtue of Article 17.1 of the PPA;

- The bonus payments for the period the plant was placed in "non-dispatch" mode were recoverable;

[2] Decision, para. 191.
[3] *Ibid*., para. 244.
[4] *Ibid*., para. 244.
[5] *Ibid*., para. 241.
[6] *Ibid*., paras. 381-388.

- The Claimant's "enforcement costs" were not recoverable;

- The tariff payments payable during the period of the operation of the plant by the Provisional Liquidator were recoverable, less any monies paid for operation and maintenance costs.

8. The Tribunal directed the Parties to attempt to agree on the tariff recalculation, the amount recoverable for bonus and the amount recoverable for payments made to IPTL's Provisional Liquidator. The Parties had three months to report to the Tribunal. As it will be explained below, the Parties could not reach an agreement.

II. Procedural History

9. The procedural history of this case has already been described in detail in the Decision.[7] For the sake of convenience, the Tribunal will recall below the key steps in these proceedings that are relevant to this Award and will describe the procedural steps that took place after the Decision.

10. On August 24, 2012, the Respondent filed a Counter-Memorial on jurisdiction and the merits ("Resp. CM."). On November 7, 2012, the Claimant filed a Reply on jurisdiction and the merits dated October 26, 2012 (amended on November 7, 2012), which was subsequently re-amended on November 22, 2012 ("Cl. Rep."). On November 21, 2012, the Respondent filed a Rejoinder on jurisdiction and the merits ("Resp. Rej.").

11. A hearing on jurisdiction and the merits took place at the IDRC in London from December 3 to 6, 2012, and from December 10 to 11, 2012 (the "December Hearing").

12. The Parties filed simultaneous Post-Hearing Briefs on February 19, 2013 ("PHB").

13. At the close of the December Hearing, the Parties agreed to hold a further hearing, and such a hearing on the issue of bifurcation, jurisdiction and the merits took place at the IDRC in London, on March 14 and 15, 2013 (the "March Hearing").

[7] *Ibid*., paras. 5-20.

14. On November 27, 2013, the Claimant submitted a letter to the Tribunal urging it to render the Decision at its earliest convenience and updating the Tribunal on the latest developments in the Tanzanian courts.[8] Subsequently, Claimant and Respondent exchanged numerous communications on the same subject during December 2013, including a letter from counsel for Respondent dated December 13, 2013 (the "December 13, 2013 Letter"),[9] on which the Claimant relies in this phase of the arbitration.

15. On February 12, 2014, the Tribunal issued its Decision on Jurisdiction and Liability. The Decision forms an integral part of this Award and is incorporated herewith save in respect of certain matters that the Tribunal will revisit in this Award. A copy of the Decision is attached herewith.

16. In its Decision, the Tribunal directed the Parties to attempt to agree on various items. In the absence of an agreement after three months from the issuance of the Decision, the Parties were instructed to report by May 12, 2014, to the Tribunal either jointly or separately on their final positions.

17. On April 3, 2014, the Claimant submitted a letter to the Tribunal providing further updates on the developments in Tanzania and the Respondent's alleged failure to engage in negotiations to recalculate the tariff.

18. On April 16, 2014, Hunton & Williams, counsel for the Respondent since November 2007, informed the Tribunal that they were no longer in a position to represent the Respondent in these proceedings. Thereafter, correspondence for the Respondent was received from TANESCO.

19. On April 28, 2004, the Respondent's Managing Director submitted a copy of an interim injunction issued by the Tanzanian High Court, i.e. Miscellaneous Application No. 174 on April 23, 2014 against the Parties. The injunction was issued in the context of an application dated April 4, 2014, submitted by IPTL and Pan Africa Power Solutions (T) Limited ("PAP") before the High Court of Tanzania seeking, *inter alia*, a restraining order against TANESCO, Ms. Martha Renju in her capacity as the administrative receiver (the

[8] Exh. C-311 (Letter from Claimant's counsel to the Tribunal dated November 27, 2013).
[9] Exh. C-313 (The "December 13, 2013 Letter").

"Administrative Receiver") of IPTL, and SCB HK from "doing anything towards enforcing/complying with ICSID preliminary award," which was allegedly obtained by fraud.[10] The application was granted on an *ex parte* basis on April 23, 2014, by Judge Hon. Twaib in order to maintain the *status quo*. The Judge enjoined the parties from "doing anything towards enforcing, complying with or operationalizing the preliminary award, pending hearing and final determination of the application."[11] The injunction was continued by a decision of September 30, 2014.[12] According to the Claimant, that injunction remains in force and is not subject to any right of appeal, or revision.[13]

20. On May 7, 2014, TANESCO's Secretary submitted a letter to the Tribunal informing it that the engagement agreement with their previous legal team had expired and seeking an extension to the Tribunal's proposed timeline pending final determination of the local judge further to the injunction.[14]

21. On May 12, 2014, TANESCO's Managing Director informed the Tribunal that Crax Law Partners in association with R. K. Rweyongeza & Co. Advocates and Kellerhals Anwälte Attorneys at Law had been retained as its new counsel in these proceedings.

22. On May 19, 2014, counsel for the Claimant indicated by email that its client was "considering" the injunctions mentioned above and "will respond further once it has done so."

23. On November 11, 2014, the Claimant filed a submission on tariff and accompanying expert report of Lord Hoffmann as well as a second expert report by Colin Johnson with exhibits C-311 through C-362 ("Cl. Tariff Sub."). On November 12, 2014, the Tribunal invited the Respondent to submit its observations on Claimant's submission by December 15, 2014.

24. On December 10, 2014, the new counsel for the Respondent submitted "Procedural Motions" requesting, *inter alia*, a copy of the file and an extension of the time limit for the submission of its observations on the Claimant's Tariff Submission. Counsel indicated that

[10] Cl. Tariff Sub., para. 74. Exh. C-350 (Plaint of IPTL and PAP dated April 4, 2014).
[11] Exh. C-351 (Injunction dated April 23, 2014).
[12] Cl. Tariff Sub., para. 79. Exh. C-352 (Injunction dated September 30, 2014).
[13] Cl. Tariff Sub., para. 82.
[14] Exh. R-159 (Respondent's letter to the Tribunal dated May 7, 2014).

the Respondent had concluded that it was in its best interests to participate in the proceedings despite the Tanzania court injunctions.[15]

25. After reviewing the Parties' positions, the Tribunal decided to grant the extension until February 13, 2015.

26. On February 13, 2015, the Respondent submitted its submission on tariff and first accompanying expert report from James Nicholson with exhibits R-159 through R-174 ("Resp. Tariff Sub.").

27. By letter dated February 19, 2015, the Tribunal set a schedule for the second round of submissions, which was extended upon the Parties' respective requests. Accordingly, on March 26, 2015, the Claimant filed its Reply on tariff and accompanying third expert report of Colin Johnson with exhibits C-363 through C-405 ("Cl. Tariff Rep.").

28. On May 21, 2015, the Respondent filed its Rejoinder on tariff and second expert report of James Nicholson with exhibits R-175 through R-192 ("Resp. Tariff Rej."). In its submission, the Respondent introduced a request for a preliminary ruling on the issue of reconsideration of the Tribunal's jurisdiction.[16]

29. On February 11, 2015, ICSID received an unsolicited letter from VIP Engineering and Marketing Ltd's ("VIP") Dutch counsel. In accordance with the Parties' past agreement,[17] the letter was first transmitted to the Parties and to the Tribunal on March 2, 2015, following the Respondent's request of February 27, 2015. VIP's counsel raised SCB HK's alleged misrepresentations in this case, including its IPTL creditor status, and mentioned various legal proceedings in Tanzania, New York and England. SCB HK replied to those allegations in its Reply on tariff.

30. In April 2015, in consultation with the Parties, the Tribunal decided to set aside three days for a hearing in London during August 19-21, 2015.

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[15] Procedural Motions on behalf of Respondent dated December 10, 2014, page 4.
[16] Resp. Tariff Rej., paras. 133-134.
[17] *See* Decision, para. 14: "*The Parties informed the Centre and the Tribunal on September 13, 2012, that they had agreed that unsolicited communications from third parties were to be first sent to the Parties for consultation as to whether such communications should be forwarded to the Tribunal and that either Party could, at any time, request the Secretariat to forward the document to the Tribunal.*"

31. On June 29, 2015, the Claimant submitted to the Tribunal a motion to compel the production of certain documents and exhibits from the Respondent, and further submitted exhibits C-406 through C-408.

32. On June 30, 2015, the Claimant submitted a copy of an English High Court judgment of Justice Flaux dated June 9, 2015, in a case initiated under the Facility Agreement by SCB HK (as Security Agent) and SCB Malaysia Berhad (as Facility Agent) against IPTL, PAP and VIP in light of numerous references in the Parties' submissions to this case.[18]

33. On July 2, 2015, the Tribunal held a pre-hearing telephone conference with the Parties. The Respondent reiterated its request made in its submission of May 21, 2015, that the Tribunal make a preliminary ruling on the issue of reconsideration of its decision referring to its lack of jurisdiction to make an award for payment in favour of the Claimant.

34. In its Procedural Order No. 13 dated July 3, 2015, the Tribunal rejected the Respondent's request to make a preliminary ruling on the issue of reconsideration and indicated that this issue would be addressed at the hearing scheduled in August 2015. The Tribunal further decided on the schedule to brief the Claimant's motion to compel documents dated June 29, 2015.

35. By letter dated July 13, 2015, the Respondent submitted its observations objecting to the production of the documents. On July 16, 2015, the Claimant submitted further observations in response to the Respondent's letter to which the Respondent replied on the same date.

36. By letter dated July 20, 2015, the Claimant provided the Parties' agreed proposal regarding the hearing bundle.

37. By email dated July 31, 2015, the Parties were informed that the Tribunal was agreeable to the Parties' agreed proposal regarding the hearing bundle.

38. On August 7, 2015, the Centre acknowledged receipt of one USB device containing an electronic copy of the Parties' hearing bundles, including the Claimant's exhibits C-409

[18] Exh. C-409 (English High Court Judgment dated June 9, 2015).

through C-413 relating to the proceedings brought by SCB HK in the English High Court against IPTL, PAP and VIP.

39. In its Procedural Order No. 14 dated July 20, 2015, the Tribunal granted the Claimant's motion to compel. The Tribunal directed the Respondent to produce the requested documents pertaining to the tariffs by August 3, 2015. In turn, the Claimant was directed to submit any document that it wanted produced to the Tribunal by August 10, 2015.

40. On August 10, 2015, the Claimant submitted documents which it intended to rely on at the hearing further to the Respondent's document production, namely exhibits C-414 through C-416.

41. A hearing on tariff recalculation took place at IDRC in London from August 19, 2015, to August 21, 2015 (the "August Hearing"). In addition to the Members of the Tribunal and Mr. Benjamin Garel on behalf of ICSID, present at the August Hearing were:

On behalf of the Claimant:

Mr. Matthew Weiniger QC	Herbert Smith Freehills LLP
Mr. Iain Maxwell	Herbert Smith Freehills LLP
Mr. Dominic Kennelly	Herbert Smith Freehills LLP
Ms. Naomi Lisney	Herbert Smith Freehills LLP
Ms. Hafsa Zayyan	Herbert Smith Freehills LLP
Mr. Joe Casson	Standard Chartered Bank (Hong Kong) Limited
Ms. Ewa Pinkowska	Standard Chartered Bank
Mr. Kieran Day	Begbies Traynor
Mr. Colin Johnson	Grant Thornton UK LLP
Mr. Sandy Cowan	Grant Thornton UK LLP

On behalf of the Respondent:

Mr. Martin Molina	Kellerhals Attorneys at Law
Mr. Bernhard Berger	Kellerhals Attorneys at Law
Ms. Marlen Eisenring	Kellerhals Attorneys at Law
Ms. Alisa Burkhard	Kellerhals Attorneys at Law
Mr. Richard Rweyongeza	R.K. Rweyongeza & Co. Advocates

Mr. Bonaventure Rutinwa	R.K. Rweyongeza & Co. Advocates
Mr. Beredy Malegasi	Crax Law Partners
Mr. Godson Ezekiel Makia	TANESCO
Ms. Stella Modest Rweikiza	TANESCO
Mr. John Julius Ikombe Kabadi	TANESCO
Ms. Anna Baltazari Ngowi	Ministry of Energy
Mr. James Nicholson	FTI Consulting
Mr. Matthias Cazier-Darmois	FTI Consulting

42. Mr. James Nicholson, FTI, financial expert, was cross-examined by the Claimant, and Mr. Colin Johnson, Grant Thornton, financial expert, was cross-examined by the Respondent.

43. Further to the Tribunal's invitation during the August Hearing for the Respondent to produce documents evidencing the continued existence of a dispute between TANESCO and IPTL concerning the appropriate rate of capacity payments and the ongoing discussions to resolve the issue, the Respondent submitted exhibits R-193 through R-206 on September 9, 2015.

44. By letter dated September 11, 2015, the Claimant requested *inter alia* that the Tribunal order the Respondent to produce a certain document (letter dated August 19, 2014 which was referred to at page 55 of the CAG Report ("August 2014 Letter")), which was not included in the Respondent's document production of September 9, 2015.

45. By letter dated September 23, 2015, the Claimant requested the Tribunal to order the Respondent to produce certain remaining documents further to its previous document production, including documents listed at the end of the Claimant's letter, by no later than October 9, 2015. In the same letter, the Claimant also reiterated its request for the Tribunal to order the production of the August 2014 Letter.

46. By email dated September 29, 2015, the Tribunal invited the Respondent to comment on the Claimant's letter of September 23, 2015, by October 2, 2015.

47. By letter dated October 2, 2015, the Respondent provided its comments on the Claimant's letter of September 23, 2015.

48. By letter dated October 5, 2015, the Tribunal ordered the Respondent to produce by October 12, 2015 the documents listed in paragraph (i) of the schedule to the Claimant's letter of September 23, 2015. The Tribunal denied the Claimant's request formulated in paragraph (ii) of its aforementioned letter.

49. By letter dated October 12, 2015, the Respondent produced documents in response to the Tribunal's order of October 5, 2015, namely exhibits R-207 through R-215. The Respondent also provided legible copies of its previously produced documents (exhibits R-205 and R-206).

50. By letter dated October 14, 2015, the Claimant requested the Tribunal's ruling on its request for the production of the August 2014 letter contained in its letter of September 11, 2015.

51. By email dated October 19, 2015, the Tribunal invited the Respondent to comment on the Claimant's letter of October 14, 2015, by October 22, 2015.

52. By letter dated October 22, 2015, the Respondent provided its comments on the Claimant's letter of October 14, 2015.

53. By letter dated October 26, 2015, the Tribunal ordered the Respondent to produce the August 2014 letter.

54. By letter dated October 28, 2015, the Respondent produced to the Claimant the August 2014 letter.

55. By letter dated October 29, 2015, the Claimant proposed that the August 2014 letter be numbered as the Claimant's exhibit C-417.

56. On November 2, 2015, the Parties filed simultaneous Post-Hearing Briefs ("PHB2"). The Claimant's PHB2 was accompanied by a fourth Supplemental Report of Colin Johnson (updating the sums due from TANESCO up to September 2015) and exhibits C-417 and C-418 and legal authority CLA-95. The Respondent's PHB2 was accompanied by legal authority RLA-86.

57. On November 16, 2015, the Claimant filed its costs submission, along with exhibits C-419 through C-430 and legal authorities CLA-96 through CLA-99 ("Cl. Costs Sub."). On the same day, the Respondent filed its costs submission ("Resp. Costs Sub."). On December 22, 2015, the Claimant filed its reply costs submission, along with exhibits C-431 through C-445 ("Cl. Reply Costs Sub."). On the same day, the Respondent filed its reply costs submission, along with exhibits R-218 and R-219 ("Resp. Reply Costs Sub.").

58. By letter dated February 5, 2016, the Respondent filed a response to the Claimant's reply costs submission of December 22, 2015.

59. By letter dated March 22, 2016, the Claimant submitted, for the Tribunal's information, a copy of the "Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of 10 March 2014" dated February 9, 2016, and the related Dissenting Opinion of Professor Andreas Bucher issued in the case *ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30).

60. By letter dated March 24, 2016, the Tribunal stated that while it did not wish to receive additional submissions from the Parties on the *ConocoPhillips v. Venezuela* case, it invited the Respondent to submit any observations it may have by March 31, 2016.

61. By letter dated April 7, 2016, further to time extension, the Respondent provided its observations on the Claimant's letter of March 22, 2016.

62. By letter dated June 6, 2016, the Tribunal declared the proceedings closed.

III. Factual Background

63. The Tribunal will recall the factual background to this dispute, as it emerged from the Parties' submissions before the Tribunal's Decision and as it has emerged since from their latest submissions.

64. As will be further elaborated upon below, the Tribunal was not aware of two important developments occurring in 2013 at the time it rendered its Decision. First, 30% of IPTL's shareholding belonging to VIP had been sold to PAP and 70% of IPTL's shareholding belonging to Mechmar had also been acquired by PAP, the result of which is that IPTL's

affairs have been transferred to PAP. Second, the tariff dispute between IPTL and TANESCO had been settled and the amounts in the Escrow Account had been released to PAP.

A. The PPA and related agreements – 1995 - 1998

65. On May 26, 1995, TANESCO and IPTL entered into the PPA, whereby IPTL agreed to design, construct, own, operate and maintain an electricity generating facility with a nominal net capacity of 100 megawatts, to be located in Tegeta, Tanzania. Pursuant to the PPA, and a related Implementation Agreement,[19] which included a guarantee, executed between IPTL and the GoT, IPTL was to deliver electricity generated by the plant to TANESCO for a period of 20 years. The power plant was designed to work only at times of peak demand and has not been running on a continuous basis.[20] The applicable law under the PPA is Tanzanian law.

66. The financial assumptions for the project were that the projected cost was US$ 163.5 million; the debt/equity ratio was 70% senior debt and 30% equity; the amortization for the 70% senior debt was 7 years (later changed to 8 years in 1998) and the internal rate of return on equity was 23% (later corrected to 22.31% by agreement of the parties after the ICSID 1 award).[21] These assumptions, which were adopted by the ICSID 1 tribunal, were reflected in a letter from IPTL to the GoT dated May 31, 1995.[22] The May 31, 1995 letter stated in relevant part:

> We refer to our telephone conversation of yesterday and hereby wish to confirm that the following assumptions used to determine the capacity charge are contained in the MECHMAR proposal submitted to the Government in November 1994 which was the basis of negotiations and agreements reached in January, 1995.
>
> | | | |
> |---|---|---|
> | 1) | Project Cost | US$ 163.5 million (1994) |
> | 2) | Senior Debt | 70% |
> | 3) | Equity | 30% |
> | 4) | Aggregate Interest Rate for Senior Debt | 10.940% |

[19] Exhs. C-28/R-90 (Implementation Agreement dated June 8, 1995).
[20] RfA, para. 18.
[21] Resp. CM., para. 3.
[22] Exh. C-38 (IPTL's letter dated May 31, 1995).

5)	Amortisation	7 years
6)	Tax Holiday	5 years
7)	Capacity Factor	85%
8)	Levelized Discount Rate	10%
9)	Fixed Operating Costs/Year	US$ 4.3 million
10)	Hours in the Year	8,760
11)	IRR	23%
12)	Degraded Heat Rate (BTU/kWhHHV)	8,913

> You will notice that the main factor which can alter the capacity charge is the Total Project cost item of US$ 163.5 million and we have made a provision in the agreement with TANESCO that any changes in the stated assumptions will result in adjustments in the Reference Tariff proportionately.
>
> At the moment the PPA is talking about the Reference Tariff and not the Final Tariff and we agreed with the Minister and the Principal Secretary before they left for Canada that in view of the clarifications we provided you would seek the approval of State House so that we sign the PPA immediately as directed by the Cabinet but mentioning the Reference Tariff.
>
> You know very well that the process of negotiations with the Banks for the Debt Financing component takes between 4 - 6 months and we have already lost 5 months since January, 1995 when we completed negotiations waiting for the PPA to be signed. We request you to authorise TANESCO to sign the PPA now mentioning the Reference Tariff so that we can take the documents to the Banks for debt negotiations and any justifiable changes can be done by way of side memoranda or addendum to the Agreement.
>
> […]

67. The financial models used by IPTL at the time in order to structure the financing for the project, including the 1995 Model (the "1995 Financial Model"),[23] were not provided to TANESCO.[24] It has also been argued that a model developed by IPTL in May 1998 (the "1998 Financial Model"),[25] was not provided to TANESCO.

68. Initially, there had been an agreement on a fixed price contract, but in Addendum No. 1 to the PPA, dated June 9, 1995 ("Addendum No. 1"), a new basis for calculating the Reference Tariff in the PPA was provided, as follows: "Before commencement of commercial operations the Reference Tariff […] will be adjusted upwards or downwards depending on

[23] Exh. R-99 (1995 Financial Model).
[24] Cl. PHB, para. 43.
[25] Exh. R-98 (1998 Financial Model).

the effect of changes that will have taken place on any or all the underlying assumptions stated in the Power Purchase Agreement."[26]

69. Payments (capacity and energy payments, supplemental charges, bonus payments, as well as interest on overdue payments) under the PPA were to be made to IPTL on a monthly basis for a term of 20 years. Capacity payments and energy payments to be made after the commencement of commercial operation, which constituted the "Reference Tariff," had been computed on the basis of assumptions mentioned in the appendices of the PPA.[27]

70. IPTL had been formed in 1994 by Mechmar, a Malaysian corporation, and VIP, a Tanzanian company. VIP held 30% of the shares of IPTL, and Mechmar held the remaining 70%.[28] IPTL's authorized share capital was US$ 10 million and its paid up share capital was equivalent to US$ 100.[29]

71. IPTL raised funds to establish the power plant by means of a credit facility extended to it by a consortium of Malaysian banks[30] under a US$ 105 million 1997 Loan Facility Agreement (the "Loan Agreement" or "Facility Agreement")[31] to be repaid over 8 years. The loan contemplated a debt/equity ratio of 70/30.[32]

72. IPTL did not draw down the full US$ 105 million under the loan, but drew down approximately US$ 85 million between August 1997 and January 2000.[33]

73. On June 28, 1997, IPTL entered into a Security Deed (the "Security Deed"), with Sime Bank Berhad, which provided security to the lenders, including right, title and interest to various contracts, including the PPA. The Security Deed is governed by English law.[34]

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[26] Exh. C-39 (Addendum No. 1 to the PPA dated June 9, 1995).
[27] Resp. PHB, para. 20. Exhs. C-4/R-1 (PPA), Art. 5.1 and 1.1. *See* Appendix B to the PPA.
[28] Cl. Mem., para. 23, Exhs. C-48/R-45 (Shareholders Agreement between Mechmar and VIP dated September 28, 1994).
[29] *See e.g.*, Cl. Rep., para. 112.
[30] Bank Bumiputra Malaysia Berhad (BBMB) as arranging bank and facility agent, Sime Bank Berhad as security agent and arranging bank, BBMB International Bank (L) Limited and Sime International Bank (L) Limited both as lenders, Cl. Mem., para. 49, Resp. PHB, para. 33.
[31] Exhs. C-11/R-47 (Facility Agreement dated June 28, 1997).
[32] Cl. Mem., para. 52.
[33] Resp. PHB, para. 35. Exh. C-43 (Exhibits SCB-1 to SCB-9 in the Interpretation Proceedings).
[34] Clause 20.1 of the Security Deed, Exhs. C-16/R-68. Cl. Mem., footnote 32: "*The Security Deed was between IPTL and Sime Bank Berhad 'in its capacity as Security Agent under the Facility Agreement … which expression includes*

Under the 1997 Security Deed and the Loan Agreement, Sime Bank Berhad of Malaysia (and later its successors RHB Bank Berhad and Danaharta)[35] was appointed as Security Agent.

74. A "Mortgage of Right of Occupancy" between IPTL and Sime Bank Berhad as mortgagee was also entered into.[36]

75. On June 28, 1997, Mechmar and VIP also pledged their shares to the Security Agent under a Charge of Shares (the "Share Pledge Agreement")[37] as security for the loan.

76. On the same day, Mechmar and VIP together with IPTL and the Security Agent entered into a shareholder support deed (the "Shareholder Support Deed").[38] Under the Shareholder Support Deed, the Shareholders' Funds could be subscribed by way of ordinary shares or the provision of subordinated loans to IPTL.[39] The shareholders also undertook not to take any action in furtherance of the winding up, liquidation or dissolution of IPTL.[40] Mechmar also undertook specific obligations under the Shareholder Support Deed such as to guarantee to the Security Agent that it would pay any sum payable under the financing agreements if IPTL did not do so.[41]

77. It is agreed between the Parties that, as recorded in a letter of May 31, 1995[42] from IPTL to the GoT, the assumption of the parties to the PPA was that the debt/equity ratio for the project was to be 70/30. It was disputed whether the equity contribution could be made by way of a subordinated shareholder loan, the Respondent's position being that this was not permitted. It is undisputed, however, that IPTL's equity contribution was in fact made

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any successor appointed as Security Agent' (C-16 at page 486). Clause 22(H) of the Facility Agreement details the procedure for the replacement of Security Agents (C-11 at page 421)."

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

[36] Resp. PHB, para. 34.

[37] Exh. C-18 (Share Pledge Agreement dated June 28, 1997).

[38] Exh. C-40 (Shareholder Support Deed dated June 28, 1997).

[39] Cl. Mem., para. 54.

[40] Exh. C-40 (Shareholder Support Deed dated June 28, 1997, Art. 4.1.3).

[41] Exh. C-40 (Shareholder Support Deed dated June 28, 1997, Art. 5.1.1).

[42] Exh. C-38 (Letter from IPTL to the Ministry of Water, Energy and Minerals dated May 31, 1995), quoted above.

mostly by way of a shareholder loan, and not by way of subscription for shares.[43] According to the Claimant, Mechmar made a loan to IPTL in an amount of US$ 27 million in December 1997, and a further loan of US$ 33 million in December 1998.[44]

78. On March 12, 1998, the Security Agent, originally Sime Bank Berhad, provided notice to TANESCO that IPTL had assigned the PPA to it as security for the loan provided in the Facility Agreement.[45]

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

79. In 1998, prior to commercial operation, TANESCO submitted to ICSID a request for arbitration against IPTL claiming that it was entitled to terminate the PPA or, alternatively, to obtain a material reduction of the tariff because the cost of the facility was excessive. IPTL submitted a counterclaim against TANESCO for damages. A tribunal composed of Mr. Kenneth S. Rokison, a national of the United Kingdom (President), Judge Charles N. Brower, a national of the United States of America, and Mr. Andrew Rogers, a national of Australia (the "ICSID 1 tribunal"), issued an award on July 12, 2001 (the "ICSID 1 award").[46]

80. The ICSID 1 tribunal decided that TANESCO had no right to terminate the PPA, which was and remained valid, and took note of the Reference Tariff agreed upon by the parties. Based on the tribunal's initial rulings, the parties had adjusted the financial model that would be used to calculate the capacity and energy tariffs after commercial operation started. That adjusted financial model was submitted to the tribunal pursuant to a "Stipulation and Agreement" between TANESCO and IPTL and incorporated into the ICSID 1 award as Appendix F. The ICSID 1 award reduced the cost of the project from US$ 163.5 million to US$ 127.2 million,[47] with a senior debt of US$ 89 million (further reduced to US$ 85.3 million)[48] and the remainder (approximately US$ 38 million) in equity. The costs that the

[43] Cl. Mem., para. 14, *see also* paras. 63-64.
[44] Cl. Rep., para. 54. Resp. CM., para. 7, questioning the reality of the 1997 loan and referring to a US$ 45 million total loan, *see also* Resp. Rej., para. 6.
[45] Exh. C-26 (Notice of Assignment dated March 12, 1998).
[46] Exhs. C-10/R-8 (*Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8), Award dated July 12, 2001 ("ICSID 1 award")), also available on the ICSID website.
[47] Further reduced to US$ 121.5 million by agreement of the Parties, Cl. Mem., para. 74. *See* Resp. CM., para. 69.
[48] Cl. Rep., para. 86.

ICSID 1 tribunal deemed not to have been prudently incurred and that should be disregarded when calculating the tariff, are referred to as the "Disallowed Costs." These costs were to be the sole responsibility of IPTL.

81. Although the plant had been completed in 1998, the commercial operation of the facility did not start until January 2002, after the ICSID 1 proceeding. According to the Claimant, the plant had been called upon to generate some electricity during each month from January 2002 to April 2007, as well as in June 2007, in March 2008 and from November 2009 to October 2011.[49]

82. However, according to the Claimant, TANESCO failed to make the required capacity payments, alleging that IPTL's equity contribution had been made by way of shareholder loan rather than subscription for shares. It also stopped making the other payments to IPTL due under the PPA as of April 2007.[50] An invoice dispute was formally raised on June 17, 2004, by TANESCO.[51] It then started making monthly payments into an escrow account (the "Escrow Account") established with the Bank of Tanzania.[52] Counsel for the Respondent indicated at the March 2013 Hearing that the amount then in that account was about US$ 90 million.[53]

83. In June 2008, IPTL filed with ICSID an application for interpretation of the ICSID 1 award.[54] The ICSID 1 tribunal was recomposed for an interpretation proceeding and reconstituted following the resignation of Judge Charles Brower. The Members of the tribunal were Messrs. Rokison, Rogers and Mr. Makhdoom Ali-Khan, a national of Pakistan.

84. According to the Respondent, it was Mechmar who had made the application for interpretation on behalf of IPTL, without securing first VIP's authorization or the

[49] Cl. Mem., para. 76 indicating that TANESCO did not produce information after October 2011.
[50] *Ibid*., para. 173.
[51] Resp. PHB, paras. 76 and *seq*.
[52] Resp. CM., para. 124.
[53] Mr. Range, Tr. March 15, 2013, page 124, line 13. Exh. C-106 (Bank of Tanzania Statement of account dated November 23, 2011, Tegeta Escrow Account).
[54] Exh. C-12 (Request for interpretation dated June 19, 2008 filed by Nixon Peabody). Both Parties seem to agree that it was at the time the short lived administrator of IPTL who authorized the proceeding, and not the Provisional Liquidator, *see* Tr. March 15, 2013, page 88.

authorization of IPTL's Provisional Liquidator.[55] SCB HK sought to intervene in that proceeding as assignee under the PPA but its intervention was not accepted.[56]

85. The ICSID 1 tribunal issued an order for discontinuance of the case on August 19, 2010, pursuant to ICSID Arbitration Rule 44.[57] The Respondent contends that Mechmar requested the discontinuance, while the Claimant argues that it was the Provisional Liquidator who made the request.[58]

86. Another ICSID arbitration was also initiated by SCB, the Claimant's parent company, in May 2010, against the Republic of Tanzania (ICSID Case No. ARB/10/12) on the basis of the 1994 UK-Tanzania bilateral investment treaty.[59] That case was dismissed on jurisdictional grounds on November 2, 2012.[60] SCB filed an application for annulment of the award. The application for annulment was registered by ICSID on February 11, 2013, and the case is currently suspended by agreement of the parties to that proceeding.[61]

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

87. The Parties do not agree on the consequences of the ICSID 1 award in respect of the amounts due to IPTL's lenders. It is not disputed, however, that in 2001 and 2003, a refinancing of the 1997 Loan Agreement took place.

[55] Resp. PHB, para. 96. *See* Section E below for the details on IPTL's liquidation.
[56] Cl. Mem., para. 116. Mr. Weiniger, Tr. March 15, 2013, page 128, lines 7-10: "*The simplest explanation is that under the ICSID rules, only a party can bring interpretation proceedings, and the Bank was not a party.*" Mr. Range, Tr. March 15, 2013, pages 133, lines 24-25, page 134, lines 1-4: "*The reason why that ended the way it did is that they decided […] to give up their application to intervene in the interpretation proceedings because they were informed, accurately, that IPTL had decided to discontinue the interpretation proceeding.*"
[57] ICSID Arbitration Rule 44 "Discontinuance at Request of a Party" reads as follow: "*If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.*"
[58] Resp. PHB, para. 97. Cl. Mem., para. 117.
[59] Exh. R-76 (SCB's Request for Arbitration dated May 5, 2010).
[60] *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award dated November 2, 2012 (available on the ICSID website).
[61] *See* ICSID website, ICSID Case No. ARB/10/12, Procedural Details.

88. According to the Respondent, in 2001, Mechmar, purporting to act in IPTL's name, and Danaharta Managers (L) Ltd. ("Danaharta")[62] – a Malaysian governmental institution created to remove non-performing loans from the Malaysian financial system – replaced the 1997 Loan Agreement with two new loans ("Term Loans 1 and 2") and extended the amortization period from 8 years to 10 years.[63] The Respondent maintains that TANESCO had no knowledge of this restructuring. The new loans amounted to over US$ 120 million, which was more than the senior debt authorized by the ICSID 1 award, and allegedly included penalty interest that had accrued on the original Loan Agreement prior to the commencement of commercial operations.[64]

89. In addition, according to the Respondent, in May 2001, Mechmar obtained a short-term loan from Danaharta in the amount of US$ 5.2 million, which was repaid by October 2002, as it had been ranked in priority to other loans extended to IPTL, including the senior debt.[65]

90. Furthermore, the operations and management contractor responsible for constructing the facility, Wartsila, obtained through an alleged "secret side-deal" a loan from Danaharta for US$ 32 million, which also had higher priority than the other loans extended to IPTL, including the senior debt.[66]

91. According to the Respondent, all of this altered the waterfall of payments with the final result that IPTL paid down the senior debt more slowly than agreed, with 13.3% paid down in the first three years instead of 60%.[67] The Claimant does not dispute the restructuring or the new loans but claims that the changed waterfall of payments resulted in the senior lender being paid off more quickly.[68]

[62] Danaharta was previously Sime International Bank (L) Limited, one of the original lenders. It changed its name in January 2009. *See* Cl. Mem., para. 84.
[63] Resp. CM., paras. 94 and *seq.*, para. 118. Resp. PHB, paras. 65 and *seq*.
[64] Resp. CM., para. 92.
[65] *Ibid*., para. 93.
[66] *Ibid*., paras. 95 and *seq*. Resp. PHB, paras. 70 and *seq*.
[67] Resp. CM., para. 103.
[68] Cl. Rep., para. 184.

D. The SCB HK's involvement – 2005 onwards

92. It is not disputed by the Parties that, by 2005, Danaharta was the sole lender under the Facility Agreement.[69] Further to an auction of distressed debt, in August 2005, SCB HK acquired from Danaharta, for US$ 76.1 million,[70] Term Loans 1 and 2, which had a face value of US$ 101.7 million, and became the sole lender to IPTL.[71] Under that transaction, SCB HK was assigned a number of contracts, including the 1997 Security Deed, the Implementation Agreement and the Guarantee Agreement concluded between IPTL and the GoT.[72]

93. SCB HK also became the Security Agent under the Share Pledge Agreement and the Shareholder Support Deed.[73] According to the Claimant, "[a]s Security Agent, SCB HK holds all of IPTL's 'right, title and interest in and to the Assigned Contracts, including all monies which may at any time be or become payable to the Borrower.'"[74]

94. SCB HK became the Security Agent on November 4, 2009.[75]

95. Whether the assignment was valid has been highly disputed by the Parties and still is. The Tribunal found in its Decision that IPTL's rights under the PPA were validly assigned to SCB HK under the Security Deed.[76] Whether the security interest needed to be registered under Tanzania's Companies Ordinance to be perfected so as to make it effective against third parties was further disputed.

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[69] *See* Cl. Mem., para. 84. Sime International Bank (L) Limited changed its name to Danaharta; BBMB International Bank (L) Limited novated its rights to Danaharta as did RHB.
[70] Resp. CM., para. 122.
[71] Exhs. C-55/R-15 (Sale and Purchase Agreement between Danaharta Managers (LL) Ltd and SCB HK dated August 4, 2005).
[72] Exhs. C-56/R-114 (Deed of Assignment dated August 17, 2005).
[73] Cl. Mem., para. 87.
[74] *Ibid*., para. 87.
[75] *Ibid*., footnote 79: "*The original Security Agent, Sime Bank, was succeeded by RHB in 1999. By letter dated 29 October 2009 from SCB HK, RHB was removed as Security Agent (see C-57). SCB HK was appointed as Security Agent on 4 November 2009 and duly accepted such appointment (see C-58). This took place after SCB Malaysia had earlier declined the appointment (see letter to SCB Malaysia dated 29 October 2009 at C-59 and letter from SCB Malaysia to SCB HK at C-60).*" *See* Cl. Mem., para. 120 and paras. 210-211.
[76] Decision, para. 151.

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

97. Under Clause 8 of the Security Deed, upon the occurrence of an event of default under the Loan Agreement, IPTL is no longer authorized to exercise and enforce the rights, discretions and remedies conferred on it under the PPA. Those rights, discretions and remedies are instead exercisable by the Security Agent acting as agent for and on behalf of the lenders. Subsequent to the occurrence of the event of default, SCK HK exercised the step-in rights conferred on it. It considered IPTL's contractual rights under the PPA to have been vested in SCB HK.

98. In December 2009, IPTL and TANESCO were notified of the occurrence of an event of default by the Facility Agent under the Financing Documents.[77] Subsequently, steps were taken to enforce the security interests created by IPTL in favour of the Security Agent, SCB HK.[78]

99. In addition, SCB HK's charge over the shares pledged by VIP and Mechmar also became enforceable.

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

1. Original dispute between the shareholders

100. On or around 2001, certain disputes arose between the Malaysian majority shareholder of IPTL, Mechmar, and the Tanzanian minority shareholder, VIP.

101. According to the Claimant:

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

[77] Exh. C-23 (Letter from SCB HK to IPTL dated December 15, 2009). Cl. Mem., paras. 120 and 210.
[78] Exh. C-25 (Letter from Standard Chartered Bank Malaysia to SCB HK dated December 15, 2009).

> should be for Mechmar's account alone, and not counted when calculating the value of VIP's shares.[79]
>
> VIP argued that if those costs were removed from the accounts of IPTL and put on the books of Mechmar, then the value of its shares at that point in time would have been US$31,273,783. It asked that Mechmar pay it this amount. Mechmar did not agree. VIP then demanded that Mechmar represent in writing to third parties that VIP's shares were valued at US$31 million. When Mechmar refused to do so, VIP began a series of actions to "*strongarm*" Mechmar into acceding to its wishes.[80]

102. According to the Respondent:

> Mechmar argued that IPTL should bear all of the disapproved costs, while VIP maintained that only the costs approved by the ICSID 1 Tribunal should be borne by IPTL, and that Mechmar alone should bear the disapproved costs. Mr. Rugemalira believed that Mechmar deliberately inflated project costs, and that therefore all disallowed costs should be assigned to Mechmar and not to IPTL.[81]

103. As a result of the shareholders' disagreements, numerous proceedings were launched, including a winding up petition regarding IPTL, and SCB HK became a party to some of those proceedings.

2. Proceedings regarding or involving IPTL and its current status

104. On February 25, 2002, VIP petitioned the High Court of Tanzania for the winding up of IPTL.[82] VIP also requested various forms of provisional relief, including that the Court appoint a provisional liquidator over IPTL.

105. On November 21, 2008, SCB HK applied to the High Court of Tanzania seeking an order to restrain VIP from continuing with the winding up, which was dismissed by the Court for want of prosecution.

106. In December 2008 and January 2009,[83] pursuant to its rights under a Charge of Shares of VIP in IPTL dated June 28, 1997, RHB Bank Berhad, acting as security agent for SCB HK,

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[79] Cl. Mem., para. 78.
[80] *Ibid*., para. 79.
[81] Resp. PHB, para. 55. Mr. Rugemalira was the Director of IPTL and author of the May 31, 2005 letter to the GoT.
[82] Exh. R-12 (Petition for Winding up between VIP Engineering and Marketing Limited and Independent Power Tanzania Limited dated February 25, 2002, Clause No. 49 of 2002).
[83] *See* facts as described in Exh. C-409 (English High Court Judgment dated June 9, 2015), para. 19.

appointed Ms. M. K. Renju as Administrative Receiver over VIP and, later, over Mechmar's shares.[84]

107. On December 16, 2008, the Tanzanian High Court appointed a Provisional Liquidator, an appointment to which Mechmar objected. A few days later, SCB HK informed the Provisional Liquidator that it held security over IPTL's assets under the Security Deed.[85]

108. On January 27, 2009, upon SCB HK's request made a few days earlier ("SCB HK's Administration Petition"), the High Court of Tanzania appointed *ex parte* an administrator over IPTL (the "Administrator"). On the ground that notice should have been issued to all of the interested parties, the appointment of the Administrator was set aside by the Tanzanian Court of Appeal on April 9, 2009.[86] SCB HK withdrew its first petition and filed a second petition to appoint an Administrator on September 17, 2009 ("SCB HK's Second Administration Petition").

109. Around October 2009, according to the Claimant, the GoT took control of the power plant, and the Provisional Liquidator and TANESCO entered into an interim PPA on February 5, 2010 (the "Interim PPA").[87] According to the Claimant, "[t]he PL has not properly accounted for monies received pursuant to the interim operation of the Plant. Despite repeated requests by SCB HK, the PL has failed to disclose detailed accounts reflecting the current state of IPTL's finances."[88]

110. On September 15, 2010, SCB HK filed its request for arbitration with ICSID.

111. On July 15, 2011, an order for IPTL's winding up was issued by the High Court of Tanzania, and the winding up was deemed to have commenced February 25, 2002 – the date of the petition (the "2011 Winding Up Order").[89] The High Court appointed a liquidator under the Tanzanian Companies Ordinance (the "Liquidator").

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[84] Cl. PHB, para. 27(16). Exh. C-153 (Forms 106a concerning appointment of the Share Receiver).
[85] Cl. Mem., para. 119.
[86] Exhs. C-302/R-152 (Ruling of Tanzanian Court of Appeal in the Revision Proceedings dated December 17, 2012), page 6.
[87] Cl. Mem., para. 122.
[88] *Ibid*., para. 124.
[89] Exh. R-72 (Letter of the Official Receiver and Liquidator of IPTL to the Secretary of the Tribunal dated July 10, 2012), para. 7, and order under Exh. 2 to that letter.

112. On April 3, 2012, the Liquidator issued a notice directing IPTL's creditors to submit their claims against IPTL's estate by April 24, 2012.[90] According to TANESCO, Wartsila asserted a claim for over US$ 22 million in the liquidation proceeding.[91] TANESCO also asserted a claim to recover unlawful charges IPTL collected from TANESCO.[92]

113. On April 5, 2012, the Tanzania High Court granted SCB HK's and Mechmar's request for a temporary stay to prevent the Liquidator from going forward with IPTL's liquidation pending full briefing on SCB HK's request to enjoin the winding up.[93]

114. On May 18, 2012, Mechmar went into liquidation in Malaysia on the application of one of its creditors with SCB HK as a supporting creditor,[94] its liquidators assuming control over its assets.[95]

115. On July 10, 2012, the Liquidator wrote to ICSID, disputing SCB HK's authority to commence the ICSID proceeding. The letter was transmitted to the Parties, who provided their comments to the Tribunal. Commenting on this letter, TANESCO submitted that the Tribunal should stay the proceeding to allow SCB HK to seek a declaration of the validity of its claimed assignment in Tanzanian courts, where the Liquidator could be joined as a party.[96]

116. In August 2012, ICSID received from VIP a copy of its letters dated July 31, 2012, and August 25, 2012, sent to the Liquidator claiming, *inter alia*, that SCB HK is not a creditor of IPTL. The letters were transmitted to the Parties, who provided their comments to the Tribunal.

117. On December 17, 2012, the Court of Appeal in the Civil Revision Proceeding No. 1 vacated all proceedings in the winding-up petition retroactive to July 17, 2009, including the Winding up Order of July 15, 2011, and directed that the matter be considered by the High

[90] Resp. Mem. Juris., para. 40. Exh. R-20 (Advertisement for Creditors dated April 3, 2012).
[91] TANESCO's Comment on Submission of the Liquidator of IPTL dated August, 15, 2012, para. 28.
[92] Cl. Tariff Rep., paras. 23-26. *See* Affidavit of Godwin Ngwilimi, TANESCO's Company Secretary of April 16, 2012, Exh. C-195 (TANESCO's Proof of Debt in relation to the Tanzanian Winding Up Proceedings dated April 16, 2012).
[93] Resp. Mem. Juris., para. 42.
[94] Exh. C-409 (English High Court Judgment dated June 9, 2015), para. 32.
[95] Parties' respective letters of November 27 and December 13, 2013. Cl. Tariff Sub., para. 29.
[96] TANESCO's Comment on Submission of the Liquidator of IPTL dated August, 15, 2012, para. 33.

Court.[97] The Court of Appeal decided that the High Court should not have appointed a liquidator in 2011 while SCB HK's Second Administration Petition to appoint an administrator to IPTL was pending. The Court of Appeal remitted the matter to the High Court for consideration.

118. The Parties are in disagreement as to the consequences of that decision on the jurisdiction of this Tribunal, as explained in the Tribunal's Decision.[98]

119. On February 17, 2013, VIP requested the High Court to have the administration proceeding expedited, allegedly given the absence of steps taken by SCB HK.[99]

120. In April 2013, ICSID received a new letter from VIP's Dutch counsel which was transmitted to the Parties and the Tribunal, regarding which the Parties declined to comment.

121. On June 10, 2013, ICSID received a letter from the Provisional Liquidator of IPTL, Mr. Saliboko, which was transmitted to the Parties and the Tribunal and regarding which the Parties declined to comment.

122. Further to the sale of VIP's 30% shareholding in IPTL to PAP on August 15, 2013 (see below para. 164), VIP agreed to withdraw its winding-up petition of IPTL at the High Court of Tanzania.[100]

123. On August 26, 2013, VIP submitted an application before the High Court (Utamwa J) (Consolidated Misc. Civil Cause No. 49 of 2002 and Misc. Civil Cause No. 254 of 2003).[101] The Claimant contends that VIP's application before the Tanzanian High Court was made without notice to SCB HK and that it was not represented at the High Court hearing in

[97] Exh. R-152 (Order of High Court dated December 17, 2012), page 27. Also Exh. C-295 (Ruling of the Court of Appeal of Tanzania in the Revision Proceedings dated December 17, 2012).
[98] Decision, para. 80.
[99] Exh. R-159 (Respondent's letter to the Tribunal dated May 7, 2014; new exhibit handed out at the March Hearing). Mr. Range, Tr. March 14, 2013, page 144.
[100] Cl. Tariff Sub., para. 32.
[101] *Ibid*., para. 34. Exh. C-312.

Tanzania before Judge Utamwa, which took place on September 3, 2013, and September 5, 2013.[102]

124. On September 5, 2013, Judge Utamwa made an order[103] (i) permitting VIP to withdraw its winding up petition in respect of IPTL, (ii) terminating the appointment of the Provisional Liquidator, and (iii) ordering IPTL's affairs, including the plant, to be handed over to PAP, which had committed to pay off all legitimate creditors of IPTL (the "Utamwa J Order") (see below for PAP's involvement).

125. The Mechmar liquidators are said to have agreed to the withdrawing of VIP's winding up petition but objected before Judge Utamwa to the remaining of the orders sought by VIP, including the transfer of the affairs of IPTL to PAP.[104] On November 4, 2013, they filed an application for the revision of the order.[105] On November 27, 2013, they submitted an additional application to rectify typographical errors.[106]

126. The Court of Appeal was then seized of the matter and held a hearing in August 2014. The Tribunal has not been made aware by the Parties of any decision of the Court of Appeal in that case.[107]

127. The Claimant disputes the merits of the Utamwa J Order. The Respondent argues that it was not a party to the proceedings resulting in the Utamwa J Order and on that basis it is not in a position to address any legal errors arising in that context.[108] However, the Respondent submits that to the extent that the respective order had effects beyond the Parties to the proceeding, it could not ignore them.[109]

128. The Respondent contends that if the Claimant believed the Utamwa J Order to have breached its rights then it should have joined the application for the revision.[110] The Claimant counter-argues that it was futile in seeking a further review of the Utamwa J Order

[102] Exh. C-312 (Order of the High Court of Tanzania dated September 5, 2013).
[103] Exh. C-312 (Order of the High Court of Tanzania dated September 5, 2013).
[104] Cl. Tariff Sub., para. 38.
[105] *Ibid*., para. 43.
[106] *Ibid*., para. 43.
[107] *Ibid*., para. 44.
[108] Resp. Tariff Sub., para. 16.
[109] *Ibid*., para. 16.
[110] *Ibid*., para. 17.

because a November Revision application initiated by the Mechmar Liquidators had remained unheard 16 months on.[111] Conversely, the Claimant contends that actions brought by VIP and PAP were heard expeditiously.[112]

129. On September 6, 2013, Ms. Renju as Administrative Receiver of IPTL brought a claim against VIP and PAP in the Commercial Division of the High Court (Commercial Case No. 123 of 2013) to obtain an injunction restraining VIP and PAP from taking possession of the monies in the Escrow Account and from interfering with her right to manage and deal with IPTL's assets charged in favour of SCB HK. She sought an order declaring that SCB HK has a valid security interest over the proceeds of the Escrow Account under the Security Deed of June 28, 1997.[113] She also sought an *ex parte* interim injunction, which was denied.[114]

130. On September 11, 2013, Ms. Renju initiated a further claim (Commercial Case No. 124 of 2013) against IPTL seeking a permanent injunction restraining IPTL from preventing her from entering the plant and controlling the assets of IPTL charged in favour of SCB HK.[115] An *ex parte* interim injunction was also requested and denied.[116]

131. The respective proceedings were consolidated afterwards.[117]

132. On October 31, 2013, the Tanzanian High Court (Commercial Division) granted an order, at the request of SCB HK's Administrative Receiver, to withdraw Consolidated Commercial Cases Nos. 123 and 124 of 2013.[118]

133. Both cases were withdrawn for motives which are disputed. The Claimant mentions *inter alia* a lack of confidence in the Tanzanian Courts,[119] while the Respondent suggests that the cases would have clarified whether SCB HK was a valid creditor of IPTL.[120]

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[111] Resp. Tariff Sub., para. 90.
[112] *Ibid*., para. 90.
[113] Exh. R-164 (Plaint of Martha Renju vs. PAP and VIP in Commercial Case No. 123 dated September 6, 2013).
[114] Exh. C-409 (English High Court Judgment dated June 9, 2015), paras. 59-60.
[115] Exh. R-165 (Plaint of Martha Renju vs. IPTL in Commercial Case No. 124 dated September 11, 2013).
[116] Exh. C-409 (English High Court Judgment dated June 9, 2015), para. 61.
[117] Resp. Tariff Sub., para. 60.
[118] Exh. R-169 (Drawn order of the High Court (Makaramba J) dated October 31, 2013).
[119] Cl. Tariff Rep., para. 47 (relying on a witness statement of Joseph Wesley Casson dated September 30, 2014, Exh. C-384 (First Witness Statement of Joseph Casson in Claim No. 2013 Folio 697), para. 26).

134. On December 6, 2013, the Tanzanian High Court (Commercial Division) granted another petition, at the request of SCB HK, to withdraw the Claimant's Administration Petition (Civil Cause No. 112 of 2009) regarding IPTL.[121]

135. SCB HK explained in its Reply on Tariff that it did so partly because, given that the Provisional Liquidator had been removed, there was no more a threat of winding up, and that SCB HK had lost confidence in the Tanzanian judicial process and did not want them to conclude that the loan was invalid.

136. In a letter to the Tribunal of November 27, 2013, SCB HK indicated that there was "no winding-up petition or substantive administration petition in respect of IPTL pending before the Tanzanian courts, and no prospect of a liquidator or administrator being appointed."[122] SCB HK further indicated that it had been informed that TANESCO had entered into an agreement with IPTL to settle the outstanding tariff payments under the PPA that are in issue in these proceedings, thereby facilitating release of the funds placed in escrow by the GoT as security for TANESCO's obligations under the PPA (see below for the details). SCB HK concluded that it was concerned about this deterioration in its position and requested an award as soon as possible.

137. In its Motion to Compel dated June 29, 2015, SCB HK claims that it was in November 2013, unaware of the details concerning the settlement of the outstanding tariff dispute between PAP-controlled IPTL and TANESCO.[123]

138. TANESCO responded on December 13, 2013,[124] noting that SCB HK had not sought to block the sale of VIP's shareholding to PAP; that the agreement by PAP to sell electricity to TANESCO at reduced tariffs is not a change in practice and is not a deterioration in SCB HK's position; and that TANESCO had no control over the escrow account agreement whose parties are the GoT, IPTL and Bank of Tanzania.

[120] Resp. Tariff Rej., para. 75.
[121] Exh. R-170 (Ruling order of the High Court (Utamwa J) dated December 6, 2013).
[122] Exh. C-311 (SCB HK's letter to the Tribunal dated November 27, 2013).
[123] Claimant's Motion to Compel Production of Documents dated June 29, 2015, para. 8.
[124] Exh. C-313 (The December 13, 2013 Letter).

139. TANESCO disagreed with SCB HK that there was no longer any prospect of a liquidator or administrator being appointed over IPTL. This last item is now disputed by the Claimant who claims that TANESCO misled the Tribunal in that regard when it knew that PAP was taking over IPTL's affairs (see request for reconsideration below).

140. On April 4, 2014, IPTL and PAP issued their own complaint against SCB HK, Ms. Renju and TANESCO (Case No. 60) seeking, *inter alia*, a declaration that: (i) SCB HK is not a creditor of IPTL; (ii) the Tribunal's Decision was obtained by fraud and is invalid; (iii) an injunction restraining SCB HK from pursuing the PPA arbitration; and (iv) damages in excess of US$ 3,240,000,000[125] (see below for the status of the case).

141. The Tribunal has not been made aware of the status of the pending claims.

3. Mechmar

142. In 2003, Mechmar commenced an arbitration under the rules of the London Court of International Arbitration (the "LCIA") to decide the dispute between Mechmar and VIP pursuant to the Promoters/Shareholders Agreement. An award was issued on August 26, 2003 (the "LCIA award")[126] directing VIP to discontinue the winding up proceedings it had initiated against IPTL before the High Court of Tanzania in 2002. Mechmar's attempts to enforce the LCIA award in Tanzania are said to have been to no avail.[127]

143. As mentioned above, on June 28, 1997, further to the occurrence of an event of default, Mechmar and VIP charged their shares in IPTL to the Security Agent, which was to become SCB HK.[128] In this phase of the arbitration, the validity of such charge resurfaced in the context of the sale of Mechmar's shares in IPTL to PAP. SCB HK claims that it had control of the share certificates since 2010.

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[125] Exh. C-350 (Civil Case No. 60 of 2014 dated April 4, 2014). Cl. Tariff Sub., para. 74. *See also* para. 85(1).
[126] Exh. C-45 (*Mechmar Corporation (Malaysia) Berhad v. VIP Engineering and Marketing Limited* (LCIA Arbitration No. 2353), Award dated August 26, 2003).
[127] The Tribunal also notes that there were allegations of various proceedings between SCB and Mechmar in Malaysia and in the British Virgin Islands.
[128] Cl. Tariff Sub., para. 19. Exh. C-319 (Letter from Linklaters & Paine to Sime Bank Berhad dated October 1, 1997).

144. According to the Claimant, in June 2010, it appeared that the GoT intended to purchase all of the shares in IPTL and that Mechmar was willing to sell its shares in IPTL.[129] In response, the Claimant submits that SCB HK communicated to the GoT that (i) the Mechmar's shares were subject to a charge by SCB HK, (ii) SCB HK had appointed Martha Renju as the Receiver over the shares in IPTL in January 2009,[130] and (iii) the GoT would need to acquire the shares through SCB HK.[131]

145. On August 7, 2010, SCB HK sought interim relief from the High Court of Malaysia in response to Mechmar's plans to sell its IPTL shares.[132] On October 4, 2010, the Malaysian Court granted an interlocutory injunction barring Mechmar from transferring its IPTL shares and requiring it to deliver the share certificates to SCB HK.[133]

146. On October 12, 2010, Mechmar's Malaysian lawyers informed the Claimant's counsel that the Mechmar shares had been sold on September 9, 2010 to an unnamed third party.

147. The Claimant initiated proceedings before the Malaysian Court to find out the identity of the party to whom Mechmar had sold its shares in IPTL.[134] According to the Claimant, it came to light that Mechmar's shares in IPTL had been acquired by Piper Link Investments Ltd., which had been incorporated in the BVI on September 2, 2010.[135] On November 4, 2010, SCB HK filed an *ex parte* application in the Malaysian Court to obtain further information

[129] Cl. Tariff Sub., para. 20.
[130] *Ibid*., footnote 19.
[131] Cl. Tariff Sub., para. 20. The Claimant submits that the PAC Report (Exh. C-367) purportedly confirmed its position regarding the enforcement of its rights over the Mechmar shares (*see* Cl. Tariff Rep., paras. 19-20).
[132] *Ibid*., para. 21. Exh. C-321 (Malaysian proceedings (*SCB HK v. Mechmar*) Amended Statement of Claim dated August 9, 2010).
[133] Cl. Tariff Sub., para. 21. Exh. C-322 (Malaysian proceedings (*SCB HK v.* Mechmar) Interlocutory Injunction Order dated October 4, 2010).
[134] Cl. Tariff Sub., para. 22. Exh. C-324 (Malaysian proceedings (*SCB HK v. Mechmar*) Summons in Chambers Ex parte application to appoint a receiver dated November 4, 2010).
[135] Cl. Tariff Sub., para. 22. According to the Due Diligence Report prepared by Mr. Godwin Ngwilimi, TANESCO's Company Secretary, in 2010 and 2011, Mechmar had sold its shares in IPTL to Piper Link based in the BVI. In this transaction, Piper Link was allegedly represented by Harbinder Sing Sethi. This was hearsay from the Mechmar liquidators. *See* Exh. R-183 (Godwin Ngwilimi, Due Diligence of Mechmar Corporation (Malaysia) Berhad in the Matters Involving IPTL and Disputes with Standard Chartered Bank (Hong Kong), Ref. No. SEC. 427/IPTL/11/2013 dated November 7, 2013), page 2, para. 3.

surrounding the sale of Mechmar's shares in IPTL to Piper Link.[136] This was granted on November 8, 2010.

148. On November 8, 2010, SCB HK obtained an *ex parte* order from the High Court of the BVI against Piper Link to obtain the share certificates and to restrain them from dealing with the shares in IPTL while pending trial.[137] On April 11, 2011, the BVI Court ordered summary judgment in SCB HK's favour and ordered that the Mechmar's IPTL share certificate be released to SCB HK.[138] According to the Claimant, the share certificate remains in possession of SCB HK's Share Receiver, namely Martha Renju.[139]

149. On August 12, 2011, the High Court of Malaya (Commercial Division) granted an injunction (i.e. the Consent Order) against Mechmar to prevent it from selling its shares in IPTL.[140]

150. According to the Respondent, the judgments obtained by the Claimant in the Malaysian and BVI courts have no legal effect in Tanzania because of their *ex parte* nature and they were not registered in accordance with Tanzanian law.[141]

151. In any event, the Respondent disputes the validity of the charge to SCB HK (see below).

152. On May 18, 2012, Mechmar went into liquidation in Malaysia and its liquidators assumed control over its assets.[142]

153. In March 2014, the Mechmar Liquidators commenced proceedings in Tanzania against IPTL and VIP seeking US$ 2.5 billion, claiming that IPTL's assets were utilised by PAP in the purported purchase of VIP's 30% shareholding in IPTL in August 2013, constituting

[136] Cl. Tariff Sub., para. 23. Exh. C-324 (Malaysian proceedings (*SCB HK v. Mechmar*) Summons in Chambers *Ex parte* application to appoint a receiver dated November 4, 2010). Exh. C-328 (Malaysian proceedings (*SCB HK v. Mechmar*), *Ex parte* Order Appointing a Receiver dated November 8, 2010).
[137] Cl. Tariff Sub., para. 24. Exh. C-330 (BVI proceedings (*Renju v. Piper Link*) Freezing and Custody Order dated November 8, 2010).
[138] Exh. C-332 (BVI proceedings (*Renju v. Piper Link*) Order for Summary Judgment dated April 11, 2011).
[139] Cl. Tariff Sub., para. 26.
[140] Exh. C-333 (Consent Order dated August 12, 2011).
[141] Resp. Tariff Sub., para. 13.
[142] Parties' respective letters of November 27 and December 13, 2013. Cl. Tariff Sub., para. 29.

wrongful financial assistance in breach of IPTL's articles of association. IPTL is said to have raised a counterclaim.[143]

4. VIP v. SCB and SCB HK

154. *Proceedings in the USA:* In June 2013, in parallel to the actions before the Tanzanian courts, VIP filed an action in the New York State Supreme Court against Standard Chartered Bank ("SCB") in Tanzania, not SCB HK, alleging that SCB fraudulently and falsely claimed VIP's interest in IPTL. SCB removed the suit to the United States District Court for the Southern District of New York (the "New York proceedings") and moved to compel arbitration and to stay or dismiss the action.[144]

155. On September 10, 2013, the United States District Court for the Southern District of New York dismissed the case on *forum non conveniens* grounds.[145] On September 23, 2013, the court issued a new order holding that Tanzania represented "an adequate alternative forum, […] which the Court deem[ed] an expression of [SCB's] consent to the adjudication of this action in Tanzania."[146] Following subsequent submissions by SCB and VIP, on October 4, 2013, the court issued a new order providing that "[j]udicial estoppel prevents a party from making a contradictory statement in a later stage of litigation based on 'the exigencies of the moment'."[147] SCB appealed the District Court's decision to the United States Court of Appeals for the Second Circuit, which dismissed SCB's appeal on December 15, 2014.[148]

156. According to the Claimant, SCB HK was not a party to the New York proceedings and did not make any representation to the New York Court concerning whether the Tanzanian courts were the proper forum for the action. Moreover, the Claimant maintains that SCB

[143] Cl. Tariff Sub., para. 85(3).
[144] Resp. Tariff Rej., para. 54. Cl. Tariff Sub., para. 66.
[145] Exh. R-171 (*VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order dated September 10, 2013), page 5.
[146] Exh. R-172 (*VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order dated September 23, 2013), page 2.
[147] Exh. R-173 (*VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order dated October 4, 2013), page 3.
[148] Exh. R-174 (*VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 13-3891-cv, Summary Order dated December 15, 2014), page 2.

did not in fact consent to the jurisdiction of the Tanzanian Court, and the proceedings were dismissed.[149]

157. *Proceedings in Tanzania:* By letter before action of October 12, 2012, counsel for VIP threatened an action against SCB HK.[150] On November 13, 2013, VIP filed suit in the High Court in Tanzania against SCB, SCB HK, two Wartsila entities and the Mechmar Liquidators (Civil Case No. 229 of 2013).[151] According to the Respondent,[152] VIP's complaint (i) seeks damages for losses it suffered from the unlawful restructuring of IPTL's debt, (ii) challenges the legality of SCB's/SCB HK's alleged purchase of the debt in 2005 from Danaharta, and (iii) seeks a declaration that SCB/SCB HK lacks standing as a valid creditor or as a valid secured creditor of IPTL. The Claimant contends that VIP alleged "fraud, conversion, waste and negligence" on the part of the defendants in dealing with the interests of VIP in IPTL. The Parties agree that VIP seeks damages of almost US$ 500 million from the defendants. According to the Claimant, a pre-trial conference took place in Tanzania on March 10, 2015 with the claim allocated to an 18-month track.[153]

158. It would appear from the judgment of Justice Flaux (see below) that the defendants in the proceedings in Tanzania filed a defence raising various objections including that Tanzania was the incorrect forum, the correct forum being the English or Malaysian Courts.[154]

159. *Proceedings in England:* On December 23, 2013, SCB HK (as Security Agent) and SCB Malaysia Berhad (as Facility Agent) initiated a case under the Facility Agreement against IPTL, PAP and VIP before the High Court seeking a declaration, *inter alia*, that the loan is valid.[155] The claimants to that action are seeking the repayment of the debt owing to it by IPTL.

160. On June 9, 2015, Justice Flaux rendered a judgement in which he dismissed the application by the defendants for a stay of the English proceedings on *forum non conveniens* grounds

[149] Cl. Tariff Rep., para. 21.124.
[150] Exh. C-409 (English High Court Judgment dated June 9, 2015), para. 33.
[151] Exh. 1 to the December 13, 2013 Letter (Exh. C-313). Exh. C-353 ("Parliament now orders probe into IPTL saga", *The Citizen*, March 17, 2014).
[152] Exh. C-313 (the December 13, 2013 Letter).
[153] Cl. Tariff Rep., para. 137.
[154] Exh. C-409 (English High Court Judgment dated June 9, 2015), para. 76.
[155] Exh. C-327 (Claim).

and VIP's application for a stay or strike out of the proceedings on the grounds of estoppel or abuse of process.[156]

F. PAP's involvement as of 2013

161. PAP is a Tanzanian company controlled by Mr. Harbinder Singh Sethi and, according to the Claimant, was incorporated in October 2011.[157]

162. PAP is purported to have purchased, on a date that cannot be confirmed, VIP's 30% shareholding and Mechmar's 70% shareholding in IPTL – the possibility of which is disputed by SCB HK. In essence, IPTL's affairs, as well as the Plant, were transferred to PAP in 2013. In the same year, TANESCO paid PAP US$ 201 million. Part of that sum appears to have been taken from the Escrow Account used for the disputed invoices at stake in this case. These facts were unknown to the Tribunal at the time it issued its Decision.

163. The following paragraphs describe the sequence of these events, relying principally on the Claimant's allegations, the Respondent having limited itself to rebutting only certain arguments.

1. The acquisition of VIP's shareholding in IPTL by PAP

164. On August 15, 2013, VIP entered into a share purchase agreement for the sale of its 30% shareholding in IPTL to PAP for a value of US$ 75 million (the "VIP-PAP SPA").[158]

165. The VIP-PAP SPA was countersigned by IPTL's Provisional Liquidator, whom the Claimant contends was corrupt and has been since arrested and charged.[159] The Claimant

[156] Exh. C-409 (English High Court Judgment dated June 9, 2015).
[157] Cl. Tariff Sub., para. 31.
[158] Exh. C-316 (VIP-PAP SPA). *See also* Exh. C-336 (VIP's Notice of Withdrawal of the winding up petition dated August 19, 2013). Cl. Tariff Sub., para. 30. The Respondent observes that, on August 11, 2014, the Claimant submitted a claim against VIP in a District Court of the Netherlands requesting the payment of US$ 75 million (Resp. Tariff Sub., para. 77). According to the Claimant, the proceedings in the Netherlands are not relevant for current purposes. It contends that the VIP-PAP SPA provided that the US$ 75 million to be paid by PAP were to be paid into a bank account in the Netherlands and that it requested for a Garnishee Order to preserve the funds. (Cl. Tariff Rep., para. 136). The proceeds for VIP's shares were purportedly not paid to the relevant banks in the Netherlands, which is why the Claimant's action was discontinued (Exh. C-397 (Witness Statement of Ewald Cornelis Netten in Claim No. 2013 Folio 697 (redacted) dated October 21, 2014)). The Respondent contends that what the Claimant is seeking to recover in the Netherlands should form part of what it is also seeking to recover from TANESCO in its proceedings before ICSID (Resp. Tariff Sub., para 59).
[159] Cl. Tariff Rep., para. 2.

further alleges that Tanzania acted as broker in that sale.[160] Conversely, the Respondent claims that the alleged legality of this transaction is irrelevant to the present dispute.[161]

166. The Claimant contends that the US$ 75 million came from the Escrow Account (see below). That money is also said to have been used to pay corrupt officials.[162]

167. According to the Claimant, the sale of VIP's shares was done notwithstanding the fact that a receiver had been appointed by SCB HK over VIP's 30% shareholding in IPTL on December 15, 2008[163] and notwithstanding SCB HK's rights as Security Agent under the Share Charge and the Shareholder Support Deed. The Claimant further contests the legality of this transaction because SCB HK has been in possession of the certificate for the IPTL shares since April 2011.[164]

168. According to the Respondent, the purported legality of the IPTL's share transaction is irrelevant to the current dispute because it involved third parties to the present proceeding.[165] On that basis, the Respondent contends that it cannot be called upon to answer for any issues arising from this transaction having not participated in it.[166] In the alternative, the Respondent submits that the Claimant's alleged objection to the VIP-PAP SPA is premised on the fact that "it had a valid charge of Mechmar's Shares" in IPTL and that the foreign court orders "were valid and effective in Tanzania," both of which are denied.[167]

[160] *Ibid*., para. 33.
[161] Resp. Tariff Sub., para. 15.
[162] Cl. Tariff Rep., para. 34, relying on the PAC Report dated November 17, 2014 (Exh. C-367), allegedly showing payments to various officials, including Philip Saliboko, IPTL's Liquidator from July 2011 to December 2012, and Provisional Liquidator until September 2013 (pages 56-57). Also worth noting, the previous Provisional Liquidator Mr. Rugonzibwa is said to have been charged for receiving bribes from VIP in January 2015 (Cl. Tariff Rep., para. 39). The Respondent submits that the mere institution of criminal proceedings does not prove or disprove the innocence of these charged individuals (Resp. Tariff Rej., para. 47).
[163] Exh. R-120 (Letter from RHB Bank Berhad dated December 15, 2008).
[164] Cl. Tariff Sub., para. 33.
[165] Resp. Tariff Sub., para. 15.
[166] *Ibid*., para. 15.
[167] *Ibid*., para. 15.

169. In accordance with the terms of the VIP-PAP SPA, VIP agreed to withdraw its IPTL winding-up petition at the High Court of Tanzania, as described above, which resulted in the Order of September 5, 2013.[168]

2. The transfer of IPTL's affairs to PAP

170. The Utamwa J Order ruled that (i) VIP's winding up petition was withdrawn, (ii) the Provisional Liquidator's appointment was terminated and the Provisional Liquidator was required to hand over all the affairs of IPTL to PAP, and (iii) took judicial notice of the SPA between VIP and PAP.[169]

171. The Claimant considers this order to be "a travesty of justice."[170]

3. The registration of PAP as owner of the Mechmar shares

172. The facts surrounding the events leading up to PAP's ownership of Mechmar's shares in IPTL are opaque.

173. According to the Claimant, on September 6, 2013, PAP purported to hold a board meeting of IPTL at which it replaced the existing board of directors with its own nominees, and purported to transfer both VIP's 30% shareholding and the Mechmar shares to itself.[171] The change of directors and transfer of shares were subsequently registered by the Business Registration and Licensing Authority of the United Republic of Tanzania.[172]

174. It remains unclear as to how and when Mechmar sold its shares to PAP.

175. According to the Claimant, an investigation run by the newspaper "The Citizen" with the Tanzanian Revenue Authority shows that Mechmar sold its 70% share in IPTL to Piper Link for the small amount of US$ 3,750 in September 2013; while a few weeks later, PAP paid

[168] Cl. Tariff Sub., paras. 2, 5(3), 39(1).
[169] Exh. C-312 (Ruling of Utamwa J dated September 5, 2013), page 4.
[170] Cl. Tariff Sub., para. 41.
[171] Exh. C-338 (IPTL Board Meeting Minutes dated September 6, 2013). Cl. Tariff Sub., paras. 46-47.
[172] Cl. Tariff Sub., paras. 46-47.

(i) VIP US$ 75 million for VIP's 30% shareholding and (ii) Piper Link US$ 300,000 for the Mechmar Shares.[173]

176. The Claimant also points out that, according to the recitals of the VIP-PAP SPA, PAP is said to have bought Mechmar's shares from Piper Link in October 2011 for US$ 20 million, a date on which the certificates to Mechmar shares had been delivered to IPTL's Receiver.[174]

177. According to the Respondent, the Claimant's allegations regarding the above mentioned share transactions are premised on facts and opinions presented in local newspapers and are transactions to which it is not a party.[175] The Respondent maintains that it is not in a position to comment on these facts or allegations because it is not a legal representative of PAP.[176] The reality of the legal situation is that PAP was recognized as owner of the shares in IPTL in the Untamwa J Order.[177] In any event, the Respondent reiterates that the orders of the Malaysian and BVI courts, including the alleged assignment of Mechmar's shares in IPTL to the Claimant, are invalid and have no legal effect in Tanzania (see below).[178]

4. The Attorney General's letter dated October 3, 2013

178. On October 2, 2013, the Attorney General of Tanzania issued a letter discussing the implementation of the Utamwa J Order.[179] According to the Attorney General, a decision to release the funds from the Escrow Account (the "Escrow Funds") was "safeguarded, protected and cushioned by the decision of the High Court (Utamwa J)."[180] In addition, the Attorney General noted that a decision to transfer the Escrow Account to IPTL will not be influenced by SCB HK because IPTL is a separate legal entity and this will provide a "golden opportunity to disentangle" the Government from "unwarranted litigation."[181]

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[173] *Ibid*., paras. 46-47. Exh C-335 ("Fresh episode unveiled in IPTL purchase saga", *The Citizen*, March 14, 2014).
[174] Cl. Tariff Sub., para. 33.
[175] Resp. Tariff Sub., paras. 18, 20.
[176] *Ibid*., para. 18.
[177] Resp. Tariff Rej., para. 18.
[178] Resp. Tariff Sub., para. 19.
[179] Exh. C-343 (Letter from MoEM to BoT dated October 21, 2013), Exh. C-344 (Memo from the Tanzanian Attorney General dated October 2, 2013).
[180] Exh. C-344 (Memo from the Tanzanian Attorney General dated October 2, 2013).
[181] Exh. C-344 (Memo from the Tanzanian Attorney General dated October 2, 2013).

179. The contents of the letter, especially in respect of the Escrow Account, are disputed by the Parties.

180. According to the Claimant, the Utamwa J Order did not authorise the release of the Escrow Account, and the Attorney General exercised, to some extent, control over the decision to release the Escrow Funds.[182]

181. The Respondent, on the other hand, denies that the Attorney General's letter would have authorized the release of the funds in the Escrow Account.[183] However, the Respondent agrees that the Attorney General exercised control in some respect over the decision to release the funds in the Escrow Account by virtue of the provisions of the Escrow Agreement and as the custodian of the agreement in question,[184] acting within his mandate.[185] Furthermore, the Respondent argues that the funds in the Escrow Account were released because the conditions for release had been met and the Claimant's alleged interests in the shares were invalid in Tanzania given their lack of registration.[186]

182. Lastly, the Respondent argues that SCB HK did not possess any legitimate entitlement to the funds in the Escrow Account on the ground that the account was governed by the Escrow Agreement between the GoT and IPTL, on the one hand, and the Bank of Tanzania, on the other.[187] Numerous provisions of the Escrow Agreement barred any party other than the GoT and IPTL from having any interest in the account.[188] In the same vein, the Respondent also contends that the Claimant had admitted by email to the Tribunal dated December 6, 2013, that it had no interest in the Escrow Account.[189]

5. The settlement of the tariff dispute between TANESCO and IPTL

183. On October 3, 2013, TANESCO and IPTL entered into a settlement agreement ("2013 Settlement Agreement") covering their tariff dispute whereby two options were agreed

[182] Cl. Tariff Sub., para 53.
[183] Resp. Tariff Sub., para. 21.
[184] *Ibid*., para. 22.
[185] *Ibid*., para. 22.
[186] *Ibid*., para. 23. Resp. Tariff Rej., paras. 86-98.
[187] Resp. Tariff Sub., para. 24.
[188] *Ibid*., paras. 24-25.
[189] Exh. R-163 (Email from the Claimant's counsel to the Tribunal dated December 6, 2013).

upon.[190] Pursuant to the first option, where interest payments on capacity charges would be waived, the parties agreed that the outstanding balance was US$ 167,885,719.97. Pursuant to the second option, where interest payments would not be waived, the outstanding balance was US$ 201,449,724.50.

184. A joint recommendation by TANESCO and IPTL was that "monies in the Escrow Account were to be released to IPTL as soon as possible."[191]

185. The Parties have different views on the reasons leading to the 2013 Settlement Agreement between the respective parties as well as the substance of the agreement.

186. According to the Claimant, TANESCO agreed to pay the outstanding capacity charges (US$ 165.4 million) in full and a top up of US$ 110 million, already deposited in the Escrow Account, as calculated pursuant to the Implementation Model agreed between TANESCO and IPTL in 2002 pursuant to ICSID award 1. TANESCO and IPTL agreed that, absent a waiver of interest and a discretionary discount, the total amount outstanding including bonus payments and interest was US$ 201 million.[192] For the Claimant, as a consequence, IPTL was in a stronger financial position and the risk of the appointment of a liquidator was largely reduced.[193]

187. According to the Claimant, a letter of August 19, 2014, from TANESCO to the Controller and Auditor General ("CAG")[194] shows that TANESCO's case in this arbitration is inconsistent and groundless and that there was no dispute regarding capacity charges, and that TANESCO believed those amounts to be due and payable to IPTL.

188. In the Claimant's view, TANESCO's position during the August Hearing that it paid invoices to PAP-controlled IPTL (produced on August 3, 2015) between 2013 and 2015

[190] Exh. C-314 (Minutes of October 3, 2013 meeting between TANESCO and IPTL).
[191] Cl. Tariff Sub., para. 59.
[192] *Ibid*., para. 8(1).
[193] Cl. PHB2, para. 5.
[194] Letter produced by the Respondent on October 28, 2015 and filed by the Claimant with its PHB2 as Exh. C-417 (Letter from TANESCO dated August 19, 2014).

"under protest" is unsupported.[195] On the contrary, the invoices produced show that capacity and energy charges have been paid in full since October 2013.[196]

189. For the Claimant, the 2013 Settlement Agreement clearly related to the tariff dispute,[197] a point disputed by the Respondent.

190. The Claimant maintains that TANESCO's actions have been inconsistent: it asserted claims against IPTL before the Provisional Liquidator in April 2012.[198] Notwithstanding that claim, it agreed that it owed over US$ 200 million to IPTL in 2013.[199] The Claimant also argues that the Respondent's new quantum expert relies on the same erroneous assertions as its previous expert David Ehrhardt of Castalia LLC to allege that a payment is due from IPTL to TANESCO.[200]

191. The Claimant believes that TANESCO was right to concede that it owed IPTL US$ 201 million but wrong in the way it was disbursed.[201] The Claimant also considers that TANESCO's admission in the 2013 Settlement Agreement contradicts its position on the tariff calculation in this arbitration.

192. The Claimant considers that it never misrepresented its knowledge of events in Tanzania to the Tribunal. In particular, the Claimant submits that it was aware of the Utamwa J Order and the rumours about TANESCO having entered into an agreement to settle the outstanding tariff payments, but it was unaware of the terms of that agreement and what was payable by TANESCO to IPTL.[202]

193. The Respondent argues that the Claimant is wrong in suggesting that the 2013 Settlement Agreement concerned tariffs.[203] Instead, the Respondent submits that the meeting between TANESCO and IPTL leading up to the settlement addressed outstanding payments due to

[195] Cl. PHB2, para. 9.
[196] *Ibid*., para. 42.
[197] Cl. Tariff Rep., paras. 169-176.
[198] Exh. C-195 (TANESCO's Proof of Debt in relation to the Tanzanian Winding Up Proceedings dated April 16, 2012).
[199] Cl. Tariff Rep., para. 26.
[200] *Ibid*., para. 29.
[201] *Ibid*., para. 29.
[202] *Ibid*., paras. 71, 74.
[203] Resp. Tariff Sub., para. 31.

IPTL but not the tariff dispute,[204] leading to no inconsistency.[205] In the view of the Respondent, this is evidenced by the fact that the agenda of the minutes of meeting did not include anything on the tariff dispute,[206] a point disputed by the Claimant.

194. For the Respondent, the 2013 Settlement Agreement represented a compromise in which TANESCO was requested to stop resisting the payment of tariff invoices and the withdrawal of monies from the Escrow Account.[207] In particular, the Respondent claims that the agreement was not reached because TANESCO accepted that the disputed invoices and/or the applicable tariff were correct.[208] Instead, in return for a commitment by PAP, the Respondent maintains that reciprocal incentives were provided by IPTL, including by converting the Tegeta generators from a heavy oils to a gas firing plant and a massive reduction in the rate of energy charges within the shortest time frame.[209]

195. In specific terms, the Respondent claims that the settlement addressed the following issues:

> In relation to capacity charges, the issue that prompted the meeting was, as can be gathered from the letter from the Chairman of the Board of Directors of TANESCO to the permanent Secretary, Ministry of Energy and Minerals dated 9 October 2013, was [sic] whether, in light of the Utamwa J Order and the advice of the Attorney General, IPTL was entitled to be paid the moneys in the Escrow Account at the time of the Order, or whether it was also entitled to the amount that was not deposited after TANESCO had stopped payments in 2010. Previously, TANESCO had advised the Ministry that IPTL was entitled only to the money in the Escrow Account. Following the negotiations, TANESCO agreed that IPTL was entitled also to the amount that was not deposited. It is in this context that the letter of the Chairman concludes by saying that "TANESCO vacates from its previous position to the effect that IPTL is not entitled to any sum than what was deposited into escrow account." Thus, the issue that had been settled was, whether as a result of the Utamwa J Order and the advice of the Attorney General, IPTL was entitled to receivables in the Escrow Account at the time of the Order or whether it was also entitled, by reason of the Court Order, to the amount that was not deposited as from 2010.
>
> The other related issues that were discussed between TANESCO and IPTL were (i) whether the payments made to IPTL during the Interim Power Purchase Agreement (IPPA) should be deducted, whether capacity charges were payable for the period when IPTL was under liquidation, the need for indemnity in light of the ongoing proceedings before ICSID, interests and penalties on outstanding capacity charges and whether VAT

[204] *Ibid*., para. 32.
[205] *Ibid*., para. 38.
[206] *Ibid*., para. 32. Exh. C-314 (Minutes of October 3, 2013 meeting between TANESCO and IPTL).
[207] Resp. Tariff Rej., para. 30.
[208] *Ibid*., para. 30.
[209] *Ibid*., para. 30. Exh. R-170 (Ruling order of the High Court (Utamwa J) dated December 6, 2013.

> was chargeable on capacity charges. The issue of tariff was not discussed at all. Indeed, the word "tariff" does not appear anywhere in the Minutes.[210]

196. The Respondent also rejects assertions regarding its purported attempt to disown its proof of debt and its expert David Ehrhardt of Castalia LLC.[211] According to the Respondent, at one point TANESCO and the GoT were concerned by the endless litigation involving IPTL and were worried that some persons within or acting on behalf of TANESCO in the litigation were pursuing interests at the expense of the institution.[212] In any event, the Respondent submits that these issues are irrelevant for current purposes.[213]

197. The Respondent argues that the letter of August 19, 2014 from TANESCO to the CAG[214] shows that there was a dispute and that the October meeting did not settle the matter.[215] The fact that TANESCO is currently paying capacity invoices at the same rate as the pre-dispute level does not prove anything. TANESCO has no choice but to do so, otherwise the production would be shut off.[216]

198. Lastly, the Respondent observes that its nine-year long dispute did not only involve tariffs payable, but also other factual and legal issues, including "the actual cost of the project and whether the equity contribution could be made by way of subordinated shareholder loan rather than subscription of shares."[217] In addition, the Respondent maintains that its incentive to settle the tariff dispute was motivated by the possibility of increasing power supply to TANESCO and a reduction of the rate of tariff due to which it was willing to make compromises.[218]

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[210] Resp. Tariff Sub., paras, 33-34. Footnote omitted.
[211] Resp. Tariff Rej., para. 27.
[212] *Ibid*., para. 27.
[213] *Ibid*., para. 28.
[214] Letter produced by the Respondent on October 28, 2015 and filed by the Claimant with its PHB2 as Exh. C-417 (Letter from TANESCO dated August 19, 2014).
[215] Resp. PHB2, para. 19.
[216] *Ibid*., para. 21.
[217] Resp. Tariff Sub., para. 36.
[218] *Ibid*., para. 37.

6. The notification of the GoT regarding the settlement and request to release the Escrow Account

199. According to the Claimant, a meeting took place on October 8, 2013, between TANESCO and IPTL to discuss the outstanding payments due to IPTL.[219]

200. On October 9, 2013, the Chairman of the Board of Directors of TANESCO wrote to the Permanent Secretary of the Ministry of Energy and Minerals advising him of the settlement for US$ 201 million, and confirming that IPTL was entitled to a top up sum and to the monies deposited into the Escrow Account.[220]

7. The release of the funds from the Escrow Account

201. On October 21, 2013, the Permanent Secretary of the Ministry of Energy and Minerals on behalf of the GoT and IPTL entered into an "Agreement for Delivery of Escrow Funds."[221]

202. For the Claimant, the "GoT and IPTL formally (i) approved the settlement of the tariff dispute and (ii) instructed the Bank of Tanzania, the escrow agent, to release immediately the funds from the Escrow Account to IPTL/PAP."[222]

203. The Respondent denies the Claimant's conclusions by observing that there was no settlement which the GoT and IPTL could approve, and that the Respondent is not in a position to address actions taken by third parties, who are not involved in these present proceedings.[223] In sum, the Respondent submits that the release of the funds from the Escrow Account was done pursuant to the October 21, 2013 Agreement and neither the Claimant nor the Respondent were a party to this agreement.[224]

[219] Exh. C-314 (Minutes of October 3, 2013 meeting between TANESCO and IPTL).
[220] Exh. C-315 (Letter from TANESCO to MoEM dated October 9, 2013).
[221] Exh. C-345 (Agreement between the GoT and IPTL dated October 21, 2013).
[222] Cl. Tariff Sub., para. 62.
[223] Resp. Tariff Sub., para. 39.
[224] *Ibid*., para. 39.

8. The payment of the funds from the Escrow Account to PAP

204. According to the Claimant, the Bank of Tanzania paid out the entire content of the Escrow Account, totalling over US$ 120 million, to PAP on November 28, 2013, and December 6, 2013.[225]

205. SCB HK understands that PAP used US$ 75 million of the funds obtained from the Escrow Account to pay VIP for its 30% shareholding in IPTL pursuant to the VIP-PAP SPA. It adds that "[s]ums held in the Escrow Account that should have been available to satisfy TANESCO's payment obligations to IPTL under the PPA have therefore been paid to two Tanzanian parties, VIP and PAP, neither of whom made any financial contribution to the construction of the Facility."[226]

206. For the Respondent, the payment from the Escrow Funds had already occurred on October 21, 2013.[227]

G. TANESCO allegedly misled the Tribunal

207. The Claimant contends that the Respondent misled the Tribunal by concealing the above facts from the Tribunal and from SCB HK. According to the Claimant, the Respondent conspired with other Tanzanian parties to have the funds in the Escrow Account (which was established to hold disputed payments) released, and paid to a third party to enable that third party to purchase shares in IPTL in breach of SCB HK's security over those shares.[228]

208. The Claimant submits that TANESCO's letter dated December 13, 2013 contained a "fraudulent misrepresentation" of TANESCO's position and of the current state of affairs.

209. According to the Claimant, in this letter, TANESCO:

> (1) Took the position that the Utamwa J Order did not materially alter SCB HK's circumstances and that there was no need for urgent action by this Tribunal;

[225] Cl. Tariff Sub., para. 63. Cl. Tariff Rep., para. 30.
[226] Cl. Tariff Sub., para. 63. *See also* Cl. Tariff Rep., paras. 34-36.
[227] Resp. Tariff Sub., para. 41. Exh. C-345 (Agreement between the GoT and IPTL dated October 21, 2013). For an overview of the events following the issuance of the CAG and PAC reports, *see* Cl. Tariff Rep., paras. 37-42. For a rebuttal of the CAG and PAC reports, *see* Resp. Tariff Rej., paras. 7-15.
[228] Cl. Tariff Sub., paras. 4 and 66.

(2) Reiterated its position that "SCB HK's argument starts from the false premise that the PPA requires Tanesco to pay the tariff as calculated by IPTL, whereas Tanesco contends IPTL has miscalculated the equity portion of the tariff";

(3) Continued to argue that "TANESCO alleges the tariff charged by IPTL under the PPA is excessive. There is no reason why TANESCO would agree to pay, under the relevant provisions of the PPA, the excessive tariff charged by IPTL. That is why TANESCO issued invoice dispute notices, discontinued payments to IPTL, and paid money into the escrow account, commencing in 2007 (emphasis added)." Such statements imply that the tariff dispute was still on-going at the date of writing;

(4) Stated that "Tanesco is not a party to the Escrow Agreement between GoT, IPTL and the Bank of Tanzania; Tanesco has no control over that account." Whilst strictly speaking this was true, the reality was that Tanesco had already requested and approved the release of the funds in the Escrow Account; and

(5) Alleged that "there has been no material change in SCB HK's 'position on the ground' in Tanzania as a result of Tanzanian court rulings. SCB HK is not justified in asserting there is an 'urgent' need for this Tribunal to issue its award to avoid a further 'deterioration' of its position." It is difficult to conceive how the complete release of the Escrow Account to IPTL (PAP) would not amount to a material change in SCB HK's position on the ground in Tanzania.[229]

210. The Claimant contends that the Respondent suggested in its letter dated December 13, 2013, that it continued to pay the reduced capacity charge under the Interim PPA to the Provisional Liquidator.[230] That statement is said to be untrue as the Respondent paid less than US$ 500,000 per month rather than the capacity charges due under the PPA which were over US$ 2.5 million per month, resulting in the Tribunal relying on an incorrect assertion of facts in paragraph 86 of its Decision.[231]

211. The Respondent denies that it would have made any misrepresentation in the above context, not to mention of a fraudulent nature.[232] Specifically, the Respondent considers that it had no duty to reveal developments regarding the 2013 Settlement Agreement and the release of the Escrow Funds given their lack of any relevance to the current proceeding.[233] Furthermore, the Respondent observes that the Tribunal could not have been misled because it took note of the 2013 Settlement Agreement and of the release of the Escrow Funds in its

[229] Cl. Tariff Sub., para. 68. *See also* Cl. Tariff Rep., paras. 52-91. *See also* Cl. PHB2, paras. 53-64.
[230] Cl. Tariff Rep., para. 56.
[231] Cl. Mem., pages 73-74. Cl. Tariff Rep., para. 56. *See also* Claimant's Motion to Compel Production of Documents dated June 29, 2015, paras. 29-32.
[232] Resp. Tariff Rej., paras. 56-66.
[233] Resp. Tariff Sub., para. 43.

Decision.[234] In addition, the release of the monies from the Escrow Account were irrelevant to the matters to be decided by the Tribunal, a position that the Claimant adopted itself in its Reply.[235]

H. Other developments

1. IPTL's and PAP's legal proceedings in the High Court of Tanzania

212. As already indicated above, on April 4, 2014, IPTL and PAP initiated legal proceedings in the High Court of Tanzania against SCB HK, Martha Renju, the Administrative Receiver of IPTL, and TANESCO.[236] The Claimant contends that the relief sought in the latter proceeding includes the following: (i) a declaration stating that SCB HK would be neither a valid creditor of IPTL nor a valid assignee of the PPA; (ii) a declaration that the Tribunal's Decision was obtained by fraud and is invalid; (iii) an injunction restraining SCB HK from pursuing the PPA arbitration; and (iv) damages in excess of US$ 3,240,000,000.[237]

213. On April 23, 2014, the High Court of Tanzania issued interim orders on the basis of the *ex parte* application made by IPTL and PAP in order to maintain the *status quo*.[238] In essence, the order prevented the parties from "doing anything towards enforcing, complying with or operationalizing [the Tribunal's Decision]."[239]

214. According to the Claimant, hearings on the interim orders that were scheduled on May 21, 2014, and on June 2, 2014, respectively, were adjourned.[240]

215. On September 30, 2014, Judge Twaib ruled on the continuance of the interim orders by holding that SCB HK, the Administrative Receiver and TANESCO were precluded from executing the Tribunal's Decision pending the final determination of the applicant's suit.[241]

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[234] Resp. Tariff Sub., para. 44.
[235] Resp. Tariff Rej., paras. 60-61.
[236] Cl. Tariff Sub., para. 74. Exh. C-350 (Injunction Plaint of IPTL and PAP in Civil Case No. 60 dated April 4, 2014).
[237] Cl. Tariff Sub., para. 74. *See also* para. 85(1).
[238] *Ibid*., para. 74. Exh. C-351 (*Ex parte* Injunction Order in Civil Case No. 60 dated April 23, 2014).
[239] Cl. Tariff Sub., para. 74.
[240] *Ibid*., paras. 76-78.
[241] Exh. C-352 (Injunction Order in Civil Case No. 60 dated September 30, 2014), page 16, para. 5.

The Claimant has indicated that the injunction is still in force and not subject to any right of appeal or revision.[242]

216. For the Claimant, IPTL's and PAP's claims are without merit. First, they appear to claim that the assignment of the loan and security package from the original consortium of Malaysian banks to SCB HK was void based on Section 172 of the Tanzania Companies Ordinance, because it was concluded whilst a winding-up petition remained outstanding in respect of IPTL. This is said to be incorrect as Section 172 applies only to the disposition of a company's property, not its debts: "IPTL's debts, such as that owed to the lenders under the Facility Agreement, are not property of IPTL and cannot therefore be subject to Section 172."[243]

217. Second, IPTL and PAP claim that SCB HK has inflated the amount it is claiming under the Facility Agreement, which cannot exceed US$ 26 million since SCB HK is not entitled to charge interest on the debt or to recover other costs and charges. According to IPTL and PAP, the amount drawn down under the Facility Agreement was US$ 84 million, of which US$ 58 million has already been repaid. According to SCB HK, this is without merit and at odds with the terms of the Facility Agreement.[244]

218. The Claimant contends that "[w]hilst Tanesco was a respondent to that application, it supported the application for the injunction and submitted that IPTL and PAP should be given more time to prove the allegations of fraud despite the fact that these arbitration proceedings are on-going. TANESCO's actions show its contempt for this arbitration, and this Tribunal."[245]

219. The Respondent, for its part, considers that it has no reason to comment on the issuance of the interim orders because it is not an applicant in these proceedings.[246]

[242] Cl. Tariff Sub., para. 82.
[243] *Ibid*., para. 81.
[244] *Ibid*., para. 81.
[245] *Ibid*., para. 12.
[246] Resp. Tariff Sub., para. 47.

2. Investigations relating to the Escrow Account in Tanzania

220. According to the Claimant, the dissipation of the funds from the Escrow Account has caused a scandal and attracted significant attention in Tanzania as a result of which various investigations have been initiated.[247] The Public Accounts Committee ("PAC") requested a thorough investigation and audit of the accounts by the CAG.[248] A parallel criminal investigation has been ordered to be conducted by the Prevention and Combatting of Corruption Bureau.[249]

221. A report was submitted by the Tanzanian Auditor General to the Speaker's Office of the Tanzanian Parliament on November 14, 2014 ("CAG Report")[250] and a report was issued by the Public Accounts Committee on November 17, 2014 ("PAC Report").[251]

222. According to the Claimant, these reports reveal corruption and inappropriate conduct at all levels in the GoT with respect to IPTL and the Project.[252] It submits that the reports show that PAP's claims to ownership of the Mechmar shares were false.

223. The Parliament passed Resolutions following the PAC Report on November 29, 2014. The Claimant submits that PAP and IPTL tried to prevent the Parliamentary Resolutions from being implemented. On December 16, 2014, the Attorney General resigned; on December 22, 2014, the President "sacked the Land and Housing Minister, who had received US$ 1 million from VIP"; on December 24, 2014, the President suspended the Permanent Secretary of the Ministry of Energy and Minerals; on January 24, 2015, the Minister of Energy and Minerals resigned.[253]

224. The Respondent rejects the relevance of the above events to the present proceeding[254] and characterised it as "baseless propaganda."[255] It denies any relation between the facts alleged

[247] Cl. Tariff Sub., paras. 83-84.
[248] *Ibid*., para. 83.
[249] *Ibid*., para. 83.
[250] Exh. C-363 (CAG Report dated November 14, 2014).
[251] Exh C-367 (PAC Report dated November 17, 2014). Cl. Tariff Rep., paras. 6, 34.
[252] Cl. Tariff Rep., para. 7.
[253] *Ibid*., para. 38.
[254] For an overview of the Respondent's position on this issue, *see* Resp. Tariff Rej., paras. 33-51.
[255] Resp. Tariff Rej., para. 15.

here and the resignations or sackings mentioned by the Claimant.[256] For the Respondent, the Parliament expressly rejected several of the PAC's findings and did not adopt the proposed resolutions but formed a Recommendations Committee, which proposed a different set of resolutions which called for more investigation. Accordingly, the PAC's "revelations" have no evidentiary value, nor legal standing,[257] and have to been read with caution as they reflect the "abyss of Tanzanian politics."[258] In particular, the Respondent argues that the matters cited in the above investigations and reports do not constitute proof of a corruption case.[259] According to Respondent, even if proven, the allegations would not support the conclusion that the Claimant's rights were not respected in Tanzania.[260]

IV. The Parties' Positions on Tariff Recalculation

A. The failure of the negotiations on the tariff recalculation

225. According to the Claimant, TANESCO has failed to engage or even respond substantively to SCB HK's attempts to initiate a process to negotiate recalculation of the tariff as directed by the Tribunal in its Decision.[261]

226. The Respondent denies criticisms about not having engaged in the recalculation exercise. Specifically, the Respondent contends that it informed the Tribunal and the Claimant about its procurement process for obtaining new legal representation and about a restraining order issued by a local judge at the behest of IPTL and PAP, which prevented TANESCO from engaging in the tariff recalculation exercise within the prescribed time period.[262] In particular, the Respondent points out that its request for extension of time was neither answered by the Claimant nor addressed by the Tribunal.[263]

[256] *Ibid*., para. 45.
[257] *Ibid*., para. 10.
[258] *Ibid*., para. 12.
[259] *Ibid*., para. 33.
[260] *Ibid*., para. 33.
[261] Cl. Tariff Sub., para. 72.
[262] Resp. Tariff Sub., para. 46. Exh. R-159 (TANESCO's letter to the Tribunal dated May 7, 2014).
[263] Resp. Tariff Sub., para. 46.

B. The Claimant's request for reconsideration of the Tribunal's Decision on Jurisdiction and other relief[264]

1. The Claimant's position

a) The situation as it stands today

227. The Tribunal's concern in its Decision was that an administrator or liquidator could be appointed, and could have claimed from TANESCO the outstanding sums under the PPA for the benefits of IPTL's unsecured creditors. An order from this Tribunal requiring TANESCO to pay SCB HK would have potentially interfered with the administrator or liquidator's rights.[265]

228. As noted above, the Respondent's former counsel, Hunton & Williams, explained in its letter dated December 13, 2013, that TANESCO did not have control over the funds held in the Escrow Account.[266] TANESCO failed to inform the Tribunal that in October 2013 it had already participated in a financial arrangement whereby the Escrow Funds were to be released to PAP, and whereby VIP was to be paid US$ 75 million.[267] VIP, the minority shareholder, should have received payment only if IPTL had been solvent and if other creditors had been paid.[268]

229. The Claimant points out the legal and practical difficulties with the current situation.

230. In so far as there is no liquidator or administrator, the non-registration of the assignment in Tanzania is irrelevant.[269] Until a liquidator or administrator is appointed, the assignment is fully valid and effective, and any rights under the PPA belong to SCB HK and not to IPTL.[270] The Claimant describes this as a "black hole" as TANESCO can ignore its payment obligations under the PPA and SCB HK would be unable to enforce them.[271] That "black hole" could only be resolved if a liquidator or administrator were to be appointed

[264] The Tribunal has not set out below the arguments of the Parties which were a re-pleading of issues dealt with in its Decision and which played no part in the Tribunal's Award.
[265] Cl. Tariff Sub., para. 112(5).
[266] Exh. C-313 (The December 13, 2013 Letter from Hunton & Williams to the Tribunal).
[267] Cl. Tariff Sub., para. 113.
[268] *Ibid*., para. 113.
[269] *Ibid*., para. 112(4)(a).
[270] *Ibid*., para. 114.
[271] Cl. Tariff Rep., para. 291. Cl. Tariff Sub., para. 116.

over IPTL, which is "in the gift of the Tanzania Courts."[272] Even if a liquidator or administrator were to be appointed there is no assurance that s/he would enforce TANESCO's obligations under the PPA.[273]

b) The Claimant's requests for a declaration of non-discharge of TANESCO and for reconsideration

231. For these reasons, the Claimant requests the Tribunal to:

> (1) Make a declaration that neither the purported settlement of the invoice dispute concluded between Tanesco and IPTL / PAP nor the subsequent payment out of the Escrow Account discharge Tanesco's indebtedness under the PPA.[274]
>
> (2) Reconsider its conclusions on jurisdiction and confirm that the Tribunal has jurisdiction to make an order for payment in favour of SCB HK, on the basis that the Decision was influenced by Tanesco's fraudulent misrepresentation to the Tribunal and/or does not have *res judicata* effect in any event.[275]

232. The Claimant submits that neither the 2013 Settlement Agreement nor the subsequent payment to PAP had any effect on TANESCO's liability under the PPA. They knowingly permitted payment to a party other than the statutory assignee.[276] SCB HK alone had the authority to give TANESCO a good discharge of its debt.[277] SCB HK requests a declaration that TANESCO has not been discharged of its indebtedness under the PPA.[278] This declaration is within the Tribunal's jurisdiction and is independent of whether the Tribunal reconsiders its Decision or not.[279]

233. The Claimant further requests the Tribunal to reconsider its Decision not to order payment under the PPA to SCB HK because that decision was (i) affected by TANESCO's misrepresentation about the likelihood of having a liquidator or administrator appointed in the future[280] and (ii) an error of law.[281]

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[272] Cl. Tariff Sub., para. 119.
[273] *Ibid*., para. 120.
[274] *Ibid*., para. 121(1)-(2).
[275] *Ibid*., para. 121(1)-(2).
[276] Cl. Tariff Rep., paras. 152-156.
[277] Cl. Tariff Sub., para. 123.
[278] Cl. Tariff Rep., paras. 148-150.
[279] *Ibid*., para. 142.
[280] Cl. Tariff Sub., paras. 126-127.
[281] *Ibid*., paras. 128.

234. As already explained, the Claimant considers that counsel for the Respondent misled the Tribunal in its Letter of December 13, 2013. By releasing the Escrow Funds to IPTL, TANESCO dramatically reduced the prospect of a liquidator or administrator being appointed.[282]

235. Furthermore, the Claimant alleges that the Tribunal erroneously concluded that it lacked the power to order payment to SCB HK whereas, under Tanzanian law, it would have the power since no liquidator or administrator had been appointed to IPTL.[283]

236. According to the Claimant's expert, Lord Hoffmann, the Tribunal has the power, under Tanzanian law, to order payment to SCB HK in circumstances where no liquidator or administrator has been appointed by IPTL.[284] The Claimant argues that the possibility of a liquidator or administrator being appointed in the future does not deprive the Tribunal of the power to order TANESCO to pay outstanding sums under the PPA to SCB HK.[285]

237. According to Lord Hoffmann, the award would not have interfered with the question of priority among creditors.[286]

238. In so far as the Tribunal was misled or made its Decision on the basis of an error of law, the Claimant submits that the Tribunal is entitled to reconsider its Decision.[287]

239. In support of its request for reconsideration, the Claimant submits that an ICSID tribunal has the power to reconsider a decision as opposed to an award.[288] This interpretation is endorsed by the dissenting opinion of Professor Georges Abi-Saab in *ConocoPhillips v. Venezuela*.[289]

240. The Claimant submits that:

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[282] Cl. Tariff Rep., para. 286.
[283] *Ibid*., para. 290.
[284] *Ibid*., para. 290.
[285] *Ibid*., para. 291.
[286] Opinion of Lord Hoffmann, para. 12.
[287] Cl. Tariff Sub., para. 129.
[288] *Ibid*., para. 130.
[289] Exh. CLA-92 (*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* ("*ConocoPhillips v. Venezuela*") (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014, Dissenting Opinion of Prof. Georges Abi-Saab). For the majority's decision, *see* Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014).

241. First, a decision does not become final unless and until it is incorporated into an award, which settles every issue that has been submitted to the Tribunal in accordance with Article 48(3) of the ICSID Convention.[290] Until that point, a decision would not fall within the scope of Article 53 of the ICSID Convention, which stipulates that an award is binding upon the Parties.[291] The ICSID Convention and the ICSID Arbitration Rules contain no provision that precludes a Tribunal from revisiting its own decisions.[292]

242. Second, a decision as opposed to an award does not fall within the purview of post-award remedies under Articles 50-52 of the ICSID Convention.[293] This distinction supports the understanding that a decision is not considered final and remains open to reconsideration by the Tribunal.[294]

243. Third, having no possibility of reviewing a decision would cause practical difficulties as any defects would only be remedied once the decision is incorporated into the award resulting in wasted costs and procedural inefficiencies upon the process.[295]

244. Fourth, the reconsideration of a decision in exceptional circumstances guarantees the possibility of remedying any inefficiency or uncertainty that may arise.[296] A decision procured by fraud enters into such a category.[297] The Claimant submits that the decision that the Tribunal lacked the power to order payment in this case was indeed procured by fraud. IPTL was in a strong financial situation contrary to TANESCO's assertions, and would have been able to pay its creditors reducing the prospect of a liquidator or administrator being appointed.[298]

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[290] Cl. Tariff Sub., para. 131(1). Exh. CLA-92 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014, Dissenting Opinion of Prof. Georges Abi-Saab), paras. 33-50.
[291] Cl. Tariff Sub., para. 131(1). Exh. CLA-92 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014, Dissenting Opinion of Prof. Georges Abi-Saab), para. 40.
[292] Cl. Tariff Rep., para. 278.
[293] *Ibid*., para. 131(2).
[294] *Ibid*., para. 131(2). Exh. CLA-92 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014, Dissenting Opinion of Prof. Georges Abi-Saab), para. 41.
[295] Cl. Tariff Sub., para. 131(3)-(7).
[296] *Ibid*., para. 131(8).
[297] Cl. PHB2, paras. 68-69.
[298] *Ibid*., paras. 72-76.

245. In light of the above, the Claimant submits that the present case warrants the reconsideration of the Decision, given TANESCO's fraudulent misrepresentations and the error of law.

246. In the alternative to its reconsideration case, the Claimant argues that by analogy with Article 51 of the ICSID Convention, the Tribunal can revise its Decision on the basis of a new fact of such a nature that would have decisively affected its Decision – such fact being in this case "the materially reduced likelihood of a liquidator being appointed."[299]

c) The Claimant seeks an order for the full amount due under the PPA

247. In the event that the Tribunal accepts to reconsider its previous Decision and order payment to SCB HK, the Claimant has now changed its approach from seeking payment of only the amount it calculates as necessary to discharge its loan to IPTL to seeking the full amount due from TANESCO to IPTL, even though in excess of the amount due to IPTL to SCB HK under the Facility Agreement.[300]

248. The Claimant submits that:

> To avoid any future confusion, SCB HK requests that the Tribunal confirms that this is not intended as a determination that SCB HK's enforcement costs are not recoverable from IPTL under the Facility Agreement (a question over which the Tribunal had already confirmed it had no jurisdiction) but only a finding that SCB HK could not seek to recover these sums as a separate claim from Tanesco under the PPA, distinct from its claim for the tariff due under the PPA.
>
> SCB HK now requests that the Tribunal order Tanesco to pay SCB HK the full amount outstanding under the PPA. SCB HK will then account to IPTL for any balance in excess of the amount outstanding under the senior debt to IPTL. Pursuant to the dispute resolution clauses in the Facility Agreement and related security documents, SCB HK has commenced proceedings in the English High Court against IPTL for relief including a declaration as to the amount outstanding under the Facility Agreement.[301]

249. In its second Post-Hearing Brief, the Claimant requests that the tariff dispute be settled according to the October 2013 Settlement Agreement. Although SCB HK does not agree to

[299] *Ibid*., paras. 65, 70-71.
[300] Cl. Tariff Sub., para. 137.
[301] *Ibid*., para. 142.

the adjustments conceded by IPTL in that agreement, it is prepared to adopt that agreement nonetheless.[302]

250. SCB HK therefore requests "that the Tribunal determine that the outstanding sum under the PPA is US$ 201.4 million from the October 2013 Agreement plus interest at the contractual rate in the PPA from October 2013 until the date of payment. As at September 2015, the sum outstanding on this basis was US$ 214.6 million."[303]

2. The Respondent's position

a) TANESCO did not commit any fraud on the Tribunal

251. As already indicated above, the Respondent denies any misleading of the Tribunal and maintains that there was no fraudulent non-disclosure because there had been no new developments or a change in the *status quo*. In addition, the Claimant's situation had not deteriorated.[304] Both the 2013 Settlement Agreement and the release of the Escrow Funds were known to the Claimant and to the Tribunal at the time of the Decision.

b) On the question of reconsideration or revision

252. The Respondent objects to the Tribunal's Decision being reopened because it is final regarding the issues decided therein and thus *res judicata*.[305] Even if it were possible, the Respondent argues that the reasons asserted by the Claimant would not trigger a reconsideration of the Decision.[306] Lastly, should the Tribunal decide to reconsider its Decision, the Respondent requests the Tribunal to reopen the Decision to have the ability to challenge conclusions that are adverse to the Respondent's position.[307]

253. Notwithstanding that the Decision is called a preliminary decision on jurisdiction, the Respondent contends that it is by nature final because it terminates the interim proceedings

[302] Cl. PHB2, paras. 83-84.
[303] *Ibid*., para. 86.
[304] Resp. PHB2, paras. 7-8.
[305] Resp. Tariff Sub., para. 81.
[306] *Ibid*., para. 81.
[307] *Ibid*., para. 82.

on jurisdiction.[308] The final character of a preliminary decision is confirmed by Article 48(3) of the ICSID Convention requiring its incorporation into the final award.[309]

254. The final character of the Decision was recognized when the Tribunal declined its jurisdiction over part of the dispute. If a Tribunal decides that it lacks jurisdiction, then the Decision will be final and under ICSID Arbitration Rule 41(6) it must be issued as an award.

255. The Respondent argues that to the extent that the Decision denies jurisdiction over the Claimant's request for an order to pay, then it would represent an award that is *res judicata*.[310] In terms of substance, the Decision is an award within the meaning of Article 48 of the ICSID Convention and only subject to the remedies under Articles 49-52 of the ICSID Convention.[311] The Decision follows also the form and content foreseen by an award under Article 48 of the ICSID Convention and ICSID Arbitration Rule 47.[312]

256. Since the Tribunal's Decision is *res judicata*, the Respondent argues that the Tribunal is prevented from reconsidering its jurisdiction in the course of the arbitral proceedings.[313] The Respondent relies on the *ConocoPhillips v. Venezuela* and *Perenco v. Ecuador* decisions to support its position on the following nine grounds.[314]

257. First, regardless of their labelling as "interim" or "preliminary", decisions are final with respect to the matter decided therein and thus are not intended to be reconsidered.[315]

258. Second, the structure and provisions of the ICSID Convention were created with the intent that a review of a decision would only take place after an award is rendered.[316] Section 5 of Part IV of the ICSID Convention provides the only means to seek redress about a

[308] *Ibid*., para. 93.
[309] *Ibid*., para. 94.
[310] *Ibid*., para. 96.
[311] *Ibid*., para. 96.
[312] *Ibid*., para. 98.
[313] *Ibid*., para. 99.
[314] Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014). Exh. RLA-84 (*Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Ecuador's Reconsideration Motion dated April 10, 2015).
[315] Resp. Tariff Sub., para. 101. Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014), para. 20.
[316] Resp. Tariff Sub., para. 102.

decision.[317] The power of reconsideration of a decision is excluded by Section 5 and the structure of the ICSID Convention.[318]

259. Three, the majority decision in *ConocoPhillips v. Venezuela* should be followed because it is consistent with the ICSID Convention and Arbitration Rules.[319]

260. Four, there is no reason why the dissenting opinion of Professor Abi-Saab should be followed because his views have never been adopted by an ICSID tribunal and accepting his approach would interfere with established ICSID principles and practice.[320]

261. Five, the Respondent argues that ICSID tribunals do not possess a "general" power to reconsider their decisions.[321]

262. Six, granting the right of reconsideration would create an imbalance in the ICSID procedure. According to the Respondent:

> […] Granting a right of "reconsideration" with respect to matters that have been decided by way of a Decision rather than in the Award would create an imbalance in the system in that such matters on which the proceedings have been bifurcated (e.g. jurisdiction, liability) would be subject to the possibility of a repeated review by the Tribunal – thereby defeating the very purpose of bifurcation – whereas in the absence of a bifurcation the Tribunal could only decide once thereon, namely in the Award. Furthermore, depending on whether a particular matter was decided in a Decision or in an Award, the disgruntled party would either benefit from a broader and potentially endless possibility of review or be restricted to the limited remedies provided for in Articles 49 to 52 of the ICSID Convention. […][322]

263. Seven, it would be procedurally inefficient to permit issues to be continuously re-litigated and reviewed until the party dissatisfied with the outcome finally obtains a satisfactory remedy.[323] Even if a tribunal were to assume jurisdiction on an erroneous basis and accumulate wasted costs with the merits phase of the arbitration, it would be irrelevant if as here the Tribunal had assumed jurisdiction over some of the Claimant's claims.[324]

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[317] *Ibid*., para. 102.
[318] *Ibid*., para. 102.
[319] *Ibid*., para. 103.
[320] *Ibid*., para. 103.
[321] *Ibid*., para. 107.
[322] *Ibid*., para. 109.
[323] *Ibid*., para. 110.
[324] *Ibid*., para. 110.

264. Eight, there is no "specific" power of reconsideration that would be available to an ICSID tribunal in case it becomes aware of an error of law or fact, or in case new evidence changed circumstances.[325] No precedent exists for such a power of reconsideration.[326]

265. Ninth and lastly, the Respondent argues that the Tribunal's Decision is not based on an error of law.[327] Also, the Respondent reiterates that it has not made any misrepresentations or fraudulently misled the Tribunal about the appointment of a liquidator or administrator to IPTL.[328]

266. Based on the above, the Respondent submits that the Tribunal's Decision is final because it is *res judicata* and thus not subject to reconsideration by the Tribunal.

267. Regarding the issue of whether by analogy with Article 51 of the ICSID Convention, a new fact would justify reconsideration (a point raised by Professor Stern at the August Hearing), the Respondent denies that such Article could apply to preliminary decisions, and submits that the requirements of such an Article are not met. The new fact, which must be established by the Claimant, is simply missing. The Tribunal made no determinations about the likelihood of a liquidator or administrator being appointed in its Decision. The 2013 Settlement Agreement and the release of the Escrow Account have no bearing on this issue. Both facts were known to the Claimant and the Tribunal. The Claimant mentioned them in a letter to the Tribunal of November 27, 2013. The Tribunal referred to this letter in its Decision at paragraph 85. If anything, the Claimant's ignorance was due to its own negligence and its failure to make any request for disclosure.[329]

268. The Respondent also rejects the idea that a tribunal could informally revise a decision, as it is *res judicata*.[330]

269. In its Rejoinder, the Respondent introduced a request for a preliminary ruling on the issue of reconsideration.[331] As decided in Procedural Order No. 13, this issue was reserved for the August Hearing.[332]

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[325] Resp. Tariff Sub., paras. 112-113.
[326] *Ibid*., para. 113.
[327] *Ibid*., para. 115.
[328] *Ibid*., paras. 42-45, 116-117.
[329] Resp. PHB2, paras. 31-59.
[330] *Ibid*., page 19.

c) On the Claimant's requests for further declaratory relief

270. The Respondent asks for the dismissal of all the Claimant's requests for further declaratory relief.

271. The Respondent objects to the Claimant's request for further declaratory relief regarding the non-discharge of TANESCO's indebtedness under the PPA on the same grounds as the reconsideration.[333] Payments into the Escrow Account in November 2006 and December 2012 validly discharged TANESCO's obligation under the PPA.[334] The Claimant itself stated in an email of December 6, 2013, that the monies in the Escrow Account were irrelevant to the issues to be discussed by the Tribunal.[335]

272. It further objects to the request for the full amount under the PPA, an inadmissible request which the Tribunal has already rejected in its Decision.[336]

C. The Parties' positions on the recalculation of the tariff/amount to be paid

1. The Claimant's position

273. Although not agreeing with every element of the calculation used,[337] the Claimant argues that the tariff recalculation is unnecessary because it is willing to adopt the amounts recorded in the 2013 Settlement Agreement in the interest of an expedited resolution of the dispute.[338]

274. Thus, the Claimant considers that under this approach, the outstanding sum from TANESCO is US$ 201.4 million plus interest at the contractual rate of LIBOR + 4% since October 2013, i.e. a total of US$ 214.6 million as of September 2015.[339] The Claimant's position is conditional upon the Tribunal's confirmation that payments made by TANESCO to IPTL under the 2013 Settlement Agreement would not discharge the outstanding sums

[331] Resp. Tariff Rej., paras. 133-134.
[332] For the Tribunal's discussion on the reconsideration issue, *see* paras. 307-360 below.
[333] Resp. Tariff Sub., paras. 122-123. *See* Resp. Tariff Rej., para. 136.
[334] Resp. Tariff Rej., paras. 138-141, 153.
[335] *Ibid*., para. 143.
[336] Resp. Tariff Sub., para. 124. Resp. Tariff Rej., paras. 145-148.
[337] In particular, the Claimant disagrees with IPTL's waiver of 70% of the bonus payment due.
[338] Cl. Tariff Sub., para. 92.
[339] *Ibid*., paras. 91-92. Second Expert Report of Colin Johnson dated November 10, 2014, para. 3.13, 9.2. Third Expert Report of Colin Johnson dated March 26, 2015, para. 2.24. Updated in Cl. PHB2, para. 86.

from TANESCO under the PPA.[340] SCB HK requests that the Tribunal declare that the sum due from TANESCO is in US$, and not in TSH, with interest from October 2013 to the date of payment.

275. Alternatively, the Claimant requests that the Tribunal determine the full amount actually owed under the PPA.[341] In that case, the Claimant argues that the settlement sum agreed by TANESCO, the GoT and IPTL should be the lowest figure to be considered by the Tribunal.[342]

276. The Claimant's expert submits six possible scenarios, which are set out in the table below:[343]

Options for resolution of outstanding tariff							
IRR and assumed form of equity investment	**17.19% (shareholder loan)**	**21.25% (shareholder loan)**	**22.31% (shareholder loan)**	**October 2013 Agreement with interest to February 2015**	**26.08% (shareholder loan)**	**22.31% (share capital)**	**30.71% (shareholder loan)**
Implications	Would permit the project to remain cash positive and pay sums due under the loan. Would not comply with the banking covenants in the Facility Agreement, either as modelled in the Implementation Model or at all.	Would permit project to comply with Senior Debt Cover Ratio, but not other covenants such as Debt Service Reserve Account or Maintenance Reserve Fund	Retains the IRR agreed between IPTL and Tanesco as per Mr Rugamalira's letter of 31 May 1995, as adopted by the ICSID 1 Tribunal as the assumptions on which the tariff was based, but recalculates the tariff to achieve that IRR on the assumption the equity is invested by way of a shareholder loan rather than paid in share capital, resulting in a reduction in tariff Would permit project to comply with Senior Debt Cover Ratio, but not other covenants such as Debt Service Reserve Account or Maintenance Reserve Fund	Agreed by all of PAP-controlled IPTL, Tanesco, GoT, and (now) SCB HK. Includes a number of concessions, including a 70% discount on outstanding bonus payments. SCB HK is prepared to accept these concessions as part of this option in interests of global agreement, without prejudice to its right to argue for the full amounts due under any other scenario.	Equivalent banking covenant compliance to that modelled by IPTL and Tanesco in the Implementation Model in 2003.	No change to the tariff.	Full compliance with Facility Agreement requirements for Senior Debt Cover Ratio, Debt Service Reserve Account and Maintenance Reserve Fund.
Outstanding tariff (February 2015) TSH (billions)	220.6	295.5	316.3	N/A	392.8	393.6	491.7
Outstanding tariff (February 2015) US$ (millions)	123.2	165.0	176.7	210.6	219.4	219.9	274.6

Updated Figures up to September 2015:[344]

[340] Cl. Tariff Sub., paras. 94, 122-124.
[341] *Ibid*., para. 94.
[342] *Ibid*., para. 95.
[343] *Ibid*., para. 230 and page 77.
[344] Fourth Supplemental Report of Colin Johnson dated October 30, 2015, page 6.

IRR and basis	17.19% (shareholder loan basis)	21.25% (shareholder loan basis)	22.31% (shareholder loan basis)	October 2013 Agreement plus interest	22.31% (share capital basis)	26.08% (share-holder loan	30.71% (share-holder loan basis)
Total until Feb 2015 (TSH bn)	220.6	295.5	316.3	N/A	393.6	392.8	491.7
Total until Sept 2015 (TSH bn)	224.2	299.5	320.5	N/A	401.8	397.6	497.9
Total until Feb 2015 (US$ m)	123.2	165.0	176.7	210.6	219.9	219.4	274.6
Total until Sept 2015 (US$ m)	103.8	138.7	148.4	214.6[18]	186.1	184.1	230.5

277. If the Parties were to keep a *status quo* model, i.e. no change to the tariff (the 7th column in the table above), calculated on paid up share capital and not on a shareholder loan, an Internal Rate of Return ("IRR") of 22.31% would be achieved. The outstanding tariff under a shareholder equity model would be US$ 186.1 million as of September 2015.[345]

278. The minimum IRR calculated on a shareholder loan should be in any event no lower than 17.19% in order to be sufficient to enable the project to fulfil its payment obligations and to remain solvent.[346] This would result in an outstanding tariff of US$ 103.8 million as of September 2015.[347] The Claimant disputes the IRR of 13.08% used by the Respondent.[348]

279. According to the Claimant's expert, a shareholder loan with an IRR below 17.19% leaves the company with insufficient cash to meet all of its cash requirements without additional shareholder funds and hence an IRR of at least 21.25% is required for it to meet the Debt Service Cover Ratio ("DSCR") requirement and 26.08% and 30.71% IRR for a shareholder loan are required respectively to achieve full compliance with the Debt Service Reserve Account ("DSRA") and the Maintenance Reserve Account ("MRA") obligations as well as the DSCR obligation.[349]

280. On the assumption that the shareholders' equity is invested by way of shareholder loans rather than paid up share capital, the IRR should not be lower than 22.31%.[350] Otherwise it

[345] Cl. Tariff Sub., para. 105. Updated in Cl. PHB2.
[346] Cl. Tariff Sub., paras. 102-103.
[347] Third Expert Report of Colin Johnson dated March 26, 2015, para. 2.25. Updated in Cl. PHB2.
[348] Cl. PHB2, paras. 105-145.
[349] Second Expert Report of Colin Johnson dated November 10, 2014, para. 5.38.
[350] Cl. Tariff Sub., paras. 105 and *seq*.

would generate a reduction greater than the one agreed between the GoT, TANESCO and IPTL (US$ 81.6 million).[351] The Claimant maintains that 22.31% remains a reasonable return based upon the risk of investing in a power plant in Tanzania. It was also what was agreed by the Parties in 1995, making the one modification that the Tribunal requested to reflect a shareholder loan rather than equity.[352] This results in significant savings to TANESCO, and even results in a lower tariff than TANESCO agreed with PAP-controlled IPTL in October 2013. Under a shareholder loan option, the outstanding tariff would be US$ 148.4 million as of September 2015.[353] This is the alternative position of SCB HK.[354]

281. However, the most appropriate IRR according to the Claimant's expert is actually 26.08%.[355] The Claimant argues that an appropriate tariff level could be achieved by providing an equivalent level of compliance with loan covenants as the one structured by IPTL and TANESCO in their Implementation Model from 2003.[356] This would presuppose an IRR on a shareholder loan basis of 26.08%, which would provide an outstanding tariff of US$ 184.1 million as of September 2015.[357]

282. However, in order to satisfy both the DSRA and MRA requirements as per the Facility Agreement, the Calculations and Forecasting Agreement and the Shareholder Support Deed, the Claimant's expert is of the opinion that a minimum IRR for a shareholder loan of 30.71% would be required.[358]

283. Regarding the appropriate interest rate, the Claimant applies US$ LIBOR 3 months plus 4% for disputed payments, and not LIBOR plus 2%.[359]

2. The Respondent's position

284. In so far as the Claimant is not the legal owner of the PPA and the alleged assignment of the PPA was invalid under Tanzanian law,[360] the Respondent does not have any legal

[351] Cl. Tariff Sub., para. 105.
[352] Cl. Tariff Rej., paras. 197 and 203.
[353] Cl. Tariff Sub., para. 111. Updated in Cl. PHB2.
[354] Cl. PHB2, paras. 96 and *seq*.
[355] Second Expert Report of Colin Johnson dated November 10, 2014, para. 9.4.
[356] Cl. Tariff Sub., paras. 104, 110.
[357] *Ibid*., para. 104. Third Expert Report of Colin Johnson dated March 26, 2015, para. 2.22. Updated in Cl. PHB2.
[358] Second Expert Report of Colin Johnson dated November 10, 2014, para. 5.37.
[359] Cl. Tariff Rep., paras. 223 and *seq*.

obligations towards the Claimant under the PPA and it does not owe any money to the Claimant.[361]

285. The Respondent rejects the Claimant's proposal to adopt the tariffs agreed in the 2013 Settlement Agreement because (i) the Claimant is not a party to the agreement,[362] (ii) the agreement was reached as part of a negotiated settlement, which does not accurately reflect all the circumstances dealt with in this arbitration,[363] and (iii) the agreement was entered into prior to the issuance of the Decision, and thus it cannot change the legal situation resulting from the Decision.[364]

286. Should the Tribunal follow that approach, the Respondent considers that the amount to be taken into consideration is "in fact USD 45.5 million (taking into account the monies paid into the Escrow Account)" or "USD 155.9 million (disregarding the monies paid into the Escrow Account)."[365]

287. On the alternative options provided by the Claimant for the tariff recalculation, the Respondent considers that the Claimant has ignored the Tribunal's instructions.[366]

288. The Respondent rejects all the Claimant's financial approaches and submits that a 13.69% IRR on the shareholder loan is adequate,[367] "resulting in an amount of USD 43.1 million owing by IPTL to TANESCO (taking into account the sums paid into the Escrow Account) or USD 83.3 million owing by TANESCO to IPTL (disregarding the sums paid into the Escrow Account)."[368] According to the Respondent's quantum expert, a shareholder loan to IPTL does not contain the same level of risk as an equity investment.[369] This justifies a reduction in the level of return compared to an equity investment and, therefore, a rate of return of 13.69% would be reasonable and fully reflects the risks associated with a

[360] Resp. Tariff Sub., para. 127(1)-(3).
[361] *Ibid*., para. 128.
[362] *Ibid*., para. 137(1).
[363] *Ibid*., para. 137(2).
[364] *Ibid*., para. 137(3). Resp. PHB2, paras. 67-76.
[365] Resp. PHB2, paras. 79-89.
[366] Resp. Tariff Sub., para. 133.
[367] Second Expert Report of James Nicholson dated May 21, 2015, para. 1.19.
[368] Resp. PHB2, para. 65.
[369] Second Expert Report of James Nicholson dated May 21, 2015, para. 1.19.

shareholder loan investment in IPTL.[370] It corresponds to the rate that investors in Wartsila's situation would have likely been required to invest in the project given that Mechmar's IRR was 15.62%.[371] This proposed IRR is consistent with the Tribunal's consideration that it should be neither 22.31% nor 0%, while being higher than the rate on the senior debt.[372]

289. The Respondent objects to the Claimant's proposed minimum IRR of 17.19% because (i) the Tribunal's instructions did not contain any indications regarding a minimum cash flow,[373] and (ii) even if the revised tariffs were insufficient to cover IPTL's debts, IPTL would have requested a revision of the debt schedule that would be consistent with its cash flow.[374] IPTL would not have requested new capital or an additional shareholder loan in such circumstances.[375]

290. The Respondent argues that an IRR of 22.31% on a shareholder loan basis suggested by the Claimant is inadmissible because it is inconsistent with the Tribunal's instructions.[376] Instead, the level of return must be assessed in light of other factors, such as risk.[377]

291. Based on an IRR of 13.69%, the Respondent made a calculation of the various reductions that should apply to the capacity payments.

292. The tax benefits flowing from the interest on the shareholder loan should accrue to the Respondent and not to IPTL, according to the Tribunal's instructions.[378] It should lead to a reduction in the capacity payments of US$ 35.3 million that would have been charged between the start of the Plant's operation and September 2013.[379]

293. The change in legislation regarding the tax shield must be taken into account, reducing the amount to IPTL by US$ 1.6 million.[380] The capping of the tax shield to 70% of the taxable

[370] *Ibid*., para. 1.7. Resp. Tariff Rej., para. 149.
[371] Resp. Tariff Rej., paras. 228-230, and *seq*. *Ibid*., para. 259.
[372] *Ibid*., para. 179.
[373] Resp. Tariff Sub., para. 147(i).
[374] *Ibid*., para. 147(ii). First Expert Report of James Nicholson dated February 13, 2015, paras. 3.15-3.22.
[375] Resp. Tariff Sub., para. 147(ii).
[376] Resp. Tariff Rej., paras. 181-188.
[377] *Ibid*., para. 188.
[378] *Ibid*., para. 174.
[379] Resp. Tariff Sub., paras. 144-145.
[380] Resp. Tariff Rej., para. 256.

profits before EBIT in place since 2004 was amended in 2010 and is no longer enforceable after 2010.[381]

294. The rate of US$ LIBOR one month plus 2% ought to apply to any unpaid and overpaid amounts owing between IPTL and Respondent, which is consistent with the contractual interest rate of the PPA.[382]

295. Bonus payments that would have been payable in the event the Plant had not been in a non-dispatch mode are recoverable and are estimated at US$ 0.5 million.[383]

296. The payments made by TANESCO to the Provisional Liquidator for operating and maintaining the Plant are deductible from any tariff payments in the amount of US$ 22.9 million.[384]

297. TANESCO's payments of US$ 114.1 million to the Escrow Account during November 2006 and December 2012 discharged the Respondent's obligations under the PPA.[385] This sum should be taken into account when recalculating the capacity payments between the Parties.[386] Notably, the sums paid into the Escrow Account offset any unpaid invoices when the funds were remitted.[387]

298. The amounts paid into the Escrow Account did discharge the Respondent's alleged obligations towards the Claimant and the time differences between the payments made to and from the Escrow Account cannot give rise to interest owed by the Respondent to IPTL.[388]

299. Based on the above, the capacity payments owing to IPTL are US$ 77.80 million (before interest), before considering the funds paid by the Respondent into the Escrow Account over the relevant period in the total amount of US$ 109.8 million. Accordingly, IPTL owes

[381] First Expert Report of James Nicholson dated February 13, 2015, paras. 5.6-5.8. Second Expert Report of James Nicholson dated May 21, 2015, para. 6.5.
[382] Resp. Tariff Sub., paras. 199-204. Resp. Tariff Rej., para. 204.
[383] First Expert Report of James Nicholson dated February 13, 2015, para. 1.69.
[384] *Ibid*., para. 1.69.
[385] *Ibid*., para. 5.16.
[386] Resp. Tariff Sub., para. 154. First Expert Report of James Nicholson dated February 13, 2015, para. 5.16.
[387] Resp. Tariff Sub., para. 154. First Expert Report of James Nicholson dated February 13, 2015, para. 5.16.
[388] Resp. Tariff Rej., para. 259.

TANESCO US$ 32 million before interest under the PPA, or US$ 43.10 million with interest as of April 2015.[389]

300. The Respondent provides the following table as a summary of its position:[390]

Recalculation of the Capacity Payments owing between IPTL and TANESCO (USD million)

	13.69% IRR, incl. payments to escrow	**13.69% IRR, excl. payments to escrow**
Corrected capacity invoices	206.4	206.4
Corrected bonus for non-dispatch period	0.5	0.5
Corrected bonus for other periods	7.1	7.1
Other unpaid invoices	3.3	3.3
Capacity payments paid to IPTL	(112.4)	(112.4)
Bonus payments paid to IPTL	(5.1)	(5.1)
Payments paid to Provisional Liquidator	(22.0)	(22.0)
Payments paid to Escrow Account	(109.8)	-
Sub total	**(32.0)**	**77.8**
Net interest up to March 2015	(11.2)	5.5
Net amount due up to March 2015	**(43.1)**	**83.3**

D. The Parties' respective requests for relief

301. The Claimant requests at paragraph 159 of its PHB2:

> (1) A declaration that pursuant to the PPA Tanesco is liable to pay US$214.6 million plus interest at the contractual rate of LIBOR +4% from 30 September 2015 to the date of the Tribunal's Final Award, reflecting the settlement agreed by PAP controlled IPTL, Tanesco and GoT in October 2013 and now adopted by SCB HK;
>
> (2) A declaration that payments by Tanesco or GoT into the Escrow Account did not discharge the debt payable by Tanesco under the PPA;
>
> (3) A declaration that the payment out of the Escrow Account to PAP or PAP-controlled IPTL in November and December 2013 did not discharge the debt payable by Tanesco under the PPA;

[389] Resp. Tariff Sub., paras. 157, 159. Second Expert Report of James Nicholson dated May 21, 2015, para. 1.20, Table 1.
[390] Resp. Tariff Rej., para. 260, page 64.

(4) A declaration that any payments made by Tanesco to PAP or PAP-controlled IPTL in the period August 2013 to date do not discharge the debt payable by Tanesco under the PPA;

(5) A final order that Tanesco pay SCB HK the full amount outstanding under the PPA. (To the extent that this sum exceeds the amount due from IPTL to SCB HK pursuant to the Facility Agreement, SCB HK will account to IPTL for the balance); and

(6) An order that Tanesco pay the cost of these arbitration proceedings, including the fees and expenses of the Tribunal and SCB HK's costs of legal and other representation, and interest thereon. SCB HK will give credit for any such costs recovered from Tanesco when claiming enforcement costs against IPTL pursuant to the terms of the Facility Agreement.

302. The Respondent requests in its Rejoinder on Tariff that:

(1) Claimant's prayer for relief in para. 293(1) CRT[391] shall be dismissed.

(2) Claimant's prayer for relief in paras. 293(2) CRT[392] shall be dismissed.

(3) Claimant's prayer for relief in paras. 293(3) CRT[393] shall be dismissed.

(4) Claimant's prayer for relief in paras. 293(4)[394] CRT shall be dismissed.

(5) Claimant's prayer for relief in para. 293(5) CRT shall be declared inadmissible on the grounds that the Tribunal's ruling in para. 379 of the Decision is *res judicata* and cannot be reconsidered in the present proceedings.

(6) Claimant shall be ordered to pay the costs of the arbitration, including the fees and expenses of the Tribunal and Respondent's costs of legal and other representation.

By way of procedural motion, Respondent respectfully requests that the Tribunal rule on Claimant's application for reconsideration by way of a preliminary decision and that such application be dismissed.[395]

[391] CRT: Claimant's Reply on Tariff. That paragraph corresponds to Claimant's relief (1) at paragraph 301 above.
[392] Corresponds to Claimant's relief (2) at paragraph 301 above.
[393] Corresponds to Claimant's relief (3) at paragraph 301 above.
[394] Corresponds to Claimant's relief (4) at paragraph 301 above.
[395] Resp. Tariff Rej., paras. 261-262.

V. The Tribunal's Analysis

A. Reconsideration of the Tribunal's Decision on Jurisdiction

1. The claims relating to reopening

303. The Claimant challenges the conclusion of the Tribunal in its Decision that while it could make a declaration of the amount owing by TANESCO to SCB HK under the PPA, it could not make an order for payment of that amount.[396]

304. The Claimant argues that the Tribunal has the power to reconsider its Decision, invoking the dissenting opinion of Professor Abi-Saab in *ConocoPhillips v. Venezuela*.[397] In the Claimant's view, a decision does not become final and *res judicata* until it is incorporated into the final award; there is no prohibition on reopening a decision in the ICSID Convention or the Arbitration Rules; and there are pragmatic reasons for recognizing a power to reopen.[398]

305. The Respondent argues that there is no power under the ICSID Convention or the Arbitration Rules to reopen a decision of an ICSID tribunal which is final and *res judicata*.[399] The Respondent rejects the dissenting opinion of Professor Abi-Saab and relies instead on the majority decision in *ConocoPhillips v. Venezuela*, which concluded that a decision was *res judicata* and could not be reopened,[400] and the award of the tribunal in *Perenco v. Ecuador*,[401] where a similar conclusion was reached.[402] The Respondent argues that there is no general power in a tribunal to reopen decisions, nor a specific power in the event of error of law or the discovery of some new evidence.

306. Furthermore, the Respondent argues, even if there were a power to reopen, the facts in this case do not support reopening. There was no error of law or any failure to disclose any

[396] Decision, paras. 182, 183 and 379.
[397] Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014).
[398] Cl. Tariff Sub., paras. 130-133.
[399] Resp. Tariff Sub., para. 99
[400] *Ibid*., paras. 100-105.
[401] Exh. RLA-84 (*Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Ecuador's Reconsideration Motion dated April 10, 2015).
[402] Resp. Tariff Rej., para. 104.

material fact or misrepresentation by the Respondent in its December 13, 2013 Letter, and hence no fraudulent misrepresentation.[403]

2. Does the Tribunal have the power to reconsider its Decision?

307. The Tribunal begins by observing that there is nothing in either the ICSID Convention or the Arbitration Rules dealing explicitly with the question of reconsideration of a decision. The power to reconsider an award is dealt with in Articles 51 and 52. The former relates to the revision of an award in the light of "the discovery of some fact of such a nature as to decisively affect the award" and the latter to an application for the annulment of an award. There are no equivalent provisions relating to decisions.

308. There is little arbitral jurisprudence on this question. The two cases directly on point and referred to by the parties are *ConocoPhillips v. Venezuela*[404] and *Perenco v. Ecuador*,[405] both of which concluded that there is no power to reopen a decision of an ICSID tribunal. Since the conclusion of the written and oral arguments in this case, the *ConocoPhillips* tribunal has issued a ruling on a further request for reopening.[406] The majority reiterated its earlier decision. The third arbitrator, Professor Andreas Bucher, who had replaced Professor Abi-Saab, dissented from the majority taking essentially the same view as Professor Abi-Saab that there is a power to reopen, and incorporating Professor Abi-Saab's dissent into his own.[407] No case has directly concluded that there is such a power although there are cases that appear to acknowledge the possibility of, or the existence of, such a power without applying it to reopen a decision.[408]

309. The starting point for the Tribunal is the relationship under the ICSID Convention and Arbitration Rules between a decision of a tribunal and an award of a tribunal and whether a

[403] Resp. Tariff Sub., paras 42-45.
[404] Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014).
[405] Exh. RLA-84 (*Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Ecuador's Reconsideration Motion dated April 10, 2015).
[406] *ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent's Request for Reconsideration of the Tribunal's Decision of March 10, 2014 dated February 9, 2016.
[407] *Ibid*, Dissenting opinion of Prof. Andreas Bucher, para. 34.
[408] Exh. CLA-95 (*Antoine Biloune (Syria) and Marine Drive Complex Ltd. (Ghana) v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability dated October 27, 1989 (the "*Biloune* award")); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award dated September 16, 2015.

decision partakes of at least one characteristic of an award – that it is *res judicata*. Clearly a decision is not an award. In accordance with Article 48(3) of the ICSID Convention, since it deals with a question submitted to the Tribunal, a decision must be incorporated into the award. Once incorporated, then as part of the award, a decision comes within the ambit of the remedies of Article 50 (interpretation), Article 51 (remedies), and Article 52 (annulment). Equally, the provisions of Article 53 dealing with finality and binding nature are applicable to awards and not directly applicable to decisions.[409]

310. The question is whether, notwithstanding the lack of any provision in the Convention relating to the finality of decisions, a decision of a tribunal is nevertheless final and *res judicata*. The majority in *ConocoPhillips* concluded that decisions were *res judicata*, and not just when they are incorporated into the final award. After identifying the decisions that it had made, the tribunal said: "It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect."[410]

311. In the view of the present Tribunal, to the extent that the *ConocoPhillips* tribunal was stating that all decisions of ICSID tribunals are *res judicata*, the statement is, at the very least, too broad. Tribunals make decisions on procedural matters, on provisional measures, all of which are subject to being reviewed, reconsidered and revised, notwithstanding the absence of anything in the Convention authorizing this. Thus, the mere fact that something is characterized as a decision of a tribunal cannot automatically make it *res judicata*.

312. Furthermore, the fact that a decision is binding on the parties does not mean the same thing as saying that it is *res judicata*. A leading text on *res judicata* in English law explains it this way: "Where a final judicial decision has been pronounced on the merits by an English or (with certain exceptions) a foreign judicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party (and in the case of a decision *in rem*, any person whatsoever, as against any other person) is estopped in any subsequent litigation from disputing such decision on the merits…."[411] The Tribunal has difficulty seeing how decisions of tribunals could have the character of *res judicata* as

[409] Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014), para. 19.
[410] *Ibid*, para. 21.
[411] Spencer Bower, Turner & Handley, *The Doctrine of Res Judicata*, 3rd ed., Butterworths, London (1996), page 4.

defined here when, under the Convention, they only attain that status under Article 53(1) when they are incorporated into the final award.

313. Decisions of tribunals are of course binding within the scope of the proceedings, but this does not make them *res judicata*. That is so with procedural orders and provisional measures as pointed out earlier. An essential feature of *res judicata* is that the judgment in question produces effects on the parties outside the proceedings in which it is granted. But decisions of tribunals only have effect within the proceedings until they have been incorporated into the final award.

314. This conclusion is supported by the structure and architecture of the ICSID Convention itself. Contracting States have an obligation to recognize only an award as binding (Art. 54(1)); recognition and enforcement is contemplated only in respect of an award (Art. 54(2)); only awards can be challenged through annulment proceedings (Art. 52). The proper inference to be drawn from these provisions is that only the Contracting State that is a party to the proceedings is under an obligation to recognize decisions of a tribunal as binding. Thus, decisions cannot have legal consequences outside the ICSID proceedings in which they are issued (i.e. they cannot be recognized and enforced and they cannot be challenged through annulment). Indeed, if decisions were *res judicata* before incorporation in the final award, then the requirement of incorporation into the final award under Article 48(3) would be redundant.

315. In the absence of any prohibition in the Convention or the Arbitration Rules on the question of reopening decisions, in the view of the Tribunal, it is not possible to draw any conclusions *a priori* about the question of reopening. There is nothing preventing a tribunal from making it clear that it considers that its decisions are final and not subject to reopening. This appears to be what the tribunal in *Electrabel* v. *Hungary* had in mind when it said, "several decisions and reasons contained in this Decision are intended by the Tribunal to be final and not to be re-visited by the Parties or the Tribunal in any later phase of these

arbitration proceedings."[412] But a tribunal cannot confer a status on its decisions that they do not have under the *lex arbitri*.

316. The Tribunal has also considered the decision of the majority in *Perenco* v. *Ecuador* which endorsed the conclusion of the majority in *ConocoPhillips* that decisions are *res judicata*. The *Perenco* tribunal states that the *ConocoPhillips* conclusion on the legal effect of decisions "fits within a well-established view as to the effect to be given to decisions made during the course of a phased arbitration such as the present one," but it offers no additional reasoning on which that conclusion can be based.[413]

317. Moreover, the *Perenco* tribunal goes out of its way to say that it is not dealing with facts similar to those in *ConocoPhillips*, where there was an allegation of recently discovered evidence that would justify reopening an award under Article 51.[414] While expressing some sympathy [415] with the approach taken by Professor Abi-Saab in his dissent in *ConocoPhillips*, who had concluded that there was a specific power in the tribunal to reopen in the circumstances of that case, the *Perenco* tribunal stated "the facts in the *ConocoPhillips* case, in the view of this Tribunal, are so far removed as to deprive Professor Abi-Saab's views of any relevance to the instant case."[416] In short, while rejecting the idea of a general power to reopen, the *Perenco* tribunal appears to avoid expressing a view on whether there would be a specific power to reopen in the light of particular facts.

318. The Tribunal is of the view that it is incorrect to characterize the decisions of ICSID tribunals, as opposed to their awards, as *res judicata*. They are binding within the scope of the proceedings but do not impose obligations upon the parties or other Contracting States outside the proceedings as is the case with awards that are *res judicata*. However, even if the conclusion were that decisions have *res judicata* status this would not provide a

[412] *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability dated November 30, 2012, para. 10.1
[413] The *Perenco* tribunal also cites to other decisions of investment tribunals, including *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) (Decision on Mexico's Preliminary Objection concerning the Previous Proceedings dated June 26, 2002), and *Electrabel S.A. v. Hungary* (ICSID Case No. ARB/07/19 (Decision on Jurisdiction, Applicable Law and Liability dated November 30, 2012), but none of those cases dealt with a power to reopen.
[414] Exh. RLA-84 (*Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Ecuador's Reconsideration Motion dated April 10, 2015), para. 50.
[415] *Ibid*., para. 82.
[416] *Ibid*., para. 87.

sufficient answer to the question whether a tribunal has a power to reopen its decisions. If the decision that the Claimant wishes to have reopened were *res judicata*, then by analogy with Article 51, it might be reopened in defined circumstances. If it were not *res judicata*, then *a fortiori* it could be reopened without the constraints of the requirements of Article 51.

319. Since there is nothing in the ICSID Convention that prohibits the reopening of decisions, the starting point is the general power of the Tribunal under Article 41(1) of the Convention to determine its own competence. Article 44 of the Convention also grants a power to a tribunal to decide "any question of procedure" that is not covered in the Convention or the Arbitration Rules or agreed by the parties. The *ConocoPhillips* tribunal did not see this as a basis for admitting a reconsideration request, stating that Article 44 "cannot be seen as conferring a broad unexpressed power of substantive decision."[417]

320. The Tribunal does not find this reasoning compelling. It is of the view that a power to reopen a decision has both procedural and substantive aspects, involving a procedural right to bring a request for reconsideration and the substantive question of what is to be done with such a request. Nor does it see that the specific reference in Article 44 to "any question of procedure" trammels the broader power of a tribunal under Article 41 to determine its own competence. The question for the Tribunal is not whether there is a specific power to reconsider under the Convention – clearly there is not – but whether in the absence of a specific power the right of a tribunal to determine its own competence has been limited. The Tribunal also takes the view that exercising a power to reopen in certain limited circumstances has practical advantages. It avoids having the Tribunal decide issues on the merits on the basis of a decision which has been seriously called into question, and then have the parties wait until the whole matter has been included in its final award before having its decision reopened or subject to annulment, thus potentially wasting the time and expense that has been incurred since the Tribunal became aware that its decision could be called into question. Efficiency grounds alone suggest that there may be circumstances where a tribunal should consider reopening a decision that it has made.

[417] Exh. CLA-91 (*ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30), Decision on the Respondent's Request for Reconsideration dated March 10, 2014), para. 22. In its second reconsideration decision, the *ConocoPhillips* tribunal elaborated on the substance/procedure distinction without changing its view, paras. 22-23. The dissenting arbitrator discusses this matter at paras. 44-45.

321. In this case, the Tribunal is only concerned with whether in light of the specific circumstances of this case it should exercise a power to reopen. The two grounds specifically raised by the Claimant are an alleged error of law in the Tribunal's Decision and the subsequent coming to light of a fact existing prior to the Decision within the knowledge of the Respondent, which the Respondent had wilfully withheld from the Tribunal.

322. In exercising a power to reopen a decision, a tribunal should be guided by, although not bound by, the limitations on reopening that apply to awards. Whatever the power the tribunal has to reconsider a decision that power must at least extend to the grounds for reopening an award in Article 51. But such a power should not be seen as unlimited. As stated earlier, the decisions made by ICSID tribunals in the course of a case are binding, and it would lead to considerable uncertainty if tribunals were to assert an unconstrained power to reopen any decisions made. A decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will.

323. In *Quiborax*, an allegation of illegality at the time of making the investment that was unknown by the respondent at the jurisdictional phase was seen to have the potential for reopening the jurisdictional decision.[418] Subsequent knowledge of facts that undermine the basis for the decision was in part the basis of Professor Abi-Saab's dissent in *ConocoPhillips*. And it was this particular ground that the *Perenco* tribunal said made Professor Abi-Saab's dissent not relevant to the facts of *Perenco*.

324. In the present case, the allegation is that the Tribunal reached its decision without knowledge of material facts which had been deliberately withheld by one of the Parties, and that with the knowledge of those facts the Tribunal might have reached a different decision. In the view of the Tribunal, such an allegation if proved would justify reopening its decision not to order payment of any amount owing to SCB HK by TANESCO.

3. Should the Tribunal reopen its Decision in the present case?

325. The Claimant argues that in the December 13, 2013 Letter to the Tribunal, the Respondent misled the Tribunal in two important ways: first, while stating that there had been no

[418] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award dated September 16, 2015, paras. 129-130.

deterioration in SCB HK's position as a result of further developments in Tanzania, it had failed to disclose that it had engaged in discussions for the release of the monies in the Escrow Account to IPTL/PAP and; secondly, it failed to disclose that it had agreed with IPTL to make payments to IPTL based on the full tariff under the PPA in contradiction of the position taken in this arbitration that the tariff had been incorrectly calculated.

326. The Respondent argues that the Tribunal was not misled by the December 13, 2013 Letter, and that the alleged new facts would have had no impact on the Tribunal's Decision and furthermore that the Claimant was aware of these facts and did not itself disclose them to the Tribunal.

327. The Tribunal will consider first what was disclosed in the Respondent's Letter of December 13, 2013, what was in fact known by the Respondent at that time, and what impact this might have had on the Tribunal's Decision. It will then consider the state of knowledge of the Claimant at the relevant time.

328. On November 27, 2013, the Claimant wrote to the Tribunal, as follows:

> SCB HK has been informed that Tanesco has now entered into an agreement with IPTL (through PAP) which purports to settle the outstanding tariff payments under the PPA which are in issue in these proceedings thereby facilitating the release of the funds placed in escrow by the GOT as security for Tanesco's obligations under the PPA […]. The agreement between PAP/IPTL and Tanesco has not been disclosed to SCB HK.

329. In its December 13, 2013 Letter, written in response to the Claimant's letter of November 27, 2013, the Respondent said:

> SCB HK alleges an agreement by PAP to sell electricity to TANESCO at a reduced tariff compared to the PPA. But that is not a new development or a change in the status quo. SCB has objected since 2009 that the Provisional liquidator was selling electricity to TANESCO at a reduced tariff compared to the PPA. SCB HK has neither demonstrated a change in existing practice nor that the continuing sale of electricity results in a "deterioration" in SCB HK's position.

Later in the December 13, 2013 Letter, the Respondent said:

> SCB HK next claims that a continuation of an agreement respecting payment of a reduced tariff will facilitate the release of the funds held in the escrow account. SCB HK provides no evidence in support of this claim. In any event, TANESCO is not a party to

> Escrow Agreement between GOT, IPTL and the Bank of Tanzania; TANESCO has no control over that account […]

The essence of these exchanges was recorded in paragraphs 85 through 89 of the Decision.

330. The December 13, 2013 Letter neither admits nor denies that there was an agreement between TANESCO and IPTL/PAP to settle the outstanding tariff payments under the PPA, but by responding to the allegation of such an agreement by referring to the arrangement that the Tribunal was aware of, under which IPTL sold electricity to PAP at reduced rates, the letter leaves the clear impression that no such new agreement existed. Furthermore, TANESCO's response to the allegation that there was an agreement facilitating the release of the funds held in escrow by saying that since SCB HK had produced no proof of any such arrangement there was nothing to respond to, and that the Escrow Account was beyond its control, equally gave the impression that there was no new agreement and that it knew nothing about the Escrow Account.

331. Yet, on October 3, 2013, some two months before it wrote this letter, the Respondent had concluded an agreement to settle the tariff dispute and not on the basis of the reduced tariff referred to by the Respondent, but on the basis of the full tariff (the Respondent's obligation to pay the full tariff has been contested by the Respondent throughout these proceedings). Furthermore, the minutes of the meeting of October 3, 2013, between TANESCO and IPTL/PAP, at which the 2013 Settlement Agreement was reached, show that TANESCO participated with IPTL in a joint recommendation that "[m]onies in the escrow account be released to IPTL as soon as possible."[419]

332. In short, while in its December 13, 2013 Letter the Respondent had given the impression that there was no agreement in existence relating to the sale of electricity (other than the agreement of which the Tribunal was already aware under which IPTL/PAP provided electricity to TANESCO at reduced rates), it failed to disclose that there was in fact a new Settlement Agreement entered into by TANESCO on October 3, 2013, under which IPTL/PAP would provide electricity to TANESCO with TANESCO paying the full tariff. And while TANESCO claimed in its December 13, 2013 Letter that it had no control over the Escrow Account, it failed to disclose that it had already recommended jointly with

[419] Exh. C-314 (Minutes of October 3, 2013 meeting between TANESCO and IPTL).

IPTL/PAP that the funds in the Escrow Account be released to IPTL/PAP and that some 8 days before the letter was written all of the funds in the Escrow Account had been released.

333. The Tribunal has no difficulty in concluding that the failure of the Respondent to disclose these facts was anything other than deliberate. The Respondent knew of the 2013 Settlement Agreement: it had entered into it. Where in the course of proceedings a party that disputes its liability under an agreement goes ahead and settles the same claim with a third party on precisely the terms it is disputing under that agreement, then the party has an obligation to disclose that settlement to the tribunal.[420] It is no answer to fall back on some notion of burden of proof and say that the other party has an obligation to prove the existence of such an agreement. Silence here was not an option. The Respondent had an obligation to disclose these matters to the Tribunal.

334. In these circumstances, the Tribunal can only conclude that the response of the Respondent on the question of a new agreement with IPTL/PAP and the status of the Escrow Account was misleading.

335. The Tribunal now turns to the state of knowledge of the Claimant at the relevant times. The Respondent argues that the Claimant was in fact aware of the matters now claimed to be new material facts and deliberately refrained from disclosing them itself to the Tribunal. This is denied by the Claimant.

336. The Tribunal notes that the actual factual situation as set out by the Parties is unclear and even at times self-contradictory. However, the Tribunal is not convinced that there is proof that SCB HK was aware of the terms of the 2013 Settlement Agreement between TANESCO and IPTL/PAP. In its letter of November 27, 2013, the Claimant indicates that it had been informed of the existence of an agreement settling the tariff dispute and facilitating the release of the Escrow Funds and states that the agreement had not been disclosed to it. It could be inferred from the fact that the Administrative Receiver, Martha Renju, had a copy of the agreement when she filed a request for an injunction to prevent the monies in the Escrow Account from being dispersed, some ten days before the Claimant

[420] In most judicial systems rules of professional conduct would place counsel under an obligation to the court to make such disclosure.

wrote its November 27 letter[421] that the Claimant must have had some knowledge of the 2013 Settlement Agreement. But there is no evidence that the Claimant knew that the Escrow Account had in fact been emptied.

337. The Respondent also refers to negotiations between Mr. Casson of SCB HK and Mr. Sethi of PAP on November 13, 2013, as related by Mr. Casson in his witness statement in proceedings before the Commercial Court in London where he stated that during such negotiations:

> [I]t was made clear [to him] by Mr Sethi that "there was no cash available to SCB HK because USD$75,000,000 was being paid to settle PAP's purchase of VIP's 30% shareholding in IPTL" and that "SCB HK [would have] received no cash now because (Mr Sethi said) none of the USD$100,000,000 sitting in the escrow account would be left after paying VIP, the Tanzania Revenue Authority and 'other creditors'."[422]

338. The full import of what was being said by Mr. Casson is not entirely clear and he was never called as a witness before this Tribunal. What he appeared to be saying is that he learned from Mr. Sethi that there was an intention to pay US$ 75 million to settle PAP's purchase of VIP's shareholding and that after that was done nothing would be left of the US$ 100 million that was in the escrow account. That information may well have prompted the letter of the Claimant to the Tribunal on November 27, 2013.

339. What the statement by Mr. Casson does not show is that the Escrow Account had been emptied at that time; indeed Mr. Sethi stated that there was US$ 100 million sitting in the Escrow Account. And it certainly does not show that TANESCO had been involved in approving the release of the Escrow Funds, something that was quite contrary to TANESCO's assertion in the December 13, 2013 Letter that it had no control over the Escrow Account. Moreover, Mr. Sethi's alleged statement says nothing about the terms of any settlement of the tariff dispute.[423] As a result, the Tribunal cannot agree that Mr. Casson's witness statement supports a claim of knowledge by SCB HK either in respect of the emptying of the Escrow Account or the settlement of the tariff dispute.

[421] Exh. R-164 (Plaint of Martha Renju vs. PAP and VIP in Commercial Case No. 123 of 2013 dated September 6, 2013).
[422] Resp. PHB2, para. 51.
[423] *Ibid*., para. 51.

340. Finally, it is relevant to note that it would have been illogical for the Claimant not to have brought the terms of the 2013 Settlement Agreement and the fact the Escrow Account had been emptied to the attention of the Tribunal immediately, had it been informed of these facts prior to the Tribunal's Decision. The Respondent's primary position throughout this long arbitration was that it was not obliged to pay the full tariff to SCB HK (who stepped into the shoes of IPTL). In the months leading up to the Tribunal's Decision, it resolved to pay the full tariff to IPTL. It is inconceivable that the Claimant would not have sought to capitalise on that reversal of position by the Respondent in its submissions to this Tribunal had it known about it.

341. Thus, the Tribunal concludes that the Respondent has failed to prove that SCB HK had knowledge of the facts which the Respondent had withheld from the Tribunal in its December 13, 2013 Letter.

342. The Respondent further argues that SCB HK was negligent in failing to make further enquiries about the new agreement and puts weight on the statement of counsel for SCB HK at the August Hearing that it may have been a tactical mistake not to have requested more documents and other information.[424] If SCB HK had known of the facts that have now come to light, then failure to bring them to the attention of the Tribunal would no doubt have been negligent. However, given the Tribunal's conclusion that there is no evidence of such knowledge by SCB HK, it is difficult to characterize SCB HK's conduct as negligent. SCB HK informed the Tribunal on November 27, 2013 of the possibility of a settlement of the tariff dispute and the potential for the release of the funds in the Escrow Account. But what it received in response by way of the Respondent's December 13, 2013 Letter was an implicit denial of any new agreement and a statement that suggested that TANESCO had no involvement with the Escrow Account. While with hindsight SCB HK might have wished that it had pushed further, the Tribunal considers that, in light of the Respondent's December 13, 2013 Letter, it had no obligation to do so and thus its actions cannot be characterized as negligent.

[424] Tr., August 19, 2015, page 167, lines 24-25.

343. As a result, the Tribunal is unable to conclude that SCB HK was negligent in respect of its lack of knowledge of the fact that TANESCO had settled the tariff dispute with IPTL on the basis of the full tariff or that the funds had been released from the Escrow Account.

344. Nevertheless, the question arises whether the existence of the 2013 Settlement Agreement between TANESCO and IPTL to settle the tariff dispute and the status of the Escrow Account were material to the conclusion that the Tribunal would not make an order for payment of the amounts owing to SCB HK under the PPA.

345. What the Tribunal knew or believed at the time of its Decision was: first, that the Respondent contested any obligation to pay the full tariff under the PPA and would not pay that or a reduced amount in the absence of a decision by this Tribunal; second, that although the winding up petition and the administration petition for IPTL had been withdrawn, the situation in the courts of Tanzania was unclear and that the prospect of the appointment of a liquidator was at least regarded by TANESCO as a real possibility; and third, that some protection for the interests of SCB HK in collecting any judgment remained because of the existence of funds within the Escrow Account.

346. What the Tribunal was not able to do was to assess the impact of the Respondent having agreed to pay the full tariff in its 2013 Settlement Agreement with IPTL/PAP, the impact of the fact that IPTL/PAP had now received substantial funds under the 2013 Settlement Agreement which reduced even further the likelihood of the appointment of a liquidator, and that the Escrow Account had been emptied. In short, the context in which the Decision of the Tribunal was made was substantially different from that which the Tribunal had been led to believe.

347. On this basis, the Tribunal considers that the facts that the Respondent failed to disclose in its December 13, 2013 Letter were material and would have had an impact on its decision not to make an order for payment. That decision was based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of the appointment of a liquidator. The facts that the Respondent had kept from the Tribunal change that assumption.

348. In the view of the Tribunal, grounds for reopening its decision not to make an order for payment of the amount owing by TANESCO to SCB HK under the PPA have been established. The fact that TANESCO had agreed to settle the invoice dispute with IPTL on the basis of the full tariff, the fact that IPTL was now in receipt of sufficient funds to pay its creditors and the fact that the Escrow Account had been emptied, were all material to the decision taken by the Tribunal, and all of these facts had been withheld by the Respondent from the Tribunal.

349. In light of this conclusion that grounds for reopening have been established, the Tribunal has no need to consider whether it should reopen its Decision on the basis of an alleged error of law.

4. The consequences of reopening the Decision

350. The Tribunal must now consider the consequences of reopening its Decision of February 12, 2014. The decision that the Tribunal would only make a declaration of the amount owing to SCB HK and not make an order for payment, was made in light of the circumstances known to the Tribunal at that time.

351. These circumstances were:

- That SCB HK's security interest had not been registered and that the effect of non-registration on priority amongst creditors was a matter that would have to be determined by Tanzanian courts;

- That although the request for the appointment of a liquidator had been withdrawn, at least on the basis of the assertions of the Respondent, the appointment of a liquidator and the resumption of proceedings to wind up IPTL remained a real likelihood;

- That if a liquidator were appointed then the issue of priority among creditors would be a live one;

- That the Escrow Account, which had been set up to hold monies that would be paid out to settle that tariff dispute once the right of the parties were determined, had substantial funds in it;

- That TANESCO was awaiting the decision of this Tribunal in order to resolve the tariff dispute.

352. The potential for the appointment of a liquidator was a predominant concern of the Tribunal in its Decision and had an impact on what was dealt with and decided. Considering whether the Tribunal should deal with the effect of non-registration of SCB HK's security the Tribunal said:

> 170. As matters stand today, the fact that SCB HK failed to register a charge over future book debts in relation to clause 3.2.1 of the Security Deed does not have any effect on the Tribunal's jurisdiction or the relief requested by SCB HK in these proceedings. This is because there is currently no liquidator or administrator appointed in respect of IPTL.
>
> 171. The Tribunal nonetheless considers that it would be prudent to rule upon the effect of non-registration in the event that a liquidator or administrator were appointed in respect of IPTL and the history of these proceedings suggests that the *status quo* is liable to change. This issue has, moreover, been the object of extensive submissions and expert evidence from both Parties.

353. And then later the Tribunal went on to say:

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

354. The concern of the Tribunal was that, given the likelihood that the liquidation of IPTL would be back before the courts of Tanzania, the Tribunal should not make an order for the payment of a sum of money that would be binding in Tanzania and thus potentially interfere with the jurisdiction of a liquidator and the Tanzanian courts to determine priority amongst creditors.

355. The question for the Tribunal is whether that concern remains valid in light of the actual circumstances that have been now brought to its attention. Given that TANESCO has agreed to pay the equivalent of the full amount owing under the tariff dispute to IPTL/PAP, the possibility of IPTL being placed in liquidation seems much more remote. The Respondent's assertion in the December 13, 2013 Letter that "nothing would stop the disgruntled creditors of IPTL from filing their own winding up or administrative petitions" loses credibility once it is known, as the Respondent did, that there had been an agreement to pay IPTL the equivalent of the full amount that SCB HK claims in the tariff dispute. With IPTL receiving such an amount, it is unclear who the "disgruntled creditors" would be. Certainly in its submissions to the Tribunal on recalculation, the Respondent has not identified any potential "disgruntled creditors."

356. As a result, the assumption that if the Tribunal were to make an order for payment of the amount owing to SCB HK by TANESCO it would be interfering with the rights of a liquidator and the Tanzanian courts to determine priorities as between creditors was based on information that was incorrect. The potential for IPTL to be placed into liquidation that led to concerns about the determination of priorities among creditors was not as it had been portrayed to be. In making its decision, the Tribunal had proceeded on the basis of an assumption that, if it had been in possession of the correction information, it would not have made.

357. Furthermore, the protection of the Claimant's interests merely through a declaration of an amount owing has less credibility now that the fund that had been held against the settlement of the tariff dispute has been emptied, and TANESCO has apparently agreed to pay the equivalent of the amount that SCB HK was claiming in these proceedings to IPTL/PAP. On both counts, the Claimant's position on the ground is much less secure than it was believed to be by the Tribunal when it made its Decision. The Respondent's assertion in its December 13, 2013 Letter that, "there has been no material change in SCB HK's 'position on the ground' in Tanzania as a result of Tanzanian court rulings" would have been viewed much differently by the Tribunal if the Respondent had disclosed that it had agreed with IPTL/PAP to pay it the equivalent of the full amount claimed by SCB HK in the tariff dispute and that the Escrow Account had been emptied.

358. In short, in concluding in its Decision that it could not make an order for payment in favour of SCB HK, the Tribunal was relying on what it believed to be facts, which were not true, and assumptions based on submissions made to it that omitted relevant information and were not correct. As a result of the undisclosed 2013 Settlement Agreement, IPTL/PAP was in a much more secure financial position than it had been in the past and thus the possibility of it being placed in liquidation was not as it was represented to the Tribunal.

359. Thus, the concern of the Tribunal about interfering with the issue of priority amongst creditors that was a matter for a liquidator and the Tanzanian courts was essentially unfounded. And the security that the Escrow Account provided SCB HK that there were funds to meet in whole or in part any amount that was determined to be owing to it had dissipated. If the Tribunal had known the true facts, it would not have reached the conclusion that a declaration without any order for payment would be sufficient. Accordingly, the Tribunal reverses that conclusion.

360. In light of the above, the Tribunal decides that in addition to making a declaration of the amount owing by TANESCO to SCB HK, it can also make an order for payment of that amount.

B. Recalculation of the tariff

361. In its Decision, the Tribunal decided that, "the tariff must be recalculated to reflect the fact that IPTL's equity contribution was by way of shareholder loan and not by way of paid up share capital"[425] and ordered the Parties to attempt to agree on a recalculated tariff taking into account this consideration and any other relevant conclusions set out in the Tribunal's Decision. No such discussions took place between the Parties and thus there was no agreement on a recalculated tariff.

362. In its submissions on the recalculation of the tariff, the Claimant proposed three alternative approaches:

- First, the Claimant argued that in view of TANESCO having agreed to pay IPTL/PAP a tariff equivalent to the amount claimed by SCB HK without any

[425] Decision, para. 324.

recalculation, there was no need to recalculate the tariff. This would result in an amount owing of US$ 201.4 million, which with interest would be US$ 214.6 million.[426]

- Second, the Claimant argued that, as an alternative, the tariff could still be based on an IRR of 22.31%, but calculated on the basis of a shareholder loan and not paid up share capital. This would result in a reduction in the tariff paid over the life of the project of US$ 81.6 million and an amount owing of US$ 148.4 million.[427]

- Third, the Claimant argued,[428] on the basis of the Expert Report of Colin Johnson, that the correct calculation for an IRR based on a shareholder loan and not paid up share capital, taking account of the greater risk involved in a shareholder loan, would be 26.08%. This would result in a reduction of the capacity charge for the period 2007-2014 of US$ 1.4 million.

363. The Respondent argued as an initial matter that it owed no obligation to SCB HK because the statutory assignment to SCB HK was ineffective as a matter of Tanzanian law. On the specific question of recalculation, the Respondent argued that, on the basis of the Expert Report of James Nicholson, taking account of the different risks entailed with a shareholder loan rather than paid up share capital, the tariff should be calculated on the basis of an IRR of 13.18% (subsequently adjusted to 13.69%).[429] The Respondent then concluded that, applying that tariff and taking into account amounts already paid, SCB HK owes TANESCO US$ 48.1 million.

364. At the outset, the Tribunal rejects the argument of the Claimant that there should be no recalculation of the tariff because of the 2013 Settlement Agreement under which TANESCO agreed to pay to IPTL in purported settlement of the tariff dispute an amount equivalent to the full amount claimed by SCB HK in this dispute.

[426] As adjusted in Cl. PHB2, para. 13.
[427] Cl. PHB2, para. 13. Fourth Expert Report of Colin Johnson dated October 30, 2015, page 7.
[428] Cl. Tariff Sub., para. 91(5).
[429] Resp. Tariff Rej., para. 178.

365. The Tribunal need not go into the reasons for this settlement or any justification of the amount, all of which was disputed by the Parties. The Tribunal had already decided in its Decision that the tariff had been incorrectly calculated on the basis of paid up share capital when it should have been calculated on the basis of a shareholder loan. No arguments were made to the Tribunal to reopen that decision, nor does the Tribunal see any justification for doing so. Accordingly, the amount paid under the 2013 Settlement Agreement, which provides for payment based on a tariff calculated on the basis of a rate of return on paid up capital and not a shareholder loan, cannot be in conformity with the decision that the Tribunal has already reached.

366. At the same, the Tribunal rejects the argument of the Respondent that there is no need to recalculate the tariff because the assignment under which SCB HK acquired its rights to the claim currently before the Tribunal was ineffective under Tanzanian law. The Tribunal has already concluded in its Decision that there had been a valid statutory assignment to SCB HK even though that assignment had not been registered.[430] Again, no argument was made to the Tribunal as to why that decision should be reopened and the Tribunal sees no justification for doing so.

367. In light of this, the task for the Tribunal is to determine which should be adopted – one of the two approaches to recalculation put forward by the Claimant or the approach to recalculation put forward by the Respondent, or some other approach.

368. In considering these alternatives, the Tribunal recalls the reasons it gave in its Decision for deciding that the tariff must be recalculated. At paragraph 271 of that Decision, the Tribunal said:

> The Tribunal is persuaded that a shareholder's loan would cost a substantial amount less than true equity over the life of the project, even if both earned exactly the same rate of return. This means that in replacing equity by a shareholder loan, IPTL was incurring less costs than the costs used for the calculation of the Capacity Payment.

369. And later in the same paragraph, the Tribunal said:

[430] "*The Tribunal concludes that Clause 3.2.1 of the Security Deed is a valid statutory assignment of IPTL's rights under the PPA to SCB HK. This was finally accepted by the Respondent in oral submissions at the hearing on March 14, 2013*" (footnote omitted). Decision, para. 151.

> The difference in the global cost – on which the Capacity Payment's calculation was based – is the economy realized in tax payments, which has not been taken into account in the calculation of the Capacity Payment […]. Whilst the Tribunal has not made its own calculation of the amount in taxes, it is clear that in principle TANESCO was effectively reimbursing IPTL for taxes that would only have been incurred if the project sponsors had contributed paid-up capital instead of shareholders' loans.

370. In short, it was clear to the Tribunal that with a tariff based on paid-up equity the Claimant was being compensated for costs it had not incurred. Thus, the negotiation exercise mandated by the Tribunal was to determine a tariff based on a shareholder loan that eliminated those effects of a tariff based on paid-up capital.

371. In ordering the Parties to negotiate a new tariff, the Tribunal set out the parameters for that negotiation:

> First, a 22.31% IRR would not be appropriate because it had been calculated on the basis of paid-up equity and not a shareholder loan.
>
> Second, a 0% IRR would not be appropriate.
>
> Third, the calculation of the tariff could not be based on any new assumptions, such as the provision of further capital or further shareholder loans by IPTL.
>
> Fourth, the rate of return for a shareholder loan had to be higher than the return on senior debt.[431]

372. Measured against these criteria, the Tribunal finds problems with the IRR of 26.08% proposed by the Claimant and the IRR of 13.69% proposed by the Respondent. In the case of the former, the approach taken by Mr. Johnson was not limited to the difference between the amount that TANESCO would have to pay if the tariff had been calculated on the basis of a shareholder loan and what it would pay when the tariff was based on paid-up share capital. His option of 26.08% was based on what the parties would have negotiated if they had abandoned 22.31%.

373. In short, to get to 26.08%, the Claimant, on the basis of Mr. Johnson's report, has to make assumptions about the risk profile of building a power plant in Tanzania at that time, the risk profile of a shareholder loan compared with the risk profile of paid-up capital, and the

[431] Decision, paras. 339-343.

capacity payment required to make the project viable.[432] All of these involve assumptions about what the parties would have decided if they had negotiated on the basis of a shareholder loan instead of paid-up share capital.

374. There is a similar problem with the approach of the Respondent's expert, James Nicholson. He indicated in his report of February 13, 2015, that he had asked himself the following question: "What rate of return would IPTL and TANESCO have agreed upon as of September 1998 (i.e. the cut-off date in the Decision) had the structuring of the equity investment as a shareholder loan been known by both TANESCO and IPTL, all else equal."[433] This, too, involves making assumptions about what the parties would have decided.

375. Neither of these approaches, then, focus on what the Tribunal had identified in its Decision as the principal problem with the tariff: it had been calculated on the basis of paid up equity and not on the basis of a shareholder loan with the result that "in replacing equity by a shareholder loan, IPTL was incurring less costs than the costs used for the calculation of the Capacity Payment." And, as the Tribunal went on to say, "in principle TANESCO was effectively reimbursing IPTL for taxes that would only have been incurred if the project sponsors had contributed paid-up capital instead of shareholders' loans."[434]

376. In the parameters set for the recalculation, the Tribunal had said that "the calculation of the tariff could not be based on any new assumptions" yet both the 26.08% calculation of Mr. Johnson and the 13.69% calculation of Mr. Nicholson were based on assumptions of what the parties would have decided if they had abandoned the 22.31% IRR. Neither of these calculations focus on permitting TANESCO to recapture what it was paying in excess of the actual costs that IPTL was incurring.

377. On this basis, the Tribunal rejects the Claimant's proposal of an IRR of 26.08% and an IRR of 13.69% proposed by the Respondent.

[432] Second Expert Report of Colin Johnson dated November 10, 2014, para. 3.15.
[433] Second Expert Report of James Nicholson dated May 21, 2015, para. 1.11
[434] Decision, para. 271.

378. The Tribunal turns now to the proposal of the Claimant for an unchanged IRR of 22.31% but based on a shareholder loan and not paid up share capital. As pointed out earlier, this would result in a reduction of US$ 81.6 million over the life of the project. The Claimant justifies this approach on the ground that the parties had agreed to an IRR of 22.31% in 1995 and thus the only change would be calculating it on the basis of a shareholder loan rather than paid up capital.[435] The result would be a transfer of the tax savings from the use of a shareholder's loan to TANESCO.

379. The Claimant nonetheless points out that using an IRR of 22.31% based on a shareholder loan does not achieve the same result as an IRR of 22.31% based on paid up share capital, in particular it would not permit IPTL to comply with all of its banking covenants, in particular the obligations with respect to the Debt Service Reserve Account (DSRA).[436] It was to rectify this shortfall that the IRR of 26.08% was proposed. But the Tribunal has already rejected that IRR on the ground that it involves making assumptions about what the parties would have decided if they had renegotiated the tariff.

380. Relying on the expert report of Colin Johnson, the Claimant indicates alternative IRRs of 17.19% and 21.25% and considers their ability to "comply with the other requirements of the Facility Agreement and other financing documents."[437] What the Claimant shows is that anything below 17.19% would require additional funding to be provided, and that only an IRR of 21.25% would be equivalent to an IRR of 22.31% in its compliance with banking covenants – that is, it would preserve the Senior Debt Coverage Ratio (DSCR), but not fulfill the obligations under the Debt Service Reserve Account (DSRA).[438]

381. If an IRR of 22.31% is effective in returning the tax savings resulting from basing the IRR on paid-up share capital, on what basis can a claim to change the IRR to 21.5% be justified? The Claimant argues that the figure of 22.31% goes back to 1995 and was a key point in the Rugamelira letter of May 31, 1995, which was adopted by the ICSID 1 tribunal. While this Tribunal does not find that to be a conclusive consideration, it has difficulty seeing how a choice can be made of the 21.25% figure that is not arbitrary or making assumptions about

[435] Cl. Tariff Rep., para. 197.
[436] *Ibid*, paras. 205-208.
[437] Cl. Tariff Sub., para. 103.
[438] *Ibid*, *see* table at page 38.

what the parties would have done if they were renegotiating the tariff, something that was contrary to the parameters set out by the Tribunal in its Decision.

382. However, the Respondent argues that an IRR of 22.31% is not permitted by the terms of the Decision. It focuses on the statement that "the Tribunal does not believe that a tariff of 22.31% would be appropriate." But the Respondent takes this out of context ignoring the following sentence, which provides that such tariff "was based on an assumption that IPTL's equity contribution could be made by way of shareholder loan, which the Tribunal has rejected." And the Respondent's argument also ignores the whole objective of the recalculation which the Respondent itself had advocated before the Tribunal.

383. The Respondent's expert, David Ehrhardt, identified the issue as the "trapped cash factor" described as follows:

> The model would have provided an entirely different payment schedule if IPTL were permitted to substitute a shareholder loan for the required 30 percent equity contribution. If a shareholder loan had been permitted in lieu of an equity contribution, the payments to shareholders would not have been subject to the dividend payment constraints, which would have eliminated or reduced the "trapped cash" and would have required a much smaller Capacity Payment to provide the agreed 22.31 percent, after-tax return on equity. Therefore, this model confirms that the required 30 percent equity contribution was required to consist of true equity, and not a shareholder loan.[439]

In its Decision, the Tribunal agreed with Mr. Ehrhardt and adopted his conclusion.[440]

384. Thus, the Respondent itself was saying that the IRR could remain the same, but the tariff should have been lower because payments to shareholders under a shareholder loan would not have been subject to dividend payment constraints.[441] The fundamental point is that the tax savings that IPTL gained from the actual use of shareholder loans rather than equity should have been transferred to TANESCO. The objective of the recalculation was to transfer those tax savings to TANESCO and that was what the negotiations between the Parties were to be directed to.

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[439] Witness statement of Mr. David Ehrhardt dated August 10, 2012, para. 111.
[440] Decision, para. 269.
[441] The Tribunal had recognized in its Decision that the same rate of return could result in different outcomes when applied on the basis of a shareholder loan or paid up equity: "*the Tribunal is persuaded that a shareholder's loan would cost a substantial amount less than true equity over the life of the project, even if both earned exactly the same rate of return*" (emphasis added), Decision, para. 271.

385. In light of the fact that the tax savings are transferred to TANESCO on the basis of an IRR of 22.31% – the whole point of the recalculation – the Tribunal cannot see on what basis there is any justification for deviating from that IRR without speculating on what the Parties might have done under a theoretical negotiation at the time the PPA was entered into, had the Parties been on notice that shareholder loans rather than equity would be used. Both Parties have tried to do that in their arguments before the Tribunal but ultimately their approach is inconsistent with the parameters set out in the Decision. There is no basis in the Decision for permitting the Respondent to get both the benefit of the transfer of taxes as well as a further benefit from a reduction of the IRR.

386. As a result, the Tribunal concludes that the tariff should be determined on the basis of an IRR of 22.31% applied to a shareholder loan and accepts in this regard the Claimant's calculation of the amount owing to IPTL under the PPA, and hence to SCB HK, of US$ 148.4 million.[442] That amount is the amount owing as of 30 September 2015, the latest information provided to the Tribunal, and that is the amount that will be ordered.

C. Interest

387. The Parties dispute the interest rate to be applied to any amount owing under the Award. The Claimant takes the view that it should be three month LIBOR plus 4%, which it argues is the rate provided for in the PPA. Relying on the expert report of Mr. Nicholson, the Respondent argues that the rate should be one month LIBOR plus 2%. According to Mr. Nicholson, under the PPA, LIBOR plus 4% applied only to undisputed amounts and the Base Lending Rate of one month LIBOR plus 2% is more appropriate when as here the amounts in dispute relate to "structural changes in the tariffs."[443]

388. The Tribunal is not persuaded by the Respondent's argument. The PPA makes clear that not only is it undisputed amounts that attract interest of LIBOR plus 4%,[444] but disputed amounts once resolved also attract interest at that rate.[445] No distinction is made between

[442] Cl. PHB2, para. 13. Fourth Expert Report of Colin Johnson dated October 30, 2015, page. 7.
[443] First Expert Report of James Nicholson dated February 13, 2015, para. 1.64. Second Expert Report of James Nicholson dated May 21, 2015, para. 6.4.
[444] Exhs. C-4/R-1 (PPA), Clause 6.7(b) "*calculated at the rate of 2% above Base Lending Rate*."
[445] Exhs. C-4/R-1 (PPA), Clause 6.8(c) "*calculated at the rate of 2% above Base Lending Rate*."

different kinds of disputes that would justify treating disputes relating to "structural changes in the tariff" differently.

389. With respect to whether the rate should be one month or three month LIBOR, the Tribunal accepts that three month LIBOR, as used in the ICSID award model, is appropriate. The Tribunal has already noted[446] that the ICSID 1 tribunal had endorsed the agreement of the parties that where there is an inconsistency between the PPA and the ICSID award model, the award model prevails.[447]

390. Accordingly, the Tribunal concludes that the interest rate on the amount owing under the PPA shall be three month LIBOR plus 4%. This interest rate shall not be compounded and thus is simple.

D. Shareholder loan as a percentage of equity contribution

391. The Parties disagree over the proportion of the "equity" contribution of IPTL that was to be by way of shareholder loan. The Respondent had argued that it was 99.9%.[448] Although it disagreed with this figure, arguing that it had been understood that IPTL's contribution would be made up of US$ 10 million by way of paid-up share capital and the balance by shareholder loan,[449] the Claimant was prepared not to dispute the issue if the IRR was 22.31% on the basis of a shareholder loan.[450] Since the Tribunal has decided that the IRR is 22.31%, the Claimant's concession applies and there is no need for any determination on this issue by the Tribunal.

[446] Decision, para. 263.
[447] Exhs. C-10/R-8 (ICSID 1 award), Appendix F 'Stipulation and Agreement', para. 2.: *"The parties recognize that there are instances where the formulae, mechanisms, notes, or comments contained in the Financial Model differ from or supplement the terms of the PPA. Where such differences exist, the parties agree that the Financial Model shall govern and supersede the terms of the PPA."*
[448] Resp. Tariff Rej., paras. 252-255.
[449] Cl. Tariff Rep., para. 199 and 266.
[450] *Ibid*, para. 201.

E. Payments made by TANESCO into the Escrow Account

392. The Respondent has argued that payments made into the Escrow Account operate to discharge its obligations under the PPA.[451] The Claimant contests this by arguing that:[452]

> [O]n the proper construction of the PPA, payment into the Escrow Account pursuant to the above provisions does not discharge Tanesco's indebtedness under the PPA. Instead, the sums deposited in escrow merely provide security for Tanesco's payment obligations.

The Claimant seeks a declaration from the Tribunal confirming that payments into the Escrow Account do not discharge the obligation of TANESCO to SCB HK.[453]

393. The Tribunal is unable to accept the Respondent's view. The Escrow Account was made up largely of monies deposited by TANESCO when there was a dispute.[454] Paying into the Escrow Account when there was a dispute is referred to in the PPA as the payments being "withheld."[455] After the dispute was resolved, the amounts, now undisputed, were to be promptly paid. Thus, the discharge of TANESCO's obligations under the PPA would occur when the disputed amounts were paid, not when deposits were made to the Escrow Account.

394. Accordingly, the Tribunal concludes that amounts paid by TANESCO into the Escrow Account did not discharge TANESCO's obligations under the PPA and thus cannot be taken into account in assessing what TANESCO owes SCB HK. The Tribunal will thus make a declaration accordingly.

F. Payments to IPTL/PAP out of the Escrow Account

395. The Claimant seeks a declaration that payments out of the Escrow Account to IPTL/PAP did not discharge the debt payable by TANESCO under the PPA. This was in response to the Respondent's claim that since SCB HK had never objected to TANESCO discharging its obligations under the PPA by making payments into the Escrow Account, "it follows … that

[451] Resp. Tariff Sub., paras. 153-154.
[452] Cl. Tariff Rep., para. 150.
[453] *Ibid*, para. 392.
[454] Exhs. C-4/R-1 (PPA), Clause 6.8(b).
[455] *Ibid*.

the release of the funds in the Escrow to IPTL validly discharge Respondent's obligation under the PPA …"[456]

396. The Tribunal is unable to accept the Respondent's submission on this point. In its Decision, the Tribunal concluded that SCB HK was the statutory assignee of IPTL's rights under the PPA.[457] In that capacity, SCB HK became "the legal owner of the rights arising under the PPA"[458] and thus was able to take action to enforce those rights.

397. The Respondent's argument that the statutory assignment was not valid is of no avail. Indeed, the Respondent itself recognizes that this argument is precluded by the Tribunal's Decision and it makes no claim to the reopening of the Decision.[459] Since TANESCO's obligation under the PPA was to make payments to the holder of the legal rights under the PPA, it can only discharge its obligations by making payments to SCB HK as the legitimate holder of those rights by virtue of the assignment that the Tribunal has held to be valid. As a consequence, TANESCO cannot discharge its obligations to SCB HK by making payments to a third party.

398. In its Rejoinder on Tariff, the Respondent appeared to back away from its position that monies paid out of the Escrow Account to IPTL/PAP discharged its obligation to SCB HK.[460] Nonetheless, for the avoidance of doubt, the Tribunal will make the declaration requested by the Claimant that payment out of the Escrow Account to IPTL/PAP did not discharge TANESCO's obligation to SCB HK under the PPA.

399. The Claimant has also requested a declaration that payments made by TANESCO directly to IPTL/PAP since August 2013, other than payments made from the Escrow Account, do not discharge TANESCO's debt under the PPA. In this regard, the Tribunal notes that in its Decision, it concluded that TANESCO could not deduct from what it owed to SCB HK payments made to the Provisional Liquidator including capacity payments and bonus payments, but that SCB HK was not entitled to claim for amounts that covered the operation and maintenance of the plant because those represented expenses that SCB HK had not

[456] Resp. Tariff Sub., para. 123.
[457] Decision, para. 151.
[458] *Ibid*., para. 152.
[459] Resp. Tariff Sub., para. 128.
[460] Resp. Tariff Rej., para.138.

incurred.[461] In short, TANESCO was not permitted to treat payments made to the Provisional Liquidator as discharging its debt under the PPA.

400. The same principle applies here. TANESCO cannot treat payments made to IPTL/PAP since August 2013 as discharging its obligations under the PPA. Accordingly, the Tribunal will make the requested declaration.

VI. Costs

401. The Tribunal will now deal with the issues of costs.

A. The Parties' positions

402. In its costs submission, the Claimant submits that the Respondent should bear the total arbitration costs incurred by the Claimant, including the Claimant's legal fees and expenses, totalling £ 2,416,244.72 (up to February 2014) and £ 1,128,057.55 (between February 2014 and November 2015).[462] The Claimant makes its claim based on the principle of "costs follow the event" and the Respondent's conduct in these proceedings.[463]

403. In its Tariff Rejoinder and Costs Submissions, the Respondent argues that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses, which have been broken down as follows:[464]

First phase of the proceedings (September 2010 to February 2014):

Legal Fees (Mkono & Co.):	USD 4,720,000.00
Legal Fees (Hunton & Williams)	USD 5,316,535.00
Expenses (Hunton & Williams)	USD 355,620.32
Expenses (TANESCO)	USD 892,317.50 and GBP 53,000

[461] Decision, paras. 375-377.
[462] Cl. Costs Sub., paras. 63-65.
[463] *Ibid*., paras. 5-62.
[464] Resp. Tariff Rej., para. 261(6). Resp. Reply Costs Sub., Schedule A: Legal fees.

Second phase of the proceedings (May 2014 to October 2015):

Legal Fees (Crax Law Partners/R.K. Rweyongeza & Co.)	USD 3,540,000.00
Legal Fees (Kellerhals Carrard)	CHF 955,081.00
Expenses (Crax Law Partners/R.K. Rweyongeza & Co.)	USD 34,572.00[465]; CHF 6,961.00 and GBP 6,584.00
Expenses (Kellerhals Carrard)	CHF 44,225.00
Expenses (TANESCO)	USD 250,000.00 and EUR 447,229.20

404. The Respondent considers that the Tribunal should award costs "according to the Parties' relative success" and in light of the Parties' conduct.[466] Furthermore, the Respondent contends that the Tribunal should take into account the substantial costs of defending itself against the Claimant's request for reconsideration.[467]

405. In its Reply Costs Submission, the Claimant rejects the Respondent's arguments regarding the appropriate allocation of costs, and contends that the Respondent's costs are "exorbitant and egregious in nature."[468]

406. By letter dated February 5, 2016, the Respondent submits additional observations on the Claimant's Reply Costs Submission and requests that the Tribunal rule on the costs of the arbitration "based on the information before it."[469]

B. The Tribunal's analysis

407. Article 61(2) of the ICSID Convention provides:

[465] Resp. Reply Costs Sub., revised Schedule of Costs, Schedule B: Legal expenses. The Tribunal notes the Respondent's correction in its revised Schedule of Costs (Schedule B: Legal expenses) to the total expense of Crax Law Partners/R.K. Rweyongeza & Co. in USD.
[466] Resp. Reply Costs Sub., paras. 9-18.
[467] Resp. Costs Sub., paras. 10-12.
[468] Cl. Reply Costs Sub., paras. 1-2.
[469] Respondent's letter dated February 5, 2016, page 5.

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

408. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the parties as it deems appropriate.

409. In making its determination on costs, the Tribunal agrees with the Parties that the normal rule is that costs follow the event. However, seeking to apply that principle in the circumstances of this case creates some difficulty as both Parties won on important issues and also lost on other issues. In respect of allegations of misconduct the Tribunal does not see this as a matter warranting an award and notes that the Claimant was successful on the issue of reopening.

410. In the result, the Tribunal has decided that both Parties should bear their own costs and so orders.

411. For the reasons set out in the paragraph above, regarding claims for costs, the Tribunal has also concluded that the costs of the arbitration should also be shared by the Parties equally.

412. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses are the following (in US$):

Arbitrators' fees and expenses	
Prof. McRae	254,775.02
Prof. Douglas	171,278.36
Prof. Stern	370,126.79
Other direct expenses (estimated)[470]	157,336.26
ICSID's administrative fees	180,000.00
Total	1,133,516.43

[470] This amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Award.

413. The above costs have been paid out of the advances made to ICSID by the Parties in equal parts. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed final financial statement, and the remaining balance will be reimbursed to the Parties in proportion to the advances they made.

VII. DECISION

414. For the reasons indicated here above, the Tribunal decides as follows:

A. Jurisdiction to Reopen

1. The Tribunal has jurisdiction to reopen its Decision of February 12, 2014, that it would not make an order for payment of any amount owed by TANESCO to SCB HK.

2. The Tribunal decides that in addition to making a declaration of the amount owing by TANESCO to SCB HK, it will also make an order for payment of that amount.

B. Recalculation of the Tariff

3. The Tribunal decides that the tariff should be determined on the basis of an IRR of 22.31% applied to a shareholder loan. Therefore, the amount owed by TANESCO under the PPA as of September 30, 2015 is US$ 148.4 million.

4. The Tribunal decides that the interest rate on the amount owing under the PPA shall be simple three month LIBOR plus 4%.

C. Other Declarations

5. The Tribunal declares that amounts paid by TANESCO into the Escrow Account did not discharge TANESCO's obligations under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK.

6. The Tribunal declares that payment out of the Escrow Account to IPTL/PAP did not discharge TANESCO's obligation to SCB HK under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK.

7. The Tribunal declares that payments made to IPTL/PAP since August 2013 do not discharge TANESCO's obligation to SCB HK under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK.

D. Other Claims

8. All the other claims are dismissed.

E. Order for Payment

9. The Tribunal orders that TANESCO pay to SCB HK the amount of US$ 148.4 million with simple interest at three month LIBOR plus 4% from September 30, 2015 until the date of this Award. Interest shall continue at the same rate until full payment is received.

F. Costs

10. Each Party shall bear its own legal fees and expenses and the Parties shall bear the costs of the arbitration in equal shares.

Zachary Douglas
Arbitrator
Date: 5 September 2016

Brigitte Stern
Arbitrator
Date: 1 September 2016

Donald McRae
President of the Tribunal
Date: 31 August 2016