

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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STANDARD CHARTERED BANK (Hong Kong)  
LIMITED )  
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Applicant, )  
 ) ICSID Case No. ARB/10/20  
v. )  
 )  
TANZANIAN ELECTRIC SUPPLY COMPANY )  
LIMITED )  
 )  
Respondent. )

**Procedural Order No. 6**

**I. Background**

**I.1 The Claimant's Document Request**

1. On 2 May 2012, the Claimant, Standard Chartered Bank (Hong Kong) ("SCB HK") made a request to the Tribunal to order the production of certain documents in the following terms:

"To the extent not already disclosed in ICSID Case No. ARB 10/12, all pleadings, legal submissions, witness statements, expert reports, exhibits, correspondence with the Tribunal/ICSID, inter-parties correspondence, transcripts and other documents produced by each of the parties in ICSID Case No. ARB 98/8."

These documents were referred to as the "ICSID 1 documents".

2. On 10 May 2012, the Respondent, Tanzania Electric Supply Company Limited ("TANESCO") filed its opposition to the Claimant's motion to compel the production of the ICSID 1 documents.

## **I.2 Respondent's Document Request**

3. On 9 May 2012, the Respondent made a request to the Tribunal to order the production of the following categories of documents:

### **A. Documents Relating to Attempts to Register the Charge of Shares (Request 36)**

“The correspondence, emails, notes, memoranda, and other documents relating to any attempt by SCB HK, SCB, Mechmar, VIP, Danaharta, or IPTL to register the Charge of Shares in Tanzania or elsewhere.”

### **B. Correspondence with the Liquidator (Requests 54 & 57)**

Request 54 sought:

“The emails, correspondence, and other communications between SCB and/or SCB HK and the Provisional Liquidator concerning SCB HK's claims against Mechmar.”

Request 57 sought:

“The emails, correspondence, and other communications between SCB and/or SCB HK and the Provisional Liquidator concerning SCB HK's standing to bring this arbitration.”

### **C. Litigation with Mechmar (Request 4)**

“The pleadings, correspondence, orders, settlement offers, settlement agreements, transcripts, and demand letters from the lawsuit filed on 23 March 2011 by SCB HK against Mechmar.”

### **D. Documents Obtained Through Purchase of Danaharta Loan (Requests 26-35, 52, 59-63, 72, 74, 86)**

### **E. The Documents Upon Which SCB HK Intends To Rely (Request 69)**

“The documents upon which SCB HK intends to rely during the course of this arbitration.”

4. In view of the short time between the Respondent's Request and the hearing of 14 May 2012, the Claimant made no written response to the Respondent's request, but made its objections orally at the hearing.

5. On 14 May 2012, in the course of a hearing on the issue of bifurcation, the Tribunal heard oral submissions from both Parties on their motions to compel the production of documents.

6. At that hearing, the Claimant produced 52 additional documents. The Respondent challenged the production of certain of these documents at the hearing and subsequently by letter of 21 May 2012 renewed that challenge. On 28 May 2012, the Claimant responded arguing that the Respondent's request to exclude those documents should be rejected. By letter of 5 June 2012, the Respondent replied to the Claimant's 28 May 2012 letter renewing its request for the exclusion of those documents.

7. In its ruling on bifurcation of 29 May 2012, the Tribunal stated that it had not relied on any of the documents challenged in reaching its decision on the issue of bifurcation and that it would rule on the Respondent's challenge to the production of those documents when it ruled on the Parties' other motions to compel the production of documents.<sup>1</sup>

8. The Tribunal will now treat each of these claims in order.

## **II. The Claimant's Request for Production: The ICSID 1 Documents**

### **II.1. Arguments of the Parties**

9. The Claimant argued that the first request for the production of the ICSID 1 documents had been made on 19 August 2011. A similar request for these documents had been made in the BIT proceedings and as a result some limited production was made of ICSID 1 documents. However, Respondent resisted any further production on the ground that they were not relevant.<sup>2</sup> Claimant argued nevertheless that production was important. Although it refused to produce these documents, the Respondent, the Claimant alleged, continued to make reference to what had happened in the ICSID 1 proceedings and lack of access to these proceedings meant that the Claimant was at a disadvantage.<sup>3</sup> Further, the Claimant argued, the ICSID 1 documents were central to this dispute, in particular for knowing when TANESCO had become aware that ITPL's

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<sup>1</sup> Procedural Order No. 5, para 24.

<sup>2</sup> Claimant's Motion, paras 8-15.

<sup>3</sup> *Ibid.*, paras 16-21.

equity contribution was to be made by shareholder contribution and not by subscription of shares.<sup>4</sup>

10. In its Opposition to the motion to compel, the Respondent argued that the request for the whole of the ICSID file was “overly broad and extraordinarily burdensome” and was seeking production of documents that were of no relevance to this arbitration.<sup>5</sup> In particular, the Respondent drew attention to the fact that the ICSID 1 documents were an old paper record and that the cost and burden of dismantling and copying those files far outweighed any benefit that could be gained from them.<sup>6</sup> Respondent also denied that it had taken advantage of its knowledge of the ICSID 1 documents either in these or in the BIT proceedings. Referring to examples cited by the Claimant, the Respondent argued that all of the statements it had made about the ICSID 1 proceedings related to what was already in the public record.<sup>7</sup>

11. Referring in particular to the Claimant’s argument relating to the need to see the ICSID 1 documents in order to determine when TANESCO became aware that the ITPL equity interest was to be in form of shareholder loans, which the Respondent characterized as a new contention, the Respondent undertook, in the event of the case proceeding to the merits, to search those portions of the ICSID 1 record where the issue of equity was briefed, including any exhibits or other documents discussing the issue of equity in the context of a shareholders loan. TANESCO will produce any documents that reflect, as SCB HK has requested, “whether the parties and the tribunal in the ICSID 1 proceedings were aware, when setting the revised tariff . . . that the IPTL shareholders’ equity contribution to the project . . . was made by way of shareholder loan rather than by subscription of shares.”<sup>8</sup>

12. In the hearing of 14 May 2012, the Claimant reiterated its arguments concerning the disadvantage of not having access to the ICSID 1 documents and the Respondent again denied that there was any disadvantage.

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<sup>4</sup> *Ibid.*, paras 22-24.

<sup>5</sup> Respondent’s Opposition, para. 2.

<sup>6</sup> *Ibid.*, paras 9-11.

<sup>7</sup> *Ibid.*, paras 12-24.

<sup>8</sup> *Ibid.*, para. 29.

## 2. Analysis

13. The Tribunal is conscious of the fact that the request for the ICSID 1 documents is a request for a large body of documents, the production of which will entail significant cost and effort, and that both Parties are in agreement that many of the documents produced are unlikely to be relevant.<sup>9</sup> The Tribunal is equally conscious of the fact that it is contrary to the principle of the equality of arms that one party has access to and can rely on documents to which the other party has no access.

14. The Tribunal considered the possibility, raised in the hearing, of access to some documents or access to ICSID's file and concluded that these possibilities also contained their own complications. The Tribunal was also aware of the commitment of the Respondent in its Opposition to the motion to compel production to review the ICSID 1 files on the issue of knowledge of ITPL's equity contribution through shareholder loans.

15. In light of the above, the Tribunal concluded that it should not grant at this stage the Motion to compel production of the ICSID 1 proceedings in the general terms that it has been requested. However, it reaches that conclusion on the following understanding:

- First, the Respondent will conduct a review of the ICSID 1 file as it undertook to do in paragraph 29 of its Opposition to the motion to compel as set out above and will provide to the Claimant any relevant documents that emerge from that review.
- Second, if the Claimant has other more specific requests relating to the documents of the ICSID 1 proceedings, it should make such requests.
- Third, in the future proceedings of this case, if the Respondent makes reference to the ICSID 1 proceedings, it must identify the documents in the record that support its assertions or produce the relevant documents from the ICSID proceedings to substantiate the reference it is making.

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<sup>9</sup> M. Weiniger in response to Professor Stern's question: Transcript 14.39: 14.

### **III. The Respondent's Requests for Production**

#### **III.1 Request A: Documents Relating to Attempts to Register the Charge of Shares (Request 36)**

16. Request 36 sought: "The correspondence, emails, notes, memoranda, and other documents relating to any attempt by SCB HK, SCB, Mechmar, VIP, Danaharta, or IPTL to register the Charge of Shares in Tanzania or elsewhere."

##### **1. Arguments of the Parties**

17. In its Motion to compel production, the Respondent argued that documents relating to any attempt to register the Charge of Shares were relevant to determining whether SCB HK believed that there was an obligation to register the Charge. Production of these documents so far, the Respondent claimed, had only been partial.<sup>10</sup> At the hearing on 14 May 2012, counsel for the Claimants stated that they had searched for documents that would be responsive to this request and had found none.<sup>11</sup> Counsel for the Respondent responded that his client was prepared to accept the representation on the record of counsel for the Claimant.<sup>12</sup>

##### **2. Analysis**

18. In light of the above, the Tribunal need not rule on Request A.

#### **III.2 Request B: Correspondence with the Liquidator (Requests 54 & 57)**

19. Request 54 sought: "The emails, correspondence, and other communications between SCB and/or SCB HK and the Provisional Liquidator concerning SCB HK's claims against Mechmar."

20. Request 57 sought: "The emails, correspondence, and other communications between SCB and/or SCB HK and the Provisional Liquidator concerning SCB HK's standing to bring this arbitration."

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<sup>10</sup> Respondent's Motion, paras 8-9.

<sup>11</sup> Transcript, 16.07:10 to 16.09:3.

<sup>12</sup> *Ibid.*, 16.09:9-11.

## **1. Arguments of the Parties**

21. In its Motion of 10 May 2012, the Respondent argued that both Parties had agreed in a letter of 11 October 2011 that correspondence with the provisional liquidator and the liquidator would be produced, but that the Claimant had failed to do this.<sup>13</sup> Accordingly, the Respondent asked that all correspondence with the liquidator be produced.<sup>14</sup> In the 14 May 2012 hearing, counsel for the Claimant pointed out that the alleged agreement of 11 October 2011 was intended to be reciprocal and that the Claimant was still awaiting confirmation that the Respondent agreed to exchange reciprocally all communications with the liquidator.<sup>15</sup>

22. The Claimant also pointed out that it had produced all documents that were responsive up to December 2011 and would be happy to have an order made for the production of documents after that date, provided that the order was reciprocal.<sup>16</sup> Counsel for the Respondent agreed with that approach.<sup>17</sup>

## **2. Analysis**

23. In light of the agreement of the Parties, the Tribunal will make the order outlined by the Claimant in respect of Request B.

### **III.3 Request C: Litigation with Mechmar (Request 4)**

24. Request 4 sought: “The pleadings, correspondence, orders, settlement offers, settlement agreements, transcripts, and demand letters from the lawsuit filed on 23 March 2011 by SCB HK against Mechmar.”

## **1. Arguments of the Parties**

25. In its Motion of 10 May 2012, the Respondent claimed that the Claimant had agreed to produce documents arising out its litigation with Mechmar over SCB HK’s entitlement to ITPL’s

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<sup>13</sup> Respondent’s Motion, paras 12-13.

<sup>14</sup> *Ibid.*, para. 16.

<sup>15</sup> Transcript, 15.41:22 – 15.42:2.

<sup>16</sup> *Ibid.*, 15.51:21 – 15.52:5.

<sup>17</sup> *Ibid.*, 15.57:8-10.

share, but had not done so. This information was important, according to the Respondent, as it would throw light on the security interests involved and the assignment of rights under the PPA.<sup>18</sup>

26. At the hearing on 14 May 2012, counsel for the Claimant asked that no order be made until Claimant's counsel had had an opportunity to liaise with counsel in Malaysia about the scope of the various proceedings there.<sup>19</sup> Counsel for the Respondent agreed to wait until counsel for the Claimant had liaised with counsel in Malaysia and stated that if they were not satisfied they would come back with a further request.<sup>20</sup>

## **2. Analysis**

27. In light of the understanding of the Parties, the Tribunal sees no need to make any order in respect of Request C at the present time.

### **III.4 Request D: Documents Obtained Through Purchase of Danaharta Loan (Requests 26-35, 52, 59-63, 72, 74, 86)**

#### **1. Arguments of the Parties**

28. In its Motion of 10 May 2012, the Respondent argued that the debt documents were relevant to the central issues in the case, including negotiation of the tariff, registration of a security interest, the waterfall of payments and changes to those payments.<sup>21</sup> At the hearing on 14 May 2012, counsel for the Claimant stated in response that it had already produced all the documents from the Danaharta file on which it planned to rely as well as all those documents that were responsive to the Respondent's requests.<sup>22</sup> The Claimant objected to handing over the complete file but said that it was prepared to respond to specific further requests.<sup>23</sup>

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<sup>18</sup> Respondent's Motion, paras 17-19.

<sup>19</sup> Transcript, 16.00:23 – 16.01:2.

<sup>20</sup> *Ibid.*, 16.06:3-7.

<sup>21</sup> Respondent's Motion, paras 23-41.

<sup>22</sup> Transcript, 15.02:8-16.

<sup>23</sup> *Ibid.*, 15.04:12-13.

## **2. Analysis**

29. The Tribunal notes that according to the Claimant all of the responsive documents have been produced from the Danaharta file. Thus, the Respondent's request for the whole file is like the Claimant's request for the ICSID 1 file – a request to have documents produced in order to double-check that the other party has done a proper job of determining relevance. In that sense, the request is not specific or focused on particular issues, or requesting something not already covered in the production by the Claimant. The Tribunal also notes that the Claimant has indicated that it would be prepared to review the file again in response to more specific requests.

30. In light of this, the Tribunal has decided that it would not order the production of the Danaharta file. However, if the Claimant wishes to make reference to anything in that file it must ensure that it has already been produced or produce it. Further, it is open to the Respondent to make further specific requests for documents that may be in the Danaharta file.

### **III.5 Request E: The Documents Upon Which SCB HK Intends To Rely (Request 69)**

31. Request 69: sought: “The documents upon which SCB HK intends to rely during the course of this arbitration.”

#### **1. Arguments of the Parties**

32. In its Motion of 10 May 2012, the Respondent described this request as a “fail safe mechanism.”<sup>24</sup> It was designed to have the Claimant produce documents on which it intends to rely, in order to prevent documents being produced piecemeal or at the last minute. At the 14 May 2012 hearing, counsel for the Claimant stated that it had produced with its Memorial all the documents on which it was relying in its Memorial and that it could not be expected to produce now documents on which it intended to rely in its Reply in response to a case that it had not yet heard.<sup>25</sup> In fact, the Claimant asserted, there were no documents on which it currently intended to rely that had not already been produced.<sup>26</sup>

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<sup>24</sup> Respondent's Motion, para. 35.

<sup>25</sup> Transcript, 15.31:11-14.

<sup>26</sup> *Ibid.*, 15.34:5-7.

## **2. Analysis**

33. The Tribunal notes that there is an obligation on a party to produce documents on which it relies in its pleadings. It also notes that there is an obligation to produce relevant documents on a request for document production. However, it does not consider that there is an obligation on a party to produce in advance documents that it will rely on in a future pleading, unless it is a document that is responsive to a request for document production.

34. In light of this, the Tribunal is not prepared to make the order that the Respondent requests.

### **IV Respondent's Motion to exclude certain documents produced at the 14 May 2012 hearing**

#### **IV.1. Arguments of the Parties**

35. At the 14 May 2012 hearing, the Respondent argued that many of the documents produced at the hearing by the Claimant were documents described as “third party” documents that were not supported by the evidence of witnesses to establish their foundation or how and when they had been received by TANESCO, including letters written by third parties.<sup>27</sup> In a subsequent letter to the Tribunal of 21 May 2012, the Respondent reiterated its objections to the production of those documents, arguing that they had been used to support arguments for which no factual foundation had been established other than the arguments of counsel.<sup>28</sup> The Respondent also argued that where portions of the Memorials in the BIT proceedings had been produced, the Claimant should be required to produce the full Memorials.

36. In its response of 28 May 2012, the Claimant argued that the documents produced at the hearing were responsive to arguments made by the Respondent in its Request for Bifurcation or it in its Motion for the production of documents. Moreover, the Claimant argued, the Respondent was not prejudiced by their production because apart from four documents all were documents that had already been produced in the BIT proceedings.<sup>29</sup> With respect to the Respondent's request that whole Memorials be produced rather than portions from them, the Claimant said that

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<sup>27</sup> *Ibid.*, 12.27:19 – 12.29:17.

<sup>28</sup> Letter of 21 May 2012.

<sup>29</sup> Letter of 28 May 2012.

it was prepared to produce the whole Memorials. In a response of 5 June 2012, the Respondent reiterated its request for the exclusion of these documents.

#### **IV.2. Analysis**

37. In considering this matter, the Tribunal notes the considerable disadvantage that can be suffered by a party when the other party produces new documents at the last minute at a hearing, although in this case the lack of time for the Claimant to respond in writing to the Respondent's request for the production of documents made some document production at the hearing inevitable. However, since the Tribunal has already ruled on the question of bifurcation, and indicated at that time that in reaching its decision it had not taken the documents produced at the hearing into account, the question now for the Tribunal is whether these documents should be excluded for the purpose of the combined jurisdiction and merits phase. In this regard, the Tribunal notes that even if these documents were excluded now, they could still be produced later by the Claimant in the course of making its arguments on jurisdiction and on the merits. If they were so produced it would be for the Respondent then to argue as to the relative weight or probative value to be given to them.

38. Since, then, there can be no question of prejudice at the hearing on bifurcation, the Tribunal is not prepared to order that these documents be excluded. It is for the Respondent to make arguments on the relative weight to be assigned to them at an appropriate future stage in the proceedings. At the same time, while recognizing the right to produce responsive documents at the hearing on jurisdiction and the merits, the Tribunal notes that excessive production at that stage of the proceedings, particularly when the documents could have been produced earlier, could cause prejudice.

39. Finally, the Tribunal notes the commitment of the Claimant to produce the full Memorials instead of the extracts that were produced at the hearing.

#### **V Order**

40. In light of the above, the Tribunal disposes of the requests made by the Parties in the following way:

### **Claimant's Request for the Production of the ICSID 1 Documents**

The Tribunal declines at this stage to grant the motion to compel the production of the ICSID 1 proceedings. It is nevertheless understood that:

- the Respondent will conduct a review of the ICSID 1 file as it undertook to do in paragraph 29 of its Opposition to the motion to compel production and will provide to the Claimant any relevant documents that emerge from that review;
- if the Claimant has more specific requests relating to the documents of the ICSID 1 proceedings, it should make such requests;
- in the future proceedings of this case, if the Respondent makes reference to the ICSID 1 proceedings, it must identify the documents in the record that support its assertions or produce the relevant documents from the ICSID proceedings to substantiate the reference it is making.

### **Respondent's Request A**

In the light of the Claimant's assurance that it had found no documents responsive to this request and the Respondent's acceptance of this assurance, as set out in paragraph 17 above, the Tribunal makes no ruling on this matter.

### **Respondent's Request B**

In the light of the agreement between the Parties as set out in paragraph 22 above, the Tribunal orders the production of all communications by either Party to the provisional liquidator or the liquidator after December 2011.

### **Respondent's Request C**

In the light of the understanding of the Parties as set out in paragraph 26 above, the Tribunal makes no order on this Request at the present time.

### **Respondent's Request D**

The Tribunal declines at this stage to order the production of the Danaharta file. It is nevertheless understood that:

- if the Claimant wishes to make reference to anything for which there are relevant documents in the Danaharta file it must ensure that those documents have already been produced or then produce the relevant documents;
- it is open to the Respondent to make further specific requests for documents that may be in the Danaharta file.

### **Respondent's Request E**

The Tribunal declines to make the order requested, but this is not to be interpreted as diminishing in any way the obligation on each Party to produce documents on which it relies in its pleadings or the obligation to produce relevant documents on any request for document production.

### **Respondent's Motion to Exclude Certain Documents Produced at the 14 May 2012 Hearing**

The Tribunal declines to make the order requested.

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On behalf of the Arbitral Tribunal

[Signed]

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Professor Donald McRae

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Date July 6, 2012