

APPENDIX A

**BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

ICSID Case Number ARB/98/8

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED (Claimant)

and

INDEPENDENT POWER TANZANIA LIMITED (Respondent)

**DECISION ON THE RESPONDENT'S REQUEST FOR
PROVISIONAL MEASURES**

Introduction

1. On 30th November 1998, five days after the Request for Arbitration on behalf of the Claimant ("TANESCO") was lodged with the Centre (on 25th November 1998), one week before it was registered by the Centre (on 7th December 1998), and some four months before the Tribunal was constituted (on 23rd March 1999), the Respondent ("IPTL") applied to the High Court of Tanzania, seeking, inter alia, an order for interim payments. That relief was granted, but execution has now been stayed by a single Justice of the Court of Appeal of Tanzania pending appeal to that Court. Any decision by this Tribunal on the Claimant's Emergency Request for Recommendation of Provisional Measures addressed to those judicial proceedings has been deferred at the request of the Parties.

2. At the first session of the representatives of the Parties with the Tribunal, held on 14th June 1999, pursuant to ICSID Arbitration Rules 13 and 20, a timetable was fixed for the future conduct of the arbitration, including for the making and hearing of any request for provisional measures which IPTL might see fit to make now that the Tribunal was fully constituted and seized of the dispute.

3. As anticipated, IPTL filed a Request for Provisional Measures, in which it sought a recommendation, pursuant to Rule 39 of the ICSID Arbitration Rules, that TANESCO:-
 - (i) Permit commercial operation of the Facility;
 - (ii) Pay to IPTL US \$32.607 million, as accumulated capacity payments which it alleged had been due since deemed commercial operation of the Facility on 15th September 1998; and
 - (iii) Continue to pay capacity payments at the rate of USD \$3.623 million per month (or, alternatively, US \$3.4 million per month as allegedly previously agreed by TANESCO) until final determination of the issues in the arbitration.

4. Further written submissions followed, and a hearing took place before the Tribunal in London on 18th and 19th October 1999, IPTL being represented by Mr Sentner and Mr Penski of Messrs Nixon Hargrave, Devans & Doyle LLP, and TANESCO being represented by Mr Hawkins of Messrs Hunton & Williams. In the course of the hearing, Mr Sentner withdrew IPTL's request for a recommendation relating to the claimed lump-sum in respect of accumulated

capacity payments, and amended the first recommendation sought to clarify that IPTL not only wished to have permission to operate the Facility, but effectively sought a recommendation that TANESCO co-operate in doing all that was necessary to enable such operation to commence, which necessarily included the completion of operational tests, and the connection of the Facility to the Tanzanian electricity grid.

5. A number of issues were argued, including in particular the following:-

- (i) Did the Tribunal have jurisdiction to entertain the request or to make the recommendations sought?
- (ii) Was the request one for conservatory measures or, in effect, for specific performance of the Agreement?
- (iii) Would the effect of making the recommendations sought be to maintain the "status quo"?
- (iv) Did IPTL demonstrate an urgent need for the relief sought?

6. Before considering these matters, we observe that both Parties concentrated a great deal of attention in their written and oral submissions on the "merits" of the dispute. As we sought to make clear in the course of the hearing, we think it neither appropriate nor indeed possible for us at this stage to form or express any concluded view on the merits. Our decision is required to address only the issues formulated by the parties and recited above.

Do we have jurisdiction?

7. It was common ground that our jurisdiction (if any) must flow from one of two sources, namely:-

- (i) English arbitration procedural law, and in particular the Arbitration Act 1996; and/or
- (ii) the ICSID Convention and Arbitration Rules.

The former was argued by IPTL to be applicable because in paragraph 18(c) and (e) of their Agreement, the Parties had provided that the “arbitration shall be conducted in London, England” and that “[t]he Law governing the procedure and administration of [the] arbitration....shall be the English law.” The latter was agreed to be applicable because the Parties’ Agreement refers disputes to arbitration under the ICSID Convention and Rules.

8. Without determining whether or not it applies vel non, we note that the English Arbitration Act grants considerable powers to arbitrators, and in particular, under section 38(4), the power to give directions in relation to the preservation of property. However, section 39 provides that the Tribunal only has power to order on a provisional basis relief which it would have power to grant in a final award (including, in particular, a provisional order for the payment of money or disposition of property) if the parties agree to confer such power on the Tribunal.

9. Rule 39(1) of the ICSID Arbitration Rules, which follows Article 47 of the ICSID Convention, provides, under the heading “Provisional Measures” :-

“At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

10. As we understand it, IPTL sought to found jurisdiction on section 39 of the English Arbitration Act and Rule 39 of the ICSID Rules, which latter provision it contended constituted an agreement by the Parties to extend the powers of the Tribunal.

11. We conclude that we have jurisdiction to make the recommendations sought, provided that they satisfy the requirements of Rule 39, which is all the power the Tribunal would have even if section 39 of the English Arbitration Act applied (as to which it is unnecessary for us to reach or express any conclusion).

Is this an application for conservatory measures? Would the recommendations sought maintain the “status quo”?

12. Although neither Article 47 nor Rule 39 uses the phrase “conservatory measures”, it is implicit in those provisions and it is our understanding that it has been so construed and applied. Provisional measures for the preservation of rights in our

view contemplate measures that will prevent the erosion of rights pending final resolution of the dispute. We accept that the rights which such measures can be invoked to protect are not limited to proprietary rights, and are not limited to rights over corporeal things. They can include, for example, contractual rights.

13. However, there is in our view a distinction to be drawn between the protection of rights and the enforcement of rights. It was no doubt in appreciation of this that Mr Sentner sought to contend that the recommendations sought would have the effect of maintaining the "status quo". His justification for this was the assertion that IPTL enjoyed rights under the Agreement which, in the absence of the recommendations sought, would be likely to be eroded, since there was a risk that the lenders to IPTL, whose rights to foreclose on the loan security (the Facility) had already accrued, would do so and thus deprive IPTL of ownership of the Facility; and a real risk that, by the time any final award in the arbitration were to be issued, TANESCO, and its owner, the Tanzanian Government, would not be in a financial position to be able to honour it, since no revenues would have been generated by the Facility in the meantime.

14. This submission requires a degree of speculation. There was no evidence put before us to the effect that the lenders have been contemplating foreclosure other than the letter of Bumiputra-Commerce Bank Berhad Corporate Banking dated 16th November 1999 threatening "drastic steps to recover the loan granted" should "the situation remain unchanged by end November 1999." We doubt, however, whether the lender would regard such a step as in its financial interest, since the Facility could not be sold to be operated by a purchaser without the co-operation

of TANESCO. It may be that, by the time our final award is issued, assuming that we were to uphold IPTL's claim and make a substantial monetary award in its favour, TANESCO would be unable to satisfy it. But there is some precedent for the view that conservatory or provisional measures under Rule 39 should not be recommended in order, in effect, to give security for the claim. See e.g. Atlantic Triton Co. Ltd v Guinea (Case No. ARB/84/1) 3 ICSID Reports 3; see also Paul D. Friedland, "Provisional Measures In ICSID Arbitration", 2 Arb Int'l 335, 348.

15. In our view, Mr Hawkins was right in his submission that what IPTL sought, in reality, was specific performance of the Agreement and/or an interim mandatory injunction requiring such performance. As we understand it, the "status quo" can be summarised as follows: IPTL, on the one hand, is contending that the Agreement remains in being and requires the Facility to be put into operation, whereas, on the other hand, TANESCO is contending that it was entitled to cancel the Agreement, and in any event that the applicable Reference Tariff, agreement upon which it is alleged is necessary before the Facility can be operated, has not yet been agreed; and, pending resolution of the dispute, the Facility has been standing idle. Far from seeking to maintain that "status quo", the recommendations sought by IPTL were plainly directed to affect a fundamental change to it.

16. We do not go so far as to conclude that "provisional measures" under Rule 39 can never include recommending the performance of a contract in whole or in part: it is not necessary for us to go that far. But where what is sought is, in effect, performance of the Agreement, and where the only right said to be preserved

thereby is the right to enjoy the benefits of that Agreement, we consider that the application falls outside the scope of Rule 39, and therefore is beyond our jurisdiction to grant.

17. It is said that TANESCO would not suffer any harm if the recommendations were to be made, since the electricity produced and put into the grid would be readily saleable at a profit to TANESCO. This may well be, although there was evidence from Dr Swales to the effect that Tanzania's immediate needs for further electricity may not be so substantial as at one time had been thought. But we do not think that the balance of convenience, or, looking at it from a different perspective, the balance of harm, can be a sufficient ground on its own for granting this sort of relief – if the nature of the relief is beyond that contemplated by Rule 39.

Has IPTL demonstrated an urgent need for the relief sought?

18. Nor are we persuaded that IPTL has demonstrated an urgent need for the relief sought. As we have indicated, we have serious doubts about the assertion, unsupported by evidence, that the lenders may foreclose, or at least do so in the foreseeable future. Further, whilst it may be that TANESCO's ability to satisfy a substantial monetary award, save out of income from the sale of electricity from the Facility, may be in doubt, if our final award were to be in IPTL's favour, and the Facility is ultimately put into operation, IPTL will receive its agreed tariff payments for the full contractual period of 20 years. All it will have lost will have been the use of the money over a period when it will have been committed to

repayment of capital and interest under its loan facility. There is no reason to believe that TANESCO would be unable to satisfy any award of damages in respect of this, out of its revenues on the sale of electricity produced. There is, admittedly, a great deal of uncertainty, but the burden at this stage must be on IPTL to make out its case of urgent need. It has not done so.

19. For the above reasons, the Tribunal declines to make the recommendations sought.

Dated this *20th* day of *December* 1999.

Hon. Charles Brower

Hon. Andrew Rogers QC

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Andrew Rogers
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Kenneth Rokison QC

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