

APPENDIX B

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 PRELIMINARY ISSUES

Introduction

1. At the hearing before the Tribunal on 18 and 19 October 1999, it was proposed by the Tribunal, and agreed between the parties, that the parties should address certain issues of construction and / or law, arising in the arbitration, to be determined by the Tribunal on a preliminary basis. A schedule for the filing of submissions on the formulation of the preliminary issues, and written memorials and

counter-memorials in relation to such issues, as finally formulated by the Tribunal, was agreed and ordered.

2. Subsequently, in the course of correspondence between the parties' legal representatives, the Secretariat of ICSID and the Tribunal, the issues to be determined as preliminary issues were defined as follows:
 1. Was or is TANESCO entitled to terminate the PPA?
 2. If not, what are the effects (if any) on the parties' respective rights and obligations under the PPA of:
 - (a) the change from low speed to medium speed diesel engines; and / or
 - (b) any other alleged differences between the Facility as built and that provided for in the PPA and/or any other agreements between the parties?
 3. How is the final Reference Tariff to be calculated, in the light of the said change and any other differences which may be established?
 4. What was the effect on the parties' respective rights and obligations of Addendum No. 1 dated 9 June 1995, and, in particular, did Addendum No. 1 on its true construction have the effect that the final Reference Tariff was to be calculated by reference to the reasonable and prudently incurred cost of the

Facility as built; and what were “the underlying assumptions stated in the PPA”?

3. Written memorials were filed on behalf of the parties in relation to the above issues on 26 January 2000, together with witness statements and documents relied on. Reply submissions were served on behalf of the parties on 28 February 2000, together with further witness statements and documents.
4. Before the hearing, both parties provided the Tribunal with copies of the legal authorities to be relied on.
5. An oral hearing on the preliminary issues took place before the Tribunal at the Fleet arbitration Centre, London on 13, 14, 15, and 16 March 2000, TANESCO being represented by Mr Robert W. Hawkins, Mr John Jay Range and Mr Brett A. Bakke of Messrs Hunton & Williams, and IPTL being represented by Mr Robert C. Sentner, Mr Christopher M. Paparella and Miss Nancy P. Hill of Messrs Nixon Peabody LLP.
6. At the start of the hearing, the Tribunal was informed that none of the witnesses whose statements had been served on either side was required to be called for cross-examination.
7. An application was pursued on behalf of TANESCO, following its request filed on 7 March 2000, for postponement of the hearing pending the disclosure by IPTL of further documents which had been requested. The Tribunal, after deliberation, refused this application.

8. Following the hearing, and in accordance with directions agreed between the parties, and given by the Tribunal, short post-hearing briefs dated 20 April 2000 were served on behalf of both parties.
9. The record in relation to the preliminary issues then being closed, the Tribunal has considered the submissions advanced on behalf of the parties, both written and oral, together with the evidence adduced, and has reached its unanimous decision on the preliminary issues (which is intended to be final in relation to those issues which it determines, and which will be incorporated in our Final Award in due course) as follows:
 10. Having had the benefit of the parties' respective submissions, and in light of the way the parties put their case, it appears to the Tribunal that the preliminary issues ordered can and should be considered under three broad headings, as follows:
 - (1) Was the PPA a valid and binding contract? This question involves two sub-issues, namely:
 - (i) Did the PPA never become binding because of the failure of a condition precedent (namely the approval of the Government of the Republic of Tanzania)?
 - (ii) Was the PPA void for uncertainty (a question which involves consideration of the meaning and effect of Addendum No. 1)?
 - (2) If the PPA became a valid and binding contract, was TANESCO entitled to serve Notice of Default, and is

TANESCO entitled to give notice of termination accordingly? This question sub-divides into:

- (i) issues of construction / agreement; and
- (ii) issues of waiver and / or estoppel.

(3) If the PPA was and remains in force, how should the Reference Tariff be adjusted pursuant to Addendum No. 1? In addition to the meaning and effect of Addendum No. 1 (see (1)(ii) above), this question raises the issue whether the actual costs taken for the purposes of the adjustment must be such costs as are reasonable and were prudently incurred.

11. We believe that in seeking to answer the above questions, we shall effectively have covered the listed preliminary issues, and we proceed to consider them in the above order.

(1) Was the PPA a valid and binding contract?

- (i) Did the PPA never become binding because of the failure of a condition precedent?
- (ii) Was the PPA void for uncertainty?

12. In relation to the first sub-issue, TANESCO's contentions can be summarised as follows:

- (1) It was made clear to IPTL that TANESCO required the approval of the Tanzanian Government before committing itself to the PPA;
- (2) The Government in turn made it clear to TANESCO that its approval was dependent upon an effective mechanism for

adjusting the Reference Tariff in the PPA to take account of any changes in the assumptions upon which it had been based;

- (3) The Government's stance was communicated to IPTL;
- (4) The mechanism stated in Addendum No. 1 was not effective to achieve that purpose, and, accordingly, a condition precedent to the efficacy of the PPA was not satisfied.

13. In relation to the second sub-issue, TANESCO contends;

- (1) That Addendum No. 1, although expressed as an "Addendum", was an integral part of the PPA;
- (2) That its meaning and effect were so uncertain that it should be regarded as void for uncertainty on two grounds – first, because the assumptions underlying the Reference Tariff were not stated in the PPA, and it was therefore impossible to derive from the words used the parties' presumed intention as to the assumptions to which the Addendum was intended to refer; and second, because there was no machinery provided in Addendum No. 1 for adjusting the Reference Tariff to take account of any changes in the relevant assumptions;
- (3) That the mechanism for the adjustment of the Reference Tariff for which Addendum No. 1 purported to provide was such a fundamental part of the parties' bargain that it could not be severed, and, accordingly, the whole contract should be regarded as void and of no effect

(i) **Condition precedent – Government approval**

14. It was not suggested that there was anything in the terms of the PPA itself that expressly provided for Government approval as a condition precedent to the efficacy of the bargain, although such provisions are not uncommon where government agencies or government-owned commercial enterprises are involved. Nor does TANESCO argue for an implied term. In advancing its argument, and despite Article 19.5 of the PPA The “Entire Agreement” provision, TANESCO relies on correspondence during the period leading up to the signature of the PPA, some of which passed between government departments, some of which was communicated to TANESCO, and only a portion of which was passed on to otherwise involved IPTL.

15. In doing so, TANESCO relies specifically on Section 101 of the Tanzanian Evidence Act, 1967, which provides, in its material parts:

“When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved..., no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purposes of contradicting, varying, adding to, or subtracting from its terms:

Provided that - ...

..... (c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved....”

It is contended that the same principle must apply, *a fortiori*, where reliance is placed on other written communications.

It is unnecessary for the Tribunal to consider in this context whether the question of the admissibility of the correspondence relied on should properly be regarded as a matter of substantive law (in which case Tanzanian law would apply), or procedural law (in which case the laws of England, as the seat of arbitration, would apply), since the Tribunal is satisfied that English law would also permit reference to such correspondence for this purpose. In any event, Article 34(1) of the ICSID Arbitration Rules would give the Tribunal full discretion in this regard.

16. However, in the opinion of the Tribunal, there is nothing in the correspondence or in the record of meetings leading up to the signature of the PPA which, upon analysis, supports TANESCO's contention.
17. Following meetings between representatives of IPTL and the Government of Tanzania that concluded on 15 December 1994, and a further meeting between Mr Rugemalira of IPTL and the Commissioner for Energy and Petroleum Affairs on 21 December 1994, at which it was confirmed that IPTL's proposal was "technically acceptable" to TANESCO, on 28 December 1994, Mr

Mollel, the Principal Secretary of the Ministry of Water, Energy and Minerals, wrote to IPTL stating:

“I am pleased to inform you that the Government has endorsed your proposal and has directed the facilitation of the implementation of the Project subject to the following:

- (a) IPTL will proceed immediately to conclude a [PPA] with [TANESCO] substantially upon the terms as outlined in your draft PPA but with amendments as agreed between IPTL and TANESCO.....”

18. On 4 January 1995, the Managing Director of TANESCO wrote to IPTL asking for additional information and data, including project cost estimates and details of financing sources. He added:

“In summary we require information and data that enabled you calculate the capacity and energy charges you proposed in your document dated 21 November 1994...”.

19. IPTL replied on 11 January 1995, responding to the queries raised and stating a project contract price of US \$163,000,000 including US \$14,000,000 for gas conversion equipment.
20. Discussions then took place on 16, 17, and 19 January 1995 between representatives of IPTL and TANESCO in the presence of representatives of the Government of Tanzania, in the course of which IPTL was again requested to provide clarification on what were described as “two key items”, namely (a) the tariff and (b) a breakdown of capital costs. At the meeting, a number of

amendments to the draft PPA were discussed and agreed. It was recorded that the signing of the PPA was still subject to the approval of TANESCO's Board of Directors, and further that TANESCO would promptly make its recommendations to the Government for "final endorsement".

21. A Cabinet Meeting was held on 3 May 1995, at which it was agreed that the President should be advised that the Government in principle should approve the PPA; that the Cabinet's Economic and Finance Committee should meet immediately to review and discuss in detail technical issues regarding rates for Capacity Charge, Energy Charge, Capacity Utilisation and a stand-by letter of credit as approved at the experts' sessions; that TANESCO should be permitted to sign the PPA; and that the Ministry of Water, Energy and Minerals also should be permitted to sign an Implementation Agreement with IPTL immediately. It was recorded that the President concurred with the above and ordered its implementation.

22. Accordingly, on 16 May 1995, the Principal Secretary of the Ministry of Water, Energy and Minerals wrote to TANESCO's Managing Director, with a copy to the Secretary to the Cabinet, informing him of the approvals given at the Cabinet Meeting, and continuing:

"On that basis, TANESCO and our ministry have been permitted to sign with IPTL contracts on Power Purchase Agreement and Implementation Agreement. However, we have been asked not to state Capacity Charge rates until we have submitted...an explanation on the rates. This means,

for the time being we will only agree on the formula and criteria that will eventually produce the rates.”

The letter ended:

“Please take the necessary action to sign an agreement with IPTL as soon as possible with attention to the stated conditions...”

23. Two days later, on 18 May 1995, the Principal Secretary of the Ministry of Water, Energy and Minerals wrote to IPTL, informing it that Government approval had been granted for TANESCO to sign the PPA. His letter continued:

“The Government has however required us to review and elaborate on Capacity Charge, Energy Charge and Standby Letter of Credit with a view to bringing down the cost of the project. Your Co-operation in this respect will be highly appreciated...TANESCO and the Ministry of Water, Energy and Minerals stand ready to sign the above agreements accordingly....”

24. IPTL replied on the same day, noting the stated approval, and attaching notes clarifying and elaborating upon the Capacity and Energy Charges. Its letter continued:

“Regarding the suggestion that we sign the Agreements without indicating the Reference Tariff we have contacted our Financial Advisors on the matter and regret to report that this will not be acceptable as such document will remain unbankable.”

25. On 25 May 1995, IPTL wrote to the Principal Secretary to the Ministry of Water, Energy and Minerals, with copies to the Chief Secretary, the Economic Advisor to the President and the Managing Director of TANESCO, recording an agreement with the Minister discussed that morning that, since the PPA did not specify a final tariff but was only quoting a reference tariff “on the basis of the January 1995 assumptions”, the parties should go ahead and sign “if the Chief Secretary will also confirm that this is not in conflict with the decision of the Cabinet...”.

The letter continued:

“We have since consulted the Chief Secretary and he is in agreement that signing the Agreements with a tentative reference tariff is within the spirit of the Cabinet’s decision...We have agreed that if I let you have sight on the revised PPA to satisfy yourself that it only talks about a reference tariff you will instruct TANESCO to sign tomorrow...”.

26. On 30 May 1995, Mr Rugemalira of IPTL sent a Memorandum to his colleague, Mr Daya, stating:

“I refer to our telephone conversation when I informed you that Government wants us to give the assumptions on which we have based to arrive at the capacity charge...and the Energy charge.....”

On the following day, 31 May 1995, Mr Rugemalira wrote to the Principal Secretary of the Ministry of Water, Energy and Minerals, with copies to the Chief Secretary, the Director General of the

Investment Promotion Centre and the Managing Director of TANESCO, listing the assumptions used to determine the capacity charge “contained in...the proposal submitted...in November 1994 which was the basis of negotiations and agreements reached in January, 1995...”

The letter continued:

“[W]e 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...[W]e agreed with the Minister and the Principal Secretary...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...”

...We request you to authorise TANESCO to sign the PPA now...and any justifiable changes can be done by way of side memoranda or addendum to the Agreement...”.

27. On 5 June 1995, the Principal Secretary of the Ministry of Water, Energy and Minerals wrote to the Secretary to the Cabinet, referring to his letter of 16 May 1995, and stating:

“...To avoid wasting any more time, we have reached an agreement with IPTL that the contract should be signed now stating “Reference Tariff” of 10 US dollar cents per kWh with an understanding that this price may change depending

on realistic changes which may occur in the utilized criteria...

...Before authorising TANESCO to sign the contract with IPTL, stating Reference Tariff, I seek your approval..."

28. The Secretary to the President replied the following day stating:

"...[T]he correct meaning of those directives is that your ministry and the Electricity Company should satisfy themselves with the terms of the contract prior to signing it. It is important that the contract should contain a clause, which will provide an opportunity for both sides to review the agreed tariff rates in accordance with any changes in the utilized criteria..."

29. On 7 June 1995, the Principal Secretary of the Ministry wrote to TANESCO stating that TANESCO could now sign the contract with IPTL.

30. In fact, we understand that the PPA had already been signed on behalf of TANESCO on 26 May 1995, but was still retained by it until 9 June 1995, when it was handed over at the same time as Addendum No. 1 was signed.

31. The Tribunal is not persuaded that the effect of the correspondence to which we have referred was to render Government approval a condition precedent to the efficacy of the PPA. Whilst we accept that the Government wanted the PPA to provide a mechanism for

adjusting the Reference Tariff, primarily so that TANESCO could obtain the benefit of any “savings”, and that IPTL was made aware of this, it was never provided, or indeed suggested to IPTL that it was necessary for there to be any formal Government approval communicated to it, nor that those negotiating and ultimately signing and returning the PPA on behalf of TANESCO lacked authority to do so. Indeed, lack of relevant authority was not pleaded or relied on per se. We further conclude that, although the Government expressed its desire to TANESCO in clear terms, in the end it left it to the relevant Ministry and in particular to TANESCO to satisfy itself that the terms of the PPA provided the mechanism for adjustment which the Government wanted. On this basis, the Minister of Water, Energy and Minerals authorised TANESCO to sign the PPA in the terms it did.

(ii) The alleged inefficacy of the adjustment mechanism provided in Addendum No. 1

32. Appendix B to the PPA provides for the payment of a Reference Tariff, which is comprised of two elements, namely a “Capacity Charge”, designed to compensate IPTL for establishing the facility to generate electricity at the contract rate, and an “Energy Charge”, to compensate for the costs of providing electricity from the facility so established, as required by TANESCO. The former obviously would have included the costs of the design and construction of the facility as well as financing costs; the latter would include fuel costs and ongoing maintenance.

33. In the correspondence to which we have referred above, it was clear that the Tanzanian Government and TANESCO required some adjustment mechanism to take account of any changes in the assumptions upon which the Reference Tariff had been based. Although they had in mind receiving the benefit of any savings, they conceded that IPTL should be compensated for any increases.
34. Paragraph 1 of Addendum No. 1 provided as follows:
- “Before commencement of commercial operations the Reference Tariff mentioned in Table I of Appendix B will be adjusted upwards or downwards depending on the effect of changes that will have taken place on any and all the underlying assumptions stated in the Power Purchase Agreement...”.
35. As appears from the correspondence which we have set out in extenso above, the Tanzanian Government inquired as to the assumptions upon which the Capacity Charge and the Energy Charge had been based; this inquiry was passed on by Mr Rugemalira to Mr Daya; and on 31 May 1995, IPTL wrote to the Principal Secretary of the Ministry of Water, Energy and Minerals setting out in detail the assumptions used to determine the Capacity Charge.
36. It will be apparent that, although the request made by the Government and passed on related to all assumptions, the assumptions stated in the letter of 31 May 1995 only covered those underlying the “Capacity Charge”, and not those on which the “Energy Charge” had been calculated.

37. It is common ground that the letter of 31 May 1995 was “on the table” in front of the parties’ representatives when they negotiated and agreed the terms of Addendum No. 1.
38. It seems to us, and was, we think, common ground between the parties’ legal representatives at the hearing, that Addendum No. 1 could be construed in a number of ways:
- (1) That the reference to “assumptions” was a reference to those set out in Appendix H to the PPA, which related only to tax and duty matters;
 - (2) That the reference to “assumptions” was a reference to those set out in the letter of 31 May 1995 to which we have just referred;
 - (3) That the reference to “assumptions” was a reference to all the assumptions which had been made by IPTL in arriving at the Reference Tariff, whether or not expressed in that letter;
 - (4) That the meaning of Addendum No. 1 was so uncertain that it should be rejected as void and meaningless.
39. On behalf of TANESCO, it was submitted that the Tribunal should adopt construction (4), with a “fallback” of (3), while IPTL contended primarily for construction (2), with a “fallback” of (1).
40. The starting point must be the actual words used, which must be literally applied, unless their literal meaning is insensible or obviously does not reflect the mutual intention of the parties. In this context, the Tribunal was, not surprisingly, referred to that part

of the speech of Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society etc* [1998] 1 All ER 98, at page 115, where he said:

“The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax...”

The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they blatantly could not have had..... Many people, including politicians, celebrities and Mrs Mallaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean...”

41. The Tanzanian Evidence Act, 1967, to the extent to which it applies, provides in Section 104 as follows:

“When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given that it was used in a peculiar sense”.

42. Upon a literal construction of the words, the only assumptions “stated in the PPA” were those in Appendix H, which referred to assumptions concerning taxes and duties of various kinds. But it was, as we understand it, common ground that it was not the intention of either party to limit Addendum No. 1 in this way; and for this reason, we should be inclined to reject this construction, unless we were driven to it as the only construction which would result in the survival of the contract.

43. We should also have been inclined to reject alternative construction (4), as an admission of defeat. It was again, we think, common ground that a tribunal should strive to give some meaning to every provision in a contract – especially one which has been specifically negotiated and agreed, as was Addendum No. 1. As is stated in the 28th edition of Chitty on Contracts, Volume I “General Principles”, paragraph 2-133 at page 149:

“The court will make considerable efforts to give meaning to an apparently meaningless phrase...”.

44. This leaves the Tribunal with a choice between alternatives (2) and (3). In support of the latter, Mr Hawkins, for TANESCO, placed

repeated emphasis on the reference to "...any or all the underlying assumptions...", but chose, as indeed he had to, to ignore the word "...stated...". Not only did TANESCO's "fallback" construction involve, in effect, striking out part of the clause; in the view of the Tribunal it makes little commercial common sense. It would mean that the parties had agreed to adjust a Reference Tariff by reference to changes and assumptions which IPTL had never communicated to TANESCO. In fact, as has emerged in the evidence, there was a mathematical model constructed in 1995 on which it is said that the Reference Tariff was based; but TANESCO did not know that at the time, and in any event was unaware of its contents.

45. As has been seen from the exchanges of correspondence among the Tanzanian Government, TANESCO and IPTL during the period leading up to the signature of the PPA, the Government was anxious not only that TANESCO should benefit from any savings in the assumptions underlying the PPA, but also to be informed what those assumptions were. The only assumptions which were reported to TANESCO in response to the Government's enquiries were those set out in the letter of 31 May 1995.

46. It is true that the Government's enquiry related to all the assumptions underlying or utilised in the PPA, and in the enquiry referred to in Mr Rugemalira's Memorandum of 30 May 1995, which gave rise to the 31 May 1995 letter, had apparently specifically requested assumptions used as the basis for both the Capacity Charge and the Energy Charge. But it was only given the latter, and although this may at first sight appear odd, there may have been good reason for IPTL so limiting its response to the

enquiry. As IPTL stated in its 31 May 1995 letter, the main factor which could alter the assumptions and thus the Tariff would be the project cost. Furthermore, under the terms of Addendum No. 1 as agreed, the Reference Tariff was not going to be subject to continual adjustment throughout the period of the PPA, but was to be the subject of a once and for all adjustment “[b]efore commencement of commercial operations...”, depending on the effect of changes that “will have taken place”. By that time, the project cost would have been known, together with all or most of the other costs and charges involved in the design and construction of the facility, as well as its financing, and putting it into operation. Whilst changes in design might have caused some re-assessment of the assumptions used for the purposes of arriving at the Energy Charge, such as maintenance costs and fuel consumption costs, the actual figures for those aspects of IPTL’s expenditure to be recovered from the Energy Charge portion of the tariff would only change in the course of the performance of the PPA, which was to last for a minimum of 20 years.

47. In relation to alternative construction (2), as was again emphasised by Mr Hawkins, Addendum No. 1 refers to the underlying assumptions stated in the PPA, and not to those stated in the letter of 31 May 1995. However, it is common ground that the letter was before the draftsmen of Addendum No. 1, and, taking the totality of the evidence, including in particular the communications which led up to the drafting and signing of Addendum No. 1, which we have set out at some length above when considering the question of Government approval, the Tribunal concludes that the mutual intention of the parties was to refer to the assumptions set out in

that letter. Although the representatives of both parties appear to have been extremely fluent in the English language, it may not have been their first language, and the explanation could well be that, rather than using the wrong words, they simply used the wrong syntax and intended to refer to "...any or all of the stated assumptions underlying the PPA...". But this involves a degree of speculation, which is not necessary to our decision.

(iii) The mechanism for adjustment

48. This problem falls into a somewhat different category. It is not so much a question of the parties purporting to make an agreement but failing to make it clear what their mutual intention was, as it is a question of the parties not having made any provision for the mechanism whereby the Reference Tariff was to be adjusted.

49. In these circumstances, the Tribunal is of the clear and unanimous view that the PPA must be read as subject to an implied term that the adjustment made must be such as would be appropriate and reasonable to take account of the changes. Whilst we anticipate that there may be problems and indeed disagreements in applying the test of reasonableness, the fact that there is an arbitration clause in the PPA, under which we were appointed, means that any dispute as to precisely how the Reference Tariff should be adjusted may be determined by this Tribunal, and, indeed, there is a further period reserved later this year for any hearing which may be necessary for this purpose.

(iv) **The consequences of the possible voidness of Addendum No. 1**

50. Since the Tribunal has concluded that Addendum No. 1 is not void for uncertainty, the consequences of its alleged voidness on the PPA as a whole becomes a wholly academic question. However, as the matter was argued, we think we should make it clear that, even if we had reached the conclusion that paragraph 1 of Addendum No. 1 was void for uncertainty, we should not have gone on to hold that the whole PPA thereby foundered.
51. Although we accept that Addendum No. 1 was an integral part of the PPA, especially in as much as it was signed at the same time as the signed PPA was handed over by TANESCO to IPTL, it nevertheless constituted a “gloss” on a contract already agreed in principle. Certainly, the PPA could stand without it. Had the point been taken at an early stage, before the parties and in particular IPTL had begun to implement the PPA, we should have been doubtful whether it was the mutual intention of the parties that the contract without Addendum No. 1 should be binding on them; but since, by the time the point was taken, IPTL had spent an enormous amount of time, effort and money in implementing the PPA over a period of some years, the suggestion that all of this had been done under a purported contract which was in reality void and of no effect is extremely unattractive.
52. It may seem illogical to adopt a different view of the consequences of the alleged voidness of Addendum No. 1, depending upon the extent to which the PPA had been purportedly performed, but the question must be: Must Addendum No. 1 be taken to have been of

such importance to the PPA that the parties (applying an objective test) must be taken to have concluded that the contract could not stand and operate without it? Whatever the parties may have concluded had the question been posed in June 1995, after the PPA had been substantially performed by IPTL by designing, constructing and commissioning the power plant at a cost of over US \$150,000,000, in our view the question only permits one answer: The PPA must stand unamended.

Thus, for the reasons stated above, the Tribunal concludes that the PPA did not lack efficacy because of the non-satisfaction of a condition precedent, and it was not void for uncertainty; thus, the PPA constituted a valid and binding contract.

(2) Notice of Default

(i) Construction / Agreement

53. TANESCO asserts that it was and is entitled to terminate the PPA, having delivered to IPTL on 9 April 1998 a valid Notice of Default pursuant to Article XVI of the PPA. That Article provides, in pertinent part, as follows:

“16.1.THE SELLER Events of Default – Termination by TANESCO.

Each of the following events shall be an event of default by THE SELLER [IPTL] (each a “SELLER Event of Default”), which, if not cured within the time period permitted (if any), with the prior written consent of the GOT [Government of Tanzania], a copy of

which consent shall be provided to THE SELLER with any notice provided under Article 16.3 shall give rise to the right on the part of TANESCO to terminate this Agreement pursuant to Article 16.3; . . .

. . .

- (c) the failure of THE SELLER to comply with any of its material obligations under this Agreement and such failure shall continue uncured for 90 Days after notice thereof by TANESCO, provided that if such failure cannot be cured within a period of 90 Days with the exercise of reasonable diligence, then such cure period shall be extended for an additional period of 90 Days so long as THE SELLER is exercising reasonable diligence to cure such failure; . . .”

That Notice of Default (referred to in Article 16.3 of the PPA as a “Notice of Intent to Terminate”) asserted specifically that IPTL was “in default on its obligation to supply and install slow speed diesel generating sets in accordance with Section 1.1 of Appendix A to the PPA.”

- 54. It is common ground that IPTL in fact installed ten *medium* speed diesel generators of 10 MW each and that the aforementioned Section 1.1 of Appendix A to the PPA specifies that “[e]ach generating unit shall be *slow* speed diesel generating sets” (of which five of 20 MW each were envisioned). [Emphasis added]. It likewise is agreed that IPTL has not cured the asserted default but that TANESCO at no time has proceeded to issue a Termination Notice.

55. The first issue thus raised is whether the installation of slow speed diesel generating sets as provided in Section 1.1 of Appendix A to the PPA constituted one of IPTL's "material obligations" under the PPA within the meaning of Article 16.1(c). A threshold question is raised by the parties as to whether what is "material" in this context is to be determined by reference to the terms of the PPA alone, or instead should (or may) be judged on the basis of judicial precedents or other substantive provisions of the applicable law (which is Tanzanian law). The Tribunal holds that Article 16 of the PPA constitutes an agreed termination scheme which must be judged on its own. The standards that otherwise exist under the applicable Tanzanian law governing a party's right to terminate a contract, absent such a special arrangement, are not pertinent to our task. It would be correct, however, as IPTL contends, for the Tribunal to consult such law for any guidance it might give as to the meaning of the word "material" were the Tribunal to be in doubt as to such meaning. The Tribunal is not, however, in doubt on this point.

56. TANESCO directs our attention in particular to Sub-Section 1.5.13 of Appendix A and Articles 4.1(b), 7.1(f) and 9.1(a) of the PPA as supporting its assertion that the installation of slow speed diesels, as specified in Section 1.1 of Appendix A, is a material obligation. The lattermost provision (Article 9.1(a)) stipulates, in pertinent part, that IPTL shall ... "construct . . . the Facility . . . in accordance with this Agreement"; and "Facility" is defined in Article 1.1 by

reference to Recital 1, *i.e.*, “described more specifically in Appendix A.” Article 4.1(b) provides, as one of the “Conditions Precedent to [TANESCO’s] Purchase Obligations”, that:

“...Not less than 30 Days prior to the Commencement Date, THE SELLER shall submit to TANESCO the general layout drawings of the Facility, which submission shall be accompanied by a certificate from the Independent Engineer stating that (i) the Facility, when constructed in accordance with such general layout drawings, will (A) conform with the Description of the Facility...”

It is relevant that “Description of the Facility” is defined by Article 1.1 “as described in Appendix A.” Thus the critical references in those two Articles are to Appendix A as a whole, and hence are not limited to Section 1.1 thereof (which contains the PPA’s sole reference to “slow speed diesel generating sets”).

57. Sub-Section 1.5.13 of Appendix A, which falls, as does Section 1.1, under the heading “FACILITY DESCRIPTION,” provides as follows:

“All specifications referred to the above are indicative only and may be changed, modified and/or altered as THE SELLER deem fit to carry out the performance requirements. Such changes, modifications and/or alternations [sic] shall be mutually agreed with TANESCO.”

TANESCO argues that since this is a Sub-Section of Section 1.5, “Specific List of Equipment,” all other Sub-Sections of which

(1.5.1-1.5.12) list individual plant components, its effect is limited to those other Sub-Sections and cannot apply to Section 1.1 (or, presumably, to any of the other Sections, namely 1.2-1.4, collected under the rubric of "1.0 FACILITY DESCRIPTION"). On this basis TANESCO argues that the specification of "slow speed diesel generating sets" in Section 1.1 of Appendix A was immutable, and therefore clearly material. In any event, TANESCO argues, it did not agree with the change to medium speed diesels as 1.5.13 would require. This point is treated separately below.

58. Against this, IPTL advances a number of points which to the Tribunal are persuasive. First, it avers (something which TANESCO has not contradicted) that any change, as took place, from five 20 MW slow speed engines to ten 10 MW medium speed diesels necessarily entails a number of alterations in the "Specific List of Equipment" detailed in Sub-Sections 1.5.1-1.5.12. Since, it is suggested, the one cannot be altered without disturbing the other, the tolerance of change memorialized in Sub-Section 1.5.13 perforce extends to Section 1.1. TANESCO's letter of 21 January 1998 to IPTL enclosing a Table I detailing 30 variations from the original specifications of Sub-Sections 1.5.2-1.5.12 that accompanied the change appears to confirm this. Second, the statement in Sub-Section 1.5.13 that the specifications therein are "indicative only" and may be changed "as THE SELLER [IPTL] deem fit to carry out the performance requirements" leads to the conclusion that IPTL, in its sole discretion, may initiate and implement changes compatible with the contractually fixed performance goals, subject only to the need for informal agreement

with TANESCO. A third point, which IPTL does not appear to have pursued so precisely, is that under Article 1.2(ix) of the PPA:

“unless otherwise provided herein, whenever a consent or approval is required by one Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed.”

It would appear, in context, that it would have been unreasonable for TANESCO to have withheld its agreement to the change to medium speed engines so long as their use would not prejudice achievement of the agreed performance goals, threaten the integrity of the overall TANESCO grid, or otherwise impair any other contractual objective.

59. This brings us to Article 7.1(f) of the PPA:

“Without the prior written consent of TANESCO (which consent shall not be unreasonably withheld or delayed), THE SELLER shall not make, or permit to be made, any material modification to the design or construction of the Facility if such modification could reasonably be expected to have a material adverse effect on TANESCO’s rights under this Agreement or the TANESCO System.”

IPTL reads this as expressly empowering it unilaterally to have substituted medium speed diesels for slow speed ones, so long as such change “could [not] reasonably be expected to have a material adverse effect on TANESCO’s rights” under the PPA or on its grid. IPTL argues, in effect, that no particular plant specification

could be material in and of itself, since IPTL's right to make modifications is limited only by the requirement that it eschew any unconsented "material adverse effect" that "could reasonably be expected." TANESCO's rejoinder that Section 7.1(f) simply imposes a limitation and has no authorizing force is unpersuasive. IPTL might have added that Section 7.1(f) scotches any notion that even such a major change as occurred could *per se* have material character when it indicates that it could be unreasonable for TANESCO to withhold its consent to a modification notwithstanding its reasonable expectation of a material adverse effect - a curious notion, indeed, as the Tribunal sees it.

60. It thus appears to the Tribunal, based on the PPA's terms alone, that the use of slow speed diesels was not a material obligation of the PPA. While neither the parties' dealings leading to conclusion of the PPA nor their conduct thereafter has played any role in the Tribunal's reaching this conclusion, it may be noted that both, which are discussed in another context below, also support the view that neither party ever regarded the installation of slow speed diesel generating sets as a material obligation of the PPA.

61. A further question arises, however, as to whether IPTL's obligation under Article 7.1(f) not to act in a certain way is itself a material one within the meaning of Article 16, thus permitting TANESCO to terminate the PPA upon any breach thereof by IPTL. (It should be noted that TANESCO did not advance this argument, relying instead basically on its contention that Section 1.1 of Appendix A

constituted a material obligation to install low speed diesel generating sets, and citing Article 7.1(f) in support). In this connection, one must first consider whether IPTL's change from slow to medium speed diesel engines without TANESCO's prior written consent was a "material modification" that "could reasonably be expected to have a material adverse effect on TANESCO's rights" under the PPA within the meaning of Article 7.1(f), which, if accomplished without TANESCO's prior written consent, would constitute a breach of Article 7.1(f). As to this latter issue, while the Tribunal has found that the installation of slow speed diesels was not a material obligation of the PPA, doubtless the change to medium speed machines did effect a "material modification to the design or structure of the Facility" within the meaning of Article 7.1(f). The dispute as regards the possibility of a breach of Article 7.1(f), therefore, is solely over the character and likelihood of any resulting effect.

62. As regards a possible breach, the Tribunal notes that what "could reasonably be expected" necessarily is to be judged as of the time the challenged modification was made. Hindsight has no place here. TANESCO claims that its rights under the PPA could reasonably have been expected to suffer a material adverse effect in two respects. The first is financial: Various higher costs reasonably could have been anticipated, which then would have increased the tariff chargeable to TANESCO under the PPA in a degree constituting material adversity. This contention appears to the Tribunal, however, to be debatable to an extent which precludes a determination that a material adverse effect "could

reasonably be expected.” The available evidence suggests, if anything, that the overall capital acquisition costs associated with medium speed generators are generally less than those connected with low speed diesels. While TANESCO presents evidence that the resulting operating and maintenance costs might be higher, IPTL, while not conceding the point, accepts that on a proper interpretation of the PPA any such increases are for its account and hence will not increase the tariff charged to TANESCO. This being the case, TANESCO could not reasonably have been expected to suffer any adverse effect on the tariff it must pay, let alone a material one.

63. Following the hearing held on these preliminary issues, and in accordance with the Tribunal’s directions, TANESCO submitted further documents, lately produced to it by IPTL, as well as additional testimony, in support of a supplemental written submission dated 10 April 2000, making further arguments directed to its contention that “a material adverse effect” on its rights under the PPA “could reasonably be expected” from the use of medium speed engines.

64. Citing, in particular, a “Preliminary Tender Adjudication Report” and a “Tender Adjudication Report (Update)” prepared in September and December of 1995, respectively, by the concern that became the Independent Engineer under the EPC Contract, which evaluated the competing bids for that contract, TANESCO argued that the cost of converting Wartsila medium speed engines

to gas was higher than for Hyundai's slow speed engines; that Wartsila's final bid for engines (including such conversion) was higher than the competition; that the Hyundai slow speed diesels were technically preferable, in that they were more reliable, less expensive to operate and maintain, and had been proven to be convertible to gas; that Wartsila, in direct communication and contact with Mechmar, quoted for certain portions of the EPC Contract prices "far below" those proposed in the formal tendering process; and that Wartsila's final EPC Contract price was \$9.1 million higher than Hyundai's, potentially resulting in a higher tariff.

65. In the view of the Tribunal, the lately-produced documents on which TANESCO relies, when read as a whole, present a somewhat different picture than emerges from TANESCO's discussion of them.

66. The "Preliminary Tender Adjudication Report" of September 1995, for example, makes clear that it "covers the preliminary evaluation of the three submitted Tenders" and that its "purpose is to short-list the tenderers for negotiation/final clarification." In its conclusion, that report ranks Hyundai first and Wartsila second, immediately following which it notes that the tender process "did not resolve all the technical and commercial issues" and "[c]onsequently there are a number of outstanding items having financial impact...which still require clarification or confirmation before entering into a contract." Finally, "[a]s a result of the preliminary evaluation [both

Hyundai and Wartsila] are short-listed" (MAN B&W having been eliminated). The report concludes:

"It is recommended that further negotiations be carried out with these two tenderers before the award is made."

67. The second such report, the "Tender Adjudication Report (Update)" of December 1995, provided "the detailed commercial and technical evaluation of the two short-listed Tenders." It ranked Wartsila engines first as to price, "[b]ased on the initial capital cost", but opined that Hyundai had "given the most attractive techno-commercial offer, notwithstanding that the [Wartsila] offer has a higher [internal rate of return]," which "is mainly due to the lower initial capital cost of [Wartsila], for both the [fuel oil] and Natural Gas operating regimes." After detailing certain advantages of slow speed engines, the report stated:

"This is the case of purchasing a cheaper plant against a technically better plant that is likely to perform reliably in the long run."

The report concluded by recommending "that both of the Tenderers...be requested to have a face to face, across table meeting" to discuss five described issues, "after which a Final Tender Evaluation Report may be drafted, which will contain a recommendation for the Award of Contract to the most attractive offer."

68. The anticipated final "Tender Adjudication Report" then was issued in January of 1996. It covered "the technical aspect of the

two” proposals but did “not include the economic/financial aspects which Mechmar Corporation has instructed that they are conducted by Fieldstone Private Capital Group.” Thus the report noted that it “cannot make a complete recommendation for Contract Award” since it “is the responsibility of Mechmar Corporation to combine technical and financial reports before deciding on the Award.” The report gives Wartsila and Hyundai exactly equal total points in its “Tender Evaluation Table,” which, like the earlier reports, includes evaluation of commercial terms as well as technical issues. The report’s “Conclusion” bears repeating:

“The two (2) short-listed Tenderers have been fully evaluated on project programme, experience, commercial terms and technical aspects of their offers.

The replies received from each of the two Tenderers, after the Tender Clarification meetings, *resolved all major technical issues*. Commercial issues were to be resolved by negotiations...

From the technical evaluation, both of the offers are equivalent. The Project Financial is being carried out by the Financial Adviser. Based on the Project Financial and this technical evaluation, a final decision may be made.”

(Emphasis added).

As appears from the Tribunal’s decision communicated in its letter of 5 May 2000, the Tribunal has concluded that the recently produced documents do not justify the scheduling of a further

hearing on the issues addressed in this Interim Award, or an order for depositions.

69. The Tribunal already has indicated the reasons for its conclusion that the provision of the PPA which referred to slow speed diesel engines was not a “material obligation” of the PPA, and that the installation of medium speed engines as opposed to slow speed engines could not “reasonably be expected to have a material adverse effect on TANESCO’s rights” under the PPA. Nothing that TANESCO most recently has put forward affects the Tribunal’s conclusions on these two crucial issues. IPTL’s reasons (or motives) for installing medium speed engines are irrelevant; what is pertinent is whether IPTL has complied with the terms of the PPA. To the extent that the evidence on which TANESCO concentrates is argued to support a conclusion that the eventual EPC Contract price was, as TANESCO alleges, “inflated” due to an “unholy alliance,” this is to be dealt with, as the Tribunal has indicated above (and will detail below), in connection with determining the tariff TANESCO is to pay.

70. The second of its “rights under” the PPA on which TANESCO claims that IPTL’s substitution of medium speed machines reasonably portended a material adverse effect is its right under Article 2.2 to negotiate “a further term of 5 years” following the initial 20 year term of the PPA:

“The initial term of this Agreement or subsequent extension periods may be extended for a further term of 5 years if either TANESCO or THE SELLER requests an extension of this Agreement. The parties shall promptly enter into good faith negotiations to reach an agreement on the extension of this Agreement, on terms and conditions mutually acceptable to both parties, provided always that the agreement on such extension is reached at least 1 year prior to the end of the initial term or subsequent extension periods , as the case may be. If the Parties cannot agree to the terms and conditions for the extension of this Agreement, THE SELLER will be permitted to contract with any other party for the sale of dependable capacity and electrical energy from the Facility and TANESCO shall deliver to the SELLER any necessary Consents for such sale, provided, however, that TANESCO shall have no obligation to assist in such sale unless otherwise required by law.”

TANESCO adduces evidence (which IPTL counters) indicating that medium speed diesels may last only 15-20 years whereas the usual life of slow speed engines is 25 years. It contends that the restricted life span of medium speed diesels prejudices its prospects of a five-year extension.

71. Quite apart from the fact, however, as IPTL points out, that Article 2.2 only imposes an obligation to negotiate in good faith, which might or might not actually result in a contract extension, TANESCO’s arguments overlook the fact that Article 2.2 expressly contemplates the possibility of multiple “subsequent extension

periods” - not just one - which could take the PPA well beyond the life expectancy of even the hardiest slow speed diesel. Consistent with this fact, the PPA elsewhere expressly undercuts any notion that IPTL is obligated to furnish turbines with a life span greater than 20 years. Article 4.1(b), under the heading “Conditions Precedent to [TANESCO’s] Purchase Obligations,” on which TANESCO strongly relies elsewhere, requires delivery prior to construction of “a certificate from the Independent Engineer stating that . . . (iii) the Facility has a useful life no shorter than the initial Term [under Article 2.1],” *i.e.*, 20 years. Therefore, on this point as well, the Tribunal finds that TANESCO’s claim of an expectable material adverse effect is not supported. Accordingly, IPTL did not act in contravention of Article 7.1(f) of the PPA, and hence the Tribunal need not decide whether the same constituted a material obligation within the meaning of Article 16.

72. In summary, then, the Tribunal rules that IPTL has not failed to comply with any of its material obligations under the PPA and hence that TANESCO has no right to terminate the PPA as provided by its Article XVI.

73. Moreover, the Tribunal is persuaded that through its own acts and omissions related to the change to medium speed engines TANESCO agreed to such change and thereby deprived itself of any right it might otherwise have had to take issue with such change (other, of course, than to question the tariff it is to pay, as is discussed below). TANESCO cannot complain now of that to

which it has failed to object in the particular circumstances set forth below and to which it consequently has agreed.

74. The first written proposal IPTL submitted to TANESCO, under date of 21 November 1994, presented both slow and medium speed diesels:

“The types of engines considered in this project are the medium speed and low speed engines.”

The draft PPA submitted therewith likewise specified in its Appendix A at Section 1.1 “either medium or low speed diesel generating sets.” These references doubtless reflected the fact that IPTL had solicited and received preliminary bids for both types of engines (two for medium speed engines, from Stork-Wartsila, the eventually successful bidder, and MAN B & W, and one for low speed ones, from Hyundai).

75. Meetings between representatives of TANESCO and IPTL leading up to execution of the PPA were held 28 November, 13, 14, and 15 December 1994 and 16, 17, and 19 January 1995. No evidence indicates that at any of those meetings there was any discussion of the speed of generating sets to be specified in the PPA. What is represented as a first draft of the PPA, however, date-stamped “25 JAN 1995”, refers in Appendix A at Section 1.1 to “either medium or low speed diesel generating sets.” It is agreed that shortly thereafter, on 27 and 29 January 1995, a representative of Stork-Wartsila, which in its preliminary bid had offered only medium

speed engines, met in Tanzania with TANESCO's Director of System Control and Transmission, Mr. Saleh, who "recall[s] general discussions along [the] lines [of] the advantage of using 10 MWs units in the proposed power plant." As detailed above, a number of meetings took place in late May and early June of 1995 resulting in the conclusion and signature of the PPA and its Addendum No. 1. No evidence indicates any discussion whatsoever during those meetings focusing on the speed of generating sets to be installed.

76. More than a year following conclusion of the PPA, but well before execution by IPTL of a contract for construction of the Facility, TANESCO again was introduced to Stork-Wartsila, which it is agreed was already well known at TANESCO in that TANESCO already had in its plants 50 or so Wartsila engines. Various personnel of the two met on 23 July 1996, apparently because Stork-Wartsila had been selected by IPTL to construct the projected new power plant. IPTL and Stork-Wartsila signed their contract for such construction on 4 February 1997. It provided for the installation of 10 medium speed diesel engines of 10 MW each.

77. In an attempt to comply with the "Condition Precedent" contained in Article 4.1(b) of the PPA, IPTL under date of 15 April 1997 transmitted to TANESCO (which contends that the same occurred only on 6 May 1997) general layout drawings of the project together with a statement from the project's "Independent Engineer." As the parties agree, the layout drawings clearly show

ten engine installations and under "Remarks" on each sheet note "10 x 18 W 38," which it is agreed denotes a specific Wartsila medium speed generator type. The drawings concededly were reviewed by TANESCO's then Director of Diesel Plants at the direction of TANESCO's Managing Director, transmitted through TANESCO's Deputy Managing Director for Technical Services. Although the Director of Diesel Plants then commented on them in writing, he has indicated in these proceedings that at the time he "was unfamiliar with the terms of the PPA," and was "therefore unaware of the specifications for the power plant IPTL was to build;" that the drawings' reference under "Remarks" to "10 x 18W 38" "did not come to my attention" at the time; and that in any event it "would not have been of any significance to me had I seen it as I did not know what it meant."

78. It is not disputed that the certificate of the Independent Engineer complied with the requirements of Article 4.1(b) in all respects, save one: TANESCO asserts that the certificate's recitation that the plant, "when constructed in accordance with the general layout drawings and the technical specification," "*[m]eets generally with the Description of the Facility*" was false, was intentionally misleading, was calculated to conceal the fact that medium speed diesels were to be installed, and, indeed, by failing to fulfill the stated condition precedent leaves TANESCO free of any obligation to pay IPTL for electrical energy or capacity. (Emphasis added.) The Tribunal's conclusions above regarding material obligations, however, dispose of any notion that the substance of the certificate was not appropriate. Moreover, the Tribunal discerns no serious

difference between “meets generally” and the requirement of Article 4.1(b) for a certification that the plant “*will . . . conform with the Description of the Facility.*” (Emphasis added.) On the face of it, Article 4.1(b) was substantially satisfied. What is pertinent for present purposes is the fact that, with full opportunity to review the general layout drawings, the Managing Director of TANESCO responded to them and the certificate by simply replying two days after TANESCO states that it received them, *i.e.*, on 9 May 1997 stating “We have noted Independent Engineer’s certification of the facility conforming to the requirements of the PPA’s Article IV Clause 4.1(b).” In doing so the Managing Director declined to sign a “suggested form of reply” also enclosed by IPTL with its letter dated 15 April 1997, which would have recorded express “agreement” by TANESCO that such requirements had been met.

79. Somewhat over a month later, on 12 or 13 June 1997, IPTL, TANESCO and Stork-Wartsila personnel met in Tanzania. While there is dispute as to whether anything was said regarding the speed of diesels to be installed, it is noteworthy that TANESCO emphasizes that the meeting focused on issues relating to the interconnection of the new plant to be constructed by Stork-Wartsila with TANESCO’s existing power grid. This view of the meeting tends to be confirmed by the text of a contemporaneous (17 June 1997) memorandum of TANESCO’s Manager Electrical Plant and Maintenance directed to its Director System Control and Transmission, and by two subsequent letters, one to IPTL from the latter dated 19 June 1997 that refers to the meeting and is headed

“CONNECTION OF IPTL SYSTEM TO TANESCO GRID AT KUNDUCHI,” and the other dated 22 August 1997 and addressed to that same Director on behalf of Stork-Wartsila that refers to the meeting and bears the subject heading “Connection of IPTL 100 MW diesel power station to Tanesco grid at Kunduchi sub-station.” These documents tend to support IPTL’s contention that TANESCO was not actually concerned with how the plant would generate the specified amount of power; rather it was concerned to achieve a compatible connection with its grid. As IPTL notes, too, the first of those communications, which is an internal TANESCO memorandum, refers to “all ten proposed D/G [presumably diesel generator] sets.”

80. It is agreed that site work for the plant began in August 1997. Concurrently, as of 28 August 1997, IPTL reported to the Principal Secretary of the Tanzanian Ministry of Energy and Minerals (but apparently not to TANESCO itself) that “[m]anufacture and works testing of all 10 engines has been completed.”
81. On 4 September 1997 TANESCO, IPTL and Stork-Wartsila met to “clarify technical details”. The Managing Director of TANESCO has confirmed that “[i]n mid-September 1997, I was aware that construction activities were underway” on the project. On 18 September 1997 he wrote to IPTL inviting it to meet “in order to review the underlying assumptions in the PPA and [its] Addendum No. 1 . . . and to review the reference tariff in the PPA in light of . . . recent developments,” *i.e.*, financial closing and the award of

construction and supply contracts. The Managing Director's letter requested "in advance all the necessary information and documentation" relevant to such tariff review. IPTL replied very preliminarily by letter of 14 November 1997.

82. Curiously, perhaps, on 12 November 1997 the firm of London Economics, appointed (apparently by the Government of Tanzania or TANESCO) "to provide an independent review of the project," wrote to TANESCO's Managing Director inquiring "whether ['the proposed diesel plant'] is a slow or medium speed diesel, and whether the station will be a ten by 10 MW station or a five by 20 MW station." Presumably prompted by this query, two days later, on 14 November 1997, TANESCO, by a letter signed "for: MANAGING DIRECTOR", inquired specifically of IPTL "*whether the units will be slow or medium speed*, the number of units to be installed and their sizes, a precise date for commissioning the plant etc." (Emphasis added.)
83. IPTL replied to this query by letter of 26 November 1997, which enclosed "[t]echnical details of the diesel Generation Plant of which there are 10 units each generating a nominal 10 MW." Those "technical details" in turn stated explicitly that "[t]he engines shall be of four stroke, *medium speed*." (Emphasis added.) TANESCO takes the position that only with this notification did it become aware that Stork-Wartsila intended to install medium speed engines, rather than slow speed ones as specified in Section 1.1 to Appendix A to the PPA. Although there is almost no

evidence on the subject, it does not appear to be disputed that as of this date the ten engines had not yet been shipped from their place of manufacture in The Netherlands. Rather, it is asserted by IPTL, and not challenged by TANESCO, that they began to be transported from The Netherlands to Tanzania sometime in December 1997 and that transportation from their point of arrival in Tanzania to the site started sometime in January 1998. However, no doubt IPTL was already under a contractual obligation to Stork-Wartsila in respect of them.

84. When, so far the record before us shows, TANESCO next communicated with IPTL, on 10 December 1997, it was not to respond to the disclosure in the latter's 26 November 1997 letter that it would install medium speed diesels. Instead, it responded specifically to IPTL's earlier letter, of 14 November 1997, which very preliminarily had addressed tariff issues as requested by TANESCO in its letter of 18 September 1997. This latest letter requested further specific supporting documentation.

85. When IPTL responded to this 10 December 1997 letter on 13 January 1998, it included among the various documentation it enclosed a "technical description of the facility" which was, in effect, a reconstituted Appendix A to the PPA which in Section 1.1 specified "ten (10) generating sets" of which "[e]ach generating unit shall be medium speed diesel generating sets."

86. Eight days later (by letter of 21 January 1998) TANESCO responded by noting:

- (1) "There have been significant changes to the type, rating and quantities of equipment to be installed," which changes (as noted earlier) were described extensively in a Table I enclosed therewith (which expressly noted the change to medium speed diesels).
- (2) "[C]ontrary to the provisions of . . . Item 1.5.13 of Appendix A to the PPA, TANESCO's consent for these changes has not been sought."
- (3) "[I]t appears to us that these changes are not reflected in the tariff calculations. Our view is that there should be significant cost reductions resulting from these changes which should be reflected in the corresponding reduction in the tariff rates..."

No indication was given that TANESCO believed that a material obligation of the PPA had been breached, or that the medium speed diesels were not acceptable. The focus of the letter was entirely on the effect the changes should have on the tariff. Indeed, the letter reiterated TANESCO's earlier demands for "missing information and documents" - according to TANESCO in these proceedings, principally the EPC Contract - because "we have to meet to review the tariff on the basis of the signed agreements and contracts." Incidentally, the reference in numbered point (2) set out above, to Item 1.5.13 of Appendix A to the PPA, suggests that, contrary to

its submission before the Tribunal, TANESCO did regard that provision as applicable to a change in speed of the diesel engines (as the Tribunal has determined above).

87. The fact that TANESCO's concerns about the use of medium speed diesels were solely tariff-related was confirmed five days later, on 26 January 1998, when the Managing Director of TANESCO wrote to the Principal Secretary of the Ministry of Energy and Minerals, referring to TANESCO's 21 January 1998 letter to IPTL as "registering our concern that consent for this change was not sought nor have we seen any reduction in the energy charges that IPTL will invoice TANESCO." TANESCO's Managing Director also pointedly invited the Ministry to "take up with IPTL any unfulfilled obligations under the Implementation Agreement [between IPTL and the Government of Tanzania] and the Generation License [issued by the Minister of Energy and Minerals]". "In this way we will be tackling the problems that have come to light recently in their totality." The objective of this intended coordinated pressure was clearly stated by TANESCO's Managing Director: "Our intention is to renegotiate the tariff after we have reviewed [the] documents" awaited from IPTL, specifically the EPC Contract and certain financing documents. Again, no objection was registered as to the actual use of medium speed diesel generating sets.

88. Particularly telling is the Principal Secretary's 9 February 1998 response specifically to this letter. In it "[t]he Ministry wishes to be

advised *whether the change of type of engines from slow speed to medium speed* plus other changes in project scope . . . as per your table I attached to your [21 January 1998 letter to IPTL] *does not constitute a default* as per the prevailing PPA signed between you and them.” (Emphasis added). The Principal Secretary then ventures an answer to his own question:

“Earlier IPTL had written to you to assure you that their Engineer had substantiated that the machines are according to specifications as per the PPA and you had made some replies. Don’t those replies constitute authority to change the scope as allowed by the PPA and thus meaning that they have not breached the contract?”

The Principal Secretary clearly was referring to the correspondence exchanged between IPTL and TANESCO 15 April and 9 May 1997 as discussed above in which TANESCO had “noted” IPTL’s submission of general layout drawings and a certificate of the Independent Engineer in pursuance of Article 4.1(b) of the PPA. He went on to express the same objective as TANESCO had posited: “Those, and any other general advice on the subject which will assist in putting pressure on IPTL to draw them to renegotiate the [Implementation Agreement] and the PPA will be appreciated.”

89. It is against this background that one must judge the fact that during a further two months, until 9 April 1998, when TANESCO issued its Notice of Default, TANESCO continued to undertake no action whatsoever to call into question the technical appropriateness of the installation of medium speed diesel engines.

90. Roughly contemporaneously with the exchange just described between TANESCO and the Ministry of Energy and Minerals, IPTL responded to TANESCO's 21 January 1998 communication, by letter of 5 February 1998 comprising five pages, the first three of which largely set forth the pertinent economic, technical and practical reasons why IPTL had chosen to proceed with medium speed rather than slow speed diesels in order to meet its contractual obligations to TANESCO. In its "Conclusion" to this letter IPTL noted that it "had read Clause 7.1(f) of the PPA and in good faith that states only material changes would require the consent of TANESCO." It went on to express the view that its scope of responsibilities as an IPP had not changed. Just over three weeks later, by letter of 27 February 1998, IPTL delivered to TANESCO copies of the EPC Contract and certain financing documents "in the spirit of cooperation" and under an injunction that their confidential character be respected.

91. The reaction of TANESCO to the disclosure of these documents was to request IPTL by letter of 11 March 1998 to provide "at your earliest convenience" a series of other agreements "which we need in order to verify the project costs and financing terms and conditions." The letter concluded with an invitation "for discussions on the PPA . . . in Dar es Salaam beginning on Thursday 26 March 1998." Here, too, no substantive objection was raised to the installation of medium speed diesels.

92. Under cover of a letter of 23 March 1998 IPTL delivered what appear to be the requested documents, and proposed instead of 26 March 1998 "that we meet in Dar es Salaam for the clarification meeting on the reference tariff under the PPA on the 8th and 9th of April 1998." It appears to be agreed that that meeting then in fact was set for 14 April 1998. Prior to that meeting, by letter of 6 April 1998, IPTL informed TANESCO that "load testing of the first three Diesel Generator Units [of ten in total] is scheduled to start on May 15th 1998 and that the Initial Operations Date (IOD) will be June 1st 1998." Then, just prior to the 14 April 1998 meeting scheduled to discuss the reference tariff under the PPA, TANESCO, by letter of 9 April 1998, delivered its Notice of Default.

93. It appears that when the parties met on 14 April 1998 IPTL "refused to negotiate or discuss the final tariff 'unless and until' TANESCO withdrew the Notice of Default," as TANESCO recorded in a letter to IPTL the very next day, 15 April 1998. TANESCO's focus on tariff reduction is reflected again in its statement in that letter that "consensual resolution of the matter raised by the Notice of Default may be possible in the context of final tariff negotiations and . . . the parties should certainly explore such means of resolving the matter." Again, on 22 April 1998, in a letter "urg[ing] IPTL to return to the negotiation table," TANESCO's Managing Director reiterated:

“that *the issues relating to substitution of the diesel engines* raised in the Notice of Default *are essentially economic issues* and that final tariff negotiations and discussions of the Notice of Default should move forward on a parallel basis, thereby maximizing chances of resolving all issues in the most expeditious, cost-effective manner.” (Emphasis added.)

The record before us indicates that the parties indeed did meet again on 14 and 15 May 1998 to discuss both issues. On 15 May 1998 TANESCO submitted to IPTL an extensive request for documents “in connection with the parties’ negotiations of a final tariff” which related “primarily to IPTL’s project costs.” This request later was followed by others. Thereafter matters ultimately led to this arbitration.

94. From the foregoing recitation of facts, spanning the period 21 November 1994 to 15 May 1998, the Tribunal concludes that TANESCO did not really care, one way or the other, whether slow or medium speed diesels were installed (which, as previously noted, tends to confirm the Tribunal’s conclusion, set forth earlier, that use of the former was not a material obligation of IPTL under the PPA); therefore, as TANESCO came to know that medium speed diesels were contemplated, which the Tribunal concludes occurred not later than 26 November 1997, it effectively consented to their installation. This is evident from the fact that engine type seems never to have been discussed during the negotiations leading to the PPA; from the seemingly indifferent manner (so far as

engine type was concerned) with which senior TANESCO personnel reviewed the general layout drawings in May (or April) of 1997; and from TANESCO's concentration at critical times on the project's interconnection with its overall power grid. Most striking, however, is the fact that when TANESCO was incontrovertibly confronted with the reality of having medium speed engines, it never once objected to them or even hinted at the possible presence of a ground for declaring a default and invoking its right to terminate the PPA under Article XVI. To the contrary, while bemoaning the fact that its consent had not been asked, it unwaveringly focused solely on bringing about a tariff reduction. Even when its "owner," the Ministry of Energy and Minerals, expressly speculated on the possibility that the installation of medium speed engines constituted a breach (and then surmised that it did not), a full two months before TANESCO issued its Notice of Default on 9 April 1998, TANESCO did not react. It can only be concluded that TANESCO, having heard IPTL's explanations for its choice of medium speed diesels and having considered the various expert reports it had received from Acres International (which had rendered a report to the Ministry of Energy and Minerals in September 1996, which TANESCO's Managing Director states did not come to TANESCO's attention until "late September of 1997," that discoursed extensively on the comparative merits of the two types of diesels for this project) and London Economics, decided to accept the change but to pursue its tariff implications.

95. The Tribunal concludes that prior to 9 April 1998 the change to medium speed diesels had been “mutually agreed with TANESCO” within the meaning of Sub-Section 1.5.13 of Appendix A to the PPA. It will have been noted that Sub-Section 1.5.13 does not require that such agreement be in writing. Since the PPA elsewhere, e.g., in Article 7.1(f), does contain express requirement for “written consent,” the omission of such stipulation in Sub-Section 1.5.13 must be understood to dispense with any need for a writing. This result is not affected by Article 19.8, which requires:

“This Agreement may be modified or amended, and any provision hereof may be waived, by an instrument in writing and signed by both Parties.”

Agreement within the meaning of Sub-Section 1.5.13 of Appendix A constitutes fulfillment of a requirement of the PPA and not a modification, amendment or waiver of any provision thereof.

96. This disposes finally of any claim that IPTL breached the PPA in any respect, material or otherwise, in installing medium speed diesels.

(ii) Waiver / Estoppel

97. In view of the Tribunal’s conclusions set out above, it is strictly speaking unnecessary to deal with the alternative submission

advanced on behalf of IPTL that, by operation of one, or other, of the doctrines of estoppel, waiver or election, TANESCO is precluded from contending that IPTL was in material breach of the PPA by installing ten medium speed diesel engines instead of five slow speed diesel engines, by failing to obtain TANESCO's agreement to the change in the indicative specifications in Appendix A, and / or by failing to obtain TANESCO's prior written consent as required by Article 7.1(f) of the PPA to the change, by reason of its standing by and / or inducing IPTL to proceed with the project after learning of the proposed change.

98. There was an interesting debate as to whether the doctrines, or any of them, were matters of procedure, and, thus, governed by English law, or whether they were matters of substance, and therefore governed by the law of Tanzania. There is no clear guidance to be derived either from authority or from academic writing. However, the Tribunal is content to proceed on the view which appears to be most favourable to TANESCO, namely, that each of the doctrines is a matter of substantive law, and therefore governed by the law of Tanzania. For what it is worth, and without deciding the point, the Tribunal considers that this is more likely to be the correct view, because application of, for example, the principles of promissory estoppel may create substantive rights.

99. Ascertainment of the current law of Tanzania on estoppel, waiver and election is rendered uncertain by two factors. First, by the Judicature on Application of Laws Ordinance of 1920, Tanzania adopted the law of England as it stood at that date. The law so adopted has, of course, been modified from time to time by

subsequent Tanzanian legislation but, with one exception, that is of no relevance to the problem under consideration. Unfortunately, there appears to be a difference of opinion between two of the advocates representing TANESCO as to whether the law of Tanzania is to be taken to have developed along the same lines as English law since 1920, or to be "frozen" as at that date. Mr Morrison expressed the view that if, by reason of subsequent English decisions there have been any developments in any concepts of English law which were part of that law in 1920, then such decisions will be regarded as persuasive authority before a Tanzanian court. Further, as we understand it, the development of any such doctrine by any superior court of standing in other common law jurisdictions would be of similar persuasive authority. Mr Mkono adopted a different view. He submitted that it was irrelevant how English common law developed after 1920: unless there were a lacuna in the law of Tanzania in the particular field, developments in England were of no authority whatever. Mr Morrison's view appears to have been supported by the "expert" witness statements of Dr Kabudi and Mr Bumani, filed by the parties respectively at an earlier stage of the proceedings in relation to the Applications for Provisional Measures. The Tribunal accepts their view, which appears to accord with common sense, and was further tacitly adopted by the parties by the citation of a considerable body of comparatively recent English authority on other aspects of the arbitration. It should be added, for completeness, that no argument was advanced to the effect that any of the more recent English decisions referred to both in the written submissions and in oral argument should be taken as inapplicable

on the ground that local conditions, or any other factor, made the decision inapplicable to Tanzania.

100. The second problem arises from the provisions of Section 123 of the Tanzanian Evidence Act, under which an intentional statement, representation or omission is required in order to make out a claim of estoppel. However, there is nothing to suggest that this statutory provision is intended to be exhaustive, and excludes the application of other forms of waiver or estoppel as these have developed in England and other common law jurisdictions.

101. In the absence of full argument on the point, it is inappropriate for the Tribunal to determine whether there is a distinct legal concept or doctrine of "waiver" in Tanzanian or indeed in any common law system. According to its strict legal connotation, waiver is an intentional act, done with full relevant knowledge, whereby a person abandons a right by acting in a manner inconsistent with that right. However, the better view is that, apart from estoppel or a new agreement, abandonment of a right will only occur where the person said to have waived the right is entitled to alternative rights which are inconsistent the one with the other, as, for example, the right to require continuing performance of a contract and the right to treat it as having been repudiated for essential breach (see, for example, *Kammins Ballrooms Co Limited. v Zenith Investments (Torquay) Limited* [1971] AC 850 at p.883). On this view, this category of waiver is, in truth, an example of the doctrine of election. Another category of waiver is where a person is prevented from asserting, in response to a claim against him, a particular defence, or objection, which would otherwise have been available.

Here, waiver is said to arise when that person agrees not to raise the particular defence or so conducts himself as to be estopped from raising it. In these circumstances, the authorities dealing with waiver do not call for special consideration separately from election and estoppel.

102. Turning to election, the broad principles applicable are not in doubt. The doctrine only applies if a person has alternative rights which are inconsistent the one with the other. It is this concurrent existence of inconsistent rights which explains the doctrine: because they are inconsistent, neither one may be enjoyed without the extinction of the other, and that extinction confers upon the elector the benefit of enjoying the other – a benefit denied to him so long as both remained in existence. Generally, it is sufficient if one party has been consciously led by the other party to believe that the latter has decided not to rescind, to exercise a contractual right to terminate or to treat the contract as at an end on grounds of repudiatory breach, or that the reasonable inference from the actions of that party, or indeed from its inaction, is that it has decided not so to do. Where a right to elect exists, the party enjoying such right is not generally bound to elect at once: it may wait and consider which way to exercise its election, so long as it can do so without causing prejudice to the other party. But in most commercial contexts, a failure to exercise a right to rescind, cancel or terminate within a reasonable time will be taken to evidence an election to affirm the continuing existence of the contract.

103. Estoppel is a label which today covers a complex array of rules spanning various categories. These include estoppel by conduct,

estoppel by representation, promissory estoppel, proprietary estoppel, estoppel by acquiescence and estoppel by convention. All these categories are directed towards the same fundamental purpose, namely, protection against the detriment which would flow from a party's change of position if the assumption or expectation that led to it were permitted to be denied. The foundation of the doctrine is in all cases the concept of unconscionability.

104. The factual material relied upon by IPTL has been fully set out earlier. It is IPTL's case that if this material is insufficient to justify the conclusion that TANESCO agreed to the change from low speed to medium speed diesel engines, such material is at least sufficient to found an estoppel.
105. But for one matter, the Tribunal would have been inclined to conclude that, even if we were wrong in our conclusion that there was an agreement to the change, the facts which we have recited would nevertheless have been amply sufficient to give rise to an estoppel by convention (the parties having apparently acted on the basis of a common assumption that IPTL was contractually entitled to install medium speed diesel engines), or at least an estoppel by acquiescence (TANESCO having stood by without comment or protest in the knowledge that IPTL was taking steps to have the medium speed engines shipped and installed, between, at the latest, November 1997 and April 1998).
106. The one matter which causes us to hesitate to draw such a conclusion at this stage is that both estoppel by convention and

estoppel by acquiescence, in common with other types of waiver and estoppel, are the children of equity; and it is axiomatic that “he who seeks equity must do equity”, and that “he who seeks equity must come with clean hands”. TANESCO has asserted, particularly in the light of documents recently disclosed by IPTL, that IPTL should be disentitled from relying on any equitable defence, because these documents suggest that there were “shady dealings” between IPTL, Mechmar and Wartsila, who formed an “unholy alliance”, which resulted in an artificially inflated EPC Contract price (an allegation which, if persisted in, will no doubt require further investigation at the hearing fixed for July). Further, TANESCO has also recently raised an allegation that the PPA was procured by bribery, or at least that IPTL was guilty of attempting to bribe TANESCO and / or Tanzanian Government representatives.

107. TANESCO has made application to the Tribunal, inter alia, to defer its decision on TANESCO’s termination claim and IPTL’s waiver / estoppel defence until it has been afforded the opportunity of cross-examining a number of IPTL witnesses, whom it has identified. Whilst the Tribunal has, nevertheless, decided to proceed to its decision on the termination claim as argued (on the basis that the documents disclosed do not, in the Tribunal’s view, affect its conclusions, and the answers of the witnesses concerned to the questions which TANESCO would wish to ask them would similarly not affect such conclusions), different considerations could apply in relation to the waiver and estoppel points.

108. In these circumstances, and since, in the light of the Tribunal's decision on the issues of construction, it is unnecessary for the waiver or estoppel points to be determined, the Tribunal has decided to withhold any decision on these points, at least for the time being.

(3) Tariff Adjustment

109. The result of our conclusions in sections (1) and (2) above, is that the Reference Tariff falls to be adjusted "upwards or downwards", depending on changes that have taken place in any of the underlying assumptions stated in IPTL's letter of 31 May 1995 (see paragraph 35 above). This letter listed twelve assumptions said to have been used to determine the capacity charge contained in the Mechmar proposal submitted on 21 November 1994, and which was the basis of negotiations and agreements reached in January 1995 (see paragraph 26 above).

110. In the absence of detailed submissions from either side as to precisely how any of the assumptions listed have changed, and as to how such change should be reflected in an adjustment to the tariff, we consider that it would be dangerous for us to express any preliminary views at this stage, even in general terms. We anticipate that these matters will be canvassed in detail before us at the July hearing.

111. There are, however, two points that should be mentioned. First, it was said on behalf of IPTL that the "IRR" (the Internal Rate of

Return) stated in the letter of 31 May 1995 should have been 22.31%, and that the figure of 23% was an error. Second, it was submitted on behalf of TANESCO that in applying any adjustments to the Reference Tariff, one should apply a test of reasonableness and prudence to the costs incurred by IPTL.

The IRR

112. In so far as we have concluded that the "base line" for the purposes of any adjustment under Addendum No. 1 should be the assumptions stated in the letter, whether or not there was a unilateral error on the part of IPTL should be of no consequence. However, in the course of the hearing, IPTL very fairly volunteered the correction, which would deem to operate in TANESCO's favour, and it further seems to be common ground that the necessary correction should be made. Accordingly, the "IRR" figure should be amended to read "22.31%".

Reasonableness and Prudence

113. The Tribunal is satisfied that, in circumstances where the consideration to be paid by one contracting party is dependent upon sums paid or payable by the other contracting party to a third person or persons, there is an implied obligation on the paying party to act prudently and reasonably in its dealings upon which the consideration will depend. We consider that this principle applies equally where, as in this case, a *prima facie* price, payable by one

party, falls to be adjusted by reference to the other party's expenditure.

114. In the present case, it is suggested on behalf of TANESCO that IPTL and Mechmar, on its behalf, did not make a reasonable or prudent EPC Contract with Wartsila, and, in particular, that it was unreasonable to accept Wartsila's final tender price in circumstances where Hyundai had reduced its tender to a lower figure. There are also allegations that there was underhand dealing which resulted in a falsely inflated EPC Contract price.
115. A considerable amount of evidence has already been put before us on these matters, for the purposes of TANESCO's application for further documentary disclosure, and in support of its application for the questioning of witnesses or postponement of our decision on certain issues (applications which we have dealt with separately, and as to which we say nothing further in this Award).
116. These are, however, amongst the matters with which we anticipate the Tribunal will have to grapple when we deal with the tariff adjustment issue in detail at the hearing in July.
117. Although this was not specifically canvassed at the hearing, it seems to us that the burden must be on the party alleging a breach of what must be an implied term, to establish the lack of reasonable or prudent conduct on which it relies, after having had the benefit of full relevant discovery (which we have now ordered in this case).

118. In its post-hearing brief, IPTL raises the further point that, if there is an implied term that the costs incurred must be incurred reasonably and prudently, TANESCO must exercise its right to contend that any costs were unreasonably or imprudently incurred, and therefore either not to be taken into account, or to be subject to adjustment, “in a commercially reasonable fashion”, and that TANESCO failed so to do. IPTL further contends that for this reason, TANESCO should be taken to have waived its right so to claim, or to be estopped from doing so. This is, we think, a new point, which was not argued at the hearing, and as to which we think it right to express no view at this stage.

Conclusions

119. For the reasons set out above, the Tribunal therefore concludes as follows:

- (1) That the PPA was not subject to an unsatisfied condition precedent as alleged or at all, and was not void for uncertainty; and accordingly was a valid and effective contract between the parties;
- (2) That TANESCO was not entitled to serve Notice of Default and was and is not entitled to give notice of termination pursuant thereto;
- (3) That the Reference Tariff should be adjusted in accordance with Addendum No. 1 by reference to changes that had taken place, before commercial operations would have commenced

but for TANESCO's purported Notice of Default, in any of the assumptions listed in Mr Rugemalira's letter to the Principal Secretary of the Ministry of Water, Energy and Minerals dated 31 May 1995, with the following qualifications, namely:-

- (i) that the figure of 23% for "IRR" should be amended to read "22.31%";
- (ii) that it is open to TANESCO to prove that any costs incurred by IPTL relating to any of the listed assumptions were not reasonably and prudently so incurred.

We therefore answer the Preliminary Issues listed in paragraph 2 above:

- (1) Not on any grounds argued and dealt with in this decision.
- (2) None, save that there may be consequences on the cost of the Facility and therefore on the adjustment to the Reference Tariff to be carried out pursuant to Addendum No. 1 to the PPA.
- (3) & (4) The "underlying assumptions stated in the PPA" were those listed in Mr Rugemalira's letter to the Principle Secretary of the Ministry of Water, Energy and Minerals dated 31 May 1995, and the effect of

Addendum No. 1 dated 9 June 1995 was as summarised in sub-paragraph (3) above.

Dated this^{22nd}..... day of May 2000

Charles W. Brower

Hon. Charles Brower

Andrew Rogers

Hon Andrew Rogers QC

Kenneth Rokison

Kenneth Rokison