INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

STANDARD CHARTERED BANK (HONG KONG) LIMITED

and

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED

(TANESCO)

(ICSID Case No. ARB/10/20) (Annulment Proceeding)

Decision on the Application for Annulment

Members of the *ad hoc* Committee

Mr Claus von Wobeser, President
Dr Christoph Schreuer
Ms Bertha Cooper-Rousseau

Secretary of the *ad hoc* Committee

Ms Aurélia Antonietti

Assistant to the President of the *ad hoc* Committee

Ms Montserrat Manzano

Date of dispatch to the parties: August 22, 2018

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I. Table of Abbreviated References

Annex-###	Annex to TANESCO's submissions during the Annulment Proceeding
Annulment Proceeding	The annulment proceeding in ICSID Case No. ARB/10/20 brought by TANESCO Tanzania Electric Supply Company Limited ("**TANESCO**") against Standard Chartered Bank (Hong Kong) Limited ("**SCB HK**"), seeking the annulment of the award dated September 12, 2016
Application for Annulment	TANESCO's Application for Annulment dated January 6, 2017
Arbitration Clause	The arbitration clause contained in Article 18.3 of the Power Purchase Agreement
Arbitration Proceeding	The arbitration proceeding in ICSID Case No. ARB/10/20 brought by SCB HK against TANESCO
Award	The award dated September 12, 2016 in ICSID Case No. ARB/10/20 brought by SCB HK against TANESCO
BIT Arbitration	Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, dated November 2, 2012
BVI	British Virgin Islands
Centre or ICSID	International Centre for Settlement of Investment Disputes

CLA-###	Legal Authority submitted by SCB HK during the Annulment Proceeding
Committee	The Committee in this annulment proceeding, constituted by Mr Claus von Wobeser as President and Prof. Dr Christoph Schreuer and Ms Bertha Cooper-Rousseau as Members
Companies Act	Tanzania's Companies Act No. 12 of 2002, which has superseded the Companies Ordinance
Companies Ordinance	Tanzania's Companies Ordinance
December 2013 Letter	Letter from TANESCO's counsel, dated December 13, 2013
Decision on Jurisdiction or Decision	The Tribunal's decision on jurisdiction and liability dated February 12, 2014 in ICSID Case No. ARB/10/20
Decision on Stay of Enforcement	The Committee's decision on TANESCO's request for a continued stay of enforcement of the Award, dated April 12, 2017
Escrow Account	The escrow account established by TANESCO with the Bank of Tanzania, into which it made monthly payments
Facility Agreement	Loan Facility Agreement dated June 28, 1997, between IPTL and Bank Bumiputra Malaysia Berhad and Sime Bank Berhad (Malaysian Banks), in order to secure financing to construct the Power Plant
First Session	In person hearing of March 30, 2017
GoT or Tanzania	Government of Tanzania
Hearing	Hearing on Annulment which took place in London on November 27 and 28, 2017

ICSID 1	The arbitration proceeding in ICSID Case No. ARB/98/8 brought by Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (ICSID Case No. ARB/98/8), where an award was issued award dated July 12, 2001
ICSID Arbitration Rules or Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965
Implementation Agreement	Agreement between the GoT and IPTL dated June 8, 1995
Implementation Model	The financial model that was subsequently agreed by the parties to the PPA (TANESCO and IPTL) before commencement of operations
IPTL	Independent Power Tanzania Limited
IRR	Internal Rate of Return
JALA	Tanzania's Judicature and Application of Laws Act
March 2013 Hearing	The last hearing before the Tribunal rendered the Decision on Jurisdiction, held on the March 14 and 15, 2013
Parties	SCB HK and TANESCO, collectively
Power Plant	A 100Mw power plant at Tegeta, Dar-es-Salaam in Tanzania, to be constructed by IPTL under the PPA
PPA	Power Purchase Agreement dated May 26, 1995, between TANESCO and IPTL,

	under which IPTL agreed to design, construct, own, operate and maintain the Power Plant, and to sell the produced electricity to TANESCO
R-###	Exhibit submitted by TANESCO during the Annulment Proceeding
Reception Date	July 22, 1920
SCB HK	STANDARD CHARTERED BANK (HONG KONG) LIMITED (SCB HK), the respondent in this annulment proceeding
SCB HK's Costs Submissions	SCB HK's Submission on Costs, dated February 20, 2018
SCB HK's Counter-Memorial on Annulment or Counter-Memorial	SCB HK's Counter-Memorial on Annulment, dated July 21, 2017
SCB HK's Further Submissions on Annulment	SCB HK's Further Additional Submissions on Annulment, dated January 11, 2018
SCB HK's PHB on Annulment	SCB HK's Post-Hearing Submission on Annulment, dated January 2, 2018.
SCB HK's Rejoinder on Annulment	SCB HK's Rejoinder on Annulment, dated September 29, 2017
SCB HK's Reply Costs Submissions	SCB HK's Reply Submission on Costs, dated March 5, 2018
SCJA	The Supreme Court of Judicature Act 1873 of Tanzania, which contained the requirements for a statutory assignment.
Section 79	Section 79 of Tanzania's Companies Ordinance
Security Deed	Security Deed between IPTL and Sime Bank Berhad, Singapore Main Office, dated June 28, 1997 (Security Agent), under which IPTL assigned to the security

	agent its present and future right, title and interest in and to certain contracts, which include the PPA
TANESCO	TANZANIA ELECTRIC SUPPLY COMPANY LIMITED (TANESCO), the applicant for annulment
TANESCO's Costs Submissions	TANESCO's Costs Submissions, dated February 20, 2018
TANESCO's Further Submissions on Annulment	TANESCO's Further Post-Hearing Submission, dated January 12, 2018
TANESCO's Memorial on Annulment	TANESCO's Memorial on Annulment dated June 2, 2017
TANESCO's PHB on Annulment	TANESCO's Submissions on Annulment of January 2, 2018
TANESCO's Reply Costs Submissions	TANESCO's Reply Costs Submissions, dated March 5, 2018
TANESCO's Reply on Annulment	TANESCO's Reply on Annulment, dated August 18, 2017
Tariff Dispute	Dispute between IPTL and TANESCO as to whether Mechmar Corporation (Malaysia) Berhad's ("Mechmar") contribution to the capital of IPTL made by way of a shareholder loan rather than paid-up share capital, was inconsistent with the PPA and the ICSID 1 Award
Tribunal	The tribunal in ICSID Case No. ARB/10/20, consisting of Prof. Donald McRae as President, and Prof. Zachary Douglas QC and Prof. Brigitte Stern, as Arbitrators
VIP	VIP Engineering and Marketing Ltd

Winding Up Petition	The petition made to the Tanzanian Court on February 25, 2002, by the minority Tanzanian shareholder, for the winding up of IPTL

II. Introduction to the dispute

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

2. The claimant in the "**Arbitration Proceeding**" was Standard Chartered Bank (Hong Kong) Limited ("**SCB HK**"), a company organised under the laws of Hong Kong, a subsidiary of Standard Chartered Bank ("**SCB**"), which is incorporated in the United Kingdom. The Respondent in the arbitration was TANESCO (and together with SCB HK the "**Parties**"), an entity wholly owned by the United Republic of Tanzania ("**Tanzania**" or the "**GoT**") and designated as an agency of Tanzania pursuant to Article 25(1) of the ICSID Convention.

3. The claim was brought on the basis of the arbitration clause contained in the PPA which refers to ICSID arbitration (the "**Arbitration Clause**"). SCB HK brought its claim in its capacity as assignee of IPTL's rights under the PPA. SCB HK originally requested from the "**Tribunal**" in the Arbitration Proceeding a declaration that TANESCO owed it outstanding payments in the sum of US$258.7 million, and an order to pay it US$138 million to discharge its loan or alternatively to pay it the amounts due under the PPA.[1]

4. A preliminary Decision on Jurisdiction and Liability was issued on February 12, 2014 (the "**Decision on Jurisdiction**" or the "**Decision**"), in which the Tribunal decided that IPTL's rights had been validly assigned to SCB HK under the PPA and that it had jurisdiction over the Parties and the dispute. The Tribunal specified that it lacked jurisdiction over the relationship between SCB HK and IPTL which arises under the Loan

[1] **Annex-1**, Decision on Jurisdiction, ¶26

Facility Agreement dated June 28, 1997 (the "**Facility Agreement**"). Consequently, the Tribunal only made a declaration of the amount owing by TANESCO to IPTL under the PPA but did not order for payment of such amount.

5. On September 12, 2016, the Tribunal rendered its award (the "**Award**"), in which it concluded that: (i) it had jurisdiction to reopen the Decision on Jurisdiction, and, in addition to making a declaration of the amount owing by TANESCO to SCB HK, it would also make an order for payment of such amount; (ii) the tariff should be determined on the basis of an Internal Rate of Return ("**IRR**") of 22.31% applied to a shareholder loan. Therefore, the amount owed by TANESCO under the PPA as of September 30, 2015 was US$148.4 million; (iii) the interest rate on the amount owing under the PPA was to be simple three-month LIBOR plus 4%; (iv) TANESCO be ordered to pay to SCB HK US$148.4 million with simple interest at three-month LIBOR plus 4% from September 30, 2015 until the date of the Award. Interest was to continue at the same rate until full payment was received; (v) all other claims were dismissed; and (vi) each Party was to bear its own legal fees and expenses and the costs of the arbitration in equal shares.[2]

6. On January 6, 2017, TANESCO filed an application for annulment in writing with the Secretary-General of the Centre requesting the annulment of the Award (the "**Application for Annulment**").

7. The Application for Annulment was made within the time-period provided in Article 52(2) of the ICSID Convention. TANESCO sought annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention), specifically claiming that, in the Award:[3]

[2] Additionally, the Tribunal made the following declarations: (i) that amounts paid by TANESCO into the Escrow Account did not discharge TANESCO's obligations under the PPA, and thus cannot be used to reduce the amount that TANESCO owes SCB HK, (ii) that payment out of the Escrow Account to IPTL/PAP did not discharge TANESCO's obligation to SCB HK under the PPA, and thus cannot be used to reduce the amount that TANESCO owes SCB HK, (iii) that payments made to IPTL/PAP since August 2013 do not discharge TANESCO's obligation to SCB HK under the PPA, and thus cannot be used to reduce the amount that TANESCO owes SCB HK. See **Annex-1**, Award dated September 12, 2016, ¶414 (5-7).

[3] Application for Annulment, ¶4; see also TANESCO's Memorial on Annulment, ¶2.

A) the Tribunal has manifestly exceeded its powers;[4]

B) there has been a serious departure from a fundamental rule of procedure;[5] and

C) the award has failed to state the reasons on which it is based.[6]

8. The Application for Annulment also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**" or the "**Arbitration Rules**"), for a stay of enforcement of the Award until the Application for Annulment is decided.

9. On January 13, 2017, the Secretary-General of ICSID registered the Application for Annulment, and provisionally granted the stay of enforcement of the Award. On the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, ICSID transmitted the Notice of Registration to the Parties. The Parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

10. By letter dated February 10, 2017, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the Parties were notified by the Centre that an *ad hoc* Committee (the "**Committee**") had been constituted, composed of Mr Claus von Wobeser (Mexican), as

[4] See Application for Annulment, ¶¶5-17; see also TANESCO's Memorial on Annulment, ¶2. "[…]by: i) wrongly exercising jurisdiction even though SCB HK made 'no investment' under Article 25(1) of the Convention; ii) assuming jurisdiction over the relationship between SCB HK and ITPL [sic] under the Facility Agreement […] and allowing SCB HK to step into the shoes of IPTL and gain standing in these proceedings; iii) reconsidering its prior Decision on Jurisdiction and Liability dated 12 February 2014 […]; and iv) incorrectly failing to apply the law of Tanzania, being the proper law under the relevant contract, contrary to its obligation under Article 42(1) of the Convention".

[5] Application for Annulment, ¶¶26-31; see also TANESCO's Memorial on Annulment, ¶2. "[…] by; i) improperly reconsidering its prior Decision on Jurisdiction and Liability; and ii) failing to allow the parties to brief the issue of reconsideration".

[6] Application for Annulment, ¶¶18-25; see also TANESCO's Memorial on Annulment, ¶2: "…c. failed to state reasons, within the meaning of Articles 48(3) and Article 52(1)(e) of the Convention. In particular, the Tribunal: i. held on purely formalistic grounds that SCB HK had made an investment within the meaning of Article 25(1) of the Convention; ii. failed to take into account additional and decisive evidence regarding the interest applicable to the Escrow Account (as defined at paragraph 25 below); iii. failed to take into account contradictory evidence concerning SCB HK's knowledge […] of the status of the Escrow Account; iv. failed to take into account the evidence presented by TANESCO on the continuing existence of the tariff dispute; v. reversed its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement; and vi. held that the tariff must be calculated on the basis of an Internal Rate of Return ("**IRR**") of 22.1% which directly contradicted its earlier finding that this rate cannot apply".

President, Ms Bertha Cooper-Rousseau (Bahamian) and Mr Christoph Schreuer (Austrian) as Members. On the same date, the Parties were informed that Ms Aurélia Antonietti, Senior Legal Adviser of ICSID, would serve as Secretary to the Committee. On February 10, 2017, the annulment proceeding commenced (the "**Annulment Proceeding**").

11. By letter dated February 20, 2017, SCB HK responded to TANESCO's request to continue the stay. By letter dated February 22, 2017, TANESCO requested that the Committee rule on the continuation of the stay of enforcement of the Award within the 30-day timeframe provided for by ICSID Arbitration Rule 54(2). By letter of February 23, 2017, SCB HK responded to TANESCO's letter dated February 22, 2017. By letter dated February 24, 2017, TANESCO, *inter alia*, reiterated its request that the Committee rule on the enforcement of the stay within the 30-day timeframe.

12. On February 25, 2017, the Committee asked the Parties to indicate whether they would agree to a procedure whereby: (i) the 30-day deadline (set for March 13, 2017) under ICSID Arbitration Rule 54(2) be extended for an additional period of 30 days for the Committee to rule on the continuance of the stay; (ii) the stay would remain in effect within the extended period; (iii) the Parties would file one round of submissions, conferring among themselves to determine the dates for their exchange; and (iv) the first session would be held in London on March 29, 2017 to discuss both procedural aspects of the proceedings and the continuation of the stay.

13. On February 28, 2017, the ICSID Secretariat transmitted to the Committee communications indicating the Parties' agreed timetable for the proceeding as follows: (i) on March 10, 2017, TANESCO was to file its submission in support of the continuation of the stay; (ii) on March 21, 2017, SCB HK was to file its response; (iii) on March 29, 2017, an in-person hearing was to take place in London; and (iv) the 30-day deadline be extended for an additional period of 30 days for the Committee to rule on the continuance of the stay, the stay remaining in effect during this period.

14. On March 3, 2017, upon the Committee's proposal and with the agreement of the Parties, an in-person hearing (the "**First Session**") was rescheduled for March 30, 2017.

15. On March 6, 2017 ICSID circulated the Committee's draft procedural order no. 1 to the Parties ahead of the First Session. On March 27, 2017, the Parties submitted their comments on the draft.

16. On March 10, 2017, TANESCO filed its submission in support of a continuation of the provisional stay, and on March 21, 2017, SCB HK filed its reply.

17. On March 30, 2017, the First Session was held. The draft procedural order no. 1 and the stay submission and reply were discussed. The Parties agreed that the decision on the request for the stay would be rendered separately from procedural order no. 1.

18. On April 3, 2017, the Committee issued "**Procedural Order No. 1**".

19. On April 7, 2017, upon the Committee's proposal and agreed to by the Parties, Ms Montserrat Manzano was appointed as Assistant to the President of the Committee in the Annulment Proceeding.

20. On April 12, 2017, the Committee issued its Decision on TANESCO's Request for a Continued Stay of Enforcement of the Award (the "**Decision on Stay of Enforcement**").

21. Therein, the Committee ordered that the stay of enforcement continue subject to the following conditions[7]: "TANESCO provides, within 30 days of the decision of the Committee, an unconditional and irrevocable bank guarantee or security bond issued by a first-tier reputable international credit institution (outside of Tanzania and with no principal branch in Tanzania) for the full amount of the Award rendered against TANESCO, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond, and immediately payable to or cashable by SCB HK upon the issuance of a final decision of the Committee rejecting the annulment, or if the annulment proceedings are withdrawn or discontinued".[8] If such conditions were not complied with, the stay of enforcement would be automatically terminated.

[7] Decision on Stay of Enforcement, ¶89.
[8] Decision on Stay of Enforcement, ¶88.

22. By letter to the Committee dated May 12, 2017, TANESCO acknowledged receipt of the Decision on Stay of Enforcement and requested an extension of 45 days instead of the 30-day period set out in such decision. By letter to the Committee dated May 16, 2017, SCB HK opposed TANESCO's request.

23. By letter dated May 19, 2017, the Committee instructed TANESCO to provide on or before May 23, 2017, clear and irrefutable proof that it had initiated the necessary actions to obtain the guarantee requested in the Decision on Stay of Enforcement and that it would be able to obtain it and present it before the Committee by June 26, 2017. After reviewing such information, the Committee would decide whether and under which terms to reinstate the stay. By letter dated May 25, 2017, the Committee confirmed the termination of the stay as a result of TANESCO's failure to provide such proof.

24. On June 2, 2017, TANESCO filed its Memorial on Annulment ("**TANESCO's Memorial on Annulment**").

25. On July 21, 2017, SCB HK filed its Counter Memorial on Annulment ("**SCB HK's Counter-Memorial on Annulment**").

26. On August 18, 2017, TANESCO submitted its Reply on Annulment ("**TANESCO's Reply on Annulment**") and on September 29, 2017, SCB HK filed its Rejoinder on Annulment ("**SCB HK's Rejoinder on Annulment**").

27. On November 2, 2017, the Committee held a pre-hearing conference call with counsel for the Parties, during which the Parties agreed on the manner in which the hearing on annulment would be conducted (the "**Hearing**").

28. A two-day hearing was held in London on November 27 and 28, 2017, at which counsel presented their arguments and submissions and responded to questions from the Members of the Committee. Present at the hearing were: (i) the Members of the Committee: Claus von Wobeser as President, Bertha Cooper-Rousseau and Christoph Schreuer as Members; Aurélia Antonietti, Senior Legal Adviser at ICSID; and Montserrat Manzano, Assistant to the President, (ii) the representatives of TANESCO: David Hesse, Devika Khanna, Tom Roberts, Nefeli Lamprou and Paul Baker, of Clyde

& Co. LLP; Bonaventure Rutinwa, Beredy Malegesi and Jackline Rweyongeza, of Crax Law Partners in Association with RK Rweyongeza Co; and (iii) the representatives of SCB HK: Matthew Weiniger QC, of Linklaters LLP, and Iain Maxwell, Aaron McDonald, Harry Ornsby and Gavin Creelman, of Herbert Smith Freehills LLP.

29. On December 1, 2017, the Committee requested that the Parties submit further comments by January 2, 2018, on the interpretation and relevance of ICSID Arbitration Rule 41(2) and on the following cases: (i) *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016; (ii) *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008; and (iii) *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, December 29, 2004.

30. On January 2, 2018, the Parties submitted their arguments regarding ICSID Arbitration Rule 41(2) and the cases listed above.

31. On January 11, 2018, SCB HK provided further submissions on TANESCO's January 2, 2018 submission. On January 12, 2018, TANESCO provided further submissions on SCB HK's January 2, 2018 submission.

32. On February 20, 2018, the Parties filed their submissions on costs. On March 5, 2018, the Parties filed their reply submissions on costs.

33. On May 21, 2018 the Committee declared the Annulment Proceeding closed pursuant to ICSID Arbitration Rule 38.

34. The Members of the Committee have considered all the arguments presented by the Parties in their written and oral submissions throughout the Annulment Proceeding, including documents tendered at the Hearing and hereby issue the following decision on annulment.

III. Factual background

35. The Committee received the factual background to this dispute from: (i) the Parties' submissions in the Annulment Proceeding, (ii) the Decision on Jurisdiction[9]; and (iii) the Award.[10] These were considered in detail by the Committee during the present Annulment Proceedings.

IV. The scope of the Annulment Proceedings

36. TANESCO seeks the annulment of the Award, issued by the Tribunal in ICSID Case No. ARB/10/20 brought by SCB HK against TANESCO.

i) TANESCO's arguments

37. TANESCO notes that it agrees with SCB HK's statement that annulment under the ICSID Convention is a limited, discretionary remedy, and that it is distinct from an appeal. However, it argues that its Application for Annulment is within the confines of that limited, discretionary remedy.[11]

38. TANESCO states that under the ICSID Convention, Article 52 is the sole means by which a party can bring to account a tribunal that has exceeded its powers. Article 52 of the ICSID Convention is therefore a limited but vital part of the ICSID regime, and the *ad hoc* committee formed pursuant to Article 52 of the ICSID Convention constitutes the only scrutiny of what is otherwise an unappealable award.[12]

39. In this respect, TANESCO explains that the grounds for annulment enumerated in Article 52 of the ICSID Convention clearly define the limits of the remedy of annulment. Therefore, it is not for SCB HK to attempt to limit them further by suppressing the

[9] **Annex-1**, Decision on Jurisdiction, ¶¶5-89.
[10] **Annex-1**, Award, ¶¶63-224.
[11] TANESCO's Reply on Annulment, ¶20, citing SCB HK's Counter-Memorial on Annulment, ¶4.
[12] TANESCO's Reply on Annulment, ¶26; at footnote 18, TANESCO quotes Art. 53 of the ICSID Convention as follows: "…Article 53 of the ICSID Convention provides that '(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention [...]'".

Committee's ability to substitute its view for that of the Tribunal where the Tribunal has erred.[13]

40. TANESCO agrees that it is not the role of *ad hoc* committees to substitute their own views on the merits for those of the tribunals.[14] However, TANESCO argues that ICSID jurisprudence clearly states that an *ad hoc* committee should not be precluded from scrutinising failings of a tribunal which fall squarely within the confines of Article 52 of the ICSID Convention.[15] TANESCO argues that this is precisely the role of the *ad hoc* committee within the ICSID regime and is what TANESCO seeks in this Annulment Proceeding.[16]

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[13] TANESCO's Reply on Annulment, ¶28, footnote 19, referring to SCB HK's Counter-Memorial on Annulment, ¶253.

[14] TANESCO's Reply on Annulment, ¶28, footnote 20, referring to SCB HK's Counter-Memorial on Annulment, ¶7.

[15] TANESCO's Reply on Annulment, ¶28, footnote 21, quoting the next exhibits as follows: **CLA-106**, *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016 ("***Adem Dogan v. Turkmenistan***"), ¶29, which states: "it is not within the Committee's remit to review the substantive correctness of the Award, either in fact or in law. However, the Committee must examine the legitimacy of the arbitration proceedings resulting in the Award. This means that it is not the Committee's function to sit in appeal on the Award of the Tribunal. It must not substitute its views for those of the Tribunal"; **CLA-104**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 ("***Tulip Real Estate v. Turkey***"), ¶42, which states: "A decision-maker exercising the power to annul only has the choice between leaving the original decision intact or annulling it in whole or in part. An appeals body may substitute its own decision for the decision that it has found to be deficient. Under the ICSID Convention, an ad hoc committee only has the power to annul the award. The *ad hoc* committee may not amend or replace the award by its own decision on the merits. Article 53(1) of the Convention explicitly rules out any appeal". [Emphasis added]; **Annex-18**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, February 1, 2016 ("***Total S.A. v. Argentina***"), ¶167, which states: "an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e*., either partial or full".

[16] TANESCO's Reply on Annulment, ¶¶28-30, footnotes 22 and 23, quoting the next cases **CLA-128**, *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment Proceeding), Decision on the Argentine Republic's Request for Annulment of the Award rendered on August 20, 2007, dated August 10, 2010 ("***Vivendi II***"), ¶200: "[t]he Argentine Republic observes that the role of the *ad hoc* Committee is to 'protect the integrity of the system'. The *ad hoc* Committee concurs with this view. This fundamental premise is therefore uncontested, and all grounds invoked for annulment in the present case have to be addressed in the light of this paramount policy consideration. [Emphasis added by TANESCO]"; **Annex-4**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 (Annulment Proceeding), Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, June 5, 2007, ¶23 ("***Soufraki v. UAE***"): "23. In the view of the *ad hoc* Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An *ad hoc* committee is empowered to verify (i) *the integrity of the tribunal* – its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii) *the integrity of the procedure* – which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii)

41. TANESCO agrees with SCB HK's assertion that the scope of the annulment remedy is to "provide emergency relief in rare cases of fundamental importance, but to uphold the finality of awards in the face of alleged relatively minor substantive or procedural flaws".[17] However, contrary to SCB HK's assertions, TANESCO states that the procedural irregularities concerning the Award were not "relatively minor substantive or procedural flaws".[18]

42. TANESCO states that, in the Award, the Tribunal adopted an unjustified approach to ICSID proceedings never seen before. According to TANESCO, that approach fell outside of the prescribed limits set by the ICSID Convention.[19] TANESCO states that this abuse of procedure goes to the heart of the purpose behind the annulment procedure under Article 52 of the ICSID Convention.[20]

43. In light of the above, TANESCO states that an *ad hoc* committee's role is paramount and thus should not be limited to the extent suggested by SCB HK. Further, it argues that the Committee is clearly entitled to exercise its powers under Article 52 of the ICSID Convention, and to hear TANESCO's request for annulment of a seriously flawed award.[21]

ii) SCB HK's arguments

the integrity of the award – meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)). Integrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism. [Emphasis added by TANESCO]".

[17] TANESCO's Reply on Annulment, ¶31, footnote 24, referring to SCB HK's Counter-Memorial on Annulment, ¶252.

[18] TANESCO's Reply on Annulment, ¶22, footnote 16, referring to SCB HK's Reply to TANESCO's Request for a Continuation of the Provisional Stay of Enforcement of the Award, March 21, 2017, paragraph 4, and ¶31, footnote 24, referring to SCB HK's Counter-Memorial on Annulment, ¶252.

[19] TANESCO's Reply on Annulment, ¶22.

[20] TANESCO's Reply on Annulment, ¶36.

[21] TANESCO's Reply on Annulment, ¶32.

44. SCB HK states that annulment is distinct from appeal and that this fundamental distinction has been emphasised repeatedly by *ad hoc* committees and is a well-established principle in ICSID annulment jurisprudence.[22]

45. In this respect, SCB HK argues that an *ad hoc* committee does not have the powers of a court of appeal and cannot carry out a substantive review of an award.[23] Rather, SCB HK states that annulment is a remedy of limited scope,[24] concerned with only the basic legitimacy of the process of a decision, and not with its substantive correctness. Therefore, its role is limited to providing emergency relief in rare cases of fundamental importance and to upholding the finality of awards in the face of alleged relatively minor substantive or procedural flaws of an award.[25]

46. Furthermore, SCB HK argues that "…in exercising this 'narrow and limited mandate', an *ad hoc* committee is forbidden from making an inquiry into the substance of the case, the misapplication of the law or any mistakes in analysing the facts because annulment is not

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[22] SCB HK's Counter-Memorial on Annulment, ¶251, footnote 283, referring to **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014 ("***SGS Société Générale de Surveillance S.A. v. Paraguay***"), ¶105; **Annex-73**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002 ("***Wena Hotels v. Egypt***"), ¶18; **Annex-68**, *MTD Equity Sdn Bhd & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 ("***MTD v. Chile***"), ¶31; **Annex-78**, *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 ("***Vivendi I***"), ¶¶62 and 64; **Annex-4**, *Soufraki v. UAE*, ¶¶20 and 24; **CLA-101**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, Sept 25, 2007 ("***CMS Gas Transmission Company v. Argentina***"), ¶¶43 and 135; **Annex-7**, *Mr Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, November 1, 2006 ("***Mitchell v. DRC***"), ¶19; **CLA-102**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, December 18, 2012 ("***Pey Casado v. Chile***"), ¶¶129, and 148; **CLA-103**, *Poštová Banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment, September 29, 2016 ("***Poštová Banka v. Hellenic Republic***"), ¶128; **CLA-104**, *Tulip Real Estate v. Turkey*, ¶44.

[23] SCB HK's Counter-Memorial on Annulment, ¶252, footnote 284, referring to **CLA-105**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, January 7, 2015 ("***Daimler Financial Services AG v. Argentina***"), ¶76; **CLA-103**, *Poštová Banka v. Hellenic Republic*, ¶129.

[24] SCB HK's Counter-Memorial on Annulment, ¶252, footnote 285, referring to **CLA-101**, *CMS Gas Transmission Company v. Argentina*, ¶ 44; **Annex-4**, *Soufraki v. UAE*, ¶20; **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶28.

[25] SCB HK's Counter-Memorial on Annulment, ¶¶4 and 252, footnote 286, referring to **CLA-107**, Schreuer, *ICSID Annulment Revisited* (2003) 30(2) 103-122, page 104; **CLA-108**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, July 8, 2013 ("***Joseph C. Lemire v. Ukraine***"), ¶233; **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ¶104; **CLA-104**, *Tulip Real Estate v. Turkey*, ¶43.

concerned with the substantive correctness of an award".[26] Therefore, SCB HK argues that an *ad hoc* committee cannot substitute its views of the law or its appreciation of the facts for those of the tribunal, and that it must take the record before the tribunal as its premise.[27]

47. Accordingly, SCB HK argues that in exercising its annulment authority, an *ad hoc* committee must be careful not to reverse an award on the merits or carry out a substantive review under the guise of applying the narrow, exhaustive grounds of Article 52 of the ICSID Convention.[28]

48. SCB HK states that the narrowly circumscribed nature of this remedy is also evident from the drafting history of the Convention, since "[t]he International Law Commission, during the drafting deliberations of the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure, from which the grounds for annulment in the ICSID Convention derive, stated that appeals against arbitral awards should not be allowed, but the validity of awards may be challenged 'within rigidly fixed limits'".[29] As a result, SCB HK explains that the ICSID Convention specifically rejects any right to appeal in Article 53(1), and states that the use of the annulment procedure should not be allowed to circumvent this prohibition.[30]

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[26] SCB HK's Counter-Memorial on Annulment, ¶253, footnotes 289 and 290, referring to **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶233; **Annex-77** to TANESCO's Memorial on Annulment: *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, December 14, 1989 ("***MINE v. Guinea***"), ¶4.04; **CLA- 104**, *Tulip Real Estate v. Turkey*, ¶43.

[27] SCB HK's Counter-Memorial on Annulment, ¶253, footnotes 291 and 292, referring to **CLA-109**, M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009 ("***M.C.I. v. Ecuador***"), ¶24; **CLA-110**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007 ("***Lucchetti v. Peru***"), ¶97; **CLA-101**, *CMS Gas Transmission Company v. Argentina*, ¶158; **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶29; **Annex-18**, *Total S.A. v. Argentina*, ¶167; **CLA-104**, *Tulip Real Estate v. Turkey*, ¶42; **CLA-111**, *CDC Group Plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 ("***CDC v. Seychelles***"), ¶35; **Annex-68** to TANESCO's Memorial on Annulment: *MTD v. Chile*, ¶31.

[28] SCB HK's Counter-Memorial on Annulment, ¶253, footnote 293, referring to **Annex-77** to TANESCO's Memorial on Annulment: *MINE v. Guinea*, ¶4.04.

[29] SCB HK's Counter-Memorial on Annulment, ¶254, footnote 294, referring to **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶7; See also ¶¶71 to 74.

[30] SCB HK's Counter-Memorial on Annulment, ¶254.

49. SCB HK emphasises that an annulment proceeding is not a retrial or an opportunity to raise new arguments, which a party could and should have made during the underlying arbitral proceedings, or to introduce new contemporaneous evidence. SCB HK also argues that it must not be used as an opportunity to re-litigate the case on the merits, nor as an opportunity to determine which party had better arguments before the tribunal nor to fill gaps in a party's arguments.[31]

50. SCB HK states that "[t]he Committee should also take into account the principle that annulment is an 'extraordinary remedy with a high threshold'". According to SCB HK, annulment is an "exceptional" remedy for unusual cases where there have been "egregious" violations of Article 52 of the ICSID Convention.[32]

51. SCB HK also calls the attention of the Committee to the fact that even if it were to find that one or more of the grounds for annulment have been established by TANESCO, it is not required to annul the award as Article 52(3) provides that: "[t]he Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)".

52. According to SCB HK, this does not require an automatic exercise of that authority, since saying that an *ad hoc* committee "shall have the authority to annul the award" is different from saying that a committee "shall annul the award". Thus, SCB HK argues that an *ad hoc* committee retains some flexibility and discretion in determining whether annulment is appropriate and that whilst this discretion is not unlimited, it is well established that there are circumstances where annulment will not be appropriate.[33]

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[31] SCB HK's Counter-Memorial on Annulment, ¶255, footnotes 295-299, referring to **Annex-68** to TANESCO's Memorial on Annulment: *MTD v. Chile*, ¶31; **CLA-123**, Christoph H. Schreuer, The ICSID Convention: A Commentary, page 902, ¶12; **CLA-113**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment, May 5, 2017 ("***Suez v. Argentina***"), ¶53; **Annex-4**, *Soufraki v. UAE*, ¶24; **CLA-103**, *Poštová Banka v. Hellenic Republic*, ¶130.

[32] SCB HK's Counter-Memorial on Annulment, ¶256, footnotes 300-302, referring to **CLA-103**, *Poštová Banka v. Hellenic Republic* ¶127; **CLA-111**, *CDC v. Seychelles*, ¶34; **Annex-18**, *Total S.A. v. Argentina*, ¶¶159, 160, 165 and 167; **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶233; **CLA-113**, *Suez v. Argentina*, ¶53; **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶28.

[33] SCB HK's Counter-Memorial on Annulment, ¶258.

53. SCB HK states that this understanding of said Article has been reiterated by several *ad hoc* committees.[34]

54. In view of the aforementioned, SCB HK states that an *ad hoc* committee may refuse to exercise its annulment authority where it is clearly not required to remedy the procedural injustice which the applicant alleges and where the annulment will unjustifiably erode the binding force of the award.[35] In support of this argument, SCB HK quotes the *Hussein Nuaman Soufraki v. United Arab Emirates* case ("***Soufraki v. UAE***"), in which the committee ruled that "even where a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances".[36]

55. Consequently, SCB HK explains that, in the present case, the Committee must consider the significance of the annullable error in relation to the legal rights of the Parties, the gravity of the circumstances which constitute the grounds for annulment, the effect on the outcome of the case, the importance of the finality of the award and the overall fairness to the Parties.[37]

56. SCB HK argues that TANESCO has failed to satisfy the high threshold required for an award to be annulled, therefore, the need for this exceptional remedy has not been made out in the present case.[38]

iii) Analysis and Decision of the Committee

57. Bearing in mind the Parties' arguments and evidence submitted in the Annulment Proceeding, especially that which concerned the drafting history of the Convention and the recent developments in case law on annulment proceedings, the Committee's conclusion regarding the scope of this annulment remedy is as follows.

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[34] SCB HK's Counter-Memorial on Annulment, ¶258, footnotes 304-307, referring to the following cases of *ad hoc* committees: **CLA-114**, *AMCO Asia Corporation v. Republic of Indonesia*, ICSID Case No ARB/81/1 Resubmitted Case-Decision on Annulment, December 3, 1992 ("***AMCO* Resubmission**"), ¶1.20; **Annex-78**, *Vivendi I*, ¶66; **Annex-77**, *MINE v. Guinea*, ¶4.09; **CLA-111**, *CDC v. Seychelles*, ¶37.

[35] SCB HK's Counter-Memorial on Annulment, ¶259, footnote 309, referring **to CLA-114**, *AMCO* Resubmission ¶1.20.

[36] SCB HK's Counter-Memorial on Annulment, ¶259, footnote 310, referring to **Annex-4**, *Soufraki v. UAE*, ¶24.

[37] SCB HK's Counter-Memorial on Annulment, ¶259.

[38] SCB HK's Counter-Memorial on Annulment, ¶¶256 and 260.

58. Article 53(1) of the ICSID Convention provides that an award is binding on the parties and not subject to any appeal or any other remedy except those provided for in the ICSID Convention. Said Article reflects an important aspect of the ICSID system, namely, its self-contained nature, since national courts have no role in the ICSID proceedings. Instead, the ICSID system contains "all provisions necessary for the arbitration of disputes, including provisions addressing the institution of proceedings, jurisdiction, procedure, the award to be rendered by the Tribunal, post-award remedies, and recognition and enforcement of the award".[39] The remedies provided for in the Convention reflect a "deliberate election by the drafters of the Convention to ensure finality of awards", as the only way to review them is pursuant to five specific remedies: rectification (Article 49), supplementary decision (Article 49), interpretation (Article 50), revision (Article 51) and annulment (Article 52).[40]

59. Regarding the annulment remedy under Article 52, the drafting history of the ICSID Convention reflects that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. In this regard, the Committee recalls the Parties' arguments regarding the scope of the annulment proceedings, specifically those dealing with its limited nature and the fact that such remedy does not imply the possibility of substituting their own views on the merits for those of the Tribunal's,[41] and finds that annulment grounds were designed purposefully to confer a limited scope of review, which would safeguard against "violation of the fundamental principles of law governing

[39] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶¶2-3.
[40] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶4.
[41] SCB HK's Counter-Memorial on Annulment, ¶¶252, 253 and 256; see also TANESCO's Reply on Annulment, ¶¶20, 26, 28, footnote 21, referring to **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶29, which states: "it is not within the Committee's remit to review the substantive correctness of the Award, either in fact or in law. However, the Committee must examine the legitimacy of the arbitration proceedings resulting in the Award. This means that it is not the Committee's function to sit in appeal on the Award of the Tribunal. It must not substitute its views for those of the Tribunal"; **CLA-104**, *Tulip Real Estate v. Turkey*, ¶42, which states: "[a] decision-maker exercising the power to annul only has the choice between leaving the original decision intact or annulling it in whole or in part. An appeals body may substitute its own decision for the decision that it has found to be deficient. Under the ICSID Convention, an *ad hoc* committee only has the power to annul the award. The *ad hoc* committee may not amend or replace the award by its own decision on the merits. Article 53(1) of the Convention explicitly rules out any appeal"; **Annex-18**, *Total S.A. v. Argentina*, ¶167, which states: "an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full".

the [t]ribunal's proceedings".[42] The remedy has been characterized as one concerning "procedural errors in the decisional process" rather than an inquiry into the substance of the award.[43]

60. Additionally, the Committee bears in mind the drafting history of the Convention, which also demonstrates that annulment "is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment]".[44] It, therefore, does not provide a mechanism to appeal any alleged misapplication of law or mistake in fact by a tribunal.

61. Therefore, an annulment proceeding is not concerned with how the tribunal appreciated the arguments and evidence submitted by the parties or the conclusion it arrived therefrom. Instead, it is merely concerned that such assessment or evaluation indeed took place, on a fair and equitable basis, and that the findings of the Tribunal were based in its appreciation and analysis of said evidence and arguments, and thus is not arbitrary.

62. ICSID *ad hoc* committees have affirmed the reasonings on which this Committee is basing its decision, having established that: (1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* committee is limited; (3) *ad*

[42] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶71.
[43] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶¶7 and 71: "7. The grounds for annulment in the ICSID Convention derive from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure ('ILC Draft'), […] The ILC recognized that the finality of an award is an essential feature of arbitral practice, but also recognized that there was a need for 'exceptional remedies calculated to uphold the judicial character of the award as well as the will of the parties as a source of the jurisdiction of the tribunal'. It thus 'sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.'. […] 71. […] the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. […] The remedy has thus been characterized as one concerning 'procedural errors in the decisional process' rather than an inquiry into the substance of the award".
[44] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶72; With regards to this, during the meetings held by the Legal Committee in 1964, it was confirmed by a vote that even a "manifestly incorrect application of the law" is not a ground for annulment. See also ¶¶18, 21: "18. [t]he Legal Committee held a series of meetings in November and December 1964[…]. 21. Chairman […] confirmed during the meetings that failure to apply the proper law could amount to an excess of power if the parties had agreed on an applicable law. One proposal suggested adding the 'manifestly incorrect application of the law' by the Tribunal as a ground of annulment, but it was defeated by a vote of 17 to 8".

hoc committees are not courts of appeal and thus, annulment is not a remedy against an incorrect decision and an *ad hoc* committee cannot substitute the tribunal's determination on the merits for its own; (4) *ad hoc* committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (6) an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e*., either partial or full.[45]

63. Considering the aforementioned, the Committee concludes that the grounds stated above are the only grounds on which the Award may be annulled and that this remedy is not an appeal nor a remedy against an incorrect decision or the Tribunal's appreciation of the facts and/or evidence. Therefore, the authority conferred upon the Committee to rule on the annulment does not allow it to review the substantive determinations reached by the Tribunal, but merely to establish which of its decisions affected the Award in such a way as to amount to a ground for annulment. The Committee cannot issue a ruling regarding the substance of the dispute, since, according to Article 52(6) of the Convention, should the Award be annulled, the dispute shall, at the request of either party, be submitted to a new tribunal in accordance with Section 2 of Chapter IV of the ICSID Convention.

[45] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶74, footnote 138: "[a]ll decisions on annulment have been published, either by ICSID with the consent of the parties, by the parties themselves, or in summaries of the legal reasoning of the *ad hoc* Committee excerpted by ICSID. See Annex 1, which includes references to each decision on annulment and its publication source. Pursuant to ICSID Arbitration Rule 48(4), the Centre has published the legal reasoning of the decisions on annulment in *RFCC*, *Repsol*, *Transgabonais*, *Lemire*, and *RSM*". The Parties have also quoted extensively many of the cases referred to by the Administrative Counsel above, such as: **Annex-50**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, May 3, 1985 ("***Klöckner v. Cameroon***"); **CLA-101**, *CMS Gas Transmission Company v. Argentina*; **Annex-4**, *Soufraki v. UAE*; **Annex-59**, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, November 2, 2015 ("***Occidental Petroleum v. Ecuador***"); **Annex-18**, *Total S.A. v. Argentina*, ¶314; **Annex-79**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016 ("***TECO v. Guatemala***"); **Annex-77**, *MINE v. Guinea*; **CLA-111**, *CDC v. Seychelles*; **Annex-68**, *MTD v. Chile*; **Annex-78**, *Vivendi I*.

V. Reconsideration of the Tribunal's Decision on Jurisdiction as a Preliminary Matter

64. The Committee will address the issue of reconsideration as a preliminary matter, given that the conclusions reached herewith will assist the analysis of the arguments on reconsideration brought forward under each of the grounds for annulment. It is, therefore, most efficient to establish certain common principles and conclusions by the Committee at the outset. In this chapter the Committee provides: (V.A) the relevant provisions on reconsideration, (V.B) the Tribunal's reasoning on reconsideration, (V.C) the Parties' arguments on reconsideration and (V.D) its analysis of reconsideration and general conclusions on the same.

65. Subsequently, when analysing the grounds under Article 52 of the ICSID Convention, the Committee will, when necessary, explain and give a more detailed analysis of each of the considerations submitted by TANESCO.

V.A Relevant Provisions on Reconsideration

66. The ICSID Convention:

> "Article 41
>
> The Tribunal shall be the judge of its own competence.
>
> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.
>
> […]
>
> Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

[…]

Article 48

The Tribunal shall decide questions by a majority of the votes of all its members.

The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

The award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.

Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

The Centre shall not publish the award without the consent of the parties.

[…]

Article 51

Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant´s ignorance of that fact was not due to negligence.

The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request".

67. ICSID Arbitration Rules:

"Rule 41

Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence".

V.B The Tribunal's Reasoning on Reconsideration

68. TANESCO bases its Application for Annulment in part on the Tribunal's reconsideration of its prior Decision on Jurisdiction that led the Tribunal to change from initially awarding only declaratory relief to SCB HK from TANESCO to instead ordering

TANESCO to pay the amount it owed to SCB HK under the PPA. In the following paragraphs, the Committee reviews the Tribunal's reasoning on reconsideration.

69. The Committee observes that the Tribunal began its enquiry on whether it had authority to reconsider its prior Decision on Jurisdiction under the ICSID system and the facts of the present case by observing that there is nothing in either the ICSID Convention or the ICSID Arbitration Rules dealing explicitly with the question of reconsideration of a decision (as opposed to an award). It recalled that the power to reconsider an award is dealt with in Articles 51 and 52 of the ICSID Convention, the former of which relates to the revision of an award in light of "the discovery of some fact of such a nature as to decisively affect the award", and the latter of which to an application for the annulment of an award. However, there are no equivalent provisions relating to interlocutory decisions.[46]

70. The starting point for the Tribunal was the relationship under the ICSID Convention and the ICSID Arbitration Rules between a decision and an award and the question of whether a decision has the same *res judicata* effect as an award. The Tribunal determined that a decision is not an award because in accordance with Article 48(3) of the ICSID Convention, a decision must be incorporated into the award. The Tribunal noted that only once incorporated, then as part of the award does a decision come "…within the ambit of Article 50, Article 51, and Article 52 (annulment) of the ICSID Convention".[47] Equally, the Tribunal considered that provisions of Article 53 of the ICSID Convention dealing with finality are applicable to awards but not directly applicable to decisions.

71. The Tribunal further noted that there was little arbitral jurisprudence on the question of whether jurisdictional decisions can be reconsidered before the rendering of the final award. The two existing cases the Tribunal found to be directly on point at the time of the Tribunal's deliberations were *ConocoPhillips v. Venezuela*[48] and *Perenco v.*

[46] **Annex-1**, Award, ¶307.
[47] **Annex-1**, Award, ¶309.
[48] **Annex-1**, Award, ¶308, footnote 404, referring to *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 ("***ConocoPhillips v. Venezuela***"), Decision on the Respondent's Request for Reconsideration, March 10, 2014.

Ecuador.[49] The majority in *ConocoPhillips v. Venezuela* expressly concluded that decisions were *res judicata*, and not just when they are incorporated into the final award. However, the Tribunal concluded that while at the time of writing its decision no case had directly found that there is a power to reconsider prior decisions, there were cases that seemed to acknowledge the possibility of, or the existence of such a power, without actually applying it to reopen a decision.[50]

72. In the eyes of the Tribunal, the question was whether, notwithstanding the lack of any provision in the ICSID Convention relating to the finality of decisions, a decision of a tribunal is nevertheless final and *res judicata*. It concluded that this same finding by the majority in *ConocoPhillips v. Venezuela* was too broad considering that tribunals make decisions on procedural matters and on provisional matters, all of which are subject to being reviewed, reconsidered and revised, notwithstanding the absence of anything in the ICSID Convention authorising this. Consequently, it held that the mere fact that something is characterised as a decision of a tribunal cannot automatically make it *res judicata*.[51]

73. The Tribunal also concluded that the fact that a decision is binding on the parties does not mean the same thing as saying that it is *res judicata*.[52] In this respect, the Tribunal explained that decisions are binding within the scope of the proceedings but that this did not make them *res judicata*, since an essential feature of *res judicata* is that the judgment in question produces effects on the parties outside of the proceedings in which it is granted. However, it found that decisions of tribunals only have effect within the proceedings until they have been incorporated into the final award as supported by Article 48(3) of the ICSID Convention.[53] The Tribunal acknowledged that there is nothing preventing a tribunal from making it clear that it considers that its decisions are final and not subject to reopening as had appeared to be done by the tribunal in *Electrabel v.*

[49] **Annex-1**, Award, ¶308, footnote 405, referring to *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, April 10, 2015 ("***Perenco v. Ecuador***").
[50] **Annex-1**, Award, ¶308.
[51] **Annex-1**, Award, ¶¶310-311.
[52] **Annex-1**, Award, ¶312.
[53] **Annex-1**, Award, ¶313.

Hungary, but found that this does not mean that a tribunal can confer a status on its decisions that they do not have under the *lex arbitri*.[54]

74. Moreover, the Tribunal considered that while nothing in the ICSID Convention prohibits the reopening of decisions, Article 41(1) of the ICSID Convention confers the general power on tribunals to determine their own competence. Further, the Tribunal explained that Article 44 of the ICSID Convention also grants a power to a tribunal to decide "any question of procedure" that is not covered in the ICSID Convention or the Arbitration Rules or agreed by the parties. The Tribunal recalled the tribunal's decision in *ConocoPhillips v. Venezuela*, where it did not see this article as a basis for admitting a reconsideration request, stating that Article 44 of the ICSID Convention "cannot be seen as conferring a broad unexpressed power of substantive decision".[55] However, the Tribunal did not find this reasoning compelling and held instead that a power to reopen a decision has both procedural and substantive aspects, involving a procedural right to bring a request for reconsideration and the substantive question of what is to be done with such a request. It also found that the specific reference to "procedure" in Article 44 of the ICSID Convention should not be seen to limit the tribunal's broader power under Article 41 of the ICSID Convention to determine its own competence.[56]

75. Having thus found that decisions do not have *res judicata* effect before their incorporation into a final award, the Tribunal went on to consider under which circumstances the reopening of decisions would indeed be justified. In that context, it noted that the *Perenco v. Ecuador* tribunal "[went] out of its way to say that it [was] not dealing with facts similar to those in *ConocoPhillips*, where there [had been] an allegation of recently discovered evidence that would justify reopening an award under Article 51 [of the ICSID Convention]. While expressing some sympathy with the approach taken by Professor Abi-Saab in his dissent in *ConocoPhillips*, […] the *Perenco* tribunal stated that the 'facts in the *ConocoPhillips* case, in the view of the tribunal, are so far removed as to deprive Professor Abi-Saab's views of any relevance to the instant

[54] **Annex-1**, Award, ¶315.
[55] **Annex-1**, Award, ¶319, footnote 417 referring to *ConocoPhillips v. Venezuela*, Decision on the Respondent's Request for Reconsideration, March 10, 2014, ¶ 22.
[56] **Annex-1**, Award, ¶¶319-320.

case'". [57] According to the Tribunal, while rejecting the idea of a general power to reopen, the *Perenco v. Ecuador* tribunal appeared to avoid expressing a view on whether there would be a specific power to reopen in the light of particular facts.[58]

76. The Tribunal in the present case held that exercising a power to reopen decisions under certain limited circumstances has practical advantages: it avoids having a tribunal decide issues on the merits on the basis of a decision which has been seriously called into question. Later, such decision could be reopened or annulled, potentially wasting the time and expenses incurred since a tribunal became aware that its decision would likely be called into question. In the Tribunal's view, efficiency grounds alone suggest that there may be circumstances where a tribunal should consider reopening a decision that it has previously made.[59]

77. In view of determining under which limited circumstances such a power to reconsider would be warranted, the Tribunal suggested an analogy with Article 51 of the ICSID Convention. It argued that in reconsidering a decision, a tribunal should be guided by, although not bound by, the limitations on reopening that apply to awards.[60]

78. The Tribunal stated that in the case at hand, SCB HK had raised an alleged error of law in the Tribunal's Decision on Jurisdiction and the subsequent coming to light of a fact existing prior to that decision within the knowledge of TANESCO, which TANESCO had wilfully withheld from the Tribunal. SCB HK's allegation was thus that the Tribunal had reached its decision without knowledge of material facts, which had been deliberately withheld by TANESCO, and that with the knowledge of those facts, the Tribunal might have reached a different decision. The Tribunal considered that such an allegation, if proved, would justify reopening its decision not to order payment of any amount owing to SCB HK by TANESCO.[61]

[57] **Annex-1**, Award, ¶317.
[58] **Annex-1**, Award, ¶317.
[59] **Annex-1**, Award, ¶320.
[60] **Annex-1**, Award, ¶¶318 and 322.
[61] **Annex-1**, Award, ¶¶321 and 324.

79. When determining whether to reopen its decision regarding the order for payment, the Tribunal conducted an analysis of the Parties' arguments. It explained that SCB HK argued that in the letter sent to the Tribunal on December 13, 2013 ("**December 2013 Letter**"), TANESCO misled the Tribunal in two important ways: first, while stating that there had been no deterioration in SCB HK's position as a result of further developments in Tanzania, it had failed to disclose that it had engaged in discussions for the release of the monies in the escrow account -- which it had established with the Bank of Tanzania due to an invoice dispute ("**Escrow Account**"), to IPTL/PAP, and; secondly, it failed to disclose that it had agreed with IPTL to make payments to IPTL based on the full tariff under the PPA in contradiction of the position taken in the arbitration that the tariff had been incorrectly calculated.[62]

80. TANESCO on the other hand argued that the Tribunal was not misled by the December 2013 Letter; that the alleged new facts would have had no impact on the Tribunal's decision; and furthermore, that SCB HK was aware of those facts and did itself fail to disclose them to the Tribunal.[63]

81. The Tribunal considered in detail what was disclosed in the December 2013 Letter; what was in fact known by TANESCO at that time, and what impact this might have had on the Decision; as well as the state of knowledge of SCB HK at the relevant time. The Tribunal found that: there was a failure by TANESCO to disclose the 2013 Settlement Agreement;[64] the Escrow Account had been deliberately emptied; there was no proof that SCB HK had been aware of these facts; and that this lack of knowledge had not been the result of negligence.[65]

82. The Tribunal more specifically found that while in its December 2013 Letter TANESCO had given the impression that there was no agreement in existence relating to the sale of electricity, it failed to disclose that there was in fact a new Settlement Agreement entered into by TANESCO on October 3, 2013 under which IPTL/PAP would provide electricity

[62] **Annex-1**, Award, ¶325.
[63] **Annex-1**, Award, ¶326.
[64] This term has been defined in the Decision on Jurisdiction and in the Award as: "Settlement Agreement dated October 3, 2013 entered into by TANESCO and IPTL (Exh. C-314)".
[65] **Annex-1**, Award, ¶¶327-343.

to TANESCO with TANESCO paying the full tariff. Further, TANESCO claimed in its December 2013 Letter that it had no control over the Escrow Account but had failed to disclose that it had already recommended jointly with IPTL/PAP that the funds in the Escrow Account be released to IPTL/PAP, and some eight days before the letter in question was written all the funds in the Escrow Account had been released. In the Tribunal's view, this failure to disclose had been deliberate and TANESCO's response had been misleading.[66]

83. The Tribunal also held that there was no proof that SCB HK had been aware of the terms of the 2013 Settlement Agreement between TANESCO and IPTL/PAP. Further, it would have been illogical for SCB HK not to have brought the terms of that agreement and the fact that the Escrow Account had been emptied to the attention of the Tribunal immediately, had it been informed of these facts prior to the Tribunal´s decision. In the Tribunal's view, it was "inconceivable" that SCB HK would not have sought to capitalise on it had it known about it.[67]

84. In addition, the Tribunal found that given that it found no evidence of knowledge of the above-mentioned facts by SCB HK, it would be difficult to characterise SCB HK's conduct as negligent. It consequently held that while with hindsight SCB HK might have wished that it had pushed further, in light of TANESCO's December 2013 Letter, it had had no obligation to do so and thus its actions could not be characterized as negligent.[68]

85. Finally, the Tribunal concluded that the existence of the 2013 Settlement Agreement between TANESCO and IPTL to settle the existing dispute between them as to whether contributions to the capital of IPTL were consistent with the PPA ("**Tariff Dispute**"), and the status of the Escrow Account were material to its decision to not make an order for payment of the amounts owing to SCB HK under the PPA as the context in which the Tribunal made its Decision was substantially different from that which it had been led to believe.[69]

[66] **Annex-1**, Award, ¶¶332-334.
[67] **Annex-1**, Award, ¶¶335-341.
[68] **Annex-1**, Award, ¶¶342-343.
[69] **Annex-1**, Award, ¶¶344-348.

86. It followed for the Tribunal that grounds for reopening its decision not to make an order for payment of the amount owing by TANESCO to SCB HK under the PPA had been established.[70]

V.C The Parties' Arguments on the Tribunal's Reasoning on Reconsideration

87. In short, TANESCO argues that there is no power under the ICSID Convention or the ICSID Arbitration Rules to reopen a decision of an ICSID tribunal, which is final and *res judicata*. It rejects the dissenting opinion of Professor Abi-Saab and relies instead on the majority decision in *ConocoPhillips v. Venezuela*, which concluded that a decision once issued is *res judicata* and cannot be reopened. It also relies on the award of the tribunal in *Perenco v. Ecuador*, which it alleges reached a similar conclusion. According to TANESCO, tribunals do not have a general power to reopen decisions, nor a specific power in the event of an error of law or the discovery of new facts. TANESCO further argues that, even if there were a power to reopen, the facts in the present case would not support reopening.

88. SCB HK, on the other hand, invokes the dissenting opinion of Professor Abi-Saab in *ConocoPhillips v. Venezuela* to support its view that a decision does not become final and *res judicata* until it is incorporated into a final award. In addition, it argues that there is no prohibition on reopening a decision in the ICSID Convention or the ICSID Arbitration Rules; and that moreover, there are pragmatic reasons for recognising a power to reopen under specific limited circumstances. Such circumstances include the deliberate misleading of a tribunal – as it alleges was the case in the present proceedings.

89. The reasoning of each of the Parties is summarised in more detail as follows.

i) TANESCO's arguments

90. In the present annulment proceedings, TANESCO argues that the Tribunal manifestly exceeded its powers by disregarding the *res judicata* effect of its Decision on Jurisdiction

[70] **Annex-1**, Award, ¶348.

when it reconsidered its determination that its jurisdiction was limited to making a declaration of the amount owing by TANESCO to SCB HK and made an order for payment of that amount to SCB HK. According to TANESCO, the Tribunal's reconsideration of its previous decision also amounts to a serious departure from a fundamental rule of procedure; and the fact that the Tribunal only premised its reconsideration of the scope of its jurisdiction on one of the legal bases on which it had established that jurisdiction and did not address or reject the other independent legal bases for establishing that limited scope of its jurisdiction should also lead to annulment for failure to state reasons.[71]

91. In TANESCO's view, the Tribunal's reconsideration of its prior Decision on Jurisdiction represents an unprecedented denial of the principles of *res judicata* and due process, as so far recognised and applied by well-established ICSID case law, including the case of *Electrabel v. Hungary*. TANESCO states that therein the tribunal affirmed the principle of *res judicata* with respect to decisions under the ICSID Convention resolving points of dispute between the parties, which was later followed by *ConocoPhillips v. Venezuela*.[72] TANESCO asserts in particular that the tribunal in *ConocoPhillips v. Venezuela* had no trouble in concluding that "[i]t is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. They are intended to be final and not to be revisited by the Parties or the [t]ribunal in any later phase of their arbitration proceedings".[73] TANESCO goes on to remind the Committee that the same point was also endorsed by the tribunal in *Perenco v. Ecuador*.[74]

92. In TANESCO's view, the reasoning of the Tribunal on these points is weak.[75] It argues that the Tribunal seems to be equating a minor procedural decision with its Decision on Jurisdiction, which was made after many rounds of written submissions and an oral hearing. According to TANESCO, this was a binding determination on all but a few

[71] Application for Annulment, ¶¶12-15.
[72] Application for Annulment, ¶29.
[73] TANESCO's Memorial on Annulment, ¶137, footnote 96 referring to Annex-21.
[74] TANESCO's Memorial on Annulment, ¶¶137-138.
[75] TANESCO's Memorial on Annulment, ¶140, quoting ¶311 of **Annex-1**, Award: "…to the extent that the *ConocoPhillips* tribunal was stating that all decisions of ICSID tribunals are *res judicata*, the statement is, at the very least, too broad. Tribunals make decisions on procedural matters, on provisional matters […] the mere fact that something is characterized as a decision of a tribunal cannot automatically make it *res judicata*".

remaining quantum issues, on which the Parties relied in order to seek to settle those remaining issues at the Tribunal's direction. It states that the fact that the Parties might well have settled those remaining issues in reliance on the Tribunal's Decision demonstrates its binding character. It asks the Committee whether the Tribunal would have unwound such a settlement on the basis that its prior Decision had actually not been final.[76]

93. TANESCO also refutes the Tribunal's reliance on Articles 41(1) and 44 of the ICSID Convention. In its view, this reliance is entirely inappropriate. TANESCO states that if Article 44 of the ICSID Convention could be used in this way, it would render the remainder of the ICSID Convention useless. It cites *ConocoPhillips v. Venezuela* in support of this argument, recalling that the tribunal in that case held that the power under Article 44 of the ICSID Convention "cannot be seen as conferring a broad unexpressed power of substantive decision".[77]

94. TANESCO further argues that it is a central tenet of the consensual dispute resolution process under the ICSID system that States expect certainty. In its view, this certainty is assured by determining that awards are binding and have *res judicata* effect, which is clearly and expressly provided for in Article 53(1) of the ICSID Convention. TANESCO infers from this that if a decision is binding, it is not open to the Tribunal to reconsider it; and consequently, if a tribunal does decide to reconsider a prior decision, it is acting contrary to the express wording of the Convention, which constitutes a clear example of manifest excess of power. In TANESCO's view, the Tribunal cannot reconsider a previous determination just because it is contained in a "decision" rather than an "award". TANESCO argues that while the Tribunal states that "clearly a decision is not an award", the Decision on Jurisdiction is a substantial determination as opposed to a procedural decision, and that, under other arbitral regimes, this Decision would be deemed a Partial Award. TANESCO states that irrespective of the label attached to the Decision, it is binding in the proceedings and is *res judicata*.[78]

[76] TANESCO's Memorial on Annulment, ¶¶140-141.
[77] TANESCO's Memorial on Annulment, ¶¶133-135; TANESCO's Reply on Annulment, ¶¶105-108.
[78] TANESCO's Memorial on Annulment, ¶¶128-131.

95. TANESCO stresses that the Tribunal's conduct fundamentally undermines the rule-based system of ICSID (on the basis of which Contracting States consent), and if not annulled will lead to a lack of certainty in the process. TANESCO states that this was acknowledged by the Tribunal in *Methanex v. United States* as long ago as 2005: "[t]here is little point in any arbitration tribunal making jurisdictional *decisions* intended and understood to be final and binding on the parties if much later a disappointed party can reargue its jurisdictional case and turn the arbitration into the equivalent of Sisyphus' torment or the film Groundhog Day". [79] TANESCO therefore urges the Committee to appreciate the potential of the Tribunal's Award to unsettle ICSID's rule-based system.[80]

96. Replying to the Tribunal's efficiency concerns, TANESCO considers that the Tribunal's argument that re-opening decisions serves the purpose of saving time is feeble. In its view, "re-writing the ICSID Rules and throwing certainty out of the window is hardly likely to promote efficiency, even if efficiency were a goal in itself capable of overriding the Tribunal's fundamental duties to act within the boundaries of its powers, and to respect fundamental rules of procedure".[81] It counters these arguments by stating that rather than increasing efficiency, the Tribunal granting itself the power to reconsider previous decisions leads to more inefficiency by providing an unnecessary opportunity for issues previously settled to be reopened.[82]

97. TANESCO also rejects the Tribunal's reference to Article 51 of the ICSID Convention. It states first that this provision relates to the revision of final awards and is therefore not applicable to reconsideration of interlocutory decisions, even if only by analogy. TANESCO further states that in applying Article 51 of the ICSID Convention by analogy, the Tribunal failed to satisfy itself that all the requirements thereunder were met.[83] In TANESCO's view, the Tribunal's decision to reconsider was based on facts which were neither of such a nature as to decisively affect the Award nor were they

[79] TANESCO's Memorial on Annulment, ¶173, footnote 114, referring to **Annex-27**, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of Tribunal on Jurisdiction and Merits, August 3, 2005, footnote 18.
[80] TANESCO's Memorial on Annulment, ¶174.
[81] TANESCO's Memorial on Annulment, ¶175.
[82] TANESCO's Reply on Annulment, ¶¶102-103.
[83] TANESCO's Reply on Annulment, ¶96; TANESCO's Memorial on Annulment, ¶181.

unknown to the Tribunal or SCB HK at the time of the Decision on Jurisdiction, and in any case, SCB HK could not have ignored them without negligence.

98. TANESCO also points out that at paragraph 318 of the Award, the Tribunal stated that if the decision that SCB HK wished to have reopened were *res judicata* then, by analogy with Article 51 of the ICSID Convention, "it might be reopened in defined circumstances", without expanding, however, on what those defined circumstances might be. This amounts to writing a new rule.[84] It argues that taking the ICSID Arbitration Rules and applying elements of them by analogy to new contexts is a dangerous precedent.[85] According to TANESCO, its expert, Professor Reinisch, supports these arguments stating that "instead [of granting] itself a broad unwritten power to reconsider core judicial findings, […] the Tribunal should have rendered the Award on the basis and within the confines of its Decision […]".[86] In his view, since the Convention expressly provides for the possibility of revision of awards, there is no room for any informal application of the grounds laid down in Article 51 of the ICSID Convention.[87]

99. In TANESCO's view, the *Burlington v. Ecuador* decision, referenced by SCB HK in the Annulment Proceeding, is not relevant to the proceeding before this Committee. It recalls that the decision in *Burlington v. Ecuador* was published almost three years after the Decision on Jurisdiction was issued and five months after the publication of the Award. Thus, according to TANESCO, even if *Burlington v. Ecuador* supported SCB HK's position, it would be impossible to justify the Tribunal's reconsideration of the Decision by reference to a later case, which of course it did not consider.[88]

100. TANESCO further states that the *Burlington v. Ecuador* tribunal recognised the established body of jurisprudence, which confirms that ICSID tribunals have had no hesitation in finding that preliminary decisions bind the parties and the tribunal in the course of the proceedings.[89] And while TANESCO admits that the same tribunal

[84] TANESCO's Memorial on Annulment, ¶¶142 and 181; see also Application for Annulment, ¶30.
[85] TANESCO's Memorial on Annulment, ¶169.
[86] TANESCO's Reply on Annulment, ¶¶97-98, recalling Legal Opinion of August Reinisch, ¶182.
[87] TANESCO's Reply on Annulment, ¶97, recalling Legal Opinion of August Reinisch, ¶182.
[88] TANESCO's Reply on Annulment, ¶¶111-113.
[89] TANESCO's Reply on Annulment, ¶114.

acknowledged that prior decisions can be reconsidered in exceptional and limited circumstances, it argues that it made it clear that this could only be done if the five conditions of Article 51 of the ICSID Convention are satisfied, something that, TANESCO alleges, the Tribunal in the present case failed to do.[90]

101. Finally, TANESCO takes issue with the Tribunal's finding at paragraph 333 of the Award that TANESCO was somehow under a duty or obligation to the Tribunal to disclose an agreement with a third party because it settled with that third party on terms that it disputes in the arbitration. TANESCO does not accept SCB HK's version of events, and states that it was not for TANESCO to make SCB HK's case for it when SCB HK could have made document production requests since it had knowledge of TANESCO's settlement with IPTL and court-sanctioned payments from the Escrow Account.[91] In TANESCO's view, the Tribunal showed bias against it in the Award by holding, for example, that the factual position as set out by the Parties with regard to SCB HK's knowledge of the 2013 Settlement Agreement between TANESCO and IPTL/PAP was "unclear and at times even self-contradictory", but yet decided that it had "no difficulty in concluding that the failure of TANESCO to disclose these facts was anything other than deliberate".[92] In any event, TANESCO is of the view that SCB HK did have knowledge of the existence of the 2013 Settlement Agreement prior to the Decision being issued, and consequently there were no new facts before the Tribunal to warrant any reconsideration of that Decision. TANESCO concludes that even if one were to agree with the Tribunal's view that it possessed a power to reconsider a prior decision under "exceptional and very limited circumstances", it transgressed its own standard.[93]

ii) SCB HK's arguments

102. SCB HK, on the other hand, is of the view that TANESCO's assertion that reconsideration is "contrary to the express wording of the Convention" is without merit. SCB HK states that the Tribunal correctly identified the starting point to be that the ICSID Convention

[90] TANESCO's Reply on Annulment, ¶¶114-124.
[91] TANESCO's Memorial on Annulment, ¶182; see also TANESCO's Reply on Annulment, ¶¶244-245.
[92] TANESCO's Memorial on Annulment, ¶¶183-185.
[93] TANESCO's Reply on Annulment, ¶¶127-154, footnote 133, referring to Legal Opinion of August Reinisch, ¶196.

and ICSID Arbitration Rules are silent on the question of reconsideration of decisions. SCB HK argues that TANESCO does not mention any specific provision of the ICSID Convention or ICSID Arbitration Rules that supports its conclusion that decisions are final and binding and may not be reconsidered under any circumstances. SCB HK states that Article 53(1) of the ICSID Convention that TANESCO cites refers to awards and not decisions.[94]

103. According to SCB HK, considering that there is no provision expressly precluding a tribunal from reconsidering its decision, or expressly permitting it to do so, the question becomes how the ICSID Convention should be interpreted, where it is silent on the issue. SCB HK argues in this context that the structure and architecture of the ICSID Convention supports the distinction between an award and a decision. SCB HK states that the conclusion that decisions can be reconsidered under specific limited circumstances is supported by the following reasoning: (1) a decision does not become final unless and until it is incorporated into an award which determines every question submitted to the tribunal in line with Article 48(3) of the ICSID Convention; (2) the fact that a decision is not subject to the post-award remedies provided in Articles 50 to 52 of the ICSID Convention indicates that a decision is not final and can be reconsidered by a tribunal; (3) there is no provision of the ICSID Convention or ICSID Arbitration Rules which compels (or indeed supports) the conclusion that decisions are final and may not be revisited under any circumstances; (4) properly construed, the ICSID Convention permits a tribunal to reconsider its decision, particularly given the results that would follow if there was no scope for a tribunal to reconsider its decision until it is incorporated into an award; (5) concluding that a decision is final and not open to reconsideration may lead to procedural inefficiencies arising as a result of proceedings continuing to the award stage on the basis of a defective decision which could have been reconsidered earlier; (6) the fact that a tribunal will in practice only reopen a decision under exceptional circumstances mitigates any inefficiency or uncertainty which may arise from recognising that a decision is not final, and these concerns are in any event outweighed by the injustice of proceedings building on an improper decision.[95]

[94] SCB HK's Counter-Memorial on Annulment, ¶305.
[95] SCB HK's Counter-Memorial on Annulment, ¶¶306-307.

104. SCB HK further defends the Tribunal's reliance on Articles 41 and 44 of the ICSID Convention in reopening its Decision on Jurisdiction. In its view, (TANESCO's expert) Professor Reinisch's interpretation of the power of ICSID tribunals to determine their own competence under Article 41(1) of the ICSID Convention is unnecessarily narrow. SCB HK points out that while it is correct that this provision provides ICSID tribunals with an exclusive power to decide on matters of their jurisdiction *vis-à-vis* national courts, the principle of *Kompetenz-Kompetenz* empowers ICSID tribunals to determine their jurisdiction more generally, including allowing them to determine whether they have the jurisdiction to reconsider an interlocutory decision under the circumstances of a specific case.[96] It similarly recalls that the Tribunal found that the decision to reconsider had a significant procedural aspect – the right to bring a request for reconsideration, as well as the substantive question of what is to be done with such a request. Thus, SCB HK alleges that the Tribunal held that the power to reconsider was consistent with Article 44 of the ICSID Convention and was not limited by that article's reference to "any question of procedure".[97] According to SCB HK, the Tribunal's reasoning in relation to Articles 41 and 44 of the ICSID Convention is therefore entirely consistent with the well-established principle that tribunals have inherent powers to make decisions regarding the conduct of proceedings in order to fulfil their judicial function, which go beyond the specific rules under which they are constituted, provided that such decisions do not contradict those specific rules. Article 41 of the ICSID Convention expressly recognises the inherent power of *Kompetenz-Kompetenz*, and Article 44 of the ICSID Convention is an express recognition of the inherent powers possessed by the Tribunal to decide on questions of procedure necessary for the resolution of the case.[98]

105. SCB HK also recalls that the Tribunal found that it had the power to reconsider prior decisions only under exceptional limited circumstances and was guided in the determination of what these should be by the grounds for reopening an award in Article 51 of the ICSID Convention.[99] In further support of this reasoning, SCB HK cites

[96] SCB HK's Rejoinder on Annulment, ¶84.
[97] SCB HK's Rejoinder on Annulment, ¶85.
[98] SCB HK's Rejoinder on Annulment, ¶86.
[99] SCB HK's Counter-Memorial on Annulment, ¶¶310-312.

Burlington v. Ecuador, which also found that a pre-award decision might be revised under Article 51 of the ICSID Convention applied by analogy, provided the conditions of that article are satisfied.[100]

106. SCB HK argues, more generally, that none of the cases cited by Professor Reinisch in support of the proposition that a tribunal is precluded from reopening jurisdictional matters which have been decided, despite a final award not having been issued, concerned an ICSID decision which was procured by the deliberately misleading conduct of one of the parties.[101] The *Perenco v. Ecuador* tribunal for example appears to avoid expressing a view on whether there would be a specific power to reopen in the light of such particular facts, while at the same time rejecting the idea of a general power to reopen.[102] Similarly, Professor Reinisch fails to mention anywhere in his opinion that the *Burlington v. Ecuador* tribunal expressly and repeatedly endorsed the reasoning of the Tribunal in the Award and stated that an interim decision may indeed be subject to reconsideration in "exceptional and very limited circumstances".[103]

107. With regard to efficiency issues, SCB HK points out that Professor Reinisch fails to address the fact that following his opinion requires tribunals and parties to go through the remainder of a case to obtain a final, flawed award even though the process would be tainted. In SCB HK's view, this would not only lead to an inordinate waste of time and costs, but also damage the credibility of the ICSID system as a whole if the parties and tribunal are required to continue with proceedings, in the face of compelling evidence that a decision is improper and should be reversed.[104]

108. Finally, SCB HK refers to ICSID tribunals' inherent power to take measures to preserve the integrity of their proceedings, which was recognised, for example, by the tribunals in *Hrvatska Elektroprivreda v. Slovenia* and *Libananco v. Turkey*, and in part finds a textual foothold in Article 44 of the ICSID Convention. SCB HK argues that the Tribunal's use of Articles 41 and 44 of the ICSID Convention should be seen in light of this inherent

[100] SCB HK's Counter-Memorial on Annulment, ¶¶315-317.
[101] SCB HK's Rejoinder on Annulment, ¶42.
[102] SCB HK's Rejoinder on Annulment, ¶47.
[103] SCB HK's Rejoinder on Annulment, ¶48.
[104] SCB HK's Rejoinder on Annulment, ¶66.

power that allows tribunals to take measures they consider necessary to protect the integrity of arbitral proceedings and to safeguard the judicial function, including reconsidering a prior decision.[105]

109. SCB HK goes on to recall that the Tribunal did find that TANESCO misrepresented the state of affairs in relation to the 2013 Settlement Agreement and concluded that the facts that TANESCO failed to disclose were material and would have had an impact on its Decision.[106] In SCB HK's view, these factual findings should not be overturned by the Committee.[107] SCB HK further states that the Tribunal served for five years, read numerous rounds of pleadings and submissions, and held three substantive oral hearings. Thus, in SCB HK's view, the questions of whether the December 2013 Letter was misleading and whether SCB HK was negligent were fully argued before it, both orally and in writing.[108] SCB HK is of the view that the problem with all of TANESCO's arguments is that they wilfully ignore the central issue in the case at hand, which is that the Tribunal found as a matter of fact that TANESCO had deliberately and materially misled it in relation to a key issue in the proceedings, and that had the Tribunal known the truth, it would have made a different decision. When it learned of the true facts, the Tribunal considered it appropriate to reconsider its Decision on Jurisdiction and order payment to SCB HK.[109]

V.D The Parties' Arguments on Arbitration Rule 41(2)

110. Following a question by the Committee at the Hearing, and upon its subsequent request[110], the Parties submitted their views on the interpretation and relevance of ICSID Arbitration Rule 41(2) and on the cases *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic (ICSID Case No. ARB/97/4)* ("***CSOB v. Slovak Republic***"); *Helnan International Hotels A.S. v. The Arab Republic of Egypt (ICSID Case No. ARB/05/19)*

[105] SCB HK's Rejoinder on Annulment, ¶¶87-89.
[106] SCB HK's Counter-Memorial on Annulment, ¶314.
[107] SCB HK's Rejoinder on Annulment, ¶117.
[108] SCB HK's Rejoinder on Annulment, ¶¶14-15.
[109] SCB HK's Rejoinder on Annulment, ¶40.
[110] Letter from the Committee to the Parties, dated December 1, 2017.

("***Helnan v. Egypt***"); *Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12)* ("***Pac Rim v. El Salvador***").

111. In summary, TANESCO submits that neither ICSID Arbitration Rule 41(2), nor the rulings in the three cases reviewed in accordance with the Committee's instructions, undermine its case for annulment in any way, especially regarding the inability of a tribunal to reconsider a decision in advance of the award being rendered because: (i) according to TANESCO, ICSID Arbitration Rule 41(2) when properly interpreted does not apply to reconsideration; (ii) the interplay between ICSID Arbitration Rules 41(1) and 41(2) means in any event that SCB HK waived its right to seek reconsideration due to its own conscious decision; and (iii) it would be wrong and dangerous for the Committee to reconstruct the Award through the imposition of ICSID Arbitration Rule 41(2).

112. In SCB HK's view, Rule 41(2) of the ICSID Arbitration Rules does allow a tribunal to consider on its own initiative, at any stage of the proceedings, its own jurisdiction. SCB HK submits that tribunals have used this rule as a basis for entertaining late objections to jurisdiction, including objections that were raised after a tribunal had issued a decision on jurisdiction. Thus, ICSID Arbitration Rule 41(2) confirms a power of reconsideration in respect of jurisdictional decisions, and that decisions on jurisdiction in ICSID arbitration are not *res judicata*. Moreover, SCB HK argues that ICSID Arbitration Rule 41(2) is another manifestation of a tribunal's inherent power to determine its own jurisdiction and protect the integrity of the proceedings.[111]

113. The reasoning of each of the Parties is summarised in more detail as follows:

i) <u>TANESCO's arguments</u>

114. According to TANESCO, ICSID Arbitration Rule 41(2) allows a tribunal to consider its jurisdiction on its own initiative but not to reconsider it once a decision has been rendered. In its view, ICSID Arbitration Rule 41(2) allows a tribunal to *proprio motu* consider jurisdictional issues that have not been raised by the parties, or that have not

[111] SCB HK's PHB on Annulment, ¶¶6-7.

been litigated and decided upon already but does not affect the finality of jurisdictional decisions already rendered.[112]

115. In support of this position, TANESCO submits that, save for *Pac Rim v. El Salvador*, none of the tribunals that have dealt with the issue of whether they had a right to reconsider a previous decision on jurisdiction have ever referred to ICSID Arbitration Rule 41(2).[113] TANESCO draws particular attention to *ConocoPhillips v. Venezuela* and the fact that Professor Abi-Saab did not seek to rely on ICSID Arbitration Rule 41(2) in his dissenting opinion in favour of reconsideration.[114] TANESCO also relies on Professor Bucher's statement that "[i]t can hardly be disputed that there does not exist any provision in the Convention or in the Arbitration Rules providing for [the reconsideration of pre-award decisions on jurisdiction]"[115] and his related comment that "[w]hile the wording [of Rule 41(2)] would permit to raise a jurisdictional matter whatever decisions have already been made, this is not the prevailing understanding of the purpose of the rule".[116]

116. Additionally, in TANESCO's view, neither the tribunal in *CSOB v. Slovak Republic* nor in *Helnan v. Egypt* were concerned with a request to reconsider an existing decision but instead had to consider an entirely new objection to their jurisdiction – which, according to TANESCO is not analogous to the matters in the present case.[117]

117. TANESCO explains that, despite the fact that the *Pac Rim v. El Salvador* award does address the ability of a tribunal to reconsider a previously rendered decision on jurisdiction through the application of Rule 41(2), this was not what the tribunal in that case was asked to do.[118] TANESCO further states that while the request was described as being for "reconsideration", the respondent in that case subsequently framed its

[112] TANESCO's PHB on Annulment, ¶¶7-9.
[113] TANESCO's PHB on Annulment, ¶11.
[114] TANESCO's PHB on Annulment, ¶12.
[115] TANESCO's PHB on Annulment, ¶12.
[116] TANESCO's PHB on Annulment, ¶12, footnote 10, referring to **Annex-105**, *ConocoPhillips v. Venezuela*, ¶26.
[117] TANESCO's PHB on Annulment, ¶¶37-42 and 52-55.
[118] TANESCO's PHB on Annulment, ¶56.

objection as a request that the tribunal: "…issue a new decision based on new submissions, rather than revise what it had decided previously".[119]

118. Additionally, TANESCO argues that even though the *Pac Rim* tribunal decided to entertain the respondent's additional objections to its jurisdiction on the basis of Article 41(1) and Rule 41(2) notwithstanding its previous decision on the matter, it also explicitly recognised that "…[i]t would be detrimental to the effectiveness of ICSID arbitration and to the proper administration of ICSID arbitrations if significant decisions could be subject to change at any point prior to the award, upon request of an aggrieved party".[120] Further, according to TANESCO, the Tribunal found that "imparting a degree of finality to decisions on jurisdiction would have significant benefits".[121] Thus, TANESCO stresses, first, that even if the *Pac Rim* tribunal decided to depart from this approach, it was simply on the basis of the facts of that case and it did not make a general statement as to decisions not having *res judicata* effect or not being binding upon the parties to the proceedings.[122] Second, that the *Pac Rim* tribunal merely considered the issue under ICSID Arbitration Rule 41(2), as with the other objections that it had determined failed to comply with ICSID Arbitration Rule 41(1), choosing not to investigate further whether that new objection could have been addressed by reference to Rule 41(1) only.[123] According to TANESCO, the decision of the *Pac Rim* tribunal to assess whether it ought to reconsider its decision as a matter of Rule 41(2) is the first and only award to determine that the said rule operates in this manner. However, TANESCO argues that this decision is an outlier and ought not to be relied upon as authority for the use of Rule 41(2) in this manner.[124]

119. Finally, TANESCO submits that the *Pac Rim* award makes extensive reference to the importance of raising jurisdictional objections as early as possible in compliance with ICSID Arbitration Rule 41(1), and that this supports TANESCO's submissions in respect of SCB HK's failure to comply with the aforementioned rule. Additionally, TANESCO

[119] TANESCO's PHB on Annulment, ¶61, footnote 51, referring to **Annex-114**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No ARB/09/12, Award, October 14, 2016 ("***Pac Rim v. El Salvador***"), ¶5.21.
[120] TANESCO's PHB on Annulment, ¶62, footnote 53, referring to **Annex-114**, *Pac Rim v. El Salvador*, ¶5.37.
[121] TANESCO's PHB on Annulment, ¶67.
[122] TANESCO's PHB on Annulment, ¶67.
[123] TANESCO's PHB on Annulment, ¶68.
[124] TANESCO's PHB on Annulment, ¶68.

claims that, although the tribunal in that case on its own initiative addressed some of the objections that would have been considered waived, the tribunal's reasoning in *Pac Rim* has no application in the present Annulment Proceeding, since, according to TANESCO, SCB HK has waived its rights to raise its objection.[125]

120. In this context, TANESCO submits that even if the Committee considers that it is possible to apply ICSID Arbitration Rule 41(2) to the reconsideration of the Tribunal's Decision on Jurisdiction, the timing and circumstances of when it can be applied must be addressed. Therefore, an analysis of the interplay between Arbitration Rules 41(1) and 41(2), viewed in the context of Article 41, is required.[126]

121. Accordingly, TANESCO explains that ICSID Arbitration Rule 41(1) encourages parties to raise any jurisdictional objections as soon as possible, while ICSID Arbitration Rule 41(2) empowers tribunals to address jurisdictional issues on their own initiative to hedge against the risk of rendering unenforceable awards due to the parties' mistakes and omissions regarding jurisdictional objections. According to TANESCO, this creates a certain tension between ICSID Arbitration Rule 41(1), which entails the possibility of waiving jurisdictional objections by not raising them as soon as possible; and ICSID Arbitration Rule 41(2), which allows tribunals to consider jurisdictional objections that might otherwise have been waived.[127]

122. TANESCO notes that tribunals have often faced the question of alleged waiver under ICSID Arbitration Rule 41 when deciding on belated jurisdictional objections, and admits that approaches have varied.[128] It explains that while certain tribunals have relied expressly upon the authority granted to them as a matter of Rule 41(2) to overcome the failure of a party to comply with Rule 41(1),[129] others have determined that a belated

[125] TANESCO's PHB on Annulment, ¶70, referring to ¶¶20-33 *supra*.
[126] TANESCO's PHB on Annulment, ¶20.
[127] TANESCO's PHB on Annulment, ¶¶23-24.
[128] TANESCO's PHB on Annulment, ¶27.
[129] TANESCO's PHB on Annulment, ¶28, footnote 24, referring to **Annex-100**, *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, November 27, 2000, ¶19.7; and **Annex-101**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, January 24, 2003, ¶317.

jurisdictional objection was out of time and therefore waived, regardless of a plea under Rule 41(2).[130]

123. Additionally, TANESCO argues that SCB HK has admitted that it failed to raise the new facts as soon as possible, and that it, instead, waited almost a year to bring them to the attention of the Tribunal; thus, TANESCO argues SCB HK waived the right to make the jurisdictional objection at a later stage in the Arbitration Proceeding.[131]

124. TANESCO asserts that an ICSID tribunal's inherent powers, the concept of which takes root in Article 44 of the ICSID Convention, extend only to matters of procedure, not to substantive issues such as reconsideration of a decision on jurisdiction. [132] According to TANESCO, the tribunal in *Siag v. Egypt* considered both the concept of a tribunal's inherent power to protect the integrity of proceedings, and a plea under ICSID Arbitration Rule 41(2) in the context of a late jurisdictional objection but did not link the two. TANESCO submits that if the *Siag v. Egypt* tribunal had considered that a tribunal's inherent powers extended beyond procedural matters, and that ICSID Arbitration Rule 41(2) constituted an element of such inherent powers, it would expressly have said so, which it did not.[133]

125. In addition, TANESCO points out that ICSID Arbitration Rule 41(2) was first raised by the Committee in its question to Professor Reinisch at the Hearing, but had not been raised by SCB HK in any of its submissions before, nor referenced by the Tribunal in its Award.[134] It thus submits that references by the Committee to ICSID Arbitration Rule 41(2) would amount to reconstructing the Tribunal's reasoning in the Award using implicit reasons, which, according to TANESCO, would be wrong for the following reasons.[135]

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[130] TANESCO's PHB on Annulment, ¶28, footnote 25, referring to **Annex-110**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶142.
[131] TANESCO's PHB on Annulment, ¶30.
[132] TANESCO's Further Submission on Annulment, January 12, 2018, ¶¶15 and17.
[133] TANESCO's Further Submission on Annulment, January 12, 2018, ¶17.
[134] TANESCO's PHB on Annulment, ¶71.
[135] TANESCO's PHB on Annulment, ¶72.

126. First, TANESCO recalls that the Tribunal clearly stated that "[…] there is nothing in either the ICSID Convention or the Arbitration Rules dealing explicitly with the question of reconsideration of a decision", and that its decision on the issue of reconsideration "should be guided by, although not bound by, the limitations on reopening that apply to awards [*i.e*. Article 51]". This shows that ICSID Arbitration Rule 41(2) was far from the Tribunal's mind and should not be read into its analysis.[136]

127. Second, TANESCO further distinguishes the present case from previous *ad hoc* committee decisions which did reconstruct a tribunal's reasoning otherwise missing on the face of an award on the basis of Article 52(1)(e) of the ICSID Convention and its interpretation in *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, (“***Wena Hotels v. Egypt****”)*.[137] Therein, the committee determined that a tribunal's reasons can be implicit in the considerations and conclusions contained in an award, as long as they could be reasonably inferred from the terms used in the decision. However, TANESCO considers that the decisions it references as adopting this approach dealt with awards where the respective tribunals perhaps only omitted to take an extra step to spell out specific reasoning for particular determinations, whereas in the present case, the Committee is concerned with a substantive right that the Tribunal "grant[ed] itself unilaterally".[138]

128. Third, TANESCO adds that the Committee should follow the *jurisprudence constante* of previous investment tribunals, which, like the Tribunal, held that the ICSID Convention and ICSID Arbitration Rules do not provide for an explicit power to reconsider a decision.[139]

129. Finally, TANESCO argues that allowing the Award to stand on the basis of repurposing ICSID Arbitration Rule 41(2) would set a dangerous precedent emboldening aggrieved parties to seek reconsideration of decisions that went against them before the rendering of a final award. In its view, applying ICSID Arbitration Rule 41(2) to the reconsideration

[136] TANESCO's PHB on Annulment, ¶73.
[137] **Annex-73**, *Wena Hotels v. Egypt*.
[138] TANESCO's PHB on Annulment, ¶¶74-76.
[139] TANESCO's PHB on Annulment, ¶77.

of jurisdictional decisions would put a new guerrilla tactic at the parties' disposal that would stifle the ICSID system as a whole and go against procedural efficiency. In particular, it would deprive the bifurcation system of much of its benefit, and it would mostly neuter Article 51 of the ICSID Convention by making it easier for parties to seek reconsideration during the proceedings under ICSID Arbitration Rule 41(2) than to wait until the close of proceedings to ask for reconsideration on the basis of Article 51 of the ICSID Convention.[140]

ii) SCB HK's arguments

130. SCB HK argues that ICSID Arbitration Rule 41(2) provides tribunals with broad powers to review whether certain claims are within their jurisdiction during the course of the arbitration. It submits that under ICSID Arbitration Rule 41(2), a tribunal may review its jurisdiction of its own volition, without the need for an objection to have been raised by a party in a timely manner or at all; and, most importantly, a tribunal may review its jurisdiction "at any stage of the proceeding".[141] Additionally, SCB HK states that Arbitration Rule 38(2) permits the tribunal to reopen proceedings before an award has been rendered, and argues that this suggests that there is no blanket prohibition on reconsidering decisions before an award, under exceptional circumstances.[142]

131. In SCB HK's view, this interpretation of ICSID Arbitration Rule 41(2) is consistent with the fact that a preliminary decision on jurisdiction is expressly contemplated in Article 41(2) of the ICSID Convention, but pursuant to Articles 48(3) and 53(1) of the ICSID Convention only becomes "final and binding" once it is incorporated into an award.[143] It affirms that nothing in the ICSID Convention ascribes *res judicata* status to jurisdictional decisions such that they cannot be revisited unless incorporated into a final award.[144] SCB HK submits that interlocutory decisions are not awards and they do not have *res judicata* effect. They will normally be binding in the course of proceedings on both the tribunal and parties, but there are certain circumstances where a tribunal may reopen its

[140] TANESCO's PHB on Annulment, ¶¶17-19.
[141] SCB HK's PHB on Annulment, ¶¶8-12.
[142] SCB HK's Rejoinder on Annulment, ¶80.
[143] SCB HK's PHB on Annulment, ¶11.
[144] SCB HK's PHB on Annulment, ¶13.

decision. According to SCB HK, this reasoning of the Tribunal is consistent with the reasoning of the *Pac Rim v. El Salvador* tribunal, which held that interlocutory ICSID decisions do not have *res judicata* effect, and while they are binding within the scope of the proceedings, they may be reopened under certain circumstances (for example where the tribunal has been deliberately misled).[145]

132. SCB HK argues that tribunals retain the discretion to examine their own jurisdiction, even if the parties' objections are not timely.[146] It states that the tribunals in *Helnan v. Egypt* and *Pac Rim v. El Salvador* found that the respondents' additional objections to jurisdiction were not raised in a timely manner under ICSID Arbitration Rule 41(1), but nevertheless examined those objections on their own initiative under ICSID Arbitration Rule 41(2) even though they had already issued a decision on jurisdiction.[147]

133. SCB HK agrees that in addressing the further objections raised to its jurisdiction, in a second decision, the *CSOB v. Slovak Republic* tribunal did not expressly rely on a specific rule to give it the power to revisit its jurisdiction. It simply addressed the new jurisdictional issues presented to it, indicating that it considered it had a self-evident power to do so. While the *CSOB v. Slovak Republic* tribunal found that it did not have jurisdiction over the new claims, SCB HK claims that the implication of the tribunal's reasoning is that it would have been open to it to find that it had jurisdiction over the new claims. For SCB HK it follows that the *CSOB v. Slovak Republic* decision shows that a tribunal has the power to re-examine its own jurisdiction in light of new submissions.[148]

134. Similarly, SCB HK points out that the tribunal in *Helnan v. Egypt* did not treat its first decision on jurisdiction as having *res judicata* effect and engaged with the substance of Egypt's additional objection to jurisdiction, thus also supporting its submission that jurisdictional decisions can be subject to reconsideration before a final award is rendered.[149]

[145] SCB HK's PHB on Annulment, ¶¶13-14, 37-39 and 46.
[146] SCB HK's PHB on Annulment, ¶44 (iv).
[147] SCB HK's PHB on Annulment, ¶¶20-26 and 27-43.
[148] SCB HK's PHB on Annulment, ¶¶18-19.
[149] SCB HK's PHB on Annulment, ¶26.

135. Moreover, SCB HK argues that although the tribunal in *Pac Rim v. El Salvador* stated that it would not engage in the debate raised by *ConocoPhillips v. Venezuela* as to whether ICSID interlocutory decisions are *res judicata* in nature, the tribunal's reasoning confirms that interlocutory decisions can be subject to reconsideration.[150]

136. SCB HK explains that the *Pac Rim* tribunal found that it had the power to examine, on its own initiative, the objections to jurisdiction raised by El Salvador after the tribunal had already issued a decision affirming jurisdiction over the dispute and based this power on ICSID Arbitration Rule 41(2).[151]

137. According to SCB HK, the *Pac Rim* tribunal did not treat its previous decision affirming jurisdiction as having *res judicata* effect and engaged with the substance of El Salvador's additional objections to jurisdiction. The tribunal examined the new objections raised by El Salvador which were based both on new facts which had come to light, as well as objections that were not based on new facts.[152]

138. Thus, SCB HK argues that while not expressly stated, the *Pac Rim* tribunal applied the same reasoning as the tribunals in *CSOB v. Slovak Republic* and *Helnan v. Egypt*, which it gave as examples of cases where tribunals faced with additional objections to their jurisdiction had examined the later objections but did not consider that their earlier decisions on jurisdiction had *res judicata* effect.[153]

139. SCB HK further submits that *Pac Rim v. El Salvador* specifically recognises a broad power of reconsideration in circumstances where a party has improperly procured a decision. It emphasises that it was "particularly the case" that interlocutory decisions on jurisdiction would not have *res judicata* or final effect "where a party is guilty of material fraud, perjury, or other improper means used to procure the impugned earlier decision from an international tribunal".[154]

[150] SCB HK's PHB on Annulment, ¶35.
[151] SCB HK's PHB on Annulment, ¶35 (i).
[152] SCB HK's PHB on Annulment, ¶35 (ii).
[153] SCB HK's PHB on Annulment, ¶35 (iii).
[154] SCB HK's PHB on Annulment, ¶40 (ii).

140. SCB HK goes on to address the following factual allegations by TANESCO as to SCB HK's knowledge in respect of the 2013 Agreement and the emptying of the Escrow Account in the context of its alleged waiver of its right to seek reconsideration.[155]

141. According to SCB HK, TANESCO alleges that: (i) SCB HK knew the true terms of the 2013 Settlement Agreement and of the emptying of the Escrow Account in November 2013, and yet deliberately delayed drawing the true position to the Tribunal's attention for almost a year;[156] (ii) SCB HK admitted that it failed to draw the Tribunal's attention to the true position as soon as possible;[157]and (iii) SCB HK's alleged delay in disclosing the true position to the Tribunal amounts to a waiver of SCB HK's right to rely on the true facts.[158]

142. In turn, SCB HK refutes these allegations by pointing out:

143. First, that the Tribunal made the factual finding in its Award that SCB HK did not have knowledge of the true position relating to the 2013 Settlement Agreement and of the emptying of the Escrow Account. It found that it was "inconceivable" that SCB HK would not have capitalised on the true position regarding the 2013 Settlement Agreement had SCB HK known about it.[159]

144. Second, that SCB HK has consistently explained that it did not have such knowledge and has not admitted that it failed to raise the new facts as soon as possible. What it did was to state that in hindsight it should perhaps have pushed for document production, not that it was aware of the true position regarding the 2013 Settlement Agreement or the emptying of the Escrow Account. There was no suggestion that SCB HK had withheld its knowledge of the true position from the Tribunal.[160]

[155] SCB HK's Further Submissions on Annulment, ¶5
[156] SCB HK's Further Submissions on Annulment, ¶5 (i).
[157] SCB HK's Further Submissions on Annulment, ¶5 (ii).
[158] SCB HK's Further Submissions on Annulment, ¶5 (iii).
[159] SCB HK's Further Submissions on Annulment, ¶¶10-12.
[160] SCB HK's Further Submissions on Annulment, ¶¶13-18.

145. Additionally, SCB HK states that, in any event, there is no evidence that SCB HK had such knowledge or engaged in such a strategy.[161]

146. Third, SCB HK argues that it did not waive its right to rely on the true facts, including by negligence. According to SCB HK, the Tribunal had considered TANESCO's argument that if SCB HK had been unaware of the true position regarding the 2013 Agreement and the emptying of the Escrow Account, such ignorance was due to SCB HK's negligence because it should have pushed for disclosure and rejected it in its Award: the Tribunal held that in light of TANESCO's deliberately misleading conduct, SCB HK had not been obliged to push for disclosure and SCB HK was not negligent.[162]

147. SCB HK recalls that in the Award the Tribunal reconsidered its decision on jurisdiction on the basis that it had been deliberately misled by one of the parties in relation to a material fact. More specifically, the Tribunal found that it had the power to reconsider an interlocutory decision in specific limited circumstances, based on Articles 41(1) and 44 of the ICSID Convention.[163] In SCB HK's view, this was an example of a tribunal exercising its inherent power to safeguard the integrity of the proceedings, and was justified by the facts of the case.[164]

148. Finally, according to SCB HK, ICSID Arbitration Rule 41(2) is an aspect of the inherent power of a tribunal to determine its own jurisdiction and to protect the integrity of the proceedings.[165] However, it is not the only pathway available to reopen a decision and the Tribunal was justified in finding that it could reopen an interlocutory decision on jurisdiction by reference to Articles 41 and 44 of the ICSID Convention.[166]

149. SCB HK submits that the Tribunal's motivation to protect the integrity of the arbitral process is clear in its Award, and in particular its findings that (i) a power to reopen in certain limited circumstances would have the practical advantage of avoiding having the Tribunal decide issues on the merits on the basis of a decision which has been seriously

[161] SCB HK's Further Submissions on Annulment, ¶¶19-22.
[162] SCB HK's Further Submissions on Annulment, ¶¶24-31.
[163] SCB HK's PHB on Annulment, ¶49, footnote 64, referring to SCB HK's Rejoinder on Annulment, ¶¶84-86.
[164] SCB HK's PHB on Annulment, ¶50.
[165] SCB HK's PHB on Annulment, ¶47.
[166] SCB HK's PHB on Annulment, ¶52.

called into question; and (ii) the Tribunal would be justified in exercising a power to reopen if it could be shown that it reached its decision without knowledge of material facts which had been deliberately withheld by one of the parties, and that with the knowledge of those facts the Tribunal might have reached a different decision.[167]

V.E The Committee's Conclusions on Reconsideration of the Decision on Jurisdiction

150. The Committee concurs with the Tribunal's reasoning that neither the ICSID Convention nor the ICSID Arbitration Rules explicitly allow or disallow reconsideration of jurisdictional decisions. Consequently, it is necessary to analyse whether the existing provisions of the Convention and the Arbitration Rules provide tribunals with the power to reopen prior decisions before issuing a final award.

151. The Committee equally follows the Tribunal's reasoning that not every decision rendered by a tribunal has a *res judicata* effect. Procedural orders and provisional measures for example are subject to being revised even though neither the ICSID Convention nor the ICSID Arbitration Rules expressly provide for this. Tribunals derive this power from provisions such as Article 44 of the ICSID Convention, which allows them to decide "any question of procedure" that is not covered in the ICSID Convention or the ICSID Arbitration Rules or agreed by the parties.

152. However, the tribunal in *ConocoPhilips* held that Article 44 "cannot be seen as conferring a broad unexpressed power of substantive decision".[168] The Tribunal explained that the power to reopen a decision under Article 44 involved both a procedural right to bring a request for reconsideration and the substantive question of what is to be done with such request. In this respect, the Tribunal held that the specific reference in Article 44 to "any question of procedure" does not limit a tribunal's broader power under Article 41 to determine its own competence.[169] The Committee agrees with the Tribunal's reasoning on these points and concludes that it assessed its jurisdiction not only taking into account

[167] SCB HK's PHB on Annulment, ¶¶47 and 50, footnotes 63 and 64, referring to SCB HK's Rejoinder on Annulment, ¶¶84-87 and 90.
[168] **Annex-105**, *ConocoPhillips v. Venezuela*, Decision on Reconsideration ¶22.
[169] **Annex-1**, Award, ¶320.

Article 44 but also Article 41(1) of the ICSID Convention, which, in the view of the Committee, conferred on the Tribunal the power to reconsider its previous Decision in light of the principle of *Kompetenz-Kompetenz*.

153. The Committee finds that the clear wording of ICSID Arbitration Rule 41(2), allowing a tribunal to consider jurisdictional objections "at any stage of the proceedings", *i.e*. including after having already rendered an interlocutory decision on jurisdiction, implies that such earlier findings on jurisdiction are subject to reconsideration.

154. TANESCO cites Professor Bucher's dissenting opinion in *ConocoPhillips v. Venezuela*, in which he states that while the wording of ICSID Arbitration Rule 41(2) would permit a party to raise a jurisdictional matter irrespective of decisions already made, this is not the prevailing understanding of the purpose of the rule. TANESCO focuses on the latter part of Professor Bucher's statement but ignores his acknowledgement that Rule 41(2) does allow for the reconsideration of jurisdictional decisions.

> "This seems also implicit in Arbitration Rule 41(2), authorizing the [t]ribunal to raise a jurisdictional issue 'on its own initiative', and this 'at any stage of the proceedings'. While the wording would permit to rise a jurisdictional matter whatever decisions have already been made, this is not the prevailing understanding of the purpose of the rule. [emphasis and text in brackets added by the Committee]".[170]

155. This observation is confirmed by the decision of the tribunal in *Pac Rim v. El Salvador*, which explicitly found that it had the power under ICSID Arbitration Rule 41(2) to reconsider its decision on jurisdiction before it had rendered a final award. In this case, the tribunal stated that:

[170] TANESCO's PHB on Annulment, ¶12, footnote 10, referring to **Annex–105**, *ConocoPhillips v. Venezuela*, Decision on Reconsideration, Dissenting Opinion of Professor Andreas Bucher, February 9, 2016, ¶26, footnote 13.

> "At the same time, the [t]ribunal is also aware of its mandate under Article 41(1) of the ICSID Convention and of its power under ICSID Arbitration Rule 41(2) to consider, 'at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence'. With this in mind, the [t]ribunal has the power to examine, upon its own initiative at any time, any jurisdictional question it considers pertinent, even if it entails a matter that was raised belatedly by a party or not raised by a party at all… [text in brackets added by the Committee]".[171]

156. TANESCO argues that the Committee raising for the first time the potential authority of a tribunal to reconsider an award under ICSID Arbitration Rule 41(2), which was not referenced in the Award, amounts to the Committee reconstructing the Tribunal's reasoning using implicit reasons.

157. As referenced by TANESCO, the *Wena Hotels* annulment committee interpreted Article 52(1)(e) of the ICSID Convention to mean that annulment committees can reconstruct a tribunal's reasoning that is otherwise missing on the face of an award, as long as those reasons are implicit in the considerations and conclusions contained in that award and can be reasonably inferred from the terms used. This has been followed by other *ad hoc* committees.[172]

158. The Committee sees no reason why it should not adopt this approach in the present case. The Committee considers it obvious that reliance on ICSID Arbitration Rule 41(2) is implied in the Tribunal's reasoning. The Tribunal explicitly relied on Article 41(1) of the ICSID Convention stating that "[t]he Tribunal shall be the judge of its own competence". Both ICSID Arbitration Rules 41(1) and 41(2) are simply more detailed articulations of the *Kompetenz-Kompetenz* power, enshrined in Article 41 of the ICSID Convention.

[171] **Annex-114**, Pac Rim Cayman LLC v. The Republic of El Salvador, (ICSID Case No. ARB/09/12) ¶5.50.
[172] TANESCO's PHB on Annulment, ¶74, footnote 66, referring to **Annex-73**, *Wena Hotels v. Egypt*, ¶81; **Annex-115**, Annulment under the ICSID Convention, R Doak Bishop and Silvia M Marchili, (2012), ¶9.40.

Further, it is TANESCO's submission that both ICSID Arbitration Rules 41(1) and 41(2) "should be viewed in the context of Article 41 [of the ICSID Convention]".[173]

159. The Committee therefore agrees that the Tribunal correctly identified its power to judge its own competence including the power to reconsider prior jurisdictional decisions, as provided by Articles 41(1) and 44 of the ICSID Convention and ICSID Arbitration Rules 41(1) and 41(2).

160. Additionally, SCB HK claims that under Arbitration Rule 38(2), there is no blanket prohibition on reconsidering decisions before an award, and that it may occur in exceptional circumstances. [174] The Committee agrees with this position.

161. In this respect, the Committee notes that in determining under which circumstances reconsideration of a prior jurisdictional decision would be justified, the Tribunal proposed that "… a tribunal should be guided by, although not bound by, the limitations on reopening that apply to awards" under Article 51 of the ISCID Convention.[175]

162. Under Article 51(1) of the ICSID Convention, revision is justified: (1) on the ground of discovery of some fact (2) of such a nature as decisively to affect the award; (3) provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant; and (4) that the applicant´s ignorance of that fact was not due to negligence. Pursuant to Article 51(2) of the ICSID Convention, the application shall be made within 90 days after the discovery of fact.

163. TANESCO argues that the Tribunal's reliance on Article 51 of the ICSID Convention was improper insofar as it only applies to the revision of awards but not to reconsideration of interlocutory decisions. Further, TANESCO contends that even if reliance on Article 51 of the ICSID Convention were justified, the Tribunal failed to ensure the five conditions of that provision were satisfied in the present case.

[173] TANESCO's PHB on Annulment, ¶20.
[174] SCB HK's Rejoinder on Annulment, ¶80.
[175] **Annex-1**, Award, ¶322.

164. The Committee disagrees. As mentioned above in paragraph 161, the Tribunal did not "apply" Article 51 of the ICSID Convention but simply turned to it seeking guidance on the nature of a discovery that would justify reconsideration of the Decision on Jurisdiction. In the Committee's view, this reliance on Article 51 of the ICSID Convention by analogy did not require the Tribunal to follow that provision to the letter. The Tribunal's reliance on Article 51 of the ICSID Convention was inspired by its desire to make sure that the circumstances before it reached the threshold required to justify the exceptional remedy of reopening an interlocutory decision – which it did.[176]

165. The Tribunal allocated several pages of its Award to its analysis of whether: (i) the facts alleged by SCB HK were of such a nature as to decisively affect the award; (ii) these facts had previously been unknown to the Tribunal and to SCB HK; and (iii) SCB HK´s ignorance of these facts was due to negligence. It found that TANESCO's failure to disclose the 2013 Settlement Agreement and the emptying of the Escrow Account were deliberate; that there was no proof that SCB HK had been aware of these facts; and that this lack of knowledge had not been the result of negligence.[177]

166. It is not the role of annulment committees to review the factual findings made by tribunals. Therefore, the Committee refuses to delve into a review of the Tribunal's factual conclusions but instead relies on the same. Thus, it accepts the Tribunal's conclusion that: the Tribunal had reached its Decision on Jurisdiction without knowledge of material facts which had been deliberately withheld by TANESCO; that with the knowledge of those facts, the Tribunal would have reached a different decision; and that SCB HK's ignorance of those facts had not been the result of negligence.

167. The Committee is not persuaded by TANESCO's related argument that SCB HK waived its right to seek reconsideration of the Decision on Jurisdiction due to SCB HK's negligence. The Tribunal found that SCB HK did not have knowledge of the true position relating to the 2013 Settlement Agreement and the emptying of the Escrow Account and found it "inconceivable" that SCB HK would not have capitalized on the true position

[176] **Annex-1**, Award, ¶322.
[177] **Annex-1**, Award, ¶¶327-343.

regarding the same, had it known about it. The Tribunal also held that in light of TANESCO´s deliberately misleading conduct, SCB HK had not been obliged to push for disclosure, thus SCB HK was not negligent.

168. The Tribunal's reference to Article 51 of the ICSID Convention to affirm that the facts before it passed the threshold justifying reconsideration of the Decision on Jurisdiction is analogous to the analysis conducted by the tribunal in *Pac Rim v. El Salvador,* which decided upon its competence under Article 41(2) of the ICSID Convention to entertain the respondent's additional objections to its jurisdiction notwithstanding its previous decision on jurisdiction. Among other things, the tribunal in *Pac Rim v. El Salvador* stated that:

> "5.36 […] Since decisions affirming jurisdiction are limited to the settlement of jurisdictional questions prior to issues as to the merits, they do not have the status of an award under the ICSID Convention until their incorporation into the award that addresses all questions and thus decides the parties' dispute…
>
> [...]
>
> 5.38 […]. The Tribunal is also aware of the debate generated by the *ConocoPhilips* [sic] procedural decision and the dissent concerning its *res judicata* effect, and that other ICSID and other tribunals faced with additional objections to their jurisdiction have examined these later objections without considering that their earlier decision had *res judicata* or final effect. The latter is particularly the case where a party is guilty of material fraud, perjury or other improper means used to procure the impugned earlier decision from an international tribunal.
>
> […]
>
> 5.49 The Tribunal therefore concludes that the Respondent has failed to fulfil the 'as early as possible' requirement of ICSID Arbitration Rule 41(1)

> in regard to its additional jurisdictional objections to the Claimant's pleaded claims […]
>
> 5.50 At the same time, the Tribunal is also aware of its mandate under Article 41(1) of the ICSID Convention and of its power under ICSID Arbitration Rule 41(2) to consider, 'at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence'. With this in mind, the Tribunal has the power to examine, upon its own initiative at any time, any jurisdictional question it considers pertinent, even if it entails a matter that was raised belatedly by a party or not raised by any party at all […]
>
> 5.51 Finally, as to the request for reconsideration of the Tribunal's Jurisdiction Decision regarding the Respondent's objection based upon alleged abuse of process and misrepresentation by the Claimant, the Tribunal observes that this request is based on new information arguably first made available by the Claimant […] the Tribunal considers that it may have been raised timeously, 'as early as possible' in accordance with ICSID Arbitration Rule 41(1). However, as with the Respondent's other objections, the Tribunal prefers to address also this objection upon its own initiative under ICSID Arbitration Rules 41(1) and (2)".[178]

169. In the Committee's view, both the Tribunal in the present case and the tribunal in *Pac Rim v. El Salvador*, despite not having made a declaration as to the *res judicata* principle, concluded that a tribunal has broad powers to reconsider an earlier decision and to correct it, rather than relying on an improperly based decision on jurisdiction that would likely affect the final award.

170. In the view of the Committee, this conclusion is also in line with Professor Abi-Saab's dissenting opinion in *ConocoPhillips v. Venezuela*, where he stated that:

[178] **Annex-114**, Pac Rim Cayman LLC v. The Republic of El Salvador, Award, October 14, 2016, ¶¶5.36, 5.38, 5.49, 5.50 and 5.51.

"36. However, the fact that a Tribunal reaches conclusions, makes findings or takes decisions does not mean that they are or make them, by any logical or legal necessity, 'final' or 'binding', particularly on the Tribunal itself (if it becomes aware for example that it has committed an error).

[…]

51. All the same, I dare presume, with all due respect to the eminent members of that Tribunal, that if they become aware, before the final award, that they have made a crucial error of fact or of law that led them astray in their findings, or of new evidence or changing circumstances to the same effect, they may not hesitate to revisit their decisions..."[179]

171. Moreover, it seems to be implied by the tribunal in *Perenco v. Ecuador*, which stated:

"82. That said, the Tribunal can see how Professor Abi-Saab could form his view that it was necessary for that tribunal to revisit a prior factual finding. His dissenting opinion was predicated upon Venezuela's submission of new evidence that was *not* available to the tribunal when it rendered its earlier merits decision and which he considered to be of great decisiveness on a particular issue going to the question of whether or not the respondent had breached its obligation to negotiate compensation for an expropriation in good faith.

[…]

85. He argued both for a general power of reconsideration and further, that if he was wrong on that point, for a specific power of reconsideration 'based on a particular or certain particular legal grounds': [...]

86. The present Tribunal takes a different view as to the existence of a general power of reconsideration as well as on Arbitration Rule 38(2). But

[179] **CLA-092**, *ConocoPhillips v. Venezuela*, Decision on Respondent's Request for Reconsideration, March 10, 2014, Professor Abi-Saab's dissenting opinion, ¶¶36 and 51.

in any case, the type of situation which so concerned Professor Abi-Saab is simply not present in the present case".[180]

172. TANESCO argues that allowing reconsideration of jurisdictional decisions would embolden aggrieved parties to seek reconsideration of decisions that went against them before the rendering of a final award, and thus put a new guerrilla tactic at their disposal, which would endanger procedural efficiency and deprive the bifurcation system of its benefits. The Committee agrees that caution is required when offering an opportunity to aggrieved parties to seek reconsideration of any interlocutory decisions they disagree with before the rendering of a final award. As TANESCO rightly points out, a generalised practice of challenging decisions on jurisdiction before the issuing of the award on the merits would impair the efficiency of the arbitral process. However, the Committee is of the view that in consideration of the relevant facts which came to light after the Decision on Jurisdiction was issued, procedural efficiency was safeguarded by allowing the Tribunal to reconsider its Decision, rather than basing its further findings on a decision it knew to be erroneous.

173. In summary, the Committee considers that the Decision on Jurisdiction was subject to reconsideration under the exceptional circumstance where the Tribunal was deliberately misled as to facts, the knowledge of which the Tribunal would have reached a different decision. In the Committee's view, the Award correctly allowed reconsideration of the Decision on Jurisdiction and this action was most apt to safeguard both the efficiency and integrity of the Arbitration Proceeding.

VI. The grounds for annulment

VI.A Introduction

174. In this case, TANESCO raises several arguments with respect to: (i) the Tribunal's findings regarding its jurisdiction; (ii) the applicable law to determine whether SCB HK had standing in the Arbitration Proceeding; (iii) the Tribunal's power to reconsider the Decision on Jurisdiction; and (iv) the reasons given by the Tribunal supporting its ruling.

[180] **Annex-22**, *Perenco v. Ecuador*, ¶¶82, 85 and 86.

Therefore, TANESCO relies on three of the five grounds for annulment provided for in the ICSID Convention, Article 52(1), namely: a) manifest excess of power, b) serious departure from a fundamental rule of procedure and c) failure to state reasons.

175. In the following sections, the Committee will address individually the different grounds for annulment TANESCO raises and the corresponding arguments of each of the Parties. In order to do so and bearing in mind that the reconsideration issue has been dealt with previously, the Committee divides its analysis into the following sections: (VI.B) manifest excess of powers, (VI.C) serious departure from a fundamental rule of procedure, and (VI.D) failure to state reasons.

VI.B Manifest excess of power (Article 52(1)(b))

1) The standard of "manifest excess of power"

i) TANESCO's arguments

176. TANESCO argues that for the Committee to determine that the Tribunal has manifestly exceeded its power, the Committee must conclude that there was both an "excess" of powers, and that this excess was "manifest" in nature. In this respect, it argues that ICSID jurisprudence demonstrates that a "manifest" excess of powers is an excess which "is obvious, self-evident and clear on the face of the Award".[181]

177. In this respect, TANESCO states that it is widely accepted that "manifest excess of powers" within the Convention refers to cases where a tribunal has gone beyond the scope of the parties' agreement or compromise or has decided points which were not submitted or which were not properly submitted.[182]

178. TANESCO explains that ICSID jurisprudence establishes that a manifest excess of powers leading to annulment occurs when a tribunal asserts jurisdiction over a case where such jurisdiction is lacking; allows a third party to arbitrate even though it has no standing

[181] TANESCO's Memorial on Annulment, ¶99 and 161, footnote 112, quoting **Annex-68** as follows: *MTD v. Chile*, ¶47, which states that "the error must be 'manifest,' not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough".
[182] TANESCO's Memorial on Annulment, ¶100.

in the proceedings;[183] or fails to completely apply or grossly or egregiously misapplies or misinterprets the applicable law.[184]

ii) SCB HK's arguments

179. SCB HK states that only if a tribunal commits a manifest excess of power, whether on a matter related to jurisdiction or the merits, is there a basis for annulment. In this respect, it argues that the requirement that an excess of power must be "manifest" applies equally if the question is one of jurisdiction.[185]

180. According to SCB HK, numerous *ad hoc* committees have accepted that the requirement of a "manifest" excess of powers will only be satisfied if "it is obvious, without deeper analysis, that a tribunal lacked or exceeded jurisdiction, but that if 'reasonable minds' might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given".[186]

iii) Analysis and Decision of the Committee

[183] TANESCO's Memorial on Annulment, ¶121 and 101, footnote 73, referring to **Annex-50**, *Klöckner v. Cameroon*, ¶4; Regarding its argument against a third-party's standing, TANESCO quotes **Annex-59**, *Occidental Petroleum v. Ecuador*, as follows: "[a] natural consequence of international investment law" and "protected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party, and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To hold the contrary, would open the floodgates to an uncontrolled expansion of jurisdiction *rationae personae*, beyond the limits agreed by the States when executing the treaty".

[184] TANESCO's Memorial on Annulment, ¶144, footnote 101, referring to **Annex-4**, *Soufraki v. UAE*, stating that in this case "the commission held that failure to apply or even gross misapplication/misinterpretation of the applicable law constitutes excess of powers", and ¶158, footnote 109, referring to ¶86 of the same annex.

[185] SCB HK's Counter-Memorial on Annulment, ¶266.

[186] SCB HK's Counter-Memorial on Annulment, ¶266, footnote 319, referring to **Annex-71** to TANESCO's Memorial on Annulment: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009 ("***Azurix v. Argentina***"), ¶68; **Annex-18**, *Total S.A. v. Argentina*, ¶243; **CLA-105**, *Daimler Financial Services AG v. Argentina*, ¶186; **CLA-119**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011 ("***Continental Casualty Company v. Argentina***"), ¶87; **CLA-120**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010 ("***Enron v. Argentina***"), ¶69.

181. In light of the express wording of Article 52 of the ICSID Convention and the Parties' arguments,[187] the Committee is convinced that Article 52(1)(b) of the ICSID Convention provides a two-fold requirement to annul an award, namely, the Tribunal has: (i) exceeded its powers; and (ii) the excess is "manifest". The excess is "manifest" in nature if it is obvious, clear, self-evident, and discernible without the need for an elaborate analysis of the award.[188] This interpretation of the "manifest" nature of the excess of powers is also consistent with rulings of several *ad hoc* committees.[189] In addition, some *ad hoc* committees have interpreted the meaning of "manifest" to require that the excess be serious or material to the outcome of the case.[190]

182. Particularly, *ad hoc* committees have identified two methodologies, which this Committee will be guided by, to determine whether an award can be annulled under Article 52(1)(b). The first is a two-step analysis determining whether there was an excess of powers and, if so, whether the excess was "manifest".[191] The second is a *prima facie* test, consisting of a summary examination to determine whether any of the alleged excesses of power could be viewed as "manifest".[192]

[187] TANESCO's Memorial on Annulment, ¶99; SCB HK's Counter-Memorial on Annulment, ¶262.
[188] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶14; see also SCB HK's Counter-Memorial on Annulment, ¶266; **Annex-71**, to TANESCO's Memorial on Annulment: *Azurix v. Argentina*, ¶68; **Annex-18**, *Total S.A. v. Argentina*, ¶243; **CLA-105**, *Daimler Financial Services AG v. Argentina*, ¶186; **CLA-119**, *Continental Casualty Company v. Argentina*, ¶87; **CLA-120**, *Enron v. Argentina*, ¶69; **Annex-73**, *Wena Hotels v. Egypt*, ¶25: "[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other"; **Annex-7**, *Mitchell v. DRC*, ¶20: "[i]f an excess of powers is to be the cause of an annulment, the *ad hoc* Committee must so find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award".
[189] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶83, footnote 153, referring among other to **CLA-128**, *Vivendi II*, ¶245 ("must be 'evident'"); **Annex-71,** *Azurix v. Argentina*, ¶68 ("obvious"); **Annex-4**, *Soufraki v. UAE*, ¶39 ("obviousness); **CLA-117**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010 ("***Rumeli v. Kazakhstan***"), ¶96 ("evident on the face of the Award"); **Annex-59**, *Occidental Petroleum v. Ecuador*, ¶57 ("perceived without difficulty").
[190] See, for example, **Annex-4**, *Soufraki v. UAE*, ¶266: "…It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious. [Emphasis added by the Committee]".
[191] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶82.
[192] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶82, footnote 152: "[o]ne ad hoc Committee has stated that "'manifest' does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of power has in fact occurred. Occidental, ¶267)".

183. The Committee agrees with SCB HK's position that numerous *ad hoc* committees have accepted that the "manifest" requirement will not be satisfied if "reasonable minds" differ as to whether or not the tribunal issued a correct decision. [193]

184. In the Committee's view, it is clear that the drafters of the ICSID Convention anticipated an excess of powers, for example, in cases where a tribunal: (i) went beyond the scope of the parties' arbitration agreement; (ii) decided points that had not been submitted to it; or (iii) failed to apply the law agreed to by the parties. Thus, the main powers of a tribunal that appear to have been contemplated by this provision relate to a tribunal's jurisdiction and to the applicable law.[194]

185. In the present case, TANESCO argues that the Tribunal exceeded its powers with respect to these specific actions: the Tribunal's exercise of jurisdiction in the absence of a qualifying investment (section 2); the Tribunal's failure to apply the proper law under the relevant contract, as mandated by Article 42(1) of ICSID Convention (section 3); the Tribunal's reconsideration of its Decision on Jurisdiction (section 4); and the Tribunal improperly assuming jurisdiction over SCB HK and IPTL under the Facility Agreement (section 5).

186. In the following paragraphs the Committee will address the Parties' arguments regarding each of these matters. The Parties' arguments regarding the reconsideration will be dealt with succinctly as it has already been addressed as a preliminary matter.

[193] SCB HK's Counter-Memorial on Annulment, ¶266.

[194] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶¶81 and ¶74 (3): "*Ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own; '[t]he law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not.'"; see also TANESCO's Memorial on Annulment, ¶144, referring to **Annex-4**, *Soufraki v. UAE*, where, according to TANESCO, the commission held that failure to apply or even gross misapplication/misinterpretation of the applicable law constitutes excess of powers.

2) The existence of a manifest excess of power of the Tribunal by wrongly exercising jurisdiction even though SCB HK made no "investment" under Article 25 (1) of the Convention.

i) TANESCO's arguments

187. TANESCO recalls that the absence of a qualifying investment is a circumstance which may give rise to annulment based on the grounds of manifest excess of powers and failure to state reasons, as confirmed by *Mitchell v. DRC*.[195]

188. In this respect, TANESCO asserts that the Tribunal incorrectly found that SCB HK had a qualifying investment under the Convention,[196] since SCB HK's purported acquisition in 2005 of the loan granted to IPTL by a consortium of Malaysian banks under the 1997 Loan Facility Agreement (the "**Facility Agreement**") lacks the characteristics of an investment under Article 25(1) of the ICSID Convention.[197] In this respect, TANESCO argues that whilst the ICSID Convention does not provide a definition of an "investment", this does not create a "free-for-all" in which the parties have the absolute freedom to determine what does. TANESCO refers to ICSID jurisprudence to interpret this term.[198]

189. TANESCO submits that ICSID jurisprudence is clear on two matters. First, that the "concept of an investment […] is objective in nature" and must be determined by a tribunal.[199] Second, that a loan is not an investment as envisaged by Article 25 of the ICSID Convention or the Salini test.[200] In support of this, TANESCO refers to *MNSS B.V v. Montenegro,* in which it was confirmed that a loan in itself is not an investment, since

[195] TANESCO's Memorial on Annulment, ¶107, footnote 76, referring to **Annex-51** (also **Annex-7**), *Mitchell v. DRC*.
[196] TANESCO's Memorial on Annulment, ¶¶102 and 201-202.
[197] TANESCO's Memorial on Annulment, ¶¶103-106.
[198] TANESCO's Reply on Annulment, ¶167.
[199] TANESCO's Reply on Annulment, ¶167, footnote 164, referring to **Annex-92**, *Československa Obchodní Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, ¶68.
[200] TANESCO's Memorial on Annulment, ¶111; see also TANESCO's Reply on Annulment, ¶¶167-168, footnote 166, referring to **Annex-52**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, July 31, 2001 ("***Salini v. Morocco***"), ¶¶52-57; According to TANESCO, the Salini Test sets out four cumulative requirements, which must all be met in order to conclude that an ICSID tribunal has jurisdiction; these requirements are: (i) the investor participated in the risks of the transaction; (ii) there was a substantial contribution by the investor of money or assets; (iii) there is a certain minimum duration; and (iv) there is a significant contribution to host state's economic development.

it did not contribute to the economic development of a State -- the final requirement of the cumulative criteria established by the Salini Test.[201]

190. In this case, TANESCO submits that the purchase of the distressed debt did nothing to further the economic development of Tanzania, since SCB HK only acquired the distressed debt long after the facility was contracted for, financed and built and there was no expectation of receiving an economic return going beyond the mere repayment of the loan with interest.[202] In TANESCO's view, SCB HK's purchase of the loan was only a commercial transaction made for its own financial benefit.[203]

191. Regarding jurisdiction, TANESCO argues that the Tribunal had a positive obligation to assess its jurisdiction from all relevant angles, regardless of the Parties' submissions on the issue as to whether there was a valid investment.[204] TANESCO claims to have raised this point during the Arbitration Proceeding and that the Tribunal, even when it correctly acknowledged its duty to "examine its jurisdiction in light of Article 25", failed entirely to engage with this crucial question. Further, TANESCO asserts that the Tribunal failed to carry out an adequate test, disposing of the issue in a two-sentence paragraph of its Decision on Jurisdiction, in a cursory and insufficient way, providing inadequate reasons.[205] TANESCO argues that, had the Tribunal performed a proper examination, it would have concluded that there was no such qualifying investment.[206]

192. TANESCO also submits that SCB HK did not respond to its substantive arguments made in its Memorial on Annulment regarding the lack of a qualifying investment made by

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[201] TANESCO's Memorial on Annulment, ¶111, footnote 79, referring to Annex-53, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 ***("MNSS B.V. v. Montenegro***"), ¶196.

[202] TANESCO's Reply on Annulment, ¶¶168 and 171, footnote 169, referring to **Annex-89**, *Alpha Projektholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶¶271–272: "[c]learly, Claimant entered into these arrangements with the expectation of receiving an economic return that went beyond merely repayment of the money Claimant contributed [...]The project involved more than a series of loan agreements and construction contracts".

[203] TANESCO's Reply on Annulment, ¶168.

[204] TANESCO's Reply on Annulment, ¶¶183-184, footnotes 178-180, all referring to **Annex-90**, The ICSID Convention, A Commentary, 2d ed., C. Schreuer, page 528-530.

[205] TANESCO's Memorial on Annulment, ¶¶104-105 and 114-115, footnotes 74 and 75, referring to **Annex-1**, Decision on Jurisdiction, ¶¶109-111; see also TANESCO's Reply on Annulment, ¶162, 164 and ¶¶183-184, footnotes 178-180, all referring to **Annex-90**, The ICSID Convention, A Commentary, 2d ed., C. Schreuer, page 528-530.

[206] TANESCO's Memorial on Annulment, ¶¶101–116.

SCB HK. Instead, it merely made submissions on this matter on the mistaken basis that TANESCO has not argued this point previously and as a consequence is estopped from doing so now.[207] TANESCO argues that, contrary to SCB HK's assertions, its objection to the jurisdiction of the Tribunal on the basis that Article 25(1) was not satisfied is not a new argument, since it had questioned the nature of the transaction during the course of the underlying proceedings.[208] TANESCO asserts that this made it clear that it did not consider that SCB HK had a qualifying investment, and that it reserved its rights concerning the Tribunal's jurisdiction.[209]

193. In support of its argument, TANESCO refers to the case *Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12*, in which, according to TANESCO, the tribunal ruled in favour of GoT and dismissed SCB's claim on the basis that it lacked jurisdiction since "[p]assive ownership of shares in a company not controlled by the [applicant] where that company in turn owns the investment is not sufficient".[210] Accordingly, TANESCO states that there can be no doubt that it raised inquiries as to the nature of the investment, since its submission made direct reference to parallel proceedings in which the tribunal, having considered the issue of investment, refused to assume jurisdiction.[211]

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[207] TANESCO's Reply on Annulment, ¶165.

[208] TANESCO's Reply on Annulment, ¶179, footnote 175, stating that: "[a]s acknowledged by Prof. Schreuer, tribunals also look at arguments expressed in more tentative terms such as 'doubts' (see *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, para 12) and 'questions' (see SPP v. Egypt, Decision on Jurisdiction II, 14 April 1988, para 54), (**Annex-90**, "The ICSID Convention, A Commentary", C. Schreuer, ¶524).

[209] TANESCO's Reply on Annulment, ¶¶165 and 173-179, footnote 172, quoting **Annex-8**, Counter-Memorial by Tanzania Electric Supply Company Limited, August 24, 2012, ¶133: "the debt that SCB HK purchased was illegally restructured to include millions of dollars for costs that the tribunal in ICSID 1 had already ruled could not be attributed to construction of power plant, and <u>therefore could not be treated as an investment in Tanzania</u>. The Tribunal has not yet ruled on whether it has jurisdiction. [emphasis added]".

[210] TANESCO's Reply on Annulment, ¶¶175-178, footnotes 173 and 174, referring to **Annex-49**, *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶¶198-200 and 211-232. Text in brackets added by the Committee. In this respect, TANESCO states that at the time of its submission, the award was still pending.

[211] TANESCO's Reply on Annulment, ¶¶179-180, footnote 173, quoting *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶¶198-200: "…implicates [SCB] doing something as part of the investing process, either directly or through an agent or entity under the investor's direction. No such actions were performed [...] [An] investment might be made indirectly, for example through an entity that serves to channel an investor's contribution into the host state. Special purpose vehicles have long facilitated cross-border investment. Such indirectly-made investments, however, would involve investing activity by a claimant, even if performed at the investor's direction or through an entity subject to the investor's control. Under the facts of the present case [SCB] made no contribution to

194. TANESCO states that in the Decision on Jurisdiction, the Tribunal concluded that it did not have jurisdiction to make an order for TANESCO to pay a specific sum to SCB HK, as this could interfere with the question of priority amongst creditors.[212] TANESCO alleges that it made no detailed submissions at that point as to other jurisdictional issues following the Tribunal's determination but that it reserved the right to do so.[213] Explicitly, it stated that:

> "The conclusions reached in the Decision are later to be incorporated in the award, and may then, and only then, be subject to review within the limits of the remedies prescribed by the ICSID Convention in respect of the award. Thus, both [SCB HK] and [TANESCO] will have to wait until the Tribunal issues its final award in order to challenge the conclusions reached in the Decision. In this regard, [TANESCO] expressly reserves its right to challenge the award on jurisdiction once rendered. [TANESCO] in particular reserves all rights with respect to the validity of the purported assignment, the validity of the purported acquisition of rights under the PPA and the Tribunal's jurisdiction over the Parties and the dispute. [Text in brackets added by the Committee]".[214]

195. In light of all the arguments above, TANESCO submits that: (i) it argued that SCB HK's purchase of distressed debt did not amount to an investment during the Arbitration Proceeding; and (ii) the Tribunal should have determined its own jurisdiction regardless of the Parties' submissions; (iii) the Committee must consider this issue within the context of the Annulment Proceedings[215] since the Tribunal failed entirely to do so.

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any relevant loans, taking no action to constitute the making of an investment. Also [SCB] has neither exercised any control over any credit to the Tanzanian debtor nor provided any direction to [SCBHK] relating to the making of the Loans".

[212] TANESCO's Reply on Annulment, ¶181, footnote 176, referring to **Annex-1**, Decision on Jurisdiction, ¶241.

[213] TANESCO's Reply on Annulment, ¶¶181-182; see also **C-478**, TANESCO's Submissions on Tariff, February 13, 2015, ¶121.

[214] TANESCO's Reply on Annulment, ¶181, footnote 177, quoting **C-478**, TANESCO's Submissions on Tariff, February 13, 2015, ¶121.

[215] TANESCO's Reply on Annulment, ¶186.

196. In summary, TANESCO claims that the Tribunal improperly exercised its jurisdiction, which constitutes a manifest excess of powers justifying annulment under Article 52(1)(b).[216]

ii) SCB HK's arguments

197. SCB HK states that TANESCO is incorrect to argue that any jurisdictional mistake constitutes a manifest excess of powers,[217] since, as stated in paragraph 179, only if a tribunal commits a manifest excess of power on a matter related to jurisdiction, is there a basis for annulment.[218]

198. In this respect, SCB HK opposes TANESCO's assertion that the Tribunal assumed jurisdiction in the absence of an investment by SCB HK,[219] and asserts that there is no uncertainty or doubt as to whether the Tribunal had jurisdiction: it clearly had jurisdiction. It argues that there was no excess of powers and the question of whether an excess of powers was "manifest" simply does not arise.[220]

199. SCB HK further explains that, even if the Tribunal exceeded its powers by assuming jurisdiction under Article 25 of the ICSID Convention (which it denies), it did not "manifestly" exceed its powers,[221] since it is not "clear and obvious".[222] SCB HK further submits that such a finding would need to be grounded in a deep analysis of the Article 25 jurisprudence in order to explain why the Convention requirements are not satisfied.

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[216] TANESCO's Memorial on Annulment, ¶116.
[217] SCB HK's Counter-Memorial on Annulment, ¶265, footnotes 315-317, referring to **CLA-123**, Christoph H. Schreuer, The ICSID Convention: A Commentary, 2d ed., page 942, ¶149; **Annex-68**, *MTD v. Chile*, ¶54; **Annex-4**, *Soufraki v. UAE*, ¶¶118-119; **CLA-110**, *Lucchetti v. Peru*, ¶101; **CLA-109**, *M.C.I. v. Ecuador*, ¶55; **Annex-71**, *Azurix v. Argentina*, ¶66; **CLA-113**, *Suez v. Argentina*, ¶117; **Annex-72**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, February 21, 2014 ("***Caratube v. Kazakhstan***"), ¶85; **CLA-129**, *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, ¶¶55-56; **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ¶¶114-115; **CLA-120**, *Enron v. Argentina*, ¶69; **Annex-79**, *TECO v. Guatemala*, ¶¶215 to 221; **CLA-130**, *Mr Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015, ¶¶78 and 79.
[218] See ¶180-184 supra; see also SCB HK's Counter-Memorial on Annulment, ¶¶265-266, footnote 318, referring to **CLA-110**, *Lucchetti v. Peru*, ¶¶101-102; **Annex-4**, *Soufraki v. UAE*, ¶119; **Annex-71**, *Azurix v. Argentina*, ¶66.
[219] SCB HK's Counter-Memorial on Annulment, ¶270.
[220] SCB HK's Counter-Memorial on Annulment, ¶267.
[221] SCB HK's Rejoinder on Annulment, ¶122, iii).
[222] SCB HK's Rejoinder on Annulment, ¶¶151-153 and Appendix 2.

In SCB HK's view, this appears to be a clear example of a legal dispute arising from an investment, and the fact that TANESCO did not raise an objection before the Tribunal indicates that any lack of jurisdiction under Article 25(1) is neither clear nor obvious.[223]

200. Additionally, SCB HK argues that TANESCO has never previously objected to the jurisdiction of the Tribunal on the basis that Article 25(1) was not satisfied,[224] nor made any submissions on the "investment" requirement,[225] despite TANESCO's counsel being aware of these matters in the underlying proceeding, they chose not to raise any objections on this point.

201. SCB HK argues that an ICSID annulment proceeding is not an appeal, still less a re-trial,[226] and that, as such, new arguments or evidence on the merits are irrelevant to the annulment process and are not admissible.[227] In this respect, SCB HK recalls TANESCO's statement in its Reply on Annulment that it "made clear in the proceedings that it did not consider that SCB HK had a qualifying investment",[228] and argues that this is an attempt to deny the record and re-write the history of the proceedings.[229]

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[223] SCB HK's Rejoinder on Annulment, ¶152

[224] SCB HK's Counter-Memorial on Annulment, ¶271; SCB HK's Rejoinder on Annulment, ¶124.

[225] SCB HK's Counter-Memorial on Annulment, ¶¶272-273, footnote 324; referring to **Annex-1**, Decision on Jurisdiction, where, according to SCB HK: "[t]he fact that jurisdiction under Article 25(1) was not disputed by Tanesco was recorded by the Tribunal".

[226] SCB HK's Counter-Memorial on Annulment, ¶276, footnote 327, referring to **Annex-68**, *MTD v. Chile*, ¶¶31 and 54; **Annex-7**, *Mitchell v. DRC*, ¶19; **Annex-4**, *Soufraki v. UAE*, ¶20; **Annex-71**, *Azurix v. Argentina*, ¶¶41 and 68; **CLA-121**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010 ("***Sempra v. Argentina***"), ¶73; **CLA-122**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the Ad Hoc Committee on the Application for Annulment, January 24, 2014, ¶119; **CLA-109**, *M.C.I. v. Ecuador*, ¶24; **CLA-117**, *Rumeli v. Kazakhstan*, ¶70; **CLA-110**, *Lucchetti v. Peru*, ¶101; **Annex-73**, *Wena Hotels v. Egypt*, ¶18; **CLA- 101**, *CMS Gas Transmission Company v. Argentina,* ¶43; **CLA-102**, *Pey Casado v. Chile*, ¶¶129 and 148; **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ¶105; **CLA-120**, *Enron v. Argentina*, ¶69.

[227] SCB HK's Counter-Memorial on Annulment, ¶276, footnote 328, referring to **Annex-68**, *MTD v. Chile*, ¶31; **CLA-121**, *Sempra v. Argentina*, ¶74.

[228] SCB HK's Rejoinder on Annulment, ¶125, footnote 121, referring to TANESCO's Reply on Annulment, heading III(1)(c)(i)(3) on page 51.

[229] SCB HK's Rejoinder on Annulment, ¶¶127-128; see also its Appendix 1, a chronology which summarises how the Article 25(1) point was addressed in the PPA Arbitration between SCB HK and TANESCO, and in the BIT Arbitration between Standard Chartered Bank and the GoT. According to SCB HK, the summary shows that SCB HK addressed the Article 25 requirements in the PPA Arbitration and that the Tribunal, after considering the issue, found that it possessed jurisdiction under Article 25, and that TANESCO never raised an objection in respect of Article 25(1), whether in the written pleadings or oral hearings.

202. SCB HK explains that in its Reply on Annulment, TANESCO refers to three documents[230] which TANESCO alleges placed the Article 25(1) point in dispute before the Tribunal.[231] Nevertheless, SCB HK argues that none of these documents achieve this because the extracts TANESCO quotes referred to: (i) a different proceeding between the Government of Tanzania (GoT) and SCB HK's parent company;[232] or (ii) the "reservation of rights" made by TANESCO in its Submissions on Tariff dated February 13, 2015[233], which was too late since it only contested jurisdiction after the Tribunal had already issued its Decision on Jurisdiction (in which it concluded that Article 25(1) was satisfied) and only a passing general statement which did not put the Tribunal on notice of an Article 25(1) objection.[234]

203. In addition, SCB HK argues that TANESCO had commenced ICSID proceedings under the PPA in 1998 ("**ICSID 1**")[235] on the basis that the dispute arose out of an "investment", and through the ICSID 1 proceeding procured tariff reductions. Thus, it cannot claim now that there is no jurisdiction under Article 25(1) because disputes about payment under the PPA did not arise directly out of an investment.[236]

204. Accordingly, SCB HK concludes that for these reasons: (i) TANESCO's argument on the "investment" requirement under Article 25(2)(b) must be rejected,[237] (ii) the Tribunal's

[230] SCB HK's Rejoinder on Annulment, ¶129: A paragraph in TANESCO's Counter Memorial dated August 24, 2012; passages from the BIT Award between Standard Chartered Bank and the GoT; and a paragraph in TANESCO's Submissions on Tariff dated February 13, 2015.
[231] SCB HK's Rejoinder on Annulment, ¶129, footnotes 122-124, referring to TANESCO's Reply on Annulment, ¶¶39, 174, 177-178, and 181.
[232] SCB HK's Rejoinder on Annulment, ¶¶133-140; Here, SCB HK stated at paragraph 135 that "[t]he passage quoted was therefore part of a summary of a separate proceeding between Standard Chartered Bank (not SCB HK) and the GoT (not TANESCO) which referred to the Disallowed Costs Argument and, possibly, the Corporate Authority Argument (not the Article 25(1) ground now run by TANESCO). This passing reference to grounds of challenge in the BIT Arbitration was just that–a passing reference. The point was not mentioned again by Tanesco and no objection on the basis of Article 25(1) was made in the remainder of the Counter-Memorial".
[233] TANESCO reserved the right to challenge the award on jurisdiction once rendered, especially with respect to the validity of the purported assignment, the validity of the purported acquisition of rights under the PPA and the Tribunal's jurisdiction over the Parties and the dispute.
[234] SCB HK's Rejoinder on Annulment, ¶¶143-146.
[235] *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Award, July 12, 2001.
[236] SCB HK's Counter-Memorial on Annulment, ¶274.
[237] SCB HK's Counter-Memorial on Annulment, ¶¶276-277; see also SCB HK's Rejoinder on Annulment, ¶¶130-146.

finding that the Article 25(1) requirement was satisfied and thus that it had jurisdiction was correct, and (iii) that even in the event that TANESCO had raised an objection under Article 25(1), such objection is unfounded on the merits.[238]

205. SCB HK responds to the substance of TANESCO's Article 25(1) objection in Appendix 2 to its Rejoinder. Therein, it submits that, among other things, there was no requirement in Article 25(1) of the ICSID Convention that the national of the Contracting State bringing the claim must itself be the investor that made the initial investment giving rise to the dispute, but that the only question for the purposes of the "investment" requirement is whether there is a legal dispute arising from an investment.[239]

206. Additionally, SCB HK submits that the Power Plant has continued to contribute to the development of Tanzania, including after it became the lender. SCB HK explains that despite the ongoing dispute, in October 2009 the President of Tanzania ordered that the Power Plant be re-started to address a power crisis in Tanzania.[240]

207. However, SCB HK argues that, while it has responded to TANESCO's allegations, it does not accept that the Committee needs to, or indeed should, embark upon a substantive review of the Tribunal's findings on jurisdiction, as TANESCO has invited it to do. For SCB HK, Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal under Article 41(1) of the Convention, once the tribunal has given its final award. Annulment is only a form of review on specified and limited grounds which take as their premise the record before the tribunal and is not an opportunity to raise new arguments or introduce new evidence.[241]

iii) Analysis and Decision of the Committee

[238] SCB HK's Rejoinder on Annulment, ¶147.
[239] SCB HK's Rejoinder on Annulment, Appendix 2, ¶5.
[240] SCB HK's Rejoinder on Annulment, Appendix 2, ¶34.
[241] SCB HK's Counter-Memorial on Annulment, ¶268, footnote 320, referring to **Annex-71**, *Azurix v. Argentina*, ¶68; **CLA-120**, *Enron v. Argentina*, ¶69; **Annex-79**, *TECO v. Guatemala*, ¶216; TANESCO's Reply on Annulment, ¶35, footnote 28, referring to SCB HK's Counter-Memorial on Annulment, ¶425.

208. Bearing in mind the Parties' arguments, the Committee's decision regarding whether the Tribunal manifestly exceeded its powers by exercising jurisdiction in light of Article 25(1) of the Convention, is as follows.

209. There is no doubt for the Committee that the wording of Article 41 of the ICSID Convention as well as *ad hoc* committees' previous decisions recognise the *Kompetenz-Kompetenz* principle, by which a tribunal is the judge of its own competence. This means that a tribunal has the power to decide whether the jurisdictional requirements under Article 25 of the Convention are met and thus, whether it has jurisdiction to hear the parties' dispute based on the parties' arbitration agreement.

210. In this respect, *ad hoc* committees have held that when a tribunal: (i) incorrectly concludes that it has jurisdiction,[242] (ii) rejects jurisdiction when jurisdiction exists,[243] or (iii) exceeds the scope of its jurisdiction,[244] such determinations amount to an excess of powers.[245]

211. Consistent with the position of the Parties[246] and following the decision in paragraphs 181-186[247] the Committee finds that for such an excess to amount to a ground for annulment, it has to be "manifest", namely, it has to be obvious, self-evident and discernible without deeper analysis, that the tribunal did not have jurisdiction.

212. The Committee is of the view that, as established by the express wording of Article 25(1), the ICSID Convention prescribes certain mandatory requirements that must be fulfilled for a tribunal to have jurisdiction. These are: (i) "a legal dispute"; (ii) "arising directly out of an investment"; (iii) "between a Contracting State (or any constituent subdivision

[242] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶87, footnote 161, referring among others to **Annex-51** (also **Annex-7**), *Mitchell v. DRC*, ¶¶47, 48 and 67; **CLA-101**, *CMS Gas Transmission Company v. Argentina*; **Annex-71**, *Azurix v. Argentina*, ¶45; **Annex-59**, *Occidental Petroleum v. Ecuador*, ¶¶49-51; **Annex-79**, *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, ¶77.
[243] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶87, footnote 163.
[244] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶87, footnote 162.
[245] **CLA-112**, Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶¶85-87.
[246] TANESCO's Memorial on Annulment, ¶99; SCB HK's Counter-Memorial on Annulment, ¶266.
[247] See ¶¶181-186 supra.

or agency of a Contracting State designated to the Centre by that State)"; (iv) "and a national of another Contracting State"; (v) "which the parties to the dispute consent in writing to submit to the Centre".

213. In this respect, TANESCO states that the Tribunal had a positive obligation to assess its jurisdiction regardless of the Parties' submissions but that it failed to engage with this crucial question and to conduct an adequate test of criteria, disposing of it in a two-sentence paragraph. The Committee agrees with TANESCO that tribunals have a duty to analyse their jurisdiction *ex officio.*[248]

214. The Committee turns now to the Decision on Jurisdiction to assess whether the Tribunal, when deciding upon its jurisdiction, conducted this *ex officio* analysis of the requirements of Article 25(1).

215. In its Decision, the Tribunal correctly acknowledged its duty to examine its jurisdiction in light of Article 25 of the ICSID Convention, regardless of whether the Parties had raised any objections on this matter and identified four conditions which needed to be fulfilled. These conditions are as follows.[249]

216. First, the Tribunal identified a condition *ratione personae*, establishing that the dispute must oppose a Contracting State and a national of another Contracting State. Here, the Tribunal concluded that this condition was fulfilled, since: (i) SCB HK was a company organised under the law of Hong Kong; (ii) China was an ICSID Contracting State; (iii) TANESCO was an entity wholly owned by Tanzania and designated as an agency of Tanzania pursuant to Article 25(1) of the ICSID Convention; and (iv) Tanzania was an ICSID Contracting State.[250]

217. As to the second condition, the Tribunal concluded that the dispute must have been a legal dispute arising directly out of an investment (condition *ratione materiae).* The Tribunal also found this requirement to be satisfied, since "…by virtue of its purchase of the outstanding debt under the loans to IPTL and the assigning of the rights under the

[248] Article 41(1) of the ICSID Convention; see also **Annex-52**, *Salini v. Morocco*, ¶52.
[249] **Annex-1**, Decision on Jurisdiction, ¶109.
[250] **Annex-1**, Decision on Jurisdiction, ¶110.

relevant agreements, SCB HK has an investment for the purposes of the ICSID Convention".[251]

218. The third condition, *ratione voluntatis*, pursuant to which the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration, was considered by the Tribunal to be fulfilled since the arbitration agreement contained in the PPA concluded between IPTL and TANESCO had been assigned to SCB HK.[252]

219. The last condition, that the ICSID Convention must have been applicable at the relevant time (*ratione temporis*), was found by the Tribunal to have been complied with, since the ICSID Convention was applicable at the initial time of consent, *i.e*. May 26, 1995, when the PPA was concluded, and on August 17, 2005, when SCB HK became entitled to exercise the rights, discretions and remedies under the PPA.[253]

220. Additionally, after having analysed its jurisdiction in light of Article 25(1) of the ICSID Convention, the Tribunal went on to examine the assignment of the PPA and the impact of the proceedings before Tanzanian courts on the jurisdiction of the Tribunal.[254]

221. Thus, despite TANESCO's allegations to the contrary, the Committee concludes that, as can be seen from the Decision on Jurisdiction, which was later incorporated into the Award, the Tribunal analysed its jurisdiction under the ICSID Convention, pursuant to Article 25(1). Therein, it took into account the Parties' arguments and the evidence presented by them during the jurisdictional phase of the Arbitration Proceeding, and concluded that, by virtue of its purchase of the outstanding debt under the loans to IPTL and the assigning of the rights under the relevant agreements, SCB HK had an investment for the purposes of the ICSID Convention.[255]

222. Applying the requirement that an excess of power must be "manifest", addressed above,[256] the Committee does not find the answer to the question of whether the Tribunal

[251] **Annex-1**, Decision on Jurisdiction, ¶111.
[252] **Annex-1**, Decision on Jurisdiction, ¶112.
[253] **Annex-1**, Decision on Jurisdiction, ¶113.
[254] **Annex-1**, Decision on Jurisdiction, ¶¶108 and 115-183.
[255] **Annex-1**, Decision on Jurisdiction; ¶¶90-114.
[256] See ¶181 supra.

had jurisdiction "obvious", nor does it find that it is a question that can be solved "without deeper analysis". It is widely accepted that, when "reasonable minds" differ as to whether a tribunal has jurisdiction, the "manifest" requirement is not fulfilled, and the excess of powers of the tribunal, even if it exists, does not amount to a ground for annulment.

223. Consequently, the Committee does not find that the Tribunal manifestly exceeded its power by exercising jurisdiction under Article 25(1) of the ICSID Convention.

3) The existence of a manifest excess of power of the Tribunal by failing to apply the law of Tanzania, being the proper law under the relevant contract, contrary to its obligation under Article 42(1) of the Convention

224. The Committee identifies two areas where TANESCO asserts that the Tribunal failed to apply Tanzanian law: (i) the statutory assignment and the registration requirement; and (ii) the assignment under the alleged winding up procedure. In the following paragraphs, the Committee will address the Parties' arguments regarding these matters.

i) TANESCO's arguments

The validity of the assignment and the registration requirement

225. As a preliminary matter, TANESCO argues that SCB HK is simply wrong to state that the validity of the assignment and its lack of effectiveness due to non-registration were not placed before the Tribunal when it issued the Decision on Jurisdiction.[257] It explains that, in the Decision itself, the Tribunal stated that: "[a]ccording to [TANESCO], SCB HK was wrong when it considered that the assignment of the PPA was an absolute assignment and need not be registered. [TANESCO] argues that, whilst an absolute assignment needs no registration, an assignment by way of charge or a security assignment must be registered under Tanzanian law, which follows English companies law. [Text in brackets added by the Committee]".[258]

[257] TANESCO's Reply on Annulment, ¶190, footnote 181, referring to SCB HK's Counter-Memorial on Annulment, ¶44.
[258] TANESCO's Reply on Annulment, ¶190, footnote 182, referring to **Annex-1**, Decision on Jurisdiction, ¶93.

226. TANESCO argues that in accordance with Article 42(1) of the Convention, "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties". In this respect, TANESCO states that the PPA contains a provision for the assignment of IPTL's rights under certain specified conditions, and claims, first, that such assignment must have been carried out in accordance with the governing law of the PPA, namely, Tanzanian law;[259] and second, that the applicability of Tanzanian law to determine the validity of the assignment was considered by the Tribunal as a common ground between the Parties.[260]

227. With regard to the validity of the assignment, TANESCO submits that the legal requirements for the registration of a security interest are subject to Tanzanian law and are a matter of Tanzanian public policy.[261] TANESCO further explains that the source of the obligation to register a charge under Tanzanian law to ensure its enforceability is Section 79 ("**Section 79**") of Tanzania's Companies Ordinance ("**Companies Ordinance**"), which establishes that:

> "(1) Subject to the provisions of this Part of this act, every charge created after the fixed date by a company registered in Tanzania and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner are delivered to or received by the Registrar for registration in the manner required by this Act within forty two days after date of its creation
>
> […]
>
> 2) This section applies to the following charges –

[259] TANESCO's Memorial on Annulment, ¶143.
[260] TANESCO's Reply on Annulment, ¶¶194-196 and 207; TANESCO's Memorial on Annulment, ¶146, footnote 102, referring to **Annex-1**, Decision on Jurisdiction, ¶126; Transcript of the Hearing, Day 1, p. 50, line 3-8.
[261] TANESCO's Memorial on Annulment, ¶¶146-154.

[…]

(e) a charge on book debts of the company;

(f) a floating charge on the undertaking of property of the company…"[262]

228. TANESCO also refers to Sections 96 and 97 of the Companies Act (No. 12 of 2002) ("**Companies Act**"), which has superseded the Companies Ordinance. Sections 96 and 97 establish that:

> "96(1) Subject to the provisions of this Part of this act, every charge created by a company registered in Tanzania and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner are delivered to or received by the Registrar for registration in the manner required by this part within forty-two days after date of its creation.
>
> 97(1) Section 96 applies to the following charges –
>
> […]
>
> (e) a charge on book debts of the company;
>
> (f) a floating charge on the undertaking of property of the company…".[263]

229. TANESCO maintains that these legal provisions are clear: a charge on book debts of the company must be registered with the Tanzanian Registrar of Companies, and considers that even the Tribunal agreed with this, when it concluded that "…clause 3.2.1 of the

[262] TANESCO's Memorial on Annulment, ¶149, footnote 103, referring to **Annex-62**, [Extracts from] Tanzania's Companies Ordinance.
[263] TANESCO's Memorial on Annulment, ¶¶148 and 150.

Security Deed ("**Security Deed**") creates a charge over future book debts and thus had to be registered pursuant to section 79 of Tanzania's Companies Ordinance".[264]

230. In this respect, TANESCO submits that this position has been acknowledged by the Tanzanian Court of Appeal (the highest Tanzanian court), in the *Shinyanga* case,[265] which is a binding Tanzanian precedent. According to TANESCO, it stated that, further to the provisions of Tanzania's Companies Ordinance or the later Tanzanian Companies Act, assignment of a security becomes void unless it is registered within forty-two days.[266] TANESCO states that the interpretation of Section 79 held by the Court of Appeal of Tanzania in this case is clear: an unregistered charge is void.[267] Thus, TANESCO argues that considering neither SCB HK nor IPTL registered the security interests assigned under the Security Deed with the Tanzanian Companies Registrar, SCB HK's purported security interest is void for want of registration,[268] and thus, that SCB HK's claim should have been dismissed on the basis of Tanzanian Law.[269]

231. With respect to the law applicable to this case, TANESCO's expert, explains that the *Shinyanga* case (dated 1997) is applicable in Tanzania by virtue of the Judicature and Application of Laws Act ("**JALA**"). [270] TANESCO further explains that English law is not applicable to the present case, because English judicial decisions are binding on Tanzanian courts only when issued prior to July 22, 1920 and when not subsequently modified in Tanzania.[271] TANESCO further states that unless and until legislation

[264] TANESCO's Memorial on Annulment, ¶151, footnote 105, referring to **Annex-1**, Decision on Jurisdiction, ¶168.
[265] **Annex-64**, *Shinyanga Regional Trading Co Ltd v. National Bank of Commerce* [1997] TLR 78.
[266] TANESCO's Reply on Annulment, ¶198; see also TANESCO's Memorial on Annulment, ¶154, footnote 106.
[267] TANESCO's Reply on Annulment, ¶203, footnote 192, where TANESCO states that it disagrees with SCB HK's assertion at ¶53 of its Counter-Memorial that the correct interpretation of "creditor" in the context of Section 79 is "a secured creditor". According to TANESCO, SCB HK's assertion is unsubstantiated, and goes against the clear wording of section 79. In TANESCO's view, if Section 79 had meant creditor to mean "secured creditor", it would have said so; see also ¶205, footnote 193, where TANESCO stated that: "Marungu Sisal Estate Ltd v. The CRDB Bank Ltd and Another, Civil Case No. 7 of 2000, High Court of Tanzania. In that case, the debenture holder attempted to distinguish *Shinyanga* so that it could enjoy the debenture, arguing *inter alia* that the company should not be allowed to benefit from its own wrong because the duty to register a debenture rests with the company. The Judge of the High Court disagreed, and confirmed the law to the effect that once a debenture become voids, it is as if it never existed at all".
[268] TANESCO's Memorial on Annulment, ¶147.
[269] TANESCO's Memorial on Annulment, ¶144.
[270] **Annex-65**, Statement of Prof. Mbunda, April 13, 2012, ¶¶13-14.
[271] Transcript of the Hearing, Day 1, p. 50, lines 9-11.

contrary to *Shinyanga* is enacted by the Parliament of Tanzania or there is a decision by the Court of Appeal of Tanzania departing from *Shinyanga*, this case remains binding law in Tanzania.[272]

232. Accordingly, TANESCO submits that the Tribunal, contrary to the obligations placed on it by Article 42(1),[273] disregarded binding Tanzanian law precedent by referring to English law on the registration issue and quoting extensively from English doctrine in an attempt to show that the assignment of rights to SCB HK under the Security Deed was a statutory one.[274] However, TANESCO explains that, first, under Tanzanian law, even if the benefit of the PPA was transferred by way of statutory assignment (which TANESCO denies was the case), such assignment would only be valid if it had been registered; and second, that the extract quoted by the Tribunal from English doctrine[275] omits an important sentence from the middle, which changes the meaning.[276] TANESCO states that: "[t]he fact that the assignment is expressed to be by way of security for a loan does not by itself prevent it from being absolute, though combined with other factors such expressions may have this effect. Thus, a provision that the assignor was entitled to

[272] TANESCO's Reply on Annulment, ¶206.
[273] TANESCO's Memorial on Annulment, ¶145.
[274] TANESCO's Memorial on Annulment, ¶¶154-156.
[275] **Annex-1**, Decision on Jurisdiction, ¶147: "[i]n respect of the first requirement, which is identical in terms to section 136 of the LPA, the following analysis appears in *Chitty on Contracts*: '[t]he assignment must be absolute and not purport to be by way of charge only. An assignment by way of mortgage may, however, be absolute within the meaning of the section, if there is an express or implied *proviso* for reassignment on repayment of the loan: for the reassignment would involve fresh notice to the debtor, who would thus be in no doubt as to whom he ought to pay the debt. An assignment of all moneys due or to become due from the debtor, which was expressed to be by way of continuing security for all moneys due from the assignor to the assignee, has been held to be absolute. On the other hand, where the assignor charged a sum which would become due to him from the debtor as security for advances made to him by the assignee, and assigned his interest in that sum until the advances were repaid to the assignee with interest, this was held to be by way of charge and not within the section […] The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument; in construing it, the court will look at the whole of its language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor. Thus the fact that the assignee is to hold the proceeds of the debt, or the surplus proceeds beyond a stated amount, on trust for the assignor does not prevent the assignment from being absolute. [Emphasis added by the Committee]".
[276] TANESCO's Memorial on Annulment, ¶¶155-157.

exercise all its rights over the property until in default under the loan agreement has prevented an assignment from being absolute".[277]

The winding-up procedure

233. In addition, TANESCO argues that the Tribunal did not make any reference to *Shinyanga* nor to Section 79 when addressing the issue of the non-registration of the security interest, but that it directly went to resolve the matter under English law.[278]

234. TANESCO further states that the fact that it acknowledged a notice of assignment does not negate the need for the security to be registered in Tanzania in accordance with Tanzanian law. Equally, TANESCO states that the registration of the share charges in Malaysia in no way impacts upon the effect of the non-registration of the assignment in Tanzania.[279]

235. Consequently, TANESCO argues that in concluding "[t]here is no doubt that the non-registration of the assignment did not invalidate the charge against [IPTL]", the Tribunal did not misapply Tanzanian law, including the *Shinyanga* precedent, but entirely failed to apply the proper law, both in the Decision and in the Award.[280] This resulted in the Tribunal allowing SCB HK to step into IPTL's shoes,[281] thereby manifestly exceeding its powers.[282] In TANESCO's view, if the Tribunal had applied *Shinyanga*, as it was bound to do, it would have held that the security became void and that therefore SCB HK did not have the right to step into IPTL's shoes to recover monies from TANESCO.[283]

236. TANESCO argues that whilst it is by no means clear whether the Tribunal did consider that it could disregard *Shinyanga* on the basis it was decided "*per incuriam*", as alleged by SCB HK, this is irrelevant because the Tribunal's failure to consider and apply

[277] TANESCO's Memorial on Annulment, ¶156, footnote 108, referring to **Annex-66**, [Extract from] Chitty on Contracts The General Principles, page 1480.
[278] Transcript of the Hearing, Day 2, p. 8, lines 4-p. 10, line 15.
[279] TANESCO's Reply on Annulment, ¶197, footnote 186, referring to SCB HK's Counter-Memorial on Annulment, ¶39.
[280] TANESCO's Reply on Annulment, ¶193, footnote 183, referring to **Annex-1**, Decision on Jurisdiction, ¶168; Transcript of the Hearing, Day 1, p. 50, line 24-p. 51, line 18.
[281] TANESCO's Reply on Annulment, ¶¶191-193.
[282] TANESCO's Reply on Annulment, ¶¶206 and 218-219.
[283] TANESCO's Reply on Annulment, ¶198.

Shinyanga is an example of its failure to apply the law of Tanzania. Further, according to TANESCO, it is incomprehensible how SCB HK can argue that *Shinyanga* can be disregarded in favour of pre-1920 English case law, as its expert, Mr Nicholas Zervos, argued in his expert report.[284] According to TANESCO, whilst such case law constitutes binding legal authority in cases of uncertainty or *lacunae* within Tanzanian legal authority, as is accepted by the Parties, such case law cannot and does not prevent the development of a modern Tanzanian system of jurisprudence, appropriate to the specific prevailing conditions within the country.[285]

237. In light of the above, TANESCO argues that the assignment is void as a matter of Tanzanian law under Section 172 of the Companies Ordinance, irrespective of whether the formal requirements were met to have a valid statutory assignment. It highlights the fact that SCB HK has failed to engage with TANESCO's argument that the Tribunal wrongfully failed to apply Tanzanian law concerning the effect of such non-registration.[286]

238. TANESCO also disagrees with SCB HK's allegation that it conceded that the non-registration of the security interest did not render it void in the absence of a liquidator or administrator.[287] It argues that SCB HK selectively relied upon Mr Range's statements during the last hearing before the Tribunal rendered the Decision on Jurisdiction, in March 2013 ("**March 2013 Hearing**"),[288] which, in its view, do not demonstrate any such concession by TANESCO. On the contrary, TANESCO argues that it has made clear throughout its submissions that, as a matter of Tanzanian law, an unregistered security interest is void and not just against administrators or liquidators.[289]

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[284] TANESCO's Reply on Annulment, ¶207, footnote 194, referring to **C-480**, Statement of Nicholas Zervos, October 26, 2012, ¶12.4.
[285] TANESCO's Reply on Annulment, ¶207, footnote 195, referring to **Annex-1**, Decision on Jurisdiction, ¶127.
[286] TANESCO's Reply on Annulment, ¶194.
[287] TANESCO's Reply on Annulment, ¶211, footnote 199, referring to SCB HK's Counter-Memorial on Annulment, ¶130(ii).
[288] TANESCO's Reply on Annulment, ¶211, footnote 200, referring to SCB HK's Counter-Memorial on Annulment, ¶365.
[289] TANESCO's Reply on Annulment, ¶¶211-219, footnotes 201-212, referring to **C-478**, TANESCO's Submissions on Tariff, ¶¶127–128; SCB HK's Counter-Memorial on Annulment, ¶¶82-85; **C-207**, PricewaterhouseCoopers Report entitled "IPTL Creditor Claim Assessment", March 22, 2012 ("**PwC Report**"), ¶3.2.4.2; **C-390**, Letter from Mr Saliboko to the Tribunal dated June 6, 2013, ¶13.

239. In addition, TANESCO maintains that the assignment from the Malaysian banks to Danaharta was highly questionable as a matter of Tanzanian law and that Article 15.2 of the Implementation Agreement,[290] which is governed by Tanzanian law, requires that the Government of Tanzania give prior written approval before any assignment of rights relating to financing the construction and operation of the Facility took place.[291] Governmental approval, according to TANESCO, was not sought nor obtained in respect of the assignment to Danaharta, in breach of Article 15.2, rendering the assignment from Danaharta to SCB HK invalid.[292] Accordingly, TANESCO argues that the question of who owns IPTL and/or who has the right to enforce rights on behalf of IPTL is a matter of Tanzanian law which can only be determined by the Tanzanian court.[293]

240. On this same issue, TANESCO recalls SCB HK's statement in its Counter Memorial that TANESCO was attempting to suggest that: (i) the New York court agreed with TANESCO that only the Tanzanian court could properly decide the ownership of IPTL; (ii) the quote from the New York court cited by TANESCO was in respect of a tortious action brought by VIP Engineering and Marketing Ltd ("**VIP**") against SCB HK's parent company, not SCB HK itself; and (iii) the jurisdiction issue in New York was related to the issue of whether that tort claim by VIP against Standard Chartered Bank should be tried in New York or Tanzania.[294]

241. According to TANESCO, SCB HK's statements regarding the New York proceedings in its Counter Memorial miss the point. TANESCO explains that, as SCB HK

[290] This term has been defined in the Decision on Jurisdiction and in the Award as: "Implementation Agreement dated June 8, 1995, entered into between IPTL and the GoT".
[291] TANESCO's Reply on Annulment, ¶220, footnote 213, referring to **C-028**, Implementation Agreement, Article 15.2.
[292] TANESCO's Reply on Annulment, ¶220.
[293] TANESCO's Reply on Annulment, ¶224.
[294] TANESCO's Reply on Annulment, ¶225, referring to SCB HK's Counter-Memorial on Annulment, ¶111: "111. Tanesco also attempts in paragraph 59 of its Memorial to suggest that the New York court agreed with Tanesco that only the Tanzanian Court can properly decide the ownership of IPTL. However, the quote from the New York court cited by Tanesco was in respect of a tortious action brought by VIP against Standard Chartered Bank (SCB HK's parent company, not SCB HK itself) on the basis that Standard Chartered Bank had wrongly claimed to be a secured creditor of IPTL. The jurisdiction issue in New York to which the quote applies related to the issue of whether that tort claim by VIP against Standard Chartered Bank should be tried in New York or Tanzania. It is wrong for Tanesco to suggest that New York court's quote had any bearing on the position of Mechmar's 70% shareholding in IPTL, which had already been determined by the Malaysian Court and the BVI Court".

acknowledges, these proceedings, relating to issues concerning the ownership of IPTL, concerned VIP and SCB.[295] TANESCO states that it is highly relevant that the New York court independently determined that the issue of ownership of IPTL (and therefore the right to bring an action on behalf of IPTL) is an issue of Tanzanian law and can only rightly be determined by the Tanzanian courts.[296]

242. Furthermore, TANESCO argues that SCB HK's assertion that Mechmar's[297] shareholding in IPTL had already been determined by the Malaysian and British Virgin Islands ("**BVI**") courts, whilst not admitted, is in any event irrelevant, since, according to TANESCO's position throughout these proceedings, the orders set down by the Malaysian and BVI courts were invalid and have no legal effect in Tanzania.[298]

243. In this respect, TANESCO maintains that the Tribunal failed to apply Section 172 of the Companies Ordinance.[299] TANESCO argues that, if this section had been applied, the Tribunal would have held that the assignment from Danaharta[300] to SCB HK in 2005 was void, because no permission was obtained from the High Court of Tanzania for the transaction.[301] With regards to this, TANESCO further explains the following.

244. First, TANESCO states that SCB HK's assertion that IPTL was "not in liquidation" at the time of the transfer is irrelevant, as Section 172 of the Companies Ordinance applies "in a winding up by the court". The fact that the Winding Up Order[302] was subsequently issued in 2011 and quashed in 2012 is also irrelevant, since, according to TANESCO, the relevant date is not the date that the order was issued, but the date on which the petition was presented.[303] Moreover, at the time of the purported assignment, IPTL had been

[295] TANESCO's Reply on Annulment, ¶225.
[296] TANESCO's Reply on Annulment, ¶227.
[297] This term has been defined in the Award as: "Mechmar Corporation (Malaysia) Berhad".
[298] TANESCO's Reply on Annulment, ¶228, footnote 218, referring to **C-478**, TANESCO's Submissions on Tariff, ¶19.
[299] TANESCO's Reply on Annulment, ¶232, footnote 227, referring to **CLA-010**, Tanzania's Companies Ordinance.
[300] This term has been defined in the Award as: "Danaharta Managers (L) Limited, a company incorporated in Malaysia and set up by the Malaysian Government to purchase loans from financial institutions in distress".
[301] TANESCO's Reply on Annulment, ¶233.
[302] This term has been defined in the Award as: "the order for IPTL's winding up was issued by the High Court of Tanzania dated July 15, 2011".
[303] TANESCO's Reply on Annulment, ¶234, footnote 228; SCB HK's Counter-Memorial on Annulment, ¶¶80 and 389.

temporarily wound up since February 2002, with the result that Section 172 squarely applied.[304]

245. Second, TANESCO argues that SCB HK's argument that the loan did not amount to property of IPTL[305] should also be rejected, due to the fact that permission from the High Court of Tanzania must be obtained for the transfer of assets and interests of a company undergoing winding up proceedings.[306]

246. Finally, TANESCO maintains that SCB HK's argument that the validity of the transfer under the Facility Agreement is a question of English law is without merit and should be rejected. In TANESCO's view, it is clear that the transfer took place in Tanzania, and – notwithstanding the law of the contract between SCB HK and Danaharta – permission from the High Court of Tanzania was required when dealing with the actionable interests of IPTL which were being wound up before it.[307]

247. In TANESCO's opinion, SCB HK's insistence that the Tribunal had jurisdiction to consider this matter, despite it clearly being a matter for the Tanzanian court, is indicative of SCB HK's approach to the Tanzanian legal system throughout these proceedings.[308]

248. TANESCO thus submits that if the Committee does not conclude that there has been a complete failure to apply the applicable law (as TANESCO submits that there has been), it must conclude that the misapplication of Tanzanian law by the Tribunal, in failing to apply *Shinyanga*, is an egregious misapplication of the law which constitutes a failure to apply the applicable law.[309] TANESCO states that no reasonable person could accept that the Tribunal's disregard of Tanzanian law was correct.[310]

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[304] TANESCO's Reply on Annulment, ¶234.
[305] SCB HK's Counter-Memorial on Annulment, ¶390.
[306] TANESCO's Reply on Annulment, ¶236, footnote 229, referring to SCB HK's Counter-Memorial on Annulment, ¶390.
[307] TANESCO's Reply on Annulment, ¶237.
[308] TANESCO's Reply on Annulment, ¶224.
[309] TANESCO's Reply on Annulment, ¶219; TANESCO's Memorial on Annulment, ¶144, footnote 101, referring to **Annex-4**, *Soufraki v. UAE*, where, according to TANESCO, the commission held that failure to apply or even gross misapplication/misinterpretation of the applicable law constitutes excess of powers.
[310] TANESCO's Memorial on Annulment, ¶165.

249. In this regard, TANESCO explains that, as ICSID jurisprudence clearly establishes, even where a tribunal has sought to apply the correct applicable law but has grossly or egregiously misapplied or misinterpreted such law, that is sufficient to constitute a manifest excess of powers and, as a consequence, the award issued by that tribunal must be annulled.[311]

250. TANESCO emphasises that a gross or egregious misapplication or misinterpretation of the applicable law differs from a mere erroneous misapplication of the law, the latter of which is not a ground for annulment. However, TANESCO submits that the Tribunal's actions and decisions in the present case constitute more than a minor misapplication of the law, but amount to, and surpass the standard of, a gross or egregious misapplication.[312]

251. On this basis, TANESCO submits the Award should be annulled on the ground of manifest excess of power under Article 52(1)(b) given that the Tribunal has grossly and/or egregiously misapplied the applicable Tanzanian law.[313]

ii) SCB HK's arguments

252. SCB HK states that TANESCO's complaint that the Tribunal misapplied, or misinterpreted Tanzanian law seeks to erode the distinction between non-application and erroneous application of the proper law,[314] and thus, that TANESCO's arguments are hopeless, for the following reasons. [315]

253. SCB HK states that an alleged misapplication of the applicable law does not constitute a manifest excess of powers,[316] and explains that the drafting history of the Convention supports such an interpretation of Article 52(1)(b). In the course of the Convention's drafting, the failure by a tribunal to apply the law chosen by the parties was given by the

[311] TANESCO's Memorial on Annulment, ¶158, footnote 109, referring to **Annex-4**, *Soufraki v. UAE*, ¶86.
[312] TANESCO's Memorial on Annulment, ¶158.
[313] TANESCO's Memorial on Annulment, ¶165.
[314] SCB HK's Counter-Memorial on Annulment, ¶344, footnote 403, referring to **CLA-136**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, May 16, 1986, ¶¶93-98.
[315] SCB HK's Counter-Memorial on Annulment, ¶¶335-336.
[316] SCB HK's Counter-Memorial on Annulment, ¶¶336, i), and 342-344.

chairman as an example of a manifest excess of power. However, a potential ground of annulment of "manifestly incorrect application of the law" was rejected by the drafters of the Convention.[317]

254. In this respect, SCB HK argues that when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law under Article 52(1)(b) of the Convention, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. In SCB HK's view, a contested interpretation of the applicable law is not reviewable in annulment proceedings.[318]

255. Consequently, SCB HK states that allowing TANESCO to challenge the Tribunal's findings on the basis of an error of law would undermine the finality of ICSID awards and the credibility of the ICSID annulment system. SCB HK argues that this is an obvious attempt to convince the Committee to second-guess the merits of the Tribunal's interpretation of Tanzanian law, and therefore should be rejected.[319]

256. SCB HK submits that even if the Committee is minded to accept TANESCO's complaint that the Tribunal misapplied or misinterpreted Tanzanian law so egregiously that it failed to apply the proper law, the standard for a finding of such a gross or egregious misinterpretation or misapplication is very high. It will only be satisfied where "no reasonable person" could accept such an interpretation.[320] SCB HK explains that such high standard poses a difficulty for TANESCO because its arguments as to the correct interpretation and application of Tanzanian law are completely without merit on any standard.[321]

The validity of the assignment and the registration requirement

[317] SCB HK's Counter-Memorial on Annulment, ¶339, footnotes 394-395, both referring to **CLA-125**, [Extract from] History of the ICSID Convention, Volume II, pages 851, 853-854.
[318] SCB HK's Counter-Memorial on Annulment, ¶338.
[319] SCB HK's Counter-Memorial on Annulment, ¶346, footnote 405, referring to **CLA-111**, *CDC v. Seychelles*, ¶35.
[320] SCB HK's Counter-Memorial on Annulment, ¶348, footnote 406, referring to **Annex-4**, *Soufraki v. UAE*, ¶86.
[321] SCB HK's Counter-Memorial on Annulment, ¶351.

257. Furthermore, SCB HK argues that TANESCO's position regarding the failure to apply the proper law conflates two separate points: (i) whether Clause 3.2.1 of the Security Deed effected a statutory assignment of the PPA under Section 25(6) of the Supreme Court of Judicature Act ("**SCJA**"),[322] and (ii) whether the assignment – statutory or not – effected by Clause 3.2.1 of the Security Deed was void by reason of the non-registration of the security under Section 79 of the Companies Ordinance.[323]

258. Regarding the first point – whether there was a statutory assignment – SCB HK states that this depends only on whether the requirements of Section 25(6) of the SCJA were satisfied. According to SCB HK, the assignment must be made in writing under the hand of the assignor and express written notice of the assignment must be given to the counterparty. SCB HK highlights that there is no registration requirement and affirms that the assignment of the PPA was absolute and not by way of charge only.[324]

259. Further, SCB HK states that TANESCO's counsel conceded at the hearing that the form of the assignment would comply with the SCJA in terms of meeting the formal requirements of a statutory assignment.[325]

260. In these circumstances, SCB HK argues that TANESCO's further attempts to resile from its concession and conflate the statutory assignment point with the registration point must be rejected. In SCB HK's opinion, TANESCO cannot agree before the Tribunal that Clause 3.2.1 effected a statutory assignment under Tanzanian law, and then complain that the Tribunal has failed to apply Tanzanian law in reaching that conclusion.[326]

261. SCB HK states that TANESCO's complaint, in its Memorial on Annulment, that the Tribunal had failed to apply Tanzanian law in finding that the assignment of the PPA under Clause 3.2.1 of the Security Deed was a statutory assignment within the meaning

[322] This term has been defined in the Award as: "Supreme Court of Judicature Act 1873".
[323] SCB HK's Rejoinder on Annulment, ¶182.
[324] SCB HK's Rejoinder on Annulment, ¶184, footnote 171, referring to **CLA-064**, Extract from the Supreme Court of Judicature Act 1873.
[325] SCB HK's Rejoinder on Annulment, ¶¶185-186; footnotes 172 and 173, referring to **C-468**, Transcript of Jurisdiction and Merits Hearing (March 2013 Hearing), Day 7, March 14, 2013, p. 163, line 13–p. 165, line 17; **C-452**, Transcript of Jurisdiction and Merits Hearing (March 2013 Hearing), Day 8, March 15, 2013, p. 84, line 9–p. 85, line 3.
[326] SCB HK's Rejoinder on Annulment, ¶187.

of Section 25(6) of the SCJA 1873, must be dismissed for two reasons.[327] First, because TANESCO's counsel conceded at the March 2013 Hearing that the assignment of the PPA was a statutory assignment within the meaning of Section 25(6) of the SCJA.[328] Second, because, in SCB HK's view, the assignment of the PPA satisfied the requirements of Section 25(6) of the SCJA, and thus, TANESCO's allegation that the assignment was not statutory is without merit.[329]

262. Consequently, SCB HK argues that TANESCO's complaint that the Tribunal failed to apply Tanzanian law, or egregiously misapplied Tanzanian law in deciding the statutory assignment point must be rejected.[330]

263. As to the second point – whether the assignment, statutory or not, effected by Clause 3.2.1 of the Security Deed was void by reason of the non-registration of the security under Section 79 of the Companies Ordinance – SCB HK argues that a finding by the Tribunal that Section 79 only voids registrable but unregistered security as against a liquidator, administrator or secured creditor (*i.e*. refusing to apply *Shinyanga*) cannot be characterised as a failure to apply Tanzanian law or an egregious misapplication of Tanzanian law since the better view is that the *Shinyanga* case was wrongly decided and does not represent Tanzanian law.[331]

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[327] SCB HK's Rejoinder on Annulment, ¶176, referring to TANESCO's Memorial on Annulment, ¶¶155-157.
[328] SCB HK's Rejoinder on Annulment, ¶179, i) and 180-187, footnote 172, referring to **C-468**, Transcript of Jurisdiction and Merits Hearing (March 2013 Hearing), Day 7, March 14, 2013, p. 163, line 13-p. 165, line 7: "MR DOUGLAS: I will try and find the provision. Whether it is a statutory assignment under section 25(6) of the Supreme Court Judicature Act. In other words, whether it is an absolute assignment, whether it has been made in writing under the hand of the assignor, and whether or not express notice has been given to the counterparty. That's the question I was focusing on. Because if it doesn't comply with the statutory regime for assignments, then it would be an equitable assignment and that would have other consequences. MR RANGE: And section 25(6) of the Supreme Court Judicature Act, that's the English Act as I recall? MR DOUGLAS: But it's the Act that applies in Tanzania. MR RANGE: Yes, there is similar language. MR DOUGLAS: I think there is a Property Law Act in England which replaced the original one, but the original one still applies in Tanzania. MR RANGE: The way I would answer that question is: yes, as a security assignment, it would meet so, far as we understand it, the requirements to be a legal assignment in that sense. So we don't create issues that aren't issues [Emphasis added by TANESCO]".
[329] SCB HK's Rejoinder on Annulment, ¶179, ii) and 188, referring to paragraphs 371 to 384 of SCB HK's Counter-Memorial on Annulment, explaining why clause 3.2.1 of the Security Deed effected a statutory assignment under Tanzanian law.
[330] SCB HK's Rejoinder on Annulment, ¶190.
[331] SCB HK's Rejoinder on Annulment, ¶¶171-173, footnote 166, referring to **C-473**, Opinion of Lord Hoffmann, ¶¶6-7.

264. During the March 2013 Hearing, SCB HK referred to Mr Zervos' report, its expert on Tanzanian law, who explained that English law is adopted with qualifications when needed in Tanzania under Section 2(3) of the JALA. This provision incorporates the Common Law doctrine of equity and statutes of general application enacted in England before July 22, 1920. This date is deemed to be the reception date of English law in Tanzania ("**Reception Date**"). According to Mr Zervos, when Tanzanian law is silent on a matter, one can resort to the common law to fill the gap.[332]

265. SCB HK states that the *Shinyanga* case directly contradicts the express language of Section 79, which provides only that a registrable but unregistered charge shall "be void against the liquidator and any creditor of the company".[333] SCB HK refers to its expert, Mr Zervos, who explained that *Shinyanga* was decided without reference to the English authorities before the Reception Date (like *Re Ehrmann Bros Ltd*). These authorities were binding on the Tanzanian court and provide that an unregistered charge is not void as against the whole world.[334]

266. According to SCB HK, TANESCO's argument for annulment on the basis that there was a failure to apply Tanzanian law (or an egregious misapplication of Tanzanian law) on the Section 79 point must fail in circumstances where TANESCO's counsel accepted at the March 2013 Hearing that Section 79 only voids a security as against a liquidator or administrator, but not against the whole world.[335] Therefore, SCB HK claims that having properly made the concession, TANESCO cannot now complain that the Tribunal failed

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[332] Transcript of the Hearing, Day 1, p. 111, line 7-p. 113, line 20.
[333] SCB HK's Rejoinder on Annulment, ¶171.
[334] SCB HK's Rejoinder on Annulment, ¶¶171-172; see also Transcript of the Hearing, Day 1, p. 111, line 7-p. 113, line 20.
[335] SCB HK's Counter-Memorial on Annulment, ¶¶363-369, footnote 432, quoting Mr Range, counsel for Tanesco, at the hearing on March 14, 2013, as follows: "[w]e are in a unique situation where if the administrator were appointed, or if the liquidator were appointed, the statute is clear that the security that isn't registered is void. It seems to me, if the security is void, then the issue does become: well, does the arbitration clause somehow survive or not the voiding of the security? […] [T]he reason in our post-hearing brief that we re-included the arguments with respect to the voiding of the security, if an administrator or a liquidator was appointed, is that we certainly anticipate that that issue is going to be arise. But technically speaking, right now where we are is simply the automatic stay in section 249. I don't think that we can argue that, until such time as a decision has been made about the administrator or liquidator, the statute, section 79 of the Companies Ordinance, or section 96 of the Companies Act, actually kicks in to void the security". [underline added by TANESCO]; SCB HK's Rejoinder on Annulment, ¶183, referring to ¶¶159-175 supra and SCB HK's Counter-Memorial on Annulment, ¶353-370.

to apply or egregiously misapplied Tanzanian law in correctly deciding the point in line with the concession and reaching the same conclusion.[336]

267. SCB HK states that even if the Committee ignores TANESCO's concession on the Section 79 point, the conclusion reached by the Tribunal when deciding that failure to register a charge does not void the charge against the whole world and thus that the assignment was not voided by Section 79 was correct on the merits.[337]

268. Additionally, SCB HK opposes TANESCO's expert's statement that the Tribunal did not make any reference to the Companies Ordinance or to *Shinyanga* in this respect and argues that the Tribunal did mention Section 79 of the Companies Ordinance and the *Shinyanga* case in its Decision on Jurisdiction, when delimiting the fourth issue addressed in the Decision, regarding the effects of the non-registration of the security interest, and later in its analysis of such matter.[338]

The winding-up procedure

269. SCB HK addresses TANESCO's complaint that the Tribunal failed to apply Section 172 of the Companies Ordinance which provides that in a winding up by the court, "any disposition of the property of the company" shall be void unless the court orders otherwise. According to SCB HK, TANESCO argues that this provision invalidated the assignment of the Facility Agreement from Danaharta to SCB HK in 2005, because at that time a minority shareholder's winding up petition ("**Winding Up Petition**") was pending against IPTL.[339]

270. SCB HK argues that to the extent TANESCO is suggesting that the Tribunal has failed to apply or egregiously misapplied Tanzanian law on the validity of the transfer of the loan, the argument must be rejected for the following reasons.[340]

[336] SCB HK's Rejoinder on Annulment, ¶¶159 and 163; In order to assist the Tribunal, SCB HK has set out in Appendix 3 a chronology of how the Section 79 point was argued by the parties before the Tribunal.
[337] SCB HK's Rejoinder on Annulment, ¶167.
[338] Transcript of the Hearing, Day 2, p. 98, line 9-p. 99, line 13.
[339] SCB HK's Rejoinder on Annulment, ¶191.
[340] SCB HK's Rejoinder on Annulment, ¶208.

271. First, SCB HK explains that the first time TANESCO questioned the validity of the transfer of the loan in these proceedings was in its Memorial on Annulment. According to SCB HK, TANESCO has not even attempted in its Reply on Annulment to engage with the fact that the point was not raised before the Tribunal during the jurisdiction and merits phase.[341] In SCB HK's view, TANESCO cannot complain that the Tribunal failed to apply or egregiously misapplied Tanzanian law on a point that was never raised before it.[342] SCB HK argues that, even if the argument had been before the Tribunal, it would have been rejected.[343]

272. Second, SCB HK explains that the Facility Agreement contained a non-exclusive English jurisdiction clause and was subject to English law. Thus, under private international law principles, the validity of the assignment of an English law contract is a question of English law.[344] In support of this argument, SCB HK refers to a case brought before the English High Court pursuant to the non-exclusive jurisdiction clause in the Facility Agreement, where Judge Flaux ruled that the assignment of the loan was valid and SCB HK is a creditor under the Facility Agreement.[345] SCB HK claims that TANESCO's attempt in this Annulment Proceeding to challenge the validity of the assignment in circumstances where the validity has already been confirmed by the English court pursuant to a non-exclusive English jurisdiction clause is meritless and must be rejected.[346]

273. Finally, SCB HK recalls that TANESCO claims that IPTL was in "a winding up by the court" in 2005 because Section 174(2) of the Companies Ordinance provides that a winding up shall be deemed to commence at the time the petition for winding up is presented. According to SCB HK, TANESCO's position is that IPTL had therefore been "temporarily wound up" since 2002 by reason of the 2011 Winding Up Order,

[341] SCB HK's Rejoinder on Annulment, ¶209; SCB HK's Counter-Memorial on Annulment, ¶¶393 to 394.
[342] SCB HK's Rejoinder on Annulment, ¶¶209-210.
[343] SCB HK's Rejoinder on Annulment, ¶195. Here, SCB HK refers to ¶¶389-392 and 395-398 of its Counter-Memorial where, according to SCB HK, it has explained why TANESCO's argument is without merit and so will not repeat its arguments in full. See also ¶¶196-206.
[344] SCB HK's Rejoinder on Annulment, ¶212.
[345] SCB HK's Rejoinder on Annulment, ¶212, footnote 196, referring to **C-458**, Flaux Judgment, ¶71; see also SCB HK's Counter-Memorial on Annulment, ¶¶71-78.
[346] SCB HK's Rejoinder on Annulment, ¶¶211-212.

notwithstanding the fact that the 2011 Winding Up Order was quashed in 2012.[347] SCB HK submits that this argument is wrong since Section 174(2) of the Companies Ordinance is a "relating back" provision, which operates retrospectively to invalidate certain property dispositions made after the winding up petition is presented in the event that a winding up order is made, but that, unless a winding up order is made, property dispositions are not invalidated.[348]

274. In this respect, SCB HK explains that in the present case, the Tanzanian Court of Appeal ruled that all proceedings in the conduct of the Winding Up Petition after the date of the Revised Administration Petition (*i.e.* September 17, 2009) were a "nullity" and the 2011 Winding Up Order was accordingly "revised, quashed and set aside". SCB HK thus submits that the quashing of the Winding Up Order means that there is nothing to trigger the operation of Section 174(2) of the Companies Ordinance. In support of this argument, SCB HK states that this was the conclusion reached by Judge Flaux in his Jurisdiction Judgment, who held that Section 172 could only apply to void a disposition "where there was a winding up order by the Court. There is no such extant Order by the Tanzanian court, the Order made by Judge Kaijage [the Winding Up Order] having been held to be a nullity by the CAT".[349]

275. In addition, SCB HK argues that TANESCO's submission regarding IPTL's property rests on a false premise and is misguided for two reasons.

276. First, the Tribunal did not, in fact, determine ownership of IPTL, because the Tribunal was not asked to decide, and did not decide, who owned or controlled IPTL. As proof of this, SCB HK calls the attention of the Committee to the fact that TANESCO remains unable to point to any passage in the Award in which the Tribunal considers and decides the legitimate owner of IPTL under Tanzanian law.[350]

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[347] SCB HK's Rejoinder on Annulment, ¶196, footnote 174, referring to **C-295**, Ruling of the Court of Appeal of Tanzania in the Revision Proceedings, December 17, 2012.
[348] SCB HK's Rejoinder on Annulment, ¶¶197-198.
[349] SCB HK's Rejoinder on Annulment, ¶199, footnote 179, referring to **C-409**, Judge Flaux Jurisdiction Judgment, ¶75.
[350] SCB HK's Rejoinder on Annulment, ¶¶215-216.

277. Second, the question of whether SCB HK can enforce the rights of IPTL under contracts entered into by IPTL in 1995 depends on whether the relevant contract was legally assigned in accordance with the governing law of the contract and that is a separate question from who owns IPTL. SCB HK states that the Tribunal held that the PPA, which was governed by Tanzanian law, was legally assigned to SCB HK under section 25(6) SCJA.[351]

278. SCB HK states that the consequence of the PPA being legally assigned to SCB HK was that SCB HK, as the legal owner of the benefit of the PPA, was entitled to recover sums due under the PPA from TANESCO without joining IPTL. Thus, SCB HK argues that since the question of ownership of IPTL was not before the Tribunal nor was it necessary to its Decision, it is beside the point whether the Tanzanian court is the only forum which is entitled to decide ownership.[352]

279. SCB HK recalls paragraphs 225 to 227 of TANESCO's Reply in which TANESCO quoted decisions from proceedings before the United States District Court for the Southern District of New York (which concerned VIP and SCB HK's parent company) in support of its position that the question of ITPL's ownership and/or who had the right to enforce rights on its behalf is a matter of Tanzanian Law.[353] The relevant quote from the New York court's decision is as follows: "[t]he focus of the parties' dispute is whether VIP relinquished its 30 percent interest in IPTL as collateral for a loan, now owned by a Standard Chartered subsidiary, made to IPTL. […] It appears that all facts relevant to this case occurred in the Republic of Tanzania, that all documents relevant to VIP's claim were executed in the Republic of Tanzania, and that the necessary parties and witnesses are located there. […] [T]he Court finds that the Republic of Tanzania is an available and adequate forum for VIP's suit and that 'in the interest of justice and all other relevant concerns the action would be best brought in' the Republic of Tanzania…"[354]

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[351] SCB HK's Rejoinder on Annulment, ¶219; see also SCB HK's Counter-Memorial on Annulment, ¶¶371-384.
[352] SCB HK's Rejoinder on Annulment, ¶¶220-222.
[353] SCB HK's Rejoinder on Annulment, ¶222, referring to TANESCO's Reply on Annulment, ¶¶225-227.
[354] TANESCO's Reply on Annulment, ¶225, footnote 216, referring to **Annex-95**, *VIP Engineering and Marketing Ltd. V. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order, September 10, 2013.

280. SCB HK argues that TANESCO misrepresents what the New York court said and invents a finding which the court did not make, in an attempt to re-write the court's decision.[355] SCB HK claims that the New York court did not make any ruling that the Tanzanian court was the only appropriate forum to determine the ownership of IPTL, much less any ruling that was binding on SCB HK (which was not a party to the proceeding).

281. Consequently, SCB HK argues that the Tribunal's decisions on these issues were correct. It claims that there is no basis for arguing that the law was misapplied, let alone misapplied to such a gross or egregious extent that it amounted to an excess of jurisdiction.[356] Thus, in SCB HK's view, TANESCO's allegations that there has been a misapplication of the applicable law in the three areas it identifies (the statutory assignment, the need for registration and the assignment under the alleged winding up procedure) are without merit on any standard.

iii) Analysis and Decision of the Committee

282. The drafting history of the ICSID Convention shows that a tribunal's failure to apply the proper law can constitute a manifest excess of powers, but that an erroneous application of the law cannot amount to an annullable error. There is no basis for an annulment due to an incorrect decision by a tribunal. This principle has been expressly recognised by many *ad hoc* committees.[357]

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[355] SCB HK's Rejoinder on Annulment, ¶¶223-225, footnote 188, referring to **R-171**, *VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order, September 10, 2013; **R-172**, *VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order, September 23, 2013; **R-173**, *VIP Engineering and Marketing Ltd. v. Standard Chartered Bank*, Case 1: 13-cv-04754-VM, Decision and Order, October 4, 2013. In Exhibit **R-171**, the New York Court's decision was as follows: "[t]he private interests in this case, including access to the relevant documents and witnesses, suggest that the Republic of Tanzania is the proper forum for this action. […] In short, the Court finds that the Republic of Tanzania is an available and adequate forum for VIP's suit and that 'in the interest of justice and all other relevant concerns the action would best be brought in' the Republic of Tanzania"; see also Appendix 4 to that memorial.

[356] SCB HK's Counter-Memorial on Annulment, ¶352.

[357] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶90, referring to ¶¶15 and 21 of the same document, which state: "15. Other suggestions were to add the words 'a serious misapplication of the law' or 'including the failure to apply the proper law' to the ground concerning excess of powers. In this connection, Chairman Broches remarked that 'a mistake in the application of the law would not be a valid ground for annulment of the award,' stating that '[a] mistake of law as well as a mistake of fact constituted an inherent risk in judicial or arbitral decision for which appeal was not provided.' However, the legal expert from Lebanon observed that if the parties had agreed to apply a particular law and the Tribunal in fact applied a different law, the award would violate the parties' arbitration agreement and could be annulled. […] 21. Chairman Broches

283. In regard to the law to be applied by a tribunal, Article 42(1) of the ICSID Convention provides as follows: "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the [t]ribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[358]

284. Therefore, the Committee finds, and *ad hoc* committees agree, that where the parties choose an applicable law, a disregard of this choice of law would be equivalent to a departure from the mandate conferred on a tribunal by the parties, and thus would amount to a manifest excess of powers. This is also the case when a tribunal acts *ex aequo et bono* without agreement of the parties to do so as required by the ICSID Convention.[359] However, *ad hoc* committees have taken different approaches on whether an error in the application of the proper law may effectively amount to non-application of the proper law.

285. In the present case, TANESCO maintains that the Tribunal failed to apply Tanzanian law to determine the validity of the assignment of IPTL's rights under the PPA and its lack of effectiveness due to SCB HK's failure to register its security interest in Tanzania, as ordered by Section 79 of the Companies Ordinance. According to TANESCO, under Tanzanian law, even if the assignment of the benefit of the PPA were made by way of statutory assignment (which it denies), such assignment would only be valid if it had been registered.

286. In the Committee's view, this argument does not stand for the following reasons.

287. As can be seen from the Decision on Jurisdiction, the Tribunal recognises as "common ground" between the Parties that the validity of the assignment of rights in the PPA must be determined in accordance with Tanzanian law.[360]

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confirmed during the meetings that failure to apply the proper law could amount to an excess of power if the parties had agreed on an applicable law. One proposal suggested adding the 'manifestly incorrect application of the law' by the Tribunal as a ground of annulment, but it was defeated by a vote of 17 to 8 [emphasis added]".

[358] ICSID Convention Article 42(1).

[359] ICSID Convention Article 42; **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶93, footnote 172.

[360] **Annex-1**, Decision on Jurisdiction, ¶126.

288. In its analysis of this issue, the Tribunal concluded that the assignment effectuated pursuant to Clause 3.2.1 of the Security Deed was a chose-in-action, and that, as such, it could be the object of a statutory assignment or an equitable assignment under Tanzanian law. The Tribunal explained that, if the assignment fulfilled the conditions for a statutory assignment, the assignee would acquire a legal right to the chose-in-action and could sue in its own name. If the assignment of the chose-in-action did not conform to the conditions for a statutory assignment, it was an equitable assignment and it was generally necessary to have the assignor joined as a claimant.[361]

289. To determine whether the assignment was a statutory assignment, the Tribunal conducted an analysis pursuant to Section 25(6) of the SCJA which is the applicable statute in Tanzania,[362] and identified that the main issues to be resolved were the following.

290. The first issue is whether a valid mortgage had been created in respect of the benefit of the PPA pursuant to Clause 3.2.1 of the Security Deed, such that there had been an effective transfer to SCB HK of the legal right to that benefit and all the remedies relating to that benefit by a statutory assignment, in accordance with Section 25(6) of the SCJA.[363]

291. It is clear to the Committee that the Tribunal analysed the Parties' arguments in relation to the nature of the security interest created pursuant to Clause 3.2.1 of the Security Deed, in light of the requirements for a statutory assignment under Section 25(6) of the SCJA. As a result, the Tribunal concluded that such requirements were fulfilled and that Clause 3.2.1 of the Security Deed was a valid statutory assignment of IPTL's rights under the PPA to SCB HK.[364]

292. The second issue the Tribunal went on to analyse were the consequences of its previous decision in relation to its jurisdiction which SCB HK asserted on the basis of the arbitration agreement in Clause 18.3 of the PPA. It stated that the security assignment

[361] **Annex-1**, Decision on Jurisdiction, ¶¶128-129.
[362] **Annex-1**, Decision on Jurisdiction, ¶¶130-131.
[363] **Annex-1**, Decision on Jurisdiction, ¶¶132.
[364] **Annex-1**, Decision on Jurisdiction, ¶¶141-151, footnote 147, referring to **C-468**, Mr Range's statement, Tr. March 14, 2013, page 165.

that SCB HK has over the benefit of the PPA conferred a more extensive range of rights in relation to the PPA than would be the case if Clause 3.2.1 of the Security Deed had given SCB HK merely an equitable charge over certain assets. It concluded that pursuant to Section 25(6) of the SCJA, SCB HK became the legal owner of rights arising under the PPA, and that, as such, it was entitled to invoke the arbitration agreement in Clause 18.3 of the PPA as a right that had been assigned to it and could bring proceedings against TANESCO without joining IPTL as a party to the action. The Tribunal thus concluded that it had jurisdiction over the Parties and the dispute.[365]

293. The third issue the Tribunal addressed was whether the security interest was required to be registered under Section 79 of the Companies Ordinance, in whole or in part.[366] The Tribunal analysed the arguments of the Parties on whether Clause 3.2.1 of the Security Deed was a charge on future book debts and/or a floating charge that was required to be registered under Section 79.[367] The Tribunal concluded that Clause 3.2.1 of the Security Deed created a charge over future book debts since the contractual payments to be made by TANESCO to IPTL under the PPA were not contingent debts but future debts that would have been entered into IPTL's books as book debts and thus that it had to be registered pursuant to Section 79 of Tanzania's Companies Ordinance.[368]

294. The fourth issue the Tribunal addressed were the consequences that follow if the security interest was required to be registered but was not. There was no dispute that the security interest was not, in fact, registered.[369] On this issue, the Tribunal first took into consideration Professor Goode's leading treatise *Principles of Corporate Insolvency Law*, which was quoted by the Tanzanian Court of Appeal in its judgment quashing the liquidation order against IPTL:

[365] **Annex-1**, Decision on Jurisdiction, ¶¶152-153. Specifically, the Tribunal explained that its jurisdiction extended in particular to the questions of whether there is a valid security assignment, whether the security interest had to be registered and whether SCB HK was entitled to step into the shoes of IPTL and assert rights against TANESCO under the PPA (since this later was an issue arising in connection with the PPA, covered by the wording of the arbitration clause).
[366] **Annex-1**, Decision on Jurisdiction, ¶154, footnote 149, referring to **CLA-10**, the Companies Ordinance.
[367] **Annex-1**, Decision on Jurisdiction, ¶¶154-168.
[368] **Annex-1**, Decision on Jurisdiction, ¶168.
[369] **Annex-1**, Decision on Jurisdiction, ¶¶169-183.

> "In [sic] should be borne in mind that registration is purely a perfection requirement designed to give notice to third parties; it is not a condition of validity of the charge, which remains fully enforceable against the company prior to winding up or administration. It follows that if the company does go into liquidation or administration the consequent avoidance of the unregistered charge has no impact on the charge to the extent that he has already realised his security or perfected it by seizure or judicial foreclosure or has otherwise obtained payment, for to that extent his security has been satisfied and there is nothing for him to enforce".[370]

295. Additionally, the Tribunal addressed case law referred to by TANESCO when analysing the consequences of the non-registration. Specifically, the Tribunal analysed the *Shinyanga* and the *Esberger & Son* cases, stating that:

> "Neither of these cases, however, assists [TANESCO] because they relate to the validity of a single security interest. In *Esberger*, a security interest over the title deeds to a parcel of land was deemed to be void because the interest was not registered in due time. There was no issue of severability raised in that case. Likewise, in *Shinyanga*, the issue was simply the validity of an unregistered debenture and the power of sale conferred by that debenture. No issue of severance was raised in that case. [TANESCO] accepted in oral submissions that there were 'no cases whatsoever in Tanzania on [the severance point]'".[371]

296. The Tribunal concluded that the failure to perfect a security interest does not invalidate other parts of the relevant instrument that do not require registration, since it was possible to sever one from the other. Therefore, the Tribunal decided that the right to bring arbitration proceedings against TANESCO to enforce its obligation under the PPA was clearly a valuable right that was not subject to registration and could be severed from

[370] **Annex-1**, Decision on Jurisdiction, ¶169.
[371] **Annex-1**, Decision on Jurisdiction, ¶174; see also Transcript of the Hearing, Day 2, p. 98, line 9-p. 100, line 14.

those interests that did require registration.[372] Accordingly, the Tribunal ruled that the registration issue would have no effect on the Tribunal's jurisdiction.[373]

297. In addition, the Tribunal concluded that the failure to register a charge over future book debts in relation to Clause 3.2.1 of the Security Deed did not have an effect on the relief requested by SCB HK in the proceedings, since the non-registration of a security interest did not invalidate the charge against the company, and also because, at that moment, no liquidator or administrator was appointed in respect of IPTL.[374]

298. With respect to the *Shinyanga* case, the Committee finds that, as can be seen from the Decision on Jurisdiction, the Tribunal was indeed aware of that case and analysed its content when addressing the effect of the non-registration. Thus, contrary to TANESCO's allegations, the Committee does not find a failure to apply the proper law exists in this respect.

299. It is clear to the Committee that the Tribunal: (i) determined the existence and validity of a statutory assignment of IPTL's rights under the PPA under Section 25(6) of the SCJA, the applicable statute in Tanzania;[375] (ii) concluded that it had jurisdiction to hear the Parties' dispute, taking into account its previous decision in light of Section 25(6) of the SJCA;[376] (iii) determined the need for registration of the security interest under Section 79 of Tanzania's Companies Ordinance;[377] and finally (iv) addressed the consequences of the non-registration of the security interest, taking into consideration Tanzanian case law, including the *Shinyanga* case.[378]

300. It is also clear to this Committee that the Tribunal, whenever it considered it necessary to determine whether it had jurisdiction and the extent of its jurisdiction, conducted its analysis and conclusions pursuant to Tanzanian law.

[372] **Annex-1**, Decision on Jurisdiction, ¶¶177-180.
[373] **Annex-1**, Decision on Jurisdiction, ¶¶181-183.
[374] **Annex-1**, Decision on Jurisdiction, ¶¶169-170.
[375] **Annex-1**, Decision on Jurisdiction, ¶151.
[376] **Annex-1**, Decision on Jurisdiction, ¶¶152-153.
[377] **Annex-1**, Decision on Jurisdiction, ¶168.
[378] **Annex-1**, Decision on Jurisdiction, ¶174.

301. The Committee notes that in some parts of its analysis, for example when analysing whether there was a valid statutory assignment,[379] the Tribunal quoted English doctrine. However, it did make clear that the reference to this doctrine was to a proviso in the English Law of Property Act 1925 which was identical to Section 25(6) of the SCJA. Therefore, the fact that the Tribunal had quoted English doctrine to support its interpretation of the first issue cannot be regarded as an application of English law. The Tribunal's analysis was always in light of Section 25(6) of the SCJA.

302. Thus, the Committee concludes that the Tribunal did apply Tanzanian law, the proper law, to decide the aforementioned matters regarding the assignment of IPTL's rights under the PPA, including its validity. Therefore, there was no manifest excess of powers by the Tribunal in this respect.

4) The existence of a manifest excess of power of the Tribunal by reconsidering its prior Decision on Jurisdiction and Liability, dated 12 February 2014

303. In this section, the Committee addresses only the Parties' arguments that are specifically concerned with the Tribunal's reconsideration as a reason for annulment under the manifest excess of powers ground and will not deal with general arguments regarding reconsideration. These general arguments are addressed in Section v. above. The Committee has taken these arguments into account in its analysis and decision.

i) TANESCO's arguments

304. TANESCO submits that in reconsidering its prior, binding Decision, the Tribunal disregarded the *res judicata* effect of the Decision and subverted the express provision in Article 53(1) of the Convention and thus, manifestly exceeded its powers.[380]

[379] **Annex-1**, Decision on Jurisdiction, ¶¶144-147.
[380] TANESCO's Memorial on Annulment, ¶¶127-129.

305. According to TANESCO, the Tribunal accepts (at paragraph 318 of the Award) that decisions (although not considered *res judicata* upon the parties or other Contracting States outside the proceedings) are binding within the scope of the proceedings.[381]

306. TANESCO recalls that, as confirmed by Prof. Reinisch in his opinion, it is not by accident that the ICSID Convention "does not allow for any review mechanisms concerning interim decisions", but that it intentionally restricts them to final awards (into which preceding decisions, if any, have to be incorporated), in order to avoid the circumstance of opening endless possibilities of one party to frustrate or delay the proceedings. That was confirmed by *ConocoPhillips*.[382] Thus, TANESCO argues that decisions, whether on jurisdiction or the merits, "are meant finally to settle a subset of issues that are later incorporated in the final award, and may then, and only then, be subject to review as part of the award",[383] and have therefore *res judicata* effects.[384]

307. Additionally, TANESCO submits that the Tribunal (at paragraph 318 of the Award), when stating that if the Decision was *res judicata* then, by analogy with Article 51, "it might be reopened in defined circumstances", was writing itself a new rule, without explaining on what basis it purported to apply by analogy a rule which explicitly applies only to final awards. TANESCO states that the Tribunal did not provide an explanation because there can be no basis for the Tribunal to apply Article 51 by analogy to decisions and that its attempt to do so was a manifest excess of its powers.[385] TANESCO states that if SCB HK had any issue with the award or the decision, it should have sought revision of the Award under Article 51.[386]

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[381] TANESCO's Memorial on Annulment, ¶130, footnote 90, where it stated that: "[t]he intention that rulings of a tribunal should be binding, is underlined by the travaux preparatoires…"; **Annex-60**, [Extract from] History of the ICSID Convention; see also ¶318 of the Award: "318. The Tribunal is of the view that it is incorrect to characterize the decisions of ICSID tribunals, as opposed to their awards, as *res judicata*. They are binding within the scope of the proceedings but do not impose obligations upon the parties or other Contracting States outside the proceedings as is the case with awards that are *res judicata*…".
[382] TANESCO's Reply on Annulment, ¶¶77-78, footnote 76, referring to Legal Opinion of August Reinisch, ¶180.
[383] TANESCO's Reply on Annulment, ¶¶77-78, footnotes 76, referring to Legal Opinion of August Reinisch, ¶180, and footnote 78, referring to **Annex-21**, *ConocoPhillips v. Venezuela*, ¶18.
[384] TANESCO's Reply on Annulment, ¶75.
[385] TANESCO's Memorial on Annulment, ¶142.
[386] TANESCO's Reply on Annulment, ¶98.

308. Furthermore, TANESCO objects to SCB HK's statement that "the issue of whether SCB HK had the relevant knowledge… is a matter going to the substance of the Award". TANESCO explains that, in order to ascertain whether the Tribunal manifestly exceeded its powers or seriously departed from a fundamental rule of procedure in reconsidering the Award, it is *de facto* necessary to ascertain what SCB HK did or did not know prior to the Decision.[387]

309. Finally, in light of TANESCO's arguments set out above in chapter V, and specifically because, according to TANESCO, the Tribunal reconsidered its Decision on the same facts and in disregard of solid legal precedents, the Tribunal's reconsideration of the Decision on Jurisdiction clearly met the standard of manifest excess of powers thus, the Award should be annulled.[388]

ii) SCB HK's arguments

310. SCB HK recalls that it has been accepted by numerous *ad hoc* committees that the requirement of a "manifest" excess of powers will only be satisfied if it is obvious, without deeper analysis, that a tribunal lacked or exceeded jurisdiction, but that if "reasonable minds" might differ as to whether the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41.[389] SCB HK notes in this regard that "reasonable minds" continue to debate the interaction between the principle of *res judicata* and the power of an ICSID tribunal to reconsider a decision or award.[390] SCB HK refers to a commentary on the *ConocoPhillips v.*

[387] TANESCO's Reply on Annulment, ¶35, footnote 28, referring to SCB HK's Counter-Memorial on Annulment, ¶425.
[388] TANESCO's Reply on Annulment, ¶¶56 and 95.
[389] SCB HK's Counter-Memorial on Annulment, footnote 319, referring to **Annex-71**, *Azurix v. Argentina*, ¶68; **Annex-18**, *Total S.A. v. Argentina*, ¶243; **CLA-105**, *Daimler Financial Services AG v. Argentina*, ¶186; **CLA-119**, *Continental Casualty Company v. Argentina*, ¶87; **CLA-120**, *Enron v. Argentina*, ¶69.
[390] SCB HK's Counter-Memorial on Annulment, ¶302, footnotes 342 and 343, referring to **Annex-21**, *ConocoPhillips v. Venezuela*; **CLA-132**, Charles N. Brower and Paula F. Henin, "Chapter 5: Res Judicata", in Building International Investment Law: The First 50 Years of ICSID (Kinnear, Fischer, et al., eds) Kluwer Law International 2015) ¶¶55 at 68; **CLA-133**, Tobia Cantelmo, "The Inherent Power of Reconsideration in Recent ICSID Case Law", Journal of World Investment & Trade 18 (2017) ¶232 (finding that "the most sensible position, recently taken by the ICSID Tribunal in SCB HK v. Tanesco – and one that still promotes judicial economy – is to recognize a limited power of reconsideration during the period until a final judgment has been rendered"); **CLA-134**, Lisa M Bohmer, "Finality in ICSID Arbitration Revisited" (2016) 31(1) ICSID Review FILJ 236; **CLA-135**, Uchkunova and Dimitrov", Standard Chartered Bank (Hong Kong) v. TANESCO: The Tribunal's Power to Reconsider Its Previous Decisions", Kluwer Arbitration Blog, January 12, 2017 (available

Venezuela case, which states that: "…Charles N. Brower and Paula F. Henin have observed that: '[w]hile it appears to the authors that Professor Abi-Saab's position [in favour of reconsideration] was, under the specific circumstances of the case under review, more sensible than the majority's reasoning and conclusions, both approaches have legitimate appeal. In the absence of a doctrine of binding precedent in international arbitration, it remains to be seen which of these two approaches will be followed by other ICSID tribunals in the future'".[391]

311. In such circumstances, SCB HK argues that an excess of power grounded upon a tribunal's differing view as to its power to reconsider a decision in light of *res judicata* principles is not "manifest".[392]

312. As to TANESCO's allegations that reconsideration is contrary to the express wording of the Convention, SCB HK submits that the Convention is silent on the question of reconsideration of decisions, and that Article 53(1), that TANESCO refers to in support of its assertions, is referring to an award and not a decision.[393]

313. SCB HK argues that TANESCO, after having had its objections to reconsideration rejected by the Tribunal, now seeks to raise them again before the Committee alleging a "manifest excess of powers" in an attempt to appeal against the substantive findings of the Tribunal.[394]

314. According to SCB HK, an examination of the relevant passages in TANESCO's Reply on Annulment demonstrates that TANESCO is seeking to re-open the substantive factual findings of the Tribunal and to reargue its case on the state of SCB HK's knowledge, and whether SCB HK was negligent.[395]

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at http://kluwerarbitrationblog.com/2017/01/12/standard-chartered-bank-hong-kong-v-tanesco-tribunals power-reconsider-previous-decisions).

[391] SCB HK's Counter-Memorial on Annulment, ¶302, footnote 343.

[392] SCB HK's Rejoinder on Annulment, ¶120.

[393] SCB HK's Counter-Memorial on Annulment, ¶305, footnote 345, referring to TANESCO's Memorial on Annulment, ¶129.

[394] SCB HK's Counter-Memorial on Annulment, ¶315.

[395] SCB HK's Rejoinder on Annulment, ¶115, footnote 118, referring to TANESCO's Reply on Annulment, ¶¶125-154.

315. Finally, and recalling its arguments set out in chapter V, SCB HK submits that a tribunal has the power to reconsider its decisions under specific limited circumstances, *i.e.* TANESCO's misrepresentation of the facts before the Tribunal in the Arbitration Proceeding, and thus, that TANESCO's allegation under the manifest excess of powers ground due to the Tribunal's reconsideration of the Decision must be rejected.[396]

iii) Analysis and Decision of the Committee

316. The Committee notes that TANESCO's main arguments for alleging the existence of a manifest excess of powers by the Tribunal when it reconsidered its Decision on Jurisdiction are: (i) the Tribunal subverted the express wording of Article 53(1), disregarding the *res judicata* character of decisions; (ii) the Tribunal "attempted" to apply Article 51 of the Convention by analogy, when there is no basis for doing so; and (iii) the Tribunal's reconsideration was made in disregard of solid legal precedents.

317. To address these questions, the Committee first recalls its previous decision in chapter V regarding the Tribunal's power to reconsider the Decision on Jurisdiction.

318. In that chapter, the Committee followed the Tribunal's reasoning that neither the ICSID Convention nor the ICSID Arbitration Rules explicitly allow or disallow reconsideration of jurisdictional decisions and that an analysis as to whether the existing provisions of the ICSID Convention and the Arbitration Rules provide tribunals with the power to reopen prior determinations before the issuance of the final award was needed.

319. When conducting the required analysis, the Tribunal considered whether decisions in an arbitration proceeding have *res judicata* effect to be of crucial importance. It concluded that, despite the fact that decisions of tribunals are binding within the scope of the proceedings, this does not make them *res judicata*. The Tribunal referred to procedural orders and provisional measures as examples of decisions that are subject to revision, even though neither the ICSID Convention nor the Arbitration Rules expressly provide for this. The Committee shares this view.

[396] SCB HK's Counter-Memorial on Annulment, ¶333.

320. The Tribunal found that, even if the conclusion were that decisions have *res judicata* status, then, by analogy with Article 51 of the Convention, they might be reopened in defined circumstances. If they were not *res judicata,* then *a fortiori* they could be reopened without the constrains of the requirements of Article 51.[397]

321. In light of the above, the Tribunal decided to reconsider the Decision on Jurisdiction basing its reasoning on the *Kompetenz-Kompetenz* principle as expressed in Articles 41 and 44 of the Convention. In the Committee's view, ICSID Arbitration Rules 41(1) and 41(2) are simply more detailed articulations of the *Kompetenz-Kompetenz* principle enshrined in Article 41 of the ICSID Convention. The Tribunal correctly identified its power to rule on its own competence, including the power to reconsider prior jurisdictional decisions, as provided by Articles 41(1) and 44 of the ICSID Convention, ICSID Arbitration Rules 41(1) and 41(2).

322. The Committee finds that the Tribunal conducted a thorough examination of the *res judicata* character of decisions. Only after having analysed the provisions of the ICSID Convention, the Arbitration Rules and case law submitted by the Parties (such as *ConocoPhillips v. Venezuela,* as well as the dissenting opinion in that case and *Pac Rim v. El Salvador*), the Tribunal concluded that they did not have that character.

323. The Committee recalls the requirement that for any excess of powers to be "manifest": it must be obvious without deeper analysis that a tribunal exceeded its powers. However, if "reasonable minds" differ as to the power of an ICSID tribunal to reconsider a prior decision, the tribunal's exercise of its power under Article 41 of the Convention cannot constitute a manifest excess of powers. Currently, there exist opposing views about a tribunal's power to reconsider a decision and the applicability of the *res judicata* principle.[398] This is evidenced by the *Burlington* case and the dissenting opinion of Professor Georges Abi-Saab in the *ConocoPhillips* case which demonstrate that the views of arbitral tribunals regarding the power of reconsideration of decisions are under debate.

[397] **Annex-1**, Award, ¶318.
[398] SCB HK's Rejoinder on Annulment, ¶120; As explained in SCB HK's Counter-Memorial on Annulment, ¶¶265-266 and 302.

324. The Committee is of the view that the reconsideration of the Decision did not disregard the *res judicata* principle, nor undermine Article 53 of the Convention, since that provision expressly establishes that it applies to awards only, not to decisions.

325. The Tribunal made reference to Article 51 when determining under what circumstances reconsideration of the Decision would be justified. The Committee notes that the Tribunal did not "apply" Article 51 of the Convention, but only turned to it for guidance. The Tribunal explained specifically that it could take this Article into consideration but was not bound by it. Under these circumstances, the Committee is of the view that the reference made by the Tribunal to Article 51 does not amount to an excess of powers by the Tribunal, and even less to an excess that is manifest.

326. Further, the Committee is mindful of TANESCO's assertions that the Tribunal reconsidered the Decision on Jurisdiction in disregard of solid legal precedents, which TANESCO claims support its argument as to the Decision having *res judicata* effect. Specifically, the Tribunal examined two cases directly on point: *ConocoPhillips v. Venezuela* and *Perenco v. Ecuador*. The Tribunal analysed these decisions in some detail, disagreeing with some of the points made by the two tribunals.

327. The Committee is of the view that it is desirable for ICSID arbitral tribunals to endeavour to build a coherent case law (*jurisprudence constante)* and that it is common practice that tribunals take into account their peers' awards and decisions. It is also undeniable that this case law does not constitute binding precedents for other arbitral tribunals.[399] In this case, the Tribunal followed the common practice of taking into account ICSID precedents. The Committee finds no reason for this "disregard" of precedents to be an excess of powers.

328. Finally, SCB HK argues that an examination of the relevant passages in TANESCO's Reply demonstrates that TANESCO is seeking to re-open the substantive factual findings

[399] TANESCO's Reply on Annulment, ¶93.

of the Tribunal and to reargue its case on the state of SCB HK's knowledge, and on whether SCB HK was negligent.[400]

329. The state of knowledge of SCB HK and whether it was negligent during the Arbitration Proceeding, are matters of appreciation of evidence and of facts which were to be determined by the Tribunal. It is not for this Committee to enter into a review of the substantive findings reached by the Tribunal in this regard.[401]

330. For all the above-mentioned reasons, the Committee concludes that there was no manifest excess of powers by the Tribunal when it reconsidered its Decision on Jurisdiction. Therefore, the Committee finds no reason why the Award should be annulled as a consequence of the reconsideration of the Decision.

5) The existence of a manifest excess of power of the Tribunal by assuming jurisdiction over the relationship between SCB HK and IPTL under the Facility Agreement, allowing SCB HK to step into the shoes of IPTL and gain standing in this proceeding

i) TANESCO's arguments

331. TANESCO calls the Committee's attention to the fact that Article 19.4 of the PPA states that the PPA "shall be governed by, and construed in accordance with, the laws of Tanzania". It also points out that SCB HK acknowledged Tanzanian law as being the applicable law pertaining to the assignment, and the Tribunal in its Decision on Jurisdiction recognised this as well.[402]

332. TANESCO argues that, although SCB HK acted as Security Agent under the multipartite financing arrangements and under the Security Deed, it failed to register its asserted security interest with Tanzania's Registrar of Companies, as required by Tanzanian law,

[400] SCB HK's Rejoinder on Annulment, ¶115, footnote 118, referring to TANESCO's Reply on Annulment, ¶¶125-154.
[401] **Annex-1**, Award, ¶¶335-341.
[402] TANESCO's Memorial on Annulment, ¶119, footnote 86, referring to **Annex-58**, Request for Arbitration, ¶56.

being the law governing the PPA.[403] Thus, according to TANESCO, SCB HK is not a valid assignee of IPTL's rights or, in any case, cannot enforce any such rights against TANESCO, since the failure to register the assignment of the security voided the assignment and precluded SCB HK from enforcing any rights under the PPA.[404]

333. TANESCO emphasises that the PPA was the sole agreement which it entered into.[405]

334. In this respect, TANESCO recalls that allowing a third party to arbitrate even though it has no standing, amounts to a manifest excess of powers,[406] and argues that it is clear, too, from the *travaux preparatoires* to the Convention, that the absence of jurisdiction was central to the grounds for annulment.[407]

335. Therefore, TANESCO states that the Tribunal manifestly exceeded its jurisdictional powers by allowing SCB HK to bring proceedings against it. According to TANESCO, SCB HK unlawfully instigated and pursued this arbitration on an unfounded premise that a security interest automatically grants a right to step into IPTL's shoes and claim amounts allegedly owed to IPTL under the PPA directly against TANESCO.[408]

336. In addition, TANESCO points out that in its Decision on Jurisdiction, the Tribunal determined that it could make a declaration as to any amounts owed by TANESCO to IPTL, but that it could not make an order requiring TANESCO to pay any such amounts to SCB HK independently of IPTL. According to TANESCO: "[i]t follows that the

[403] TANESCO's Memorial on Annulment ¶118.
[404] TANESCO's Memorial on Annulment ¶¶118-120; TANESCO's Reply on Annulment, ¶188 (b).
[405] TANESCO's Memorial on Annulment ¶118.
[406] TANESCO's Memorial on Annulment, ¶121, footnote 87, referring to **Annex-59**, *Occidental Petroleum v. Ecuador*, ¶ 264: "protected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party, and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To hold the contrary, would open the floodgates to an uncontrolled expansion of jurisdiction *rationae personae*, beyond the limits agreed by the States when executing the treaty".
[407] TANESCO's Memorial on Annulment, ¶122, footnote 88, quoting **Annex-60**, [Extract from] History of the ICSID Convention, Vol. II, page 423: "[t]he CHAIRMAN said that a number of suggestions had been made with respect to the drafting of Section 13. It had been suggested that the ground for declaring an award invalid in Section 13(1)(a) should read 'that the Tribunal has no jurisdiction'. It had also been suggested that in Section 13(1)(c) the words 'a serious departure from the principles of natural justice…' or 'a serious misapplication of the law…' should be added".
[408] TANESCO's Memorial on Annulment, ¶117, footnote 85, referring to **Annex-58**, Request for Arbitration, ¶¶9,47, 49-50, 54, 58-59 and 67.

registration issue is irrelevant so long as the Tribunal confines itself to giving declaratory relief, which the Tribunal is obliged to do in the circumstances of this case".[409]

337. TANESCO points out that, by contrast, in the Award the Tribunal held that it had jurisdiction to make an order for payment because, "the possibility of IPTL being placed in liquidation seems much more remote…"[410] and TANESCO "…had agreed with IPTL / PAP to pay the equivalent of the full amount claimed by SCB HK in the tariff dispute and the Escrow Account had been emptied".[411] However, TANESCO recalls that IPTL being placed into liquidation was only ever a possibility, and the process in Tanzania was complex. TANESCO states that it is unclear how remote a possibility the liquidation of IPTL was considered by the Tribunal to be when making its Decision, and how much more remote the Tribunal considered it became in light of the alleged "new" facts; or why this was considered a ground to reverse its previous decision on jurisdiction.[412]

338. According to TANESCO, the reversal of its position, in circumstances where it had previously made clear that it did not have jurisdiction, amounts to a manifest excess of powers on behalf of the Tribunal.[413] TANESCO argues that the Tribunal's failure to apply Tanzanian law resulted in it wrongfully assuming jurisdiction under the PPA.[414]

ii) SCB HK's arguments

339. According to SCB HK, TANESCO's arguments appear to be: (i) the Tribunal was wrong to allow SCB HK to bring a direct claim against TANESCO in its capacity as assignee of the PPA;[415] (ii) the Tribunal was wrong to assume jurisdiction between SCB HK and IPTL under the Facility Agreement;[416] and (iii) the Tribunal was wrong to reconsider its Decision that it lacked jurisdiction to order the payment to SCB HK of the outstanding sum under the PPA.[417]

[409] TANESCO's Memorial on Annulment, ¶¶123-124, footnote 89, **Annex-1**, Decision on Jurisdiction, ¶183.
[410] TANESCO's Memorial on Annulment, ¶125, referring to **Annex-1**, Award, ¶355.
[411] TANESCO's Memorial on Annulment, ¶125, referring to **Annex-1**, Award, ¶355.
[412] TANESCO's Memorial on Annulment, ¶125.
[413] TANESCO's Memorial on Annulment, ¶126.
[414] TANESCO's Reply on Annulment, ¶¶188-189.
[415] SCB HK's Counter-Memorial on Annulment, ¶280, i.
[416] SCB HK's Counter-Memorial on Annulment, ¶280, iii.
[417] SCB HK's Counter-Memorial on Annulment, ¶280, ii.

340. As to the Tribunal wrongly allowing SCB HK to bring a direct claim against TANESCO, SCB HK considers that the decision of the Tribunal was a straightforward application of the rules of assignment, and that these conclusions were reached as a result of the correct application of Tanzanian law.[418]

341. In this regard, SCB HK states that the findings which supported the Tribunal's decision that SCB HK was entitled to bring a direct claim against TANESCO are as follows.[419]

342. First, SCB HK argues that the assignment of the PPA from IPTL to the Security Agent (now SCB HK) was a statutory assignment within the meaning of 25(6) of the SCJA, the legislation in force in Tanzania, and stresses that this point was accepted by TANESCO's counsel at the March 2013 Hearing. According to SCB HK, the effect of the statutory assignment was that it took the legal benefit of the PPA, including the right to receive payments under the PPA and the right to invoke the arbitration agreement contained in the PPA without joining IPTL to the Arbitration Proceeding.[420]

343. Second, SCB HK states that the failure to register the charge on book debts meant that the charge was void against a liquidator or administrator under Section 79 of the Companies Ordinance, and argues that, since IPTL was not in liquidation or administration, the charge remained valid.[421]

344. Finally, SCB HK claims that in any event, even if IPTL were in liquidation or administration, the registration requirement applied to the charge on book debts, not the entire bundle of security interests granted by the assignment of the PPA. SCB HK's right to arbitrate under the PPA was severable from any rights which were invalidated by the registration requirement, and thus remained valid.[422]

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[418] SCB HK's Counter-Memorial on Annulment, ¶¶282-284; Here, SCB HK sets forth the findings which, according to it, supported the Tribunal's decision as to SCB HK's being entitled to bring a direct claim against TANESCO.
[419] SCB HK's Counter-Memorial on Annulment, ¶283.
[420] SCB HK's Counter-Memorial on Annulment, ¶283, (i).
[421] SCB HK's Counter-Memorial on Annulment, ¶¶283, (ii), and 284.
[422] SCB HK's Counter-Memorial on Annulment, ¶283, (iii).

345. SCB HK argues that TANESCO has not identified any flaws in the Tribunal's reasoning, save that it complains that the failure to register the security interest invalidated the assignment.[423]

346. SCB HK also argues that TANESCO cites an extract from *Occidental Petroleum v. Ecuador* in paragraph 121 of its Memorial on Annulment, which, if read in isolation, may suggest that the right to arbitrate under the ICSID Convention cannot be assigned.[424] SCB HK argues that, if this is TANESCO's submission, then the submission is wrong.[425] SCB HK explains that the case was making a different point, namely "that the nationality restrictions under BITs cannot be evaded by bringing a claim in the name of the legal owner in respect of an investment which is beneficially owned by a national of a third state not protected by the BIT".[426]

347. Therefore, SCB HK states that despite the impression that may have been created in TANESCO's submissions, there was no suggestion in *Occidental Petroleum* that an arbitration clause (or the right to arbitrate under the Convention) cannot be assigned.[427]

348. As to SCB HK's claim that TANESCO's submission is that the Tribunal has assumed jurisdiction between IPTL and SCB HK under the Facility Agreement by allowing SCB

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[423] SCB HK's Counter-Memorial on Annulment, ¶284.
[424] See ¶334 supra.
[425] SCB HK's Counter-Memorial on Annulment, ¶286.
[426] SCB HK's Counter-Memorial on Annulment, ¶287, footnote 329, **Annex-59**, *Occidental Petroleum v. Ecuador*, ¶¶259 and 262-264: "259. In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee. […] 262. The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument. 263. This subjective limitation of ICSID jurisdiction is a natural consequence of international investment law. Arbitral tribunals are not courts of justice holding unfettered jurisdiction. The role of arbitral tribunals is not to redress torts worldwide. Arbitral tribunals are instruments created by and subject to the consent of States, as formalized in the relevant instrument, and are only empowered to adjudicate disputes between protected investors and consenting States. Other disputes are outside their remit. Investors cannot expand the jurisdiction *ratione personae* of arbitral tribunals by executing private contracts with third parties. 264. Specifically, protected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To hold the contrary would open the floodgates to an uncontrolled expansion of jurisdiction *ratione personae*, beyond the limits agreed by the States when executing the treaty. [underline added by TANESCO]".
[427] SCB HK's Counter-Memorial on Annulment, ¶287.

HK to claim directly against TANESCO in its capacity as the assignee of the PPA, in SCB HK's view, this submission is wrong.[428] It explains that, in the Decision on Jurisdiction, the Tribunal indicated that it could not make the order sought by SCB HK since determining the amount owing between IPTL and SCB HK would involve a determination of the parties' rights under the Facility Agreement, rather than a determination of TANESCO's rights and SCB HK's rights (as assignee) under the PPA.[429]

349. As to the Tribunal wrongly reconsidering its Decision that it lacked jurisdiction to order the payment to SCB HK of the outstanding sum under the PPA, SCB HK argues that the Decision on this point is the result of the fact that in the subsequent phase of the arbitration, SCB HK instead sought an order for payment of the full amount due under the PPA, as it was entitled to do under the assignment of the PPA.[430] SCB HK states that in the Award, the Tribunal made an order that TANESCO pay to SCB HK the sum owing under the PPA. It did not order TANESCO to pay a sum which depended on the amount owing between IPTL and SCB HK under the Facility Agreement.[431]

350. SCB HK argues that this was a straightforward application of assignment rules, which permit the legal assignee of a contract to recover sums owing under the contract from the debtor, without the need to join the assignor/original creditor. In addition, SCB HK states that, as was clearly explained by Lord Hoffmann in his expert evidence, such an order does not involve an adjudication of rights between the assignor and the assignee. In SCB HK's view, it is noteworthy that TANESCO did not adduce expert evidence to challenge Lord Hoffmann's evidence.[432]

iii) Analysis and Decision of the Committee

[428] SCB HK's Counter-Memorial on Annulment, ¶¶288 and 291.
[429] SCB HK's Counter-Memorial on Annulment, ¶292, footnote 330, referring to **Annex-1**, Decision, ¶¶239, and 243-244.
[430] SCB HK's Counter-Memorial on Annulment, ¶293.
[431] SCB HK's Counter-Memorial on Annulment, ¶294.
[432] SCB HK's Counter-Memorial on Annulment, ¶294, footnote 332, referring to **C-473**, Opinion of Lord Hoffmann, ¶¶8-10.

351. In the Decision on Jurisdiction,[433] the Tribunal explicitly declared that it did not have jurisdiction over the relationship between SCB HK and IPTL which arose under the Facility Agreement.[434] Therefore, it was not in a position to make an order determining what amount was allegedly owed by IPTL to SCB HK.

352. In the Decision, the Tribunal decided that: (i) it had jurisdiction over TANESCO and SCB HK as the assignee of IPTL's rights by virtue of the PPA,[435] and (ii) that it was able to make a declaration of any amount owing by TANESCO to IPTL to which SCB HK had a claim as assignee of all of IPTL's rights.[436] The Tribunal explained that, by restricting itself to making a declaration of the amount owing by TANESCO under the PPA and not making any order for payment of monies, it left open the question of priority amongst creditors in domestic court. According to the Tribunal, an order that TANESCO pay a specific sum to SCB HK would have potentially interfered with the question of priority amongst creditors, which was a matter for a liquidator and Tanzanian courts to decide. By contrast, a declaration that TANESCO owes a specific sum under the PPA left to the Tanzanian courts any question of priority amongst creditors.[437]

353. In the Award, the Tribunal concluded, among other matters, that it had jurisdiction to reopen its Decision on Jurisdiction, and, in addition to making a declaration of the amount owing by TANESCO to SCB HK, it would also make an order for payment of such amount.[438]

354. Based on the above, the Committee is not persuaded that the Tribunal assumed jurisdiction over the relationship between SCB HK and IPTL under the Facility Agreement. Both in its Decision on Jurisdiction and in its Award, the Tribunal concluded

[433] **Annex-1**, Decision on Jurisdiction, ¶¶239-245.
[434] **Annex-1**, Decision on Jurisdiction, ¶244.
[435] **Annex-1**, Decision on jurisdiction, ¶244.
[436] **Annex-1**, Decision on Jurisdiction, ¶245.
[437] **Annex-1**, Decision on jurisdiction, ¶¶240-241.
[438] Additionally, the Tribunal made the following declarations: (i) that amounts paid by TANESCO into the Escrow Account did not discharge TANESCO's obligations under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK, (ii) that payment out of the Escrow Account to IPTL/PAP did not discharge TANESCO's obligation to SCB HK under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK, and (iii) that payments made to IPTL/PAP since August 2013 do not discharge TANESCO's obligation to SCB HK under the PPA and thus cannot be used to reduce the amount that TANESCO owes SCB HK.

that the sum owed by TANESCO was under the PPA. When it made a declaration for payment of this amount in favour of SCB HK, it was also under that agreement, as a result of a straightforward application of assignment rules, which permit the legal assignee of a contract to recover sums owing under the contract from the debtor, without the need to join the assignor/original creditor.

355. Therefore, the Committee concludes that the Tribunal did not order TANESCO to pay a sum which depended on the amount owing between IPTL and SCB HK under the Facility Agreement.

356. The Committee now turns to the standard of a manifest excess of power as defined in Section V.B (1). It does not find an "excess" and even less an excess that is "manifest" regarding the Tribunal's power to decide on its own jurisdiction and to exercise its power accordingly. The Tribunal restricted itself to act within the confines of the PPA and the rights and obligations assigned with regard to the PPA. Thus, the Committee finds no reason to conclude that the Award should be annulled due to a wrong exercise of jurisdiction by the Tribunal under the Facility Agreement.[439]

357. Whether the reconsideration of the Tribunal's Decision on Jurisdiction amounted to a manifest excess of powers under which the Award ought to be annulled, was dealt with as a preliminary issue. The Committee concluded that the Tribunal had the power to reconsider its prior Decision on Jurisdiction and thus, that the reconsideration did not amount to a manifest excess of power.[440] In addition to the previous, the Committee hereby concludes that TANESCO's claim that the Tribunal's reconsideration of its position to order payment (and therefore its jurisdiction to do so) was not a manifest excess of powers.

VI.C Serious departure from a fundamental rule of procedure

358. According to TANESCO, certain procedural conduct by the Tribunal *vis-à-vis* TANESCO demonstrates a failure of the Tribunal to treat TANESCO in an impartial and

[439] **C-473**, Opinion of Lord Hoffmann, ¶¶8-10.
[440] See ¶¶150-173 and 316-330 supra.

equal fashion.[441] TANESCO states that this conduct consists of: (i) the Tribunal's reconsideration of the Decision on Jurisdiction; (ii) failure to give TANESCO a proper opportunity to brief SCB HK's request for reconsideration; and (iii) failure to apply basic rules on the burden of proof.

1. The existence of a serious departure from a fundamental rule of procedure by improperly reconsidering the Decision on Jurisdiction

i) TANESCO's arguments

359. In order to establish what rules of procedure are considered to be fundamental, TANESCO refers to the *Total S.A. v. Argentina ad hoc* committee, which, as quoted by TANESCO, stated that "[w]ith respect to the rules of procedure that are to be considered fundamental, the Committee considers that they are the rules of natural justice *i.e.*, rules concerned with the essential fairness of the proceeding.… [These] include: (i) the equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial [t]ribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations among members of the [t]ribunal".[442]

360. In this respect, TANESCO states that the Tribunal manifestly exceeded its powers in improperly reconsidering its prior decision and in doing so also seriously departed from a fundamental rule of procedure. TANESCO argues that the Tribunal disregarded the binding and *res judicata* effect of the Decision, which, in TANESCO's view, also constitutes an unprecedented denial of the principle of due process.[443]

361. In support of its argument, TANESCO submits that these principles have been recognised and applied by well-established ICSID case law and refers the Committee to the *Electrabel v. Hungary* case. Therein, according to TANESCO, the tribunal affirmed the principle of *res judicata* with respect to decisions under the ICSID Convention, and thus that a decision cannot be challenged by way of a request for reconsideration.[444]

[441] Application for Annulment, ¶27.
[442] Application for Annulment, ¶26, footnote 36, referring to **Annex-18**, *Total S.A. v. Argentina*, ¶314.
[443] TANESCO's Memorial on Annulment, ¶¶167-168; TANESCO's Reply on Annulment, ¶238.
[444] Application for Annulment, ¶29; TANESCO's Reply on Annulment, ¶81.

Additionally, TANESCO states that the tribunal in *Electrabel v. Hungary* recognized that its approach was followed subsequently by, *inter alia,* the tribunal in *ConocoPhillips v. Venezuela.*[445]

362. TANESCO argues that despite the fact that the Tribunal recognised there was little arbitral jurisprudence on this question, it decided to disregard the clear decision reached in *ConocoPhillips* and *Perenco,* which, according to TANESCO, were the only two cases directly concerning the issue of reconsideration at the date of the Award.[446]

363. Additionally, TANESCO submits that the Tribunal cannot justify its reconsideration of the Decision on Jurisdiction by referring to Article 51 of the ICSID Convention, which the Tribunal purported to apply by analogy. According to TANESCO, this is because: firstly, such provision is evidently not applicable in this case, since it relates to the revision of final awards; and secondly, the Tribunal failed to satisfy itself that all requirements under this Article were met. In this regard, TANESCO states that it is unclear why the Tribunal should be permitted to apply Article 51 by analogy to decisions but should not be bound by the limitations on reopening that apply to awards nor by the specific procedures set out in Article 51(1) and 51(4).[447]

364. Referring to Prof. Reinisch's observations with respect to the *Perenco* tribunal's discussion of Article 51 of the ICSID Convention, TANESCO states that it is Prof. Reinisch's opinion that in order to meet the standard of decisively affecting the award (under Article 51) the newly discovered fact must be of such a nature that it would have led the tribunal to reach a different opinion had the fact been known to the tribunal at the time.[448] However, TANESCO claims that the Tribunal's reconsideration was based on facts that were neither of such a nature as to decisively affect the Award nor were they unknown to the Tribunal or SCB HK at the time of the Decision.[449] Additionally,

[445] Application for Annulment, ¶29; see also TANESCO's Reply on Annulment, ¶¶79-87.
[446] TANESCO's Reply on Annulment, ¶92.
[447] TANESCO's Memorial on Annulment, ¶¶169-171; see also Application for Annulment, ¶30.
[448] TANESCO's Reply on Annulment, ¶88.
[449] TANESCO's Reply on Annulment, ¶88; Application for Annulment, ¶30.

TANESCO argues that, in any event, SCB HK could not have ignored them without negligence.[450]

365. Furthermore, TANESCO recalls the Tribunal's argument that re-opening decisions serves the purpose of saving time, and states that this argument is not only feeble, but also that it amounts to re-writing the ICSID Arbitration Rules and undermines certainty.[451]

366. Finally, TANESCO submits that in the Decision on Jurisdiction, the Tribunal found that its jurisdiction was limited to making a declaration as to amounts owing under the PPA for a number of reasons, which were: (i) that the Tribunal could not make an order requiring TANESCO to pay amounts to SCB HK independently of IPTL, as SCB HK had no rights against TANESCO as the lender to IPTL;[452] and (ii) that if a liquidator or administrator were appointed in respect of IPTL, "this would only have an impact in respect of any order of the Tribunal requiring the enforcement of SCB HK's security interest against IPTL's assets. But for independent reasons, the Tribunal has concluded that it has no jurisdiction to make such an order in any case".[453]

367. TANESCO states that these reasons were brushed aside by the Tribunal in the Award, when it concluded that the Decision had been "based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of appointment of a liquidator".[454] Thus, TANESCO submits that it is a serious departure from a fundamental rule of procedure for a tribunal to make a decision based on reasons, and subsequently to reverse that decision, without even addressing those reasons.[455]

368. TANESCO submits that the Tribunal's reconsideration of the Decision on Jurisdiction was made not only despite the fact that ICSID tribunals do not have that power under the

[450] Application for Annulment, ¶30; TANESCO's Reply on Annulment, ¶128.
[451] TANESCO's Memorial on Annulment, ¶175.
[452] TANESCO's Memorial on Annulment, ¶176, footnote 116, referring to **Annex-1**, Decision on Jurisdiction, ¶182.
[453] TANESCO's Memorial on Annulment, ¶176, footnote 117, referring to **Annex-1**, Decision on Jurisdiction, ¶183.
[454] TANESCO's Memorial on Annulment, ¶177, footnote 118, referring to **Annex-1**, Award, ¶347.
[455] TANESCO's Memorial on Annulment, ¶177.

ICSID Convention or the ICSID Arbitration Rules, but also, that such reconsideration is contrary to basic notions of justice and fairness. Thus, it constitutes a serious departure from a fundamental rule of procedure.[456]

369. Therefore, TANESCO states that the Committee must conclude that the Tribunal's actions constituted a "substantial", as opposed to a minor, departure from a rule of procedure since it has been deprived of the protection the rule was intended to provide, and that this deprivation constitutes a "substantial" departure from the rules of procedure.[457]

370. As a result, TANESCO submits that the Award should be annulled in accordance with Article 52(1)(d) on the basis that there has been a serious departure from a fundamental rule of procedure.[458]

ii) SCB HK's arguments

371. SCB HK notes that under Article 52(1)(d), two requirements must be fulfilled for a committee to find a serious departure from a fundamental rule of procedure: first, that the rule in question must be so essential that it qualifies as a fundamental rule of procedure; and second, the tribunal must have committed such a grave violation of a procedural rule that it constitutes a serious departure from that rule. In support of this, SCB HK referred to the *ad hoc* committee in *CDC v. Seychelles*, and quoted:

> "48. … Not just any departure from any rule of procedure will support annulment. Prior *ad hoc* [c]ommittees have held that it is the duty of the party seeking annulment to 'identify the fundamental rule of procedure' and to show that any departure from it 'has been serious'".[459]

372. In this respect, SCB HK argues that TANESCO fails to both identify the fundamental rule on procedure and to show that any departure was serious.[460]

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[456] Application for Annulment, ¶31.
[457] TANESCO's Memorial on Annulment, ¶168.
[458] TANESCO's Memorial on Annulment, ¶¶166-168.
[459] SCB HK's Counter-Memorial on Annulment, ¶400, footnote 470, referring to **CLA-111**, *CDC v. Seychelles*, ¶48; See also **Annex-73**, *Wena Hotels v. Egypt*, ¶56; **Annex-77**, *MINE v. Guinea*, ¶¶ 5.05 and 5.06.
[460] SCB HK's Counter-Memorial on Annulment, ¶¶399-401.

373. SCB HK states that TANESCO's argument on this point overlaps substantially with its argument on *res judicata* and the Tribunal's power to reconsider its Decision on Jurisdiction, and its arguments concerning the reasons given in the Award.[461]

374. According to SCB HK, TANESCO's arguments that the Tribunal departed from a fundamental rule of procedure when it reconsidered its Decision on Jurisdiction are based on the following arguments: (i) the Tribunal's Decision was binding within the scope of the proceedings and has *res judicata* effect, irrespective of the fact that the Tribunal's determination was expressed as a "Decision" rather than an "Award"; (ii) the Tribunal had no power to reconsider its Decision under the ICSID Convention; (iii) the Tribunal did not distinguish the ICSID cases of *ConocoPhillips v. Venezuela* and *Perenco v. Ecuador*, which, according to TANESCO, held that a decision is *res judicata* and an ICSID tribunal has no power to reconsider a decision; and (iv) the Tribunal therefore had no power to reverse its finding in the Decision that it had no jurisdiction to make an order for the payment of amounts owing under the PPA.[462]

375. SCB HK states regarding the first and second arguments above, that TANESCO does not identify any specific provision in the ICSID Convention or in the ICSID Arbitration Rules which supports its assertion that decisions are final and binding and may not be reconsidered. According to SCB HK, Article 53(1) referred to by TANESCO deals with awards and not with decisions.[463] SCB HK submits that the structure and architecture of the Convention support the distinction between awards and decisions. SCB HK therefore claims that, properly construed, the Convention permits a tribunal to reconsider its decision.[464]

376. As to the third argument regarding the *ConocoPhillips v. Venezuela* and *Perenco v. Ecuador* cases, SCB HK asserts that the Tribunal did engage with the Parties' arguments regarding these cases and did distinguished them but was not convinced by the reasoning in those cases. The Tribunal explained that tribunals make decisions on procedural

[461] SCB HK's Counter-Memorial on Annulment, ¶402, referring to ¶¶296-333 and ¶¶467-479 of the same.
[462] SCB HK's Counter-Memorial on Annulment, ¶¶296-297.
[463] SCB HK's Counter-Memorial on Annulment, ¶305.
[464] SCB HK's Counter-Memorial on Annulment, ¶307 (iv).

matters and on provisional measures, all of which are subject to review, notwithstanding the absence of anything in the ICSID Convention authorising this.[465] Thus, it opposed TANESCO's assertion in this respect.[466]

377. With regard to the fourth argument, SCB HK states that the Tribunal first determined that it had the power to reopen its Decision, and then specified the limited circumstances under which it could be reconsidered. It referred to Article 51 of the Convention only as guidance, explaining that the power to reconsider a decision must at least extend to the grounds for reopening an award.[467] In SCB HK's view, this is not "writing a new rule" but applying logical reasoning in resorting to Article 51 by analogy.[468]

378. SCB HK submits that the Tribunal found that it would be justified to reconsider its Decision if SCB HK could prove that TANESCO deliberately withheld the 2013 Settlement Agreement which was a material fact in the Tribunal's Decision that it had no jurisdiction to order TANESCO to pay SCB HK under the PPA.[469]

379. SCB HK argues that, after discovery of TANESCO's misrepresentation, SCB HK sought to explain the errors in the liquidation ground[470] and sought an order from the Tribunal for the full amount due by TANESCO under the PPA. According to SCB HK, the Tribunal concluded that this concern was no longer valid and thus, reconsidered its Decision.[471] It held that:

> "347. … [T]he facts that [TANESCO] failed to disclose in its December 13, 2013 Letter were material and would have had an impact on its decision not to make an order for payment. That decision was based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of the appointment of

[465] SCB HK's Counter-Memorial on Annulment, ¶309, footnotes 358-362, all referring to **Annex-1**, Award, ¶¶307-320.
[466] SCB HK's Counter-Memorial on Annulment, ¶¶327-328.
[467] SCB HK's Counter-Memorial on Annulment, ¶¶310 and 329, footnotes 364, 387 and 388, all referring to **Annex-1**, Award, ¶¶320-322.
[468] SCB HK's Counter-Memorial on Annulment, ¶¶331-332.
[469] SCB HK's Counter-Memorial on Annulment, ¶312; footnote 365, referring to **Annex-1**, Award, ¶324.
[470] See ¶567 infra.
[471] SCB HK's Counter-Memorial on Annulment, ¶¶471-475.

a liquidator. The facts that [TANESCO] had kept from the Tribunal change that assumption.

348. … [The] grounds for reopening [the Tribunal's] decision not to make an order for payment of the amount owing by TANESCO to SCB HK under the PPA have been established. The fact that TANESCO had agreed to settle the invoice dispute with IPTL on the basis of the full tariff, the fact that IPTL was now in receipt of sufficient funds to pay its creditors and the fact that the Escrow Account had been emptied, were all material to the decision taken by the Tribunal, and all of these facts had been withheld by [TANESCO] from the Tribunal. [Text in brackets added by the Committee]".[472]

380. In SCB HK's view, TANESCO's complaint regarding the reconsideration of the Decision on Jurisdiction is an attempt to challenge the substance of the Tribunal's Award, since, according to SCB HK, TANESCO claims that the Tribunal was incorrect in making the findings of fact which let it to reconsider its Decision on Jurisdiction. Therefore, according to SCB HK, the issue of whether the Tribunal exceeded its jurisdiction in reconsidering its Decision turns not only on a question of law, but also on a question of fact.[473]

381. SCB HK submits that *ad hoc* committees have repeatedly stated that the ICSID annulment process does not provide an appeal against the substantive findings of the tribunal, and that it is not part of an *ad hoc* committee's functions to review the tribunal's decision, still less to substitute its own views for those of the tribunal.[474]

382. As to the findings of facts made by the Tribunal that led to the reconsideration of the Decision, SCB HK submits that *ad hoc* committees will not review a tribunal's findings concerning the appreciation of evidence. SCB HK refers to ICSID Arbitration Rule 34(1),

[472] SCB HK's Counter-Memorial on Annulment, ¶314, footnote 366, referring to **Annex-1**, Award, ¶¶347-348.
[473] SCB HK's Counter-Memorial on Annulment, ¶¶298-299.
[474] SCB HK's Counter-Memorial on Annulment, ¶299.

which provides that: "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value".[475]

383. Finally, SCB HK addresses TANESCO's allegations that in the Award the Tribunal did not address the "independent legal bases" that led it not to order payment in the Decision, such as finding that TANESCO could not be ordered to pay any amount to SCB HK independently of IPTL.[476] SCB HK explains that these "independent legal bases" are just expressions of the Tribunal's decision that it could only address debts between TANESCO and IPTL under the PPA and not debts as between IPTL and SCB HK under the Facility Agreement. However, SCB HK did not pursue its claim for an amount to discharge the debt under the Facility Agreement, therefore, the issue did not arise and did not need to be addressed in the Award.[477]

384. Consequently, SCB HK concludes that the Tribunal acted well within its powers and TANESCO's allegations on this ground must be rejected.[478] In any event, even if there was a departure from a fundamental rule of procedure (which it denies), such a departure was not serious.[479]

iii) Analysis and Decision of the Committee

385. After considering the Parties' arguments and its previous decision regarding the power of reconsideration of the Tribunal, the Committee concludes that, by reconsidering its prior Decision on Jurisdiction, the Tribunal did not depart from a fundamental rule of procedure. Its reasons are as follows.

386. In the Committee's view, it appears from the drafting history of the ICSID Convention that the ground of a "serious departure from a fundamental rule of procedure" has a wide

[475] SCB HK's Counter-Memorial on Annulment, ¶300, footnote 340, referring to **CLA-117**, *Rumeli v. Kazakhstan*, ¶96; **CLA-131**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, ¶214; **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶¶129, 138, 149 and 214; **CLA-105**, *Daimler Financial Services AG v. Argentina*, ¶189; **Annex-79**, *TECO v. Guatemala*, ¶126.
[476] SCB HK's Counter-Memorial on Annulment, ¶¶476-477, referring to TANESCO's Memorial on Annulment, ¶211.
[477] SCB HK's Counter-Memorial on Annulment, ¶¶476-479.
[478] SCB HK's Counter-Memorial on Annulment, ¶333.
[479] SCB HK's Rejoinder on Annulment, ¶227.

connotation, including principles of natural justice, but that not all rules of procedure would be covered. According to the drafters, the phrase "fundamental rules of procedure" was a reference to principles. The drafting history thus shows that this ground is concerned with the integrity and fairness of the arbitral process.[480]

387. *Ad hoc* Committees have established a dual analysis based on the words "serious" and "fundamental" in this ground, namely: the departure from a rule of procedure must be serious and the rule must be fundamental.[481] Thus, not every departure from any rule of procedure justifies annulment.[482] According to several *ad hoc* committees, examples of fundamental rules of procedure concern: (i) the equal treatment of the parties;[483] (ii) the right to be heard;[484] (iii) an independent and impartial tribunal;[485] (iv) the treatment of evidence and burden of proof;[486] and (v) deliberations among members of the tribunal.[487] Additionally, some *ad hoc* committees have required that the departure have a material impact on the outcome of the award for the annulment to succeed.[488]

388. The Background Paper on Annulment under the ICSID Convention,[489] submitted as an exhibit by one of the Parties, describes the drafting history of the annulment remedy in the Convention. It states that the task of determining whether a fundamental rule of

[480] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶98, footnotes 182-183, referring to ¶¶16 and 23 of said document.
[481] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99.
[482] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 185.
[483] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 186.
[484] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶¶98-99, footnote 183, referring to ¶16: "16. A further suggestion sought to clarify that 'departure from a fundamental rule of procedure' excluded challenges on the basis of inobservance of ordinary arbitration rules, as opposed to 'breaches of procedural rules which would constitute a violation of the rules of natural justice.' One proposal was to add the phrase 'a serious departure from the principles of natural justice.' Another proposal was to replace the term by 'fundamental principles of justice.' Chairman Broches subsequently explained that 'fundamental rule of procedure' was to be understood to have a wider connotation, and to include under its ambit the so-called principles of natural justice. As an example, he mentioned the parties' right to be heard.', […] 23: The ground for annulment relating to a serious departure from a fundamental rule of procedure had become a stand-alone ground under the First Draft. A discussion was held about whether to add the words 'or substance' after the words 'rule of procedure,' but the proposal was seen as confusing. A further suggestion to replace the word 'rule' by 'principle' was also rejected because the reference to 'fundamental' rules of procedure was considered to be a clear reference to principles. Likewise, a specific reference noting that both parties must have a fair hearing was defeated".
[485] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 188.
[486] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 189.
[487] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 190.
[488] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶99, footnote 100.
[489] **CLA-112**, Background Paper on Annulment, May 5, 2016.

procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the tribunal.[490] The Committee shares this view.

389. As previously concluded, the ICSID Convention is silent on whether a tribunal has the power to reconsider its prior decisions. This Committee has concluded that the reconsideration of its Decision on Jurisdiction was within the Tribunal's power under the ICSID system, under the defined circumstances found by the Tribunal.[491] Decisions of this kind, even when intended to be binding upon the Parties in the proceeding, are not *res judicata* until they are incorporated into the award.

390. Accordingly, in the present case, the reconsideration of a decision, *per se*, does not amount to a ground for annulment under the rubric of "serious departure from a fundamental rule of procedure".

391. The fact that the act of reconsidering is not a ground for annulment on its own, does not mean that an arbitral tribunal may overlook fundamental rules of procedure during the reconsideration process, such as the ones mentioned in paragraph 387 *supra*.[492]

392. The *ad hoc* Committee notes TANESCO's allegations concerning the Tribunal's: (i) failure to allow the Parties to properly brief the issue of reconsideration; and (ii) wrong reversal of the burden of proof. As these are matters that concern the equal treatment of the Parties and their right to be heard, the Committee must examine whether the Tribunal violated them.

2. The existence of a serious departure from a fundamental rule of procedure by failing to allow the Parties to brief the issue of reconsideration

i) TANESCO's argument

[490] **CLA-112**, Background Paper on Annulment, May 5, 2016, ¶100.
[491] See ¶¶150-173 supra.
[492] (i) The equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial Tribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations among members of the Tribunal.

393. TANESCO states that even if the power to reverse a prior decision exists (which TANESCO argues it does not), the Tribunal accepted allegations made by SCB HK without allowing TANESCO to properly address the issue or adduce evidence in response. TANESCO claims that this is a gross breach of due process and constitutes a serious departure from a fundamental rule of procedure.[493]

394. TANESCO argues that the Tribunal's "conclusion that grounds for reopening have been established" suggest: (i) that those grounds exist in the Arbitration Rules and are known to the Parties, and (ii) that a thorough and fair process to establish those grounds or otherwise has been followed. In TANESCO's opinion, neither is the case here, thus constituting a serious departure from a fundamental rule of procedure.[494]

395. With regards to the application by the Tribunal of Article 51 by analogy, TANESCO explains that in order for this Article to be applied, it would require, *inter alia* (i) a fact which decisively affected the Decision, (ii) a new fact, and (iii) a proper opportunity to brief.[495]

396. First, as to a fact which decisively affected the Decision on Jurisdiction, TANESCO argues that the question of whether payments had been made out of the Escrow Account, the extent of the agreement between IPTL and TANESCO in October 2013 and the state of SCB HK's knowledge of these matters, were not decisive to the decision not to order payment. This is because, in its view, the Tribunal had already concluded that it had independent grounds for reaching its decision that it had jurisdiction only in relation to the amount of the tariff, but not to order payment.[496]

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[493] TANESCO's Memorial on Annulment, ¶178.
[494] TANESCO's Memorial on Annulment, ¶179, referring to **Annex-1**, Award, ¶349.
[495] TANESCO's Memorial on Annulment, ¶181.
[496] TANESCO's Memorial on Annulment, ¶181 (a), footnote 119, quoting **Annex-1**, Decision on Jurisdiction, ¶¶181-183: "… cannot make an order requiring TANESCO to pay such amounts to SCB HK independently of IPTL. SCB HK has no rights as against TANESCO as the lender to IPTL in these arbitration proceedings; it only has rights against TANESCO as the assignee of IPTL's rights under the PPA. […] If a liquidator or administrator were to be appointed in respect of IPTL, this would only have an impact in respect of any order of the Tribunal requiring the enforcement of SCB HK's security interest against IPTL's assets. But for independent reasons, the Tribunal has concluded that it has no jurisdiction to make such an order in any case".

397. Second, TANESCO states that SCB HK did not discover new facts, as it was fully aware that an agreement had been reached in October 2013 between TANESCO and IPTL, and that the escrow monies might be paid out to IPTL as a result. SCB HK elected to take no substantive action and thus SCB HK's choice not to act is not something which TANESCO should be permitted to take the blame for.[497] The Tribunal's decision to focus on the narrow (and incorrect) finding that "there is no evidence that the [SCB HK] knew that the escrow account had in fact been emptied" ignored the evidence on the record and failed to take account of the logical inference that a party aware of the existence of an escrow held pending full or partial resolution of a dispute would obviously understand that a full or partial resolution may result in the escrow funds being disbursed.[498]

398. Third, regarding the fact that parties must be given proper opportunity to brief, TANESCO highlights that at the hearing of August 19-21, 2015, the Tribunal for the first time *suo moto* invited the Parties to make submissions on the application of Article 51 by analogy. TANESCO argues that the issue was dealt with to the extent possible in the Parties' submissions on tariff. Furthermore, TANESCO claims that the Tribunal directed that the post-hearing briefs, which also had to cover any further elaboration of the Parties' respective arguments and submission on costs, had to be limited to 50 pages. In TANESCO's opinion, this seriously limited the ability of the Parties to fully address the issue of the applicability of Article 51 by analogy. TANESCO argues that the process was not fair and proper. SCB HK's argument that TANESCO could have made submissions on the applicability of Article 51 in the Tariff Submissions[499] is baseless.[500]

399. Moreover, TANESCO states that the suggestion by the Tribunal that Article 51 could be applied by analogy raised a novel approach to the Convention, which would at least have required substantial submissions and consideration. Instead – according to TANESCO – the Parties were given overnight to prepare their comments. TANESCO's counsel did not consider that it would be possible meaningfully to make oral submissions on this point

[497] TANESCO's Memorial on Annulment, ¶181, (b).
[498] TANESCO's Memorial on Annulment, ¶181, (b), footnote 124, referring to **Annex-1**, Award, ¶336.
[499] This term has been defined in the Award as: "Respondent's Tariff Submission of February 13, 2015".
[500] TANESCO's Memorial on Annulment, ¶181, (c); see also **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 163, line 10–p. 164, line 1.

"off the cuff" with such little notice, and so it had no option other than to limit its submissions on this point to written submissions.[501] TANESCO states that its counsel noted its concern about the "inadequacy" of SCB HK making oral and written submissions while TANESCO was able to make submissions only in writing, but that this was disregarded by the Tribunal.[502] Therefore, in TANESCO's view, it should not be penalised for not having contemplated the need to make submissions ahead of time on an argument which, according to TANESCO, runs contrary to all established understandings of the Convention.

400. In terms of procedure, TANESCO also takes issue with the Tribunal's finding at paragraph 333 of the Award,[503] that TANESCO was somehow under a duty or obligation to the Tribunal to disclose an agreement with a third party because it settled with that third party on terms that it disputes in the arbitration. [504] According to TANESCO, it was for SCB HK to ask for the relevant information.[505]

401. In addition, TANESCO states that at paragraph 336 of the Award, the Tribunal further set out its assumption that SCB HK did not have knowledge about the emptying of the escrow funds.[506] According to TANESCO, this was the first time that these issues had

[501] TANESCO's Reply on Annulment, ¶240, footnote 231, referring to **C-484**, Transcript of Tariff Hearing (August 2015 Hearing), Day 2, August 20, 2015, p. 212, line 23: "[b]ut we could try to reply off the cuff, but I am not sure that that would be extremely useful. We are prepared to accommodate any requirement obviously".
[502] TANESCO's Reply on Annulment, ¶240, referring to **C-484**, Transcript of Tariff Hearing (August 2015 Hearing), Day 2, August 20, 2015, p. 212, line 23.
[503] TANESCO's Memorial on Annulment, ¶182, referring to **Annex-1**, Award, ¶333: "[t]he Tribunal has no difficulty in concluding that the failure of [TANESCO] to disclose these facts was anything other than deliberate. [TANESCO] knew of the 2013 Settlement Agreement: it had entered into it. Where in the course of proceedings a party that disputes its liability under an agreement goes ahead and settles the same claim with a third party on precisely the terms it is disputing under that agreement, then the party has an obligation to disclose that settlement to the tribunal. It is no answer to fall back on some notion of burden of proof and say that the other party has an obligation to prove the existence of such an agreement. Silence here was not an option. [TANESCO] had an obligation to disclose these matters to the Tribunal [Text in brackets added by the Committee]".
[504] TANESCO's Memorial on Annulment, ¶182; see also TANESCO's Reply on Annulment, ¶244, referring to **Annex-1**, Award, ¶333.
[505] TANESCO's Memorial on Annulment, ¶182.
[506] TANESCO's Reply on Annulment, ¶244, referring to **Annex-1**, ¶336: "[t]he Tribunal notes that the actual factual situation as set out by the Parties is unclear and even at times self-contradictory. However, the Tribunal is not convinced that there is proof that SCB HK was aware of the terms of the 2013 Settlement Agreement between TANESCO and IPTL/PAP. In its letter of November 27, 2013, [SCB HK] indicates that it had been informed of the existence of an agreement settling the tariff dispute and facilitating the release of the Escrow Funds and states that the agreement had not been disclosed to it. It could be inferred from the fact that the Administrative Receiver, Martha Renju, had a copy of the agreement when she filed a request for an injunction

been raised, and TANESCO had no chance to make submissions on these crucial points. TANESCO argues that, in circumstances where SCB HK had knowledge of the 2013 Settlement Agreement, the Tribunal wrongfully concluded that TANESCO had an obligation to disclose the document, notwithstanding there being no disclosure requests by SCB HK and no general duty of disclosure. TANESCO also argued that the Tribunal wrongfully assumed SCB HK's state of knowledge without any evidence on this point.[507]

402. TANESCO argues the Tribunal showed bias against TANESCO in the Award, while being quick to show SCB HK the benefit of the doubt on issues which the Tribunal rightly acknowledged were issues in dispute. As an example, TANESCO states that on the question of whether "…there is proof that SCB HK was aware of the terms of the 2013 Settlement Agreement between TANESCO and IPTL/PAP", the Tribunal willingly acknowledged that the factual position as set out by the Parties was "unclear and at times even self-contradictory".[508] However, it "…[had] no difficulty in concluding that the failure of TANESCO to disclose these facts was anything other than deliberate".[509] In respect of SCB HK, TANESCO states that the situation was different: it claims that even though the Tribunal noted that "[i]n its letter of November 27 2013, SCB HK indicates that it has been informed of the existence of an agreement setting [sic] the tariff dispute and facilitating the release of the Escrow Funds",[510] it concluded that "… there is no evidence that the SCB HK knew that the Escrow Account had in fact been emptied".[511] According to TANESCO, the Tribunal was eager to assume SCB HK's state of knowledge, despite there being "no evidence", when seeking a reversal of the Decision, even though it was inconsistent with evidence on the record.[512]

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to prevent the monies in the Escrow Account from being dispersed, some ten days before [SCB HK] wrote its November 27 letter that [SCB HK] must have had some knowledge of the 2013 Settlement Agreement. But there is no evidence that [SCB HK] knew that the Escrow Account had in fact been emptied [Text in brackets added by the Committee]".

[507] TANESCO's Reply on Annulment, ¶244.
[508] TANESCO's Memorial on Annulment, ¶183, quoting **Annex-1**, Award, ¶336.
[509] TANESCO's Memorial on Annulment, ¶184, quoting **Annex-1**, Award, ¶333.
[510] TANESCO's Memorial on Annulment, ¶184, quoting **Annex-1**, Award, ¶336.
[511] TANESCO's Memorial on Annulment, ¶184, quoting **Annex-1**, Award, ¶336.
[512] TANESCO's Memorial on Annulment, ¶¶183-184.

403. TANESCO argues that, in this case, TANESCO did not bear the burden of proof,[513] and that the procedural bias and unwarranted actions of the Tribunal constitute a serious departure from a fundamental rule of procedure.[514]

404. According to TANESCO, although the Tribunal held it was unconvinced, there is proof that SCB HK was aware of the terms of the settlement agreement. SCB HK was aware as early as August 2013 that the petition for the winding up of IPTL was being withdrawn and that the affairs of IPTL would then pass from the Official Receiver and Provisional Liquidator to PAP.[515]

405. Also, TANESCO maintains that the Tribunal's reversal of its prior Decision on Jurisdiction is sufficient for this Committee to annul the Award,[516] because the Parties were not given the opportunity to present expert evidence on this point, and there would have been no opportunity for the cross-examination of such experts in any event. In TANESCO's opinion, this amounted to a clear failure by the Tribunal to brief the issue of reconsideration.[517]

406. TANESCO states that even if (which it denies) Article 51 could be applied by analogy, TANESCO was not provided sufficient opportunity to brief regarding the state of knowledge of SCB HK as it pertained to the 2013 Settlement Agreement.[518]

407. In sum, TANESCO states that the Tribunal made these findings unilaterally in the Award without giving TANESCO the opportunity to brief the issue. TANESCO argues that if it had been given such an opportunity, it would have pointed out that SCB HK had knowledge of the 2013 Settlement Agreement, and yet took no action to seek a copy

[513] TANESCO's Memorial on Annulment, ¶¶188-189, footnote 126, referring to **Annex-71**, *Azurix v. Argentina*, ¶215.
[514] TANESCO's Memorial on Annulment, ¶189, footnote 127, referring to **Annex-72**, *Caratube v. Kazakhstan*, citing Klockner, notes that a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure, ¶97; **Annex-73**, *Wena Hotels v. Egypt*, it was held that burden of proving the "affirmative defense" of misconduct and corruption is on the respondent, *i.e.*, the party making the allegation.
[515] TANESCO's Memorial on Annulment, ¶190. Here, TANESCO refers to "the letter from VIP to SCB PLC dated 21 August 2013 stating that VIP's winding up petition would be withdrawn"; **Annex-74**, Notice by VIP of Withdrawing the Petition for Winding Up IPTL, August 26, 2013; **Annex-75**, Daily News Newspaper, August 29, 2013.
[516] TANESCO's Memorial on Annulment, ¶196.
[517] TANESCO's Reply on Annulment, ¶241.
[518] TANESCO's Reply on Annulment, ¶243.

and/or to obtain an injunction concerning the funds in the Escrow Account. TANESCO explains that it would therefore have made clear that it had no duty to make SCB HK's case for it, in circumstances where SCB HK had full ability to make appropriate submissions about the 2013 Settlement Agreement and the Escrow Account before the Decision was rendered. TANESCO concludes that on the basis that the Tribunal made these findings in the Award, without allowing TANESCO to make appropriate submissions, the Award should be annulled.[519]

ii) SCB HK's arguments

408. SCB HK notes that, under Article 52(1)(d) of the ICSID Convention, two requirements must be fulfilled: first, the rule in question must be so essential that it can be qualified as a fundamental rule of procedure; second, the tribunal must have committed such a grave violation of a procedural rule that it constitutes a serious departure from that rule.[520]

409. SCB HK recalls TANESCO's arguments that the Tribunal seriously departed from a fundamental rule of procedure under Article 52(1)(d) of the Convention, by failing to allow TANESCO properly to address the issue of reconsideration of the Decision in submissions, or to adduce evidence in response to allegations made by SCB HK which were then relied on by the Tribunal to justify reconsideration of its Decision.[521] According to SCB HK, TANESCO seeks to advance the following propositions.[522]

410. First, SCB HK states that the points regarding whether Article 51 was applicable by analogy relate to the substance of the Award, and not to the procedure by which it was reached. SCB HK argues that just because TANESCO disagrees with the conclusions of the Tribunal as to the state of the Parties' knowledge (or as to the significance of new facts to the Decision), it does not follow that the procedure followed by the Tribunal to reach those conclusions must therefore have been defective.[523]

[519] TANESCO's Reply on Annulment, ¶245.
[520] SCB HK's Counter-Memorial on Annulment, ¶400.
[521] SCB HK's Counter-Memorial on Annulment, ¶403, footnote 471, referring to TANESCO's Memorial on Annulment, ¶178.
[522] SCB HK's Counter-Memorial on Annulment, ¶404.
[523] SCB HK's Counter-Memorial on Annulment, ¶406.

411. SCB HK argues that, in any event, it did not have knowledge of the relevant facts about the 2013 Settlement Agreement prior to the publication of the CAG and PAC Reports.[524]

412. Secondly, SCB HK states that TANESCO had multiple opportunities throughout the proceedings to make submissions and adduce evidence on the issues relevant to reconsideration of the Decision, and that in each case TANESCO either took advantage of those opportunities or voluntarily declined to do so. In SCB HK's view, TANESCO's suggestions to the contrary are contrived attempts to reinstate the Decision by circumventing the Tribunal's conclusions on SCB HK's application for reconsideration.[525]

413. Thirdly, SCB HK claims that, in the alternative, even if (which it denies) the Tribunal did not give TANESCO sufficient opportunity to brief the issue of reconsideration, TANESCO failed to object to this absence of opportunity in a timely manner. SCB HK states that TANESCO raised no concern as to the sufficiency of the argument on the matter of reconsideration before the Award was issued and must therefore be deemed, pursuant to Rule 27 of ICSID Arbitration Rules, to have waived its right to make any such objection at this stage.[526]

414. SCB HK maintains that the allegation that the Parties were not allowed to brief the issue of reconsideration is patently incorrect. According to SCB HK, the Parties were given a full opportunity to brief the Tribunal on SCB HK's application for reconsideration of the Decision, and the question of whether the Tribunal had the legal power to reconsider the Decision was a central issue in the proceedings from the time of SCB HK's Submissions on Tariff[527] dated November 11, 2014 onwards.[528]

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[524] Both of these terms have been defined in the Award as: "A report […] submitted by the Tanzanian Auditor General to the Speaker's Office of the Tanzanian Parliament on November 14, 2014" and "a report […] issued by the Public Accounts Committee on November 17, 2014", respectively. SCB HK's Counter-Memorial on Annulment, ¶407, referring to ¶¶202 to 204 of the same.

[525] SCB HK's Counter-Memorial on Annulment, ¶408.

[526] SCB HK's Counter-Memorial on Annulment, ¶409, footnote 477, referring to Rule 27 of the ICSID Arbitration Rules; **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶272.

[527] This term has been defined in the Award as: "Claimant's Tariff Submission of November 11, 2014".

[528] SCB HK's Rejoinder on Annulment, ¶228.Herein, SCB HK stated that it had included Appendix 5 as a summary of how the reconsideration point was argued in the arbitration.

415. SCB HK claims that TANESCO's conduct from the point at which the question was raised to the point at which the Award was issued discloses no indication that TANESCO considered the process followed by the Tribunal to be defective. According to SCB HK, the record shows that TANESCO believed it had sufficient opportunity to present its case. SCB HK states that it does not follow from the fact that the Tribunal rejected TANESCO's case that the procedure followed by the Tribunal before doing so was unfair.[529]

416. SCB HK maintains that TANESCO had sufficient opportunity to brief and adduce evidence on the applicability of Article 51 by analogy. In this respect, SCB HK claims that it first applied for reconsideration of the Decision in its Submissions on Tariff, dated November 11, 2014. The application from SCB HK included discussion of the overarching issue of whether, in principle, the Tribunal had the power to reconsider the Decision, and TANESCO made detailed submissions on this issue in both its Submission on Tariff (dated February 13, 2015) and its Rejoinder on Tariff[530] (dated May 21, 2015). In SCB HK's opinion, had TANESCO wished to adduce evidence on the possibility of reconsideration generally, it could have done so, but it did not.[531]

417. SCB HK therefore submits that both TANESCO and SCB HK had two opportunities to set out their case in writing on this point before the August 2015 Hearing. SCB HK states that, at the August 2015 Hearing,[532] counsel for TANESCO actually complained that too much time and effort had been expended on arguments regarding SCB HK's application for reconsideration, which in TANESCO's view should have been rejected "without even needing to first hear [TANESCO] on the issue".[533]

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[529] SCB HK's Rejoinder on Annulment, ¶238.
[530] This term has been defined in the Award as: "Respondent's Tariff Rejoinder of May 21, 2015".
[531] SCB HK's Counter-Memorial on Annulment, ¶410, SCB HK's Rejoinder on Annulment, ¶240, Appendix 5.
[532] This term has been defined in the Award as: "a hearing on tariff recalculation [wich] took place at IDRC in London from August 19, 2015, to August 21, 2015".
[533] SCB HK's Counter-Memorial on Annulment, ¶411, footnote 481, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 112, lines 11-18: "[t]his shows that the principle of *res judicata* of ICSID preliminary decisions is so obvious that this Tribunal should indeed have rejected [SCB HK]'s application for reconsideration without even needing to first hear [TANESCO] on the issue. Just as the ICSID tribunal in *Perenco v. Ecuador* did when it rejected Ecuador's application for reconsideration without hearing Perenco. [Text in brackets added by the Committee]".

418. According to SCB HK, the specific issue of whether Article 51 of the Convention could apply by analogy to the Decision was first raised by Professor Stern, member of the Tribunal, on the first day of the August 2015 Hearing.[534]

419. SCB HK states that TANESCO's case that it was not given sufficient opportunity to respond fully to the question, or to adduce evidence in support of its response is fundamentally flawed.[535]

420. SCB HK argues that the issue was posed by the Tribunal as a purely legal question regarding the scope of the Tribunal's power under the Convention and was accepted as such by both counsel for the Parties.[536] Accordingly, SCB HK states that it was a matter for legal submission which did not require reference to additional factual evidence.[537]

421. SCB HK states that the question had not previously been addressed by either party, and the Parties were given the same opportunity to respond to it. According to SCB HK, TANESCO chose to deal with the matter exclusively in writing in its post-hearing brief and cannot now contend that it has been the victim of unfairness as a result of its own decision.[538]

422. SCB HK states that in its post-hearing brief of November 2, 2015, TANESCO devoted more than 30 paragraphs to a discussion of Article 51.[539] According to SCB HK, only one of those paragraphs advances an argument that Article 51 of the Convention does not apply to decisions, and it does so by reference to TANESCO's previous submissions in the proceedings (to the effect that no remedies exist other than those expressly provided for in the Convention).[540] Further, SCB HK states that the remainder of TANESCO's

[534] SCB HK's Counter-Memorial on Annulment, ¶412, footnote 482, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 163, line 10–p. 164, line 1.
[535] SCB HK's Counter-Memorial on Annulment, ¶413.
[536] SCB HK's Counter-Memorial on Annulment, ¶414, footnote 483, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 163, lines 10-11 (Professor Stern); p. 164, lines 12-16 (Mr Weiniger QC); p. 171, lines 18-21 (Mr Molina).
[537] SCB HK's Counter-Memorial on Annulment, ¶414.
[538] SCB HK's Counter-Memorial on Annulment, ¶415.
[539] SCB HK's Counter-Memorial on Annulment, ¶415, footnote 489, referring to **Annex-10**, Tanesco's Post-Hearing Brief, November 2, 2015, ¶¶31-62.
[540] SCB HK's Counter-Memorial on Annulment, ¶415, footnote 490, referring to **Annex-10**, Tanesco's Post-Hearing Brief, November 2, 2015, ¶33.

submissions on Article 51 were directed to whether the conditions for revision under Article 51 were satisfied, as opposed to whether it was possible (as a matter of law) to apply Article 51 by analogy to the Decision in the first place.[541]

423. In consequence, SCB HK claims that it is not open to TANESCO to argue that it was denied a full opportunity to make submissions on the applicability of Article 51 by analogy, when it declined the opportunity to do so orally at the August 2015 Hearing. It agreed to do so in writing and then felt able to do so solely by reference to its earlier pleadings.[542]

424. SCB HK points out that TANESCO also argues that although it did address the Article 51 point in its post-hearing brief, "the process was not fair and proper" due to the limitation of those briefs to a length of 50 pages. According to SCB HK, TANESCO describes this as having "seriously limited the ability of the parties to fully address the issue of the applicability of Article 51".[543] However, SCB HK states that TANESCO has never before raised any concerns about the page limit and did not request any extension of that limit before filing its post-hearing brief. Therefore, SCB HK argues that, given that the Parties were consulted by the Tribunal on the proposed limit after the August 2015 Hearing at which the Article 51 question was raised, this absence of an objection is striking.[544] In addition, SCB HK argues that, in its response to the Tribunal's proposal, on September 11, 2015, TANESCO stated clearly that "[TANESCO] has no objection to the 50-page limit on the length of the post-hearing briefs proposed by the Tribunal". According to SCB HK, at this stage, TANESCO knew about the Article 51 issue and knew that it had agreed to deal with it in the post-hearing brief.[545]

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[541] SCB HK's Counter-Memorial on Annulment, ¶415.
[542] SCB HK's Counter-Memorial on Annulment, ¶416.
[543] SCB HK's Counter-Memorial on Annulment, ¶418, footnotes 492 and 493, both referring to TANESCO's Memorial on Annulment, ¶181, (c): "[f]urther, the Tribunal directed that the post-hearing brief, which also had to cover any further elaboration of the parties' respective arguments and submission on costs, had to be limited to 50 pages. This seriously limited the ability of the parties to fully address the issue of the applicability of Article 51 by analogy".
[544] SCB HK's Counter-Memorial on Annulment, ¶419.
[545] SCB HK's Counter-Memorial on Annulment, ¶420, footnote 495, referring to **C-472**, Letter from Kellerhals Carrard to the Tribunal dated September 11, 2015: "[f]or the rest, [TANESCO] has no objection to the 50-page limit on the length of the post-hearing briefs proposed by the Tribunal. We understand that [SCB HK], which had previously expressed its agreement with the Tribunal's proposal, now wishes to extend this limit to 60 pages to allow the Parties to include their comments on the new documents produced by [TANESCO]. [TANESCO]

425. SCB HK argues that the level of detail with which the Article 51 issue was addressed was therefore a matter of TANESCO's own judgement, and not the result of any procedural restriction imposed by the Tribunal.[546]

426. In SCB HK's view, it also follows from the above that even if (which it denies) there was any inadequacy in the procedure by which the Article 51 question was addressed by the Tribunal, TANESCO has waived any right to object to it.[547]

427. Further, SCB HK states that it was not open to TANESCO to wait and see whether the Award would be in its favour before making a complaint as to the sufficiency of the opportunity for argument on the point, as it now attempts to do. In support of this argument, SCB HK quotes the *ad hoc* committee in *Joseph C. Lemire v. Ukraine* as follows: "a party that is aware of a procedural violation should react immediately by objecting to the violation … [A] party that has failed to object to a violation of procedure before the arbitral tribunal may not rely on this violation as a ground for annulment".[548]

428. Similarly, SCB HK recalls TANESCO complains that the Tribunal "wrongfully concluded that TANESCO had an obligation to disclose the [2013 Settlement Agreement]", without giving TANESCO the opportunity to make submissions on the existence of any such disclosure obligation.[549] In this respect, SCB HK states that this argument is based on a misreading of the Award. It states that, as further set out in its Appendix 5, this was a live issue throughout the tariff phase and both Parties made extensive submissions on the point.[550]

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leaves [SCB HK]'s proposal for an extension of the page limit to 60 pages to the Tribunal's appreciation [Text in brackets added by the Committee]".

[546] SCB HK's Counter-Memorial on Annulment, ¶421.

[547] SCB HK's Counter-Memorial on Annulment, ¶421.

[548] SCB HK's Counter-Memorial on Annulment, ¶422, footnote 497, quoting **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶272.

[549] SCB HK's Rejoinder on Annulment, ¶243, footnote 214, referring to TANESCO's Reply on Annulment, ¶244.

[550] SCB HK's Rejoinder on Annulment, ¶¶243-244, footnote 216, referring to **C-453**, SCB HK's Submissions on Tariff dated November 11, 2014, ¶¶67-69 and 126- 127; **C-478**, Tanesco's Submission on Tariff dated February 13, 2015, ¶¶26-29 and 42-45; **C-476**, SCB HK's Further Submissions on Tariff dated March 26, 2015, ¶¶51-77; **Annex-19**, Tanesco's Rejoinder on Tariff dated May 21, 2015, ¶¶56-66; **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 44, line 1–p. 50, line 19 and p. 102, line 3–p. 103, line 21 (Mr Weiniger QC); **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19,

429. According to SCB HK, the Tribunal did not find that TANESCO had an independent obligation to disclose the 2013 Settlement Agreement or "make SCB HK's case for it".[551] SCB HK argues, however, that the Tribunal did find that in light of the positive statements voluntarily made by TANESCO in the December 2013 Letter, TANESCO could not omit the details of the 2013 Settlement Agreement without misleading the Tribunal as to the factual position. SCB HK claims that, as set out at Appendix 5, TANESCO had multiple opportunities to make, and did make, submissions on the issue of whether the December 2013 Letter was misleading.[552]

430. SCB HK further states that TANESCO had sufficient opportunity to brief and adduce evidence on the issue of SCB HK's knowledge.[553]

431. In SCB HK's view, the issue of whether SCB HK had the relevant knowledge (which it did not in any event) is a matter going to the substance of the Award. SCB HK states that the relevant question, for purposes of the present application for annulment, is whether TANESCO was given sufficient opportunity to present its case on the question of SCB HK's knowledge to the Tribunal and to adduce evidence on the point. SCB HK claims TANESCO clearly did have such opportunities.[554]

432. SCB HK's application for reconsideration of the Decision, made in its Submissions on Tariff dated November 11, 2014, expressly relies on the detail of the 2013 Settlement Agreement as something which was concealed both from the Tribunal and from SCB HK.[555] TANESCO had multiple opportunities to argue in response that these matters had not been concealed and were known to SCB HK: the point could have been developed in

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2015, p. 111, lines 7-12 and p. 119, line 1–p. 128, line 9 (Mr Molina); **C-469**, SCB HK's Post-Hearing Brief dated November 2, 2015, ¶¶53-63; **Annex-10**, Tanesco's Post-Hearing Brief dated November 2, 2015, ¶¶7-8 and 38-45.

[551] SCB HK's Rejoinder on Annulment, ¶245, footnote 218, referring to TANESCO's Reply on Annulment, ¶245.

[552] SCB HK's Rejoinder on Annulment, ¶245.

[553] SCB HK's Counter-Memorial on Annulment, ¶425.

[554] SCB HK's Counter-Memorial on Annulment, ¶425.

[555] SCB HK's Counter-Memorial on Annulment, ¶426, footnote 499, referring to **C-453**, SCB HK's Submissions on Tariff dated November 11, 2014, ¶4: "[TANESCO] purported to settle the tariff dispute with IPTL for over US$200m …TANESCO then proceeded to conceal this fact from the Tribunal, and from SCB HK". See also ¶69: "[t]here can be no other interpretation of TANESCO's December 13, 2013 letter than it being a fraudulent misrepresentation to both the Tribunal and SCB HK".

both TANESCO's Submission on Tariff and TANESCO's Rejoinder on Tariff, as well as at the August 2015 Hearing and in the subsequent post-hearing brief.[556]

433. Furthermore, SCB HK asserts that TANESCO did in fact take advantage of these opportunities to set out its case. In its Rejoinder on Tariff, TANESCO expressly submitted that "the TANESCO-IPTL Settlement and the release of the monies from the Escrow Account were known to the parties and the Tribunal at the time the Decision was issued", and subsequently advanced a number of arguments to support this proposition.[557] Similarly, TANESCO's post-hearing brief dated November 2, 2015 devoted 14 paragraphs over five pages to arguing either that the relevant facts were known to SCB HK and the Tribunal, or that SCB HK's alleged ignorance of these facts was due to SCB HK's own negligence.[558]

434. SCB HK states that, had TANESCO wished to adduce further evidence in support of these arguments, it could have done so. However, SCB HK submits that TANESCO made no application to the Tribunal to serve further evidence in advance of the August 2015 Hearing. SCB HK explains that, similarly, in the course of the August 2015 Hearing, TANESCO neither indicated any wish to rely on further evidence, nor expressed any dissatisfaction with the opportunity afforded prior to the hearing for TANESCO to put its case on this issue. To the contrary, prior to the August 2015 Hearing, TANESCO itself expressly submitted that because "[t]he parties have exchanged two rounds of written submissions and neither has requested that any witnesses be heard or other evidence be taken with regard to [SCB HK's application for reconsideration]", the Tribunal should deal with the application by means of a preliminary ruling on the papers.[559]

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[556] SCB HK's Counter-Memorial on Annulment, ¶426.

[557] SCB HK's Counter-Memorial on Annulment, ¶427, footnote 500, referring to **Annex-19**, Tanesco's Rejoinder on Tariff dated May 21, 2015, ¶¶32 and 63-65 (*e.g.* "[SCB HK]'s claimed ignorance of the terms of the TANESCO-IPTL Settlement is directly contradicted by the contents of its own letter"; "[SCB HK] was necessarily aware that whatever amount might have been agreed in the TANESCO-IPTL Settlement, such amount was at least equivalent to the value of the monies deposited in the Escrow Account". [Text in brackets added by the Committee]).

[558] SCB HK's Counter-Memorial on Annulment, ¶427, footnote 501, referring to **Annex-10**, Tanesco's Post-Hearing Brief dated November 2, 2015, ¶¶46-57.

[559] SCB HK's Counter-Memorial on Annulment, ¶428, **Annex-19**, Tanesco's Rejoinder on Tariff dated May 21, 2015, ¶134. TANESCO's request for a preliminary ruling was denied by the Tribunal in **C-486**, Procedural

435. Thus, in SCB HK's view, TANESCO did have such opportunity (across two rounds of written argument, a hearing, and a post-hearing brief), and did actually make submissions on the point. That TANESCO did not attempt to adduce further evidence on this issue was its own decision, which does not cast any doubt on the fairness or propriety of the procedure adopted by the Tribunal.[560]

436. Finally, SCB HK states that, in any event, even if (which it denies) TANESCO was not given sufficient opportunity to brief and adduce evidence on the issue of SCB HK's knowledge, TANESCO has clearly waived its right to make any objection to this effect. TANESCO was aware of the argument and evidence which had been put to the Tribunal on this point before the August 2015 Hearing, and was aware of the significance of the issue to its case. Had TANESCO considered that the Tribunal did not have sufficient material before it fairly to determine the state of SCB HK's knowledge, TANESCO should have raised an objection at that stage. TANESCO did not do so, believing (and asserting) at the time not merely that the state of the argument and evidence before the Tribunal was adequate, but in fact that it was sufficient to permit SCB HK's application to be determined on the papers without any further hearing.[561]

iii) Analysis and Decision of the Committee

437. TANESCO's main argument in support of this ground of annulment is that in deciding on its power to reverse the Decision on Jurisdiction, the Tribunal accepted allegations made by SCB HK without allowing TANESCO to properly address the issue or adduce evidence in response. TANESCO claims that this is a gross breach of due process and constitutes a serious departure from a fundamental rule of procedure.[562]

438. TANESCO argues that, in the Award, the Tribunal's "conclusion that grounds for reopening have been established" suggests two elements: (i) that those grounds exist in

Order No. 13 dated July 3, 2015, following a hearing organisational meeting which took place by telephone on July 2, 2015.

[560] SCB HK's Counter-Memorial on Annulment, ¶429.

[561] SCB HK's Counter-Memorial on Annulment, ¶430, footnote 503, referring to **Annex-19**, Tanesco's Rejoinder on Tariff dated May 21, 2015, ¶134.

[562] TANESCO's Memorial on Annulment, ¶178.

the Arbitration Rules and are known to the Parties, and (ii) that a thorough and fair process to establish those grounds or otherwise has been followed. TANESCO states that neither was satisfied in this case, constituting a serious departure from a fundamental rule of procedure.[563]

439. In the Committee's opinion, these requisites have been met, and thus there is no departure from a fundamental rule of procedure, let alone one that could be considered serious. Regarding the first element, the Committee has already determined that the Tribunal properly exercised its power to reconsider its Decision and that such power derives from the Arbitration Rules (discussed above at paragraphs 150-173, thus the first element is met.

440. As to the second element, the Committee, having analysed the Award and the submissions in the Annulment Proceeding, concludes that a fair process was followed by the Tribunal with respect to the reopening application and the Parties were allowed a due opportunity to plead their positions, including those regarding the application by the Tribunal of Article 51 by analogy.

441. With regard to the application by the Tribunal of Article 51 by analogy, TANESCO has explained that in order for this Article to be applied, it would require: (i) a fact that decisively affected the Decision; (ii) a new fact; and (iii) a proper opportunity to brief.[564] In the Committee's view, all three of these elements have also been satisfied.

442. First, as to a fact which decisively affected the Decision on Jurisdiction, TANESCO argues that the question of whether payments had been made out of the Escrow Account, the extent of the agreement between IPTL and TANESCO in October 2013 and the state of SCB HK's knowledge of these matters, were decisive to the reversal of the decision not to order payment. However, the Committee notes that whether Article 51 was applicable by analogy relates to the substance of the Award, and not to the procedure by which the Award was reached.

[563] TANESCO's Memorial on Annulment, ¶179.
[564] TANESCO's Memorial on Annulment, ¶181.

443. Second, the Committee is not in a position to second guess the Tribunal's conclusion that SCB HK's assertions that it discovered new facts were correct and that they were not countered by any evidence established on the record.

444. Third, regarding the proper opportunity to brief, the Committee considers that TANESCO had the opportunity to state its position before the August 2015 Hearing, at the Hearing and thereafter. That there were restrictions to the timing of these submissions does not in itself result in a serious departure from a fundamental rule of procedure. This is demonstrated by a brief recapitulation of the procedure:

- SCB HK first applied for reconsideration of the Decision in its Submissions on Tariff, dated November 11, 2014. The application from SCB HK included discussion of the overarching issue of whether, in principle, the Tribunal had the power to reconsider the Decision.
- TANESCO made detailed submissions on this issue in both its Submission on Tariff, dated February 13, 2015 and its Rejoinder on Tariff, dated May 21, 2015.
- At the August 2015 Hearing, counsel for TANESCO actually complained that too much time and effort had been expended on arguments regarding SCB HK's application for reconsideration, which in TANESCO's view should have been rejected "without even needing to first hear [TANESCO] on the issue [Text added by the Committee]".[565]
- The specific issue of whether Article 51 of the Convention could apply by analogy to the Decision was first raised by Professor Stern, on the first day of the Hearing.[566]
- TANESCO chose to deal with the matter exclusively in writing in its post-hearing brief and made no objection to the page limit proposed by the Tribunal.

[565] SCB HK's Counter-Memorial on Annulment, ¶411, footnote 481, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 112, lines 11-18: "[t]his shows that the principle of *res judicata* of ICSID preliminary decisions is so obvious that this Tribunal should indeed have rejected [SCB HK]'s application for reconsideration without even needing to first hear [TANESCO] on the issue. Just as the ICSID tribunal in *Perenco v. Ecuador* did when it rejected Ecuador's application for reconsideration without hearing Perenco. [Text in brackets added by the Committee]".

[566] SCB HK's Counter-Memorial on Annulment, ¶412, footnote 482, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 163, line 10–p. 164, line 1.

445. TANESCO did in fact take advantage of these opportunities to set out its case. In its Rejoinder on Tariff, TANESCO expressly submitted that "the TANESCO-IPTL Settlement and the release of the monies from the Escrow Account were known to the [P]arties and the Tribunal at the time the Decision was issued", and subsequently advanced a number of arguments to support this proposition.[567] Similarly, TANESCO's post-hearing brief dated November 2, 2015 devoted over five pages to arguing either that the relevant facts were known to SCB HK and the Tribunal, or that SCB HK's alleged ignorance of these facts was due to its own negligence.

446. In the Committee's view, it is important that TANESCO did not request more time or an additional opportunity to brief the issue, whether through submissions or at a subsequent hearing, or to present factual or expert evidence on the reconsideration of the Decision or on the Article 51 application by analogy. Thus, the Committee considers that TANESCO, pursuant to Rule 27 of the ICSID Arbitration Rules, waived its right to make any such procedural objections later on in the arbitration or annulment proceeding. As stated by the *ad hoc* committee in *Joseph C. Lemire v. Ukraine*: "a party that is aware of a procedural violation should react immediately by objecting to the violation … [A] party that has failed to object to a violation of procedure before the arbitral tribunal may not rely on this violation as a ground for annulment".[568]

447. The Committee does not find bias against TANESCO in the Award and considers that a reasonable explanation was given for the assessment of the evidence on the record and the allocation of the burden of proof.

448. The Committee, having reviewed Appendix 5 to SCB HK's Rejoinder on Annulment, is further convinced that TANESCO had multiple opportunities to make, and did make, submissions on whether the December 2013 Letter was misleading and had sufficient

[567] SCB HK's Counter-Memorial on Annulment, ¶427, footnote 500, referring to **Annex-19**, Tanesco's Rejoinder on Tariff dated May 21, 2015, ¶¶32 and 63-65 (*e.g.* "[SCB HK]'s claimed ignorance of the terms of the TANESCO-IPTL Settlement is directly contradicted by the contents of its own letter"; "[SCB HK] was necessarily aware that whatever amount might have been agreed in the TANESCO-IPTL Settlement, such amount was at least equivalent to the value of the monies deposited in the Escrow Account").

[568] SCB HK's Counter-Memorial on Annulment, ¶422, footnote 497, quoting **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶272.

opportunity to brief and adduce evidence on the issue of SCB HK's knowledge of the facts.[569]

449. The Committee further determines that the issue of whether SCB HK had any relevant knowledge is a matter going to the substance of the Award. For purposes of the present Application for Annulment, the question is whether TANESCO was given sufficient opportunity to present its case to the Tribunal on the question of SCB HK's knowledge and to adduce evidence on this point. In the Committee's view, it did have sufficient opportunity to argue that these matters had not been concealed and were known to SCB HK. The point could have been developed in both TANESCO's Submission on Tariff and TANESCO's Rejoinder on Tariff, as well as at the August 2015 Hearing and in the subsequent post-hearing brief. In conclusion, the Committee does not find any departure from a fundamental rule of procedure in connection with the present allegation.

3. The existence of a serious departure from a fundamental rule of procedure by reversing the burden of proof without giving TANESCO the opportunity to brief this point

i) TANESCO's arguments

450. According to TANESCO, the Tribunal unilaterally took the decision to reverse the burden of proof without giving TANESCO the opportunity to brief this point. TANESCO explains that these were crucial questions that the Parties should have had a chance to fully brief and adduce witness evidence on.[570]

451. TANESCO refers to the Tribunal's argument that SCB HK could not have known about these facts, otherwise it is "illogical" that it would not have made its case sooner. In response, it states that whether illogical, erroneous, tactical, or somehow influenced by SCB HK's strategy in the complex web of parallel proceedings in multiple jurisdictions, it is not for the Tribunal to perfect a party's case, or to make assumptions about SCB HK's knowledge without further evidence.[571]

[569] SCB HK's Rejoinder on Annulment, ¶245.
[570] TANESCO's Reply on Annulment, ¶246; see also TANESCO's Memorial on Annulment, ¶185.
[571] TANESCO's Memorial on Annulment, ¶185.

452. TANESCO argues that SCB HK failed to make a point at the relevant time (for whatever reason) and failed to do so despite its knowledge which (at least) was undeniably sufficient to request documents from TANESCO.[572]

453. TANESCO also argues that the Tribunal wrongly reversed the burden of proof by putting the burden upon TANESCO to prove facts upon which SCB HK relied. It considers that SCB HK bore that burden of proof when seeking to rely on these facts to prove its case, after giving TANESCO an opportunity to respond in full. Upon SCB HK's request to reopen the Decision on Jurisdiction, the Tribunal shifted the burden of proof onto TANESCO to prove that SCB did have knowledge of the facts. At paragraph 341 of the Award, "the Tribunal concludes that [TANESCO] has failed to prove that SCB HK had knowledge of the facts which [TANESCO] had withheld from the Tribunal in its December 13, 2013 Letter".[573]

454. TANESCO states that without being allowed to make submissions on the point, the Tribunal unilaterally took in the Award the decision to reverse the burden of proof. On the basis of an incorrect assumption of lack of knowledge by SCB HK, the Tribunal held that TANESCO should prove that SCB HK did have knowledge of the facts. SCB HK alleged misrepresentation in TANESCO's letter dated December 13, 2013 in order to bypass the issue of knowledge or somehow to negate its "negligence" in not seeking disclosure. The Tribunal wrongly endorsed this approach. Accordingly, TANESCO concludes that the Award should be annulled.[574]

ii) SCB HK's arguments

455. SCB HK explains that the burden of proof was correctly allocated to TANESCO to show that SCB HK had knowledge of the relevant facts, e.g. the 2013 Settlement Agreement and the payments from the Escrow Account.[575]

[572] TANESCO's Memorial on Annulment, ¶186.
[573] TANESCO's Memorial on Annulment, ¶187, referring to **Annex-1**, Award, ¶341.
[574] TANESCO's Reply on Annulment, ¶246.
[575] SCB HK's Counter-Memorial on Annulment, ¶431.

456. SCB HK argues that TANESCO had actively and knowingly misled the Tribunal as to the likelihood of a liquidator or administrator of IPTL being appointed in the future. Accordingly, the burden on SCB HK was to prove that the alleged representations were made, that they were false, and that TANESCO knew them to be false. SCB HK duly discharged this burden in its submissions to the Tribunal.[576]

457. In SCB HK's view, the relevant aspect of TANESCO's defence is its assertion that SCB HK and the Tribunal could not have been misled by the representations because they had knowledge of the relevant facts. SCB HK states that the burden to prove this lies with TANESCO, because it was an element of its positive argument to refute SCB HK's claims. It was not for SCB HK to prove a negative statement (that it did not have knowledge of the facts), merely because TANESCO made an assertion to the contrary. TANESCO put forward the allegation that SCB HK's misrepresentation argument could not succeed because SCB HK had knowledge of the true facts and, as TANESCO itself observes, "the burden lies with the party seeking to prove the allegation".[577]

458. SCB HK explains that the Tribunal did not reverse the burden of proof by so finding, but rather determined simply that TANESCO had failed to discharge a burden of proof which properly rested with it.[578]

459. Finally, even if (which is denied) insufficient opportunity was given for the Parties to brief any issue in the Arbitration Proceeding, and this constituted a departure from a fundamental rule of procedure, SCB HK asserts that the departure was not serious. SCB HK states that the Arbitration Proceeding was conducted according to an entirely conventional procedural timetable, and the Parties' submissions were structured in an entirely conventional way.[579] Even if certain issues could have been ventilated further,

[576] SCB HK's Counter-Memorial on Annulment, ¶¶432-433, footnotes 505-507, **C-313**, Letter from Hunton & Williams LLP to the Tribunal dated December 13, 2013; **C-453**, SCB HK's Submissions on Tariff dated November 11, 2014, ¶127; **C-476**, SCB HK's Further Submissions on Tariff dated March 26, 2015, ¶¶52-68; **C-469**, SCB HK's Post-Hearing Brief dated November 2, 2015, ¶¶53-63.
[577] SCB HK's Counter-Memorial on Annulment, ¶434, footnote 508, referring to TANESCO's Memorial on Annulment, ¶188.
[578] SCB HK's Counter-Memorial on Annulment, ¶435, SCB HK's Rejoinder on Annulment, ¶¶246-247.
[579] SCB HK's Rejoinder on Annulment, ¶248.

the Parties had the opportunity to make, and did make, detailed submissions on the key points relied on in the Award.[580]

460. In summary, SCB HK states that had TANESCO believed that the manner in which issues were being addressed constituted a departure from a fundamental rule of procedure, or that any such departure was serious, TANESCO would have raised an objection while the proceedings were pending. That TANESCO did not do so indicates that either there was no departure, or it was not serious, and by reason of its silence TANESCO has now waived any right it had to object to any such procedural violation as may (which is denied) have occurred.[581]

iii) Analysis and Decision of the Committee

461. After considering the position of the Parties, the Committee concludes that the Tribunal properly determined that the burden to prove SCB HK's knowledge was with TANESCO, because it was an element of the positive argument made by it to refute SCB HK's claims. It was not for SCB HK to prove a negative, given that the "the burden lies with the party seeking to prove the allegation".[582]

462. In conclusion, the Committee considers that there was no departure from a fundamental rule of procedure, or that any such departure was serious.

VI.D Failure to state reasons on which the Award is based

463. In this section, the Committee will address the Parties' arguments regarding the Tribunal's failure to state reasons on which the Award is based, invoked by TANESCO as a ground for annulment according to Article 52(1)(e) of the ICSID Convention.

[580] SCB HK's Rejoinder on Annulment, ¶248, footnote 223, referring to Appendix 5.
[581] SCB HK's Rejoinder on Annulment, ¶249, footnote 224, where SCB HK stated that: "[a]s the *ad hoc* committee observed in **CLA-108**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, July 8, 2013, paragraph 272: 'a party that is aware of a procedural violation should react immediately by objecting to the violation… [A] party that has failed to object to a violation of procedure before the arbitral tribunal may not rely on this violation as a ground for annulment.' See further [SCB HK's] Counter-Memorial [on Annulment], paragraph 422".
[582] SCB HK's Counter-Memorial on Annulment, ¶434, footnote 508, referring to TANESCO's Memorial on Annulment, ¶188.

i) TANESCO's arguments

a) The standard of the "failure to state reasons" ground

464. TANESCO submits that, pursuant to Article 52(1)(e) of the ICSID Convention, a party may request annulment of an award if the award has failed to state the reasons on which it is based. TANESCO further states that this follows from Article 48(3) of the Convention, which obliges a tribunal to ensure that an award "shall state the reasons upon which it is based", and also from ICSID jurisprudence, which has confirmed that an award must "enable the reader to follow the reasoning of the Tribunal on points of fact and law".[583]

465. According to TANESCO, ICSID jurisprudence also confirms that reasons which are contradictory are akin to a failure to state reasons given that "two genuinely contradictory reasons cancel each other out".[584] It refers to the *ad hoc* committee in the *MINE* case, where, according to TANESCO, "…the *ad hoc* committee stated that an award must be sufficiently clear so as to enable a reader to understand how the tribunal proceeded from 'A to B' and that this 'minimum requirement is in particular not satisfied by either contradictory or frivolous reasons'".[585]

b) The Tribunal's failure to state reasons on which the Award is based by holding on purely formalistic grounds that SCB HK had made an investment within Article 25(1) of the Convention

466. TANESCO submits that the Tribunal's analysis of whether there was an investment rested on purely formalistic grounds with no engagement of the Tribunal as to whether SCB HK's alleged investment satisfied the threshold of an investment under Article 25(1) of the ICSID Convention or as required under the Salini test and ICSID jurisprudence.[586]

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[583] Application for Annulment, ¶18; TANESCO's Memorial on Annulment, ¶198, footnote, 131, referring to **Annex-77**, *MINE v. Guinea*, ¶5.08.
[584] TANESCO's Memorial on Annulment, ¶199, footnote 132, referring to **Annex-50**, *Klöckner v. Cameroon*, ¶116; **Annex-4,** *Soufraki v. UAE*, ¶125; see also Application for Annulment, ¶20.
[585] TANESCO's Memorial on Annulment, ¶199, footnote 133, referring to **Annex-77**, *MINE v. Guinea*, ¶5.09.
[586] Application for Annulment, ¶19; TANESCO's Memorial on Annulment, ¶¶105, and 201-202; TANESCO's Reply on Annulment, ¶247.

467. In this respect, TANESCO states that it is clear that the transaction in this case did not constitute an investment under Article 25(1) of the Convention, and that the Tribunal's conclusion on this issue is wrong, however, the Committee does not need to go this far in its analysis. According to TANESCO, the Committee needs simply to consider whether the Tribunal has complied with Article 48(3) of the Convention and has therefore ensured that the Award states the reasons upon which it is based.[587]

468. TANESCO argues that given the complex considerations which are involved in determining whether there was an investment on the specific facts, the Tribunal's cursory consideration of this issue is wholly insufficient for TANESCO or any other party to understand the reasons for the Tribunal's conclusions.[588]

469. Furthermore, TANESCO submits that SCB HK's arguments that the Tribunal's reasoning was perfectly adequate on this issue are inadequate as well for the following reasons.[589]

470. First, TANESCO states that SCB HK's assertion that there was "plainly a legal dispute arising from an investment" is unsubstantiated. TANESCO submits that SCB HK's speculative acquisition of a distressed debt, at a substantive discount, plainly cannot constitute an investment under Article 25(1) of the Convention.[590]

471. Second, TANESCO submits that further to SCB HK's claim that it gave reasons as to why it considered that the investment requirement was satisfied, the adequacy of these submissions is irrelevant.[591] TANESCO elaborates that the Parties' submissions on this issue as well as whether the Tribunal read and considered those submissions are irrelevant, since TANESCO is raising this argument on the basis that the Tribunal itself failed to state reasons why it concluded that there was an investment. Accordingly,

[587] TANESCO's Reply on Annulment, ¶247; TANESCO's Memorial on Annulment, ¶202. As to the reasons why TANESCO considers that there was no investment and thus that the Tribunal reached a mistaken conclusion, TANESCO refers the Committee to ¶¶101-116 of its Memorial.
[588] TANESCO's Memorial on Annulment, ¶¶106 and 202; TANESCO's Reply on Annulment, ¶247.
[589] TANESCO's Reply on Annulment, ¶248.
[590] TANESCO's Reply on Annulment, ¶¶162 and 249.
[591] TANESCO's Reply on Annulment, ¶250, footnote 234, referring to SCB HK's Counter-Memorial, ¶450(ii).

TANESCO states that what is of paramount importance is whether the Tribunal's reasoning on an issue is clear.[592]

472. TANESCO explains that the Tribunal dedicated a 56-word paragraph to the fundamental issue of the existence of an investment and provided no reasoning as to why it considered SCB HK had one.[593] According to TANESCO, in that paragraph the Tribunal merely asserted that it was "satisfied" that by virtue of the purchase of outstanding debt due under loans to IPTL, and the assignment of the rights under the relevant agreements, SCB HK had an investment. Nevertheless, TANESCO argues that there were numerous valid reasons why SCB HK did not make a qualifying investment under the ICSID Convention, and the Tribunal failed to consider a single one.[594]

473. Thus, TANESCO submits that the Tribunal merely restated a factual situation that SCB HK had purchased the outstanding debt due under loans to IPTL – without engaging in any consideration of the requirements of what constitutes an investment.[595]

474. Lastly, TANESCO opposes SCB HK's assertion that TANESCO raised no objections to the Tribunal's jurisdiction under Article 25(1) of the Convention.[596] According to TANESCO, it made clear in its submissions that it did not consider the distressed debt to amount to a qualifying investment. In support of this, TANESCO refers the Committee to paragraphs 156-187 of its Reply on Annulment, where, among other things, it argues that it questioned the nature of the transaction during the course of the underlying proceedings, and reserved its rights concerning the Tribunal's jurisdiction.[597]

475. TANESCO states that, in any event, the objective requirements of Article 25(1) should have been taken into account by the Tribunal irrespective of the arguments made by the Parties. According to TANESCO, had the Tribunal performed a thorough examination

[592] TANESCO's Reply on Annulment, ¶250.
[593] TANESCO's Reply on Annulment, ¶251, footnote 235, referring to **Annex-1**, Decision on Jurisdiction, ¶111.
[594] TANESCO's Reply on Annulment, ¶251.
[595] TANESCO's Reply on Annulment, ¶164.
[596] TANESCO's Reply on Annulment, ¶252, footnote 236, referring to SCB HK's Counter-Memorial on Annulment, ¶450(iii).
[597] TANESCO's Reply on Annulment, ¶173.".

of the relevant transactions to determine whether or not there was a qualifying investment, it would have concluded that there was no such investment.[598]

476. Consequently, TANESCO submits that the Award should be annulled for failure to state reasons on which it is based regarding the Tribunal's conclusion that SCB HK had made an investment within Article 25(1) of the Convention.[599]

c) The Tribunal's failure to take into account additional and decisive evidence regarding the Parties' interest in the Escrow Account

477. TANESCO states that the Tribunal failed to take into consideration additional decisive evidence submitted by TANESCO regarding the Parties' interest in the Escrow Account, specifically showing that SCB HK had declared that it had no interest in the funds of the account, and that, contrary to SCB HK's assertions, the release of these funds did not end the Tariff Dispute.[600]

478. TANESCO argues that it exhibited an email from SCB HK dated December 6, 2013, which purported to explain the "purpose and scope" of SCB HK's November 27, 2013 letter.[601] By this email, SCB HK confirmed that it did not consider the Tribunal had jurisdiction with respect to the Escrow Account, and stated that: "[f]or the avoidance of doubt, SCB HK accepts that this Tribunal does not have jurisdiction in respect of the Escrow Agreement. SCB HK does not assert any claim in this arbitration to the monies held in the Escrow Account; nor does it contend that the Escrow Agreement is relevant to the matters to be determined by this Tribunal in its award. However, SCB HK reserves the right to seek relief against the funds in the Escrow Account in other proceedings, including in any proceedings seeking enforcement of any award by this Tribunal in SCB HK's favour".[602]

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[598] TANESCO's Reply on Annulment, ¶164, footnote 163, referring to TANESCO's Memorial on Annulment, ¶¶101-116.
[599] TANESCO's Memorial on Annulment, ¶202; TANESCO's Reply on Annulment, ¶247.
[600] Application for Annulment, ¶23; TANESCO's Memorial on Annulment, ¶¶203-204.
[601] TANESCO's Memorial on Annulment, ¶203, footnote 134, referring to **Annex-12**, Email from SCB HK to the Tribunal, dated December 6, 2013 and **Annex-13**, Letter from TANESCO to the Tribunal, dated December 13, 2013.
[602] TANESCO's Reply on Annulment, ¶255, footnote 237, referring to **Annex-12**, Email from SCB HK to the Tribunal, dated December 6, 2013; see also TANESCO's Memorial on Annulment, ¶203.

479. TANESCO asserts that this statement was effectively a waiver by SCB HK, which should have precluded SCB HK from asserting that the Escrow Account was material to the Tribunal's determinations in the proceedings. The Tribunal failed to pay attention to this waiver. Instead, it asserted that, despite SCB HK's self-declared lack of interest in the Escrow Account, TANESCO's silence regarding the Escrow Account was a relevant factor in its decision to reconsider the Decision.[603]

480. Additionally, TANESCO states that in further seeking to justify its reconsideration of the Decision, the Tribunal held at paragraph 345 of the Award what it claimed it knew or believed at the time of the Decision and which includes "…that some protection for the interests of SCB HK in collecting any judgment remained because of the existence of funds within the Escrow Account". In TANESCO's view, it was never appropriate for the Tribunal to treat the Escrow Account as some additional security for SCB HK, particularly given that it recognised that the Tribunal had no jurisdiction over the escrow and SCB HK had no rights over the funds therein.[604]

481. Thus, TANESCO submits that the Tribunal apparently disregarded this important evidence and failed to give reasons for doing so.[605]

d) The Tribunal's failure to take into account the evidence presented by TANESCO on the continuing existence of the Tariff Dispute

482. TANESCO states that the Tribunal was presented with evidence demonstrating that negotiations regarding the level of the tariff payable under the PPA by TANESCO to IPTL were ongoing and that the Tariff Dispute was not settled in full.[606]

483. According to TANESCO, the evidence presented proved that elements of the nine-year long dispute between TANESCO and IPTL continued after the signing of the 2013

[603] TANESCO's Reply on Annulment, ¶256.
[604] TANESCO's Reply on Annulment, ¶257.
[605] TANESCO's Memorial on Annulment, ¶204.
[606] Application for Annulment, ¶23; TANESCO's Memorial on Annulment, ¶205.

Settlement Agreement and the release of the funds in the Escrow Account, and that they are still ongoing to this day.[607]

484. In this respect, TANESCO submits that whilst the Tribunal did set out the Parties' arguments in paragraphs 183 to 198 of its Award, including TANESCO's arguments that elements of the dispute continued notwithstanding the 2013 Settlement Agreement, it failed to deal with these in paragraph 331 of its Award, by which it simply stated that there had been a settlement.[608]

485. Consequently, TANESCO submits that the Tribunal disregarded this evidence and failed to explain its reasons for doing so.[609]

e) The Tribunal's failure to take into account contradictory evidence concerning SCB HK's knowledge of the status of the Escrow Account

486. TANESCO maintains that the Tribunal failed to take into account contradictory evidence concerning SCB HK's state of knowledge of the emptying of the Escrow Account.[610]

487. As a starting point, TANESCO recalls the Tribunal's assertion at paragraph 336 of the Award, where it found that: "…there is no evidence that [SCB HK] knew that the Escrow Account had in fact been emptied".[611] However, it also identifies that the Tribunal noted that: "…the fact that the Administrative Receiver, Martha Renju, had a copy of the agreement when she filed a request for an injunction to prevent the monies in the Escrow Account from being dispersed, some ten days before [SCB HK] wrote its November 27 letter that [SCB HK] must have had some knowledge of the 2013 Settlement Agreement".[612]

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[607] TANESCO's Reply on Annulment, ¶258; see also Application for Annulment, ¶23; TANESCO's Memorial on Annulment, ¶205.
[608] TANESCO's Reply on Annulment, ¶258.
[609] TANESCO's Memorial on Annulment, ¶205.
[610] TANESCO's Reply on Annulment, ¶260.
[611] Text in brackets added by the Committee; TANESCO's Memorial on Annulment, ¶206, footnote 136, referring to **Annex-1**, Award, ¶336.
[612] Text in brackets added by the Committee; TANESCO's Memorial on Annulment, ¶207, referring to **Annex-1**, Award, ¶336.

488. TANESCO further explains that it submitted evidence of direct knowledge of the managing director of SCB HK, Mr Joseph Casson, regarding the release of the funds, from November 13, 2013 at the latest, well before the Decision on Jurisdiction was issued. Here, TANESCO refers the Committee to paragraph 337 of the Award, where the Tribunal stated: "[TANESCO] also refers to negotiations between Mr. Casson of SCB HK and Mr Sethi of PAP on November 13, 2013, as related by Mr. Casson in his witness statement in proceedings before the Commercial Court in London where he stated that during such negotiations: 'it was made clear [to him] by Mr Sethi that 'there was no cash available to SCB HK because USD$75,000,000 was being paid to settle PAP's purchase of VIP's 30% shareholding in IPTL' and that SCB HK [would have] received no cash now because (Mr Sethi said) none of the USD$100,000,000 sitting in the escrow account would be left after paying VIP, the Tanzania Revenue Authority and 'other creditors' [text in brackets added by the Committee]".[613]

489. According to TANESCO, it is undeniable based on Mr Casson's evidence that SCB HK knew that the Escrow Account was likely to be emptied or already had been emptied. TANESCO further states that even the Tribunal acknowledged that this information might have prompted SCB HK's letter to the Tribunal on November 27, 2013.[614]

490. Additionally, TANESCO opposes SCB HK's statement that there was an "obvious mix-up" by the Tribunal in its finding that Ms Renju had a copy of the 2013 Settlement Agreement by November 17, 2013 at the latest.[615] TANESCO considers that, in any event, it is a matter of record that SCB HK had knowledge of the existence of the

[613] TANESCO's Memorial on Annulment, ¶208, footnote 137, referring to **Annex-1**, Award, ¶337.
[614] TANESCO's Reply on Annulment, ¶266, footnote 241, referring to **Annex-1**, Award, ¶338.
[615] TANESCO's Reply on Annulment, ¶261, referring to SCB HK's Counter-Memorial, ¶459, where SCB HK stated that: "Tanesco first complains about the Tribunal's consideration of the evidence that Ms Renju 'had a copy of the settlement agreement' when she filed an injunction to prevent the dissipation of the Escrow Account. This argument is opportunistic and cynical in that it relies on an obvious mix-up by the Tribunal about the agreement that was available to Ms Renju and the timing of her injunction application. As footnote 421 (paragraph 336) of the Award correctly records, the injunction application was made on 6 September 2013 (i.e. before the October 2013 Agreement settling the Tariff Dispute) and the application exhibited the PAP-VIP SPA of August 2013, not the October 2013 Agreement. As discussed above in paragraph 153, it is important to distinguish between these agreements, notwithstanding Tanesco's efforts to take advantage of the confusion"; see also **R-164**, Plaint of Martha Renju vs PAP and VIP in Commercial Case No. 123 of 2013 dated September 6, 2013, page 10.

agreement by its letter dated November 27, 2013, so the question of whether Ms Renju did have a copy of it 10 days earlier is ultimately moot.[616]

491. According to TANESCO, SCB HK's letter of November 27, 2013 confirmed that it knew that TANESCO had entered into an agreement with IPTL that purported to settle the outstanding tariff payment under the PPA, thereby facilitating release of the funds placed in escrow by the GoT as security for TANESCO's obligations under the PPA.[617] TANESCO quotes this letter as follows:

> "[SCB HK has been informed that TANESCO] has now entered into an agreement with IPTL (through PAP) that purports to settle the outstanding tariff payments under the PPA that are in issue in these proceedings, thereby facilitating release of the funds placed in escrow by the GoT as security for Tanesco's obligations under the PPA".[618]

492. In TANESCO's view, this letter could not be clearer: SCB HK knew of the existence of the 2013 Settlement Agreement and recognised that it permitted the release of the funds from the Escrow Account and that this might well be emptied imminently.[619] TANESCO argues that despite knowing this, SCB HK took no action either to obtain a copy of the 2013 Settlement Agreement, or injunct the monies in the Escrow Account.[620]

493. On this point, TANESCO argues that even SCB HK's own counsel admitted that "[i]t may have been a tactical error" on his part not to seek disclosure and make further inquiries regarding said agreement. In this respect, TANESCO submits that, on the contrary, SCB HK made clear its intention not to interfere with the escrow funds, stating that the Escrow Account was not relevant to the issues in dispute.[621]

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[616] TANESCO's Reply on Annulment, ¶261.
[617] TANESCO's Reply on Annulment, ¶262, footnote 238, referring to **C-311**, Letter from Herbert Smith Freehills LLP to the Tribunal, dated November 27, 2013.
[618] TANESCO's Reply on Annulment, ¶262, footnote 238, referring to **C-311**, Letter from Herbert Smith Freehills LLP to the Tribunal, dated November 27, 2013.
[619] TANESCO's Reply on Annulment, ¶¶262-263.
[620] TANESCO's Reply on Annulment, ¶263.
[621] TANESCO's Reply on Annulment, ¶¶263-264.

494. However, TANESCO states that SCB HK cannot rely on a "tactical error" to hide its own procedural negligence or otherwise.[622] Consequently, TANESCO states that Mr Casson's evidence coupled with SCB HK's November 27, 2013 letter leave no doubt that the existence of the 2013 Settlement Agreement and the status of the Escrow Account were well known to both SCB HK and the Tribunal before the Decision was issued.[623]

495. TANESCO argues that there is simply no reason why SCB HK or the Tribunal could not have requested further information at that time. TANESCO explains that, instead, the Tribunal came to the conclusion that although "with hindsight SCB HK might have wished that it pushed further", the Tribunal's view that the December 2013 letter was misleading somehow excused SCB HK's negligence in failing to make further disclosure enquiries.[624]

496. TANESCO submits that although it seemed the Tribunal was unable to understand why SCB HK, if it had known of the existence of the 2013 Settlement Agreement, which TANESCO states it did, would not have sought to capitalise on its knowledge of said agreement prior to the issuance of the Decision, it hurriedly dismissed the evidence merely labelling SCB HK's procedural negligence as a "tactical mistake", stating that it was "not entirely clear" and that "it [was] inconceivable that the [SCB HK] would not have sought to capitalise on that reversal..."[625] Nevertheless, TANESCO argues that "[w]hether illogical, an error, tactical, or somehow influenced by SCB HK's strategy in the complex web of parallel proceedings in multiple jurisdictions, it is not for the Tribunal to perfect a party's case, or to make assumptions about SCB HK's knowledge without evidence".[626]

497. In TANESCO's view, the Tribunal simply did not properly consider the evidence on this point. Further, the Tribunal: (i) did not provide reasons for coming to the conclusion that SCB HK did not know about the terms of the 2013 Settlement Agreement despite

[622] TANESCO's Reply on Annulment, ¶263, footnote 239, referring to **C-475**, Transcript of tariff hearing (August 2015 Hearing), Day 1, dated August 19, 2015, p. 167, lines 24-25.
[623] TANESCO's Reply on Annulment, ¶¶262-267.
[624] TANESCO's Reply on Annulment, ¶269, footnote 243, referring to **Annex-1**, Award, ¶342.
[625] TANESCO's Memorial on Annulment, ¶209; see also TANESCO's Reply on Annulment, ¶270.
[626] TANESCO's Memorial on Annulment, ¶185.

TANESCO's position that SCB HK had made a statement that it did know about it;[627] and (ii) did not give reasons as to why it interpreted the evidence of Mr Casson in the way that it did, stating that the Tribunal noted that Mr Casson had learned there "was an intention to pay US$ 75 million to settle PAP's purchase of VIP's shareholding and that after that was done nothing would be left of the US$ 100 million that was in the escrow account".[628]

498. On this point, TANESCO argues that SCB HK's attempts to convince the Committee that the Tribunal "carefully considered the evidence about Mr Casson's knowledge" are insincere and misleading.[629]

499. Consequently, TANESCO submits that the Tribunal came to a one-sided conclusion without explaining why it was disregarding the clear evidence before it and thus, that the lack of reasoning in the Tribunal's Award and presumption that SCB HK did not have knowledge despite its own admission that it did, is in itself a reason why the Award should be annulled.[630]

f) The Tribunal's reversal of its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement

500. TANESCO explains that the Tribunal based its reconsideration on the existence of the 2013 Settlement Agreement between TANESCO and IPTL to settle the Tariff Dispute and on the fact that the Escrow Account had been emptied, stating that it considered such premises to be "all material to the decision taken by the Tribunal" and that "all of these facts had been withheld by [TANESCO] from the Tribunal".[631]

501. However, TANESCO states that the Tribunal concluded in the Decision that its jurisdiction was limited to making a declaration as to amounts owed by TANESCO to

[627] TANESCO's Reply on Annulment, ¶264.
[628] TANESCO's Reply on Annulment, ¶265, footnote 240, referring to **Annex-1**, Award, ¶338.
[629] TANESCO's Reply on Annulment, ¶268.
[630] TANESCO's Reply on Annulment, ¶¶268 and 271.
[631] TANESCO's Memorial on Annulment, ¶210.

IPTL, on legal bases which, according to TANESCO, are completely independent from those which subsequently led the Tribunal to reconsider the scope of its jurisdiction.[632]

502. In support of this, TANESCO quotes the Decision on Jurisdiction as follows: "[t]he Tribunal has concluded elsewhere that, in so far as SCB HK has stepped into the shoes of IPTL in respect of its rights under the PPA, this Tribunal only has jurisdiction in respect of IPTL's rights against TANESCO under the PPA. As will be discussed later, this means that the Tribunal can make a declaration as to any amounts owed by TANESCO to IPTL, but it cannot make an order requiring TANESCO to pay any such amounts to SCB HK independently of IPTL. SCB HK has no rights as against TANESCO as the lender to IPTL in these arbitration proceedings; it only has rights against TANESCO as the assignee of IPTL's rights under the PPA".[633]

503. Accordingly, TANESCO submits that the fact that the Tribunal only premised its reconsideration of the scope of its jurisdiction on one of the legal bases on which it had previously established it, without addressing or rejecting the other independent legal bases taken into account in its Decision, should also lead to annulment for failure to state reasons.[634]

g) The Tribunal's holding that the tariff must be calculated on the basis of an "IRR" of 22.1% which directly contradicted its earlier finding that this rate cannot apply

504. TANESCO explains that, in the Decision on Jurisdiction, the Tribunal concluded that, before it could quantify the amount owing by TANESCO under the PPA, the tariff must have been recalculated to reflect the fact that IPTL's equity contribution was not in the form of paid-up share capital but, rather, was by way of a shareholder loan.[635]

505. TANESCO further explains that the Tribunal encouraged the Parties to seek to agree the basis on which the recalculation should be carried out and, in so doing, it set out its

[632] TANESCO's Memorial on Annulment, ¶210.
[633] TANESCO's Memorial on Annulment, ¶210, footnote 139, referring to **Annex-1**, Decision on Jurisdiction, ¶¶182–183.
[634] TANESCO's Memorial on Annulment, ¶211.
[635] TANESCO's Memorial on Annulment, ¶213.

position which the Parties were asked to adhere to when seeking an agreement. According to TANESCO, the Tribunal concluded that it did "not believe that a tariff of 22.31% would be appropriate" as it had rejected the premise on which the tariff was based, that an equity contribution could be made by way of a shareholder loan.[636]

506. However, TANESCO states that, in the Award, the Tribunal's determination that the tariff must be recalculated on the basis of an IRR of 22.31% applied to a shareholder loan directly contradicts the previous finding of the Tribunal in the Decision on Jurisdiction, in which it concluded that an IRR of 22.31% would not be appropriate.[637]

507. TANESCO states that it has brought this inconsistency to the Tribunal's and SCB HK's attention, but that this was dismissed by the Tribunal in the Award without adequate reasons.[638] TANESCO explains that, in dismissing its objection to the Tribunal's change in position, the Tribunal asserted that its new approach was consistent with the conclusion adopted by TANESCO's expert, Mr David Ehrhardt, in his expert report.[639]

508. Additionally, TANESCO states that the Tribunal concluded that the entire purpose of the recalculation of the tariff was to ensure that tax savings were transferred to TANESCO. In this respect, TANESCO accepts that the Tribunal considered arguments on the issue of the potential tax savings under differing tariffs, however, it states that the Tribunal's reasoning for reversing its decision on the appropriateness of the 22.31% tariff is unclear and contradictory.[640]

509. On this point, TANESCO argues that the Tribunal sought to justify its decision on an expert report that pre-dates both the Award and the Decision on Jurisdiction. It states that the evidence on which the Tribunal relied was fully before it at the time it made its earlier contradictory decision.[641] Consequently, TANESCO submits that it is unclear why the

[636] TANESCO's Memorial on Annulment, ¶¶213-214, footnote 142, referring to **Annex-1**, Decision on Jurisdiction, ¶339.
[637] Application for Annulment, ¶24, footnote 30, referring to Decision on Jurisdiction, ¶339 and Award, ¶371; see also TANESCO's Memorial on Annulment, ¶215.
[638] TANESCO's Memorial on Annulment, ¶215, footnote 144, referring to **Annex-1**, Award, ¶¶382–384.
[639] TANESCO's Memorial on Annulment, ¶216, footnote 145, referring to **Annex-1**, Award, ¶383.
[640] TANESCO's Memorial on Annulment, ¶216.
[641] TANESCO's Memorial on Annulment, ¶217.

Tribunal reached a wholly different conclusion as to the nature and level of the tariff in its Award, despite having referred to evidence which was already in its possession at the time it issued the Decision on Jurisdiction.[642]

510. Further, TANESCO submits that in a recent ICSID annulment decision, an *ad hoc* committee decided that an award should be annulled because the tribunal had reached a decision on the basis of an element that it had previously rejected.[643] According to TANESCO, in the present case, the Tribunal effectively dismissed – or at least determined irrelevant or inapplicable – Mr Ehrhardt's expert evidence in its Decision on Jurisdiction, and then sought to rely in the Award on the very same evidence to justify why it had formed an entirely different view on the same issue.[644]

511. Finally, TANESCO states that, as noted in *Vivendi*,[645] the failure to state reasons: (i) must leave a point lacking in any expressed rationale; and (ii) that point must be necessary to the tribunal's decision. TANESCO claims that it is beyond doubt that consideration of the level of the tariff is fundamental to the case and the Tribunal's reasoning as to its ultimate conclusion must be readily apparent. It claims that the change in the Tribunal's approach to the level of tariff to be imposed has no clear rationale and that the Tribunal's reasoning as to why it reached the decision it did is impossible to follow.[646]

512. Consequently, TANESCO concludes that for all the reasons mentioned above, the Award should be annulled on the basis that the Tribunal failed to state its reasons for applying a tariff of 22.31%.

ii) <u>SCB HK's arguments</u>

a) The standard of the "failure to state reasons" ground

[642] TANESCO's Memorial on Annulment, ¶218.
[643] TANESCO's Memorial on Annulment, ¶220, footnote 149, referring to **Annex-80**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, December 27, 2016, ¶230.
[644] TANESCO's Memorial on Annulment, ¶220.
[645] TANESCO's Memorial on Annulment, ¶219, footnotes 146 and 147, both referring to **Annex-78**, *Vivendi I*, ¶65.
[646] TANESCO's Memorial on Annulment, ¶¶218-219.

513. SCB HK recalls TANESCO's assertions that an award "must enable the reader to follow the reasoning of the tribunal on points of fact and law", that it must be sufficiently clear so as to enable a reader to understand how the tribunal proceeded from A to B and that this "minimum requirement is in particular not satisfied by either contradictory or frivolous reasons".[647] SCB HK also recalls TANESCO's submission that reasons which are contradictory are akin to a failure to state reasons since they "cancel each other out".[648]

514. In this respect, SCB HK submits that, while it agrees with these general statements of principle, it also notes that not only did the *ad hoc* committee in *MINE v. Guinea* find that the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded to its conclusion, this committee also clarified that the requirement to state reasons is a minimum requirement that is fulfilled even if the tribunal made an error of fact or law.[649]

515. In support of this, SCB HK refers to the *ad hoc* committee in *Vivendi I,* which stated that: "…it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons…"[650] In this respect, SCB HK argues that, as noted by the *ad hoc* committee in *MTD v. Chile,* the test for failure to state reasons under said Article is an absence rather than inadequacy or brevity of reasoning.[651]

516. Additionally, SCB HK submits that not only must there be a failure to state any reasons, but that the reasons themselves must be necessary to the tribunal's decision.[652] On this

[647] SCB HK's Counter-Memorial on Annulment, ¶437, footnote 511, referring to TANESCO's Memorial on Annulment, ¶198, referring to *MINE v. Guinea* at ¶5.09.
[648] SCB HK's Counter-Memorial on Annulment, ¶437, footnote 512, referring to TANESCO's Memorial on Annulment, ¶198, referring to **Annex-50,** *Klöckner v. Cameroon*, ¶116 and **Annex-4,** *Soufraki v. UAE*, ¶125.
[649] SCB HK's Counter-Memorial on Annulment, ¶438, footnote 513, referring to **Annex-77**, *MINE v. Guinea*, ¶5.09.
[650] SCB HK's Counter-Memorial on Annulment, ¶438, footnote 514, referring to **Annex-78**, *Vivendi I*, ¶64; **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶278; **Annex-73**, *Wena Hotels v. Egypt*, ¶79; **Annex-4**, *Soufraki v. UAE*, ¶¶123-128; **CLA-111**, *CDC v. Seychelles* ¶75; **Annex-68**, *MTD v. Chile*, ¶¶90 and 92; **CLA-119**, *Continental Casualty Company v. Argentina*, ¶100; **CLA-117**, *Rumeli v. Kazakhstan*, ¶104; **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ¶¶139-141.
[651] SCB HK's Counter-Memorial on Annulment, ¶441.
[652] SCB HK's Counter-Memorial on Annulment, ¶439.

point, SCB HK referred the Committee to *Joseph C. Lemire v. Ukraine*, where the *ad hoc* committee concluded that annulment under Article 52(1)(e) of the Convention should only occur when two conditions are met: (i) the failure to state reasons must leave the decision on a particular point essentially lacking of any expressed rationale; and (ii) that point must itself be necessary to the tribunal's decision.[653]

517. Further, SCB HK states that an evaluation of a tribunal's reasoning carries the risk of blending into an examination of the award's substantive correctness, and hence to crossing the border between annulment and appeal.[654] SCB HK quotes here the *ad hoc* committee in *El Paso v. Argentina*, which concluded that: "…there is no ground for annulment of the award if it is based on an alleged inaccuracy of the arbitral tribunal's reasoning or because the reasons underlying its decisions were not convincing to the Party requesting the annulment of the [a]ward".[655]

518. As to the existence of contradictory reasons, SCB HK states that the test for a finding of such a nature is very high. In this respect, SCB HK argues that the *ad hoc* committee in *Rumeli v. Kazakhstan* found that "…it is not clear that contradictory reasons constitute a failure to state reasons unless they completely cancel each other out and therefore amount to a total absence of reasons. It is believed that such cases would be extremely rare".[656]

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[653] SCB HK's Counter-Memorial on Annulment, ¶439, footnote 515, referring to **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶279.

[654] SCB HK's Counter-Memorial on Annulment, ¶440, footnote 516, referring to **CLA-107**, Schreuer, *ICSID Annulment Revisited*, p. 112.

[655] SCB HK's Counter-Memorial on Annulment, ¶440, footnote 517, referring to **Annex-35**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, September 22, 2014 ("***El Paso v. Argentina***"), ¶217; **CLA-107**, Schreuer, *ICISD Annulment Revisited*, p. 113: "[t]he ability to explain to the parties the motives that have induced the tribunal to adopt its decision should be distinguished from the ability to convince the losing party that the decision was the right one. A party that has not prevailed in litigation is inclined to regard the decision as incomprehensible and to feel that the decision-maker has not explained adequately why it rejected the arguments of which the losing party is convinced".

[656] SCB HK's Counter-Memorial on Annulment, ¶442, footnote 519, referring to **CLA-117**, *Rumeli v. Kazakhstan*, ¶82; see also **CLA-126**, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016 ("***Ioan Micula v. Romania***"), ¶299; **CLA-104**, *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, ¶¶109-110; **Annex-78**, *Vivendi I*, ¶ 65; **CLA-116**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014 ("***Alapli Elektrik B.V. v. Turkey***"), ¶¶200-202.

519. In addition, SCB HK states that a similar conclusion was reached in *Continental Casualty v. Argentina*, where the *ad hoc* committee concluded that "…[i]n cases where it is merely arguable whether there is a contradiction of inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct".[657]

520. Thus, SCB HK submits that any allegation of contradictory reasoning must be examined in context. According to SCB HK, this was explained by the *ad hoc* committee in *Daimler Finance AG v. Argentina,* which found that the reasons in an award must be examined with due regard to their context, highlighting an annulment committee's duty to satisfy itself that these reasons have the effect of cancelling each other out, leaving the decision without any rational basis, before it proceeds to annul it.[658]

521. SCB HK further argues that, in any event, a tribunal's reasons may be implicit in the award and the *ad hoc* committee may clarify and explain those reasons in its decision without adding new elements previously absent rather than annul the award. SCB HK states that this was explained by the *ad hoc* committee in *Soufraki v. UAE*[659] and was also recognised by the *ad hoc* committee in *Vivendi II.*[660]

b) The Tribunal's failure to state reasons on which the Award is based by holding on purely formalistic grounds that SCB HK had made an investment within Article 25(1) of the Convention

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[657] SCB HK's Counter-Memorial on Annulment, ¶443, footnote 520, referring to **CLA-119**, *Continental Casualty Company v. Argentina*, ¶103.
[658] SCB HK's Counter-Memorial on Annulment, ¶444, footnote 521, referring to **CLA-105**, *Daimler Financial Services AG v. Argentina*, ¶135.
[659] SCB HK's Counter-Memorial on Annulment, ¶445, footnote 522, referring to **Annex-4**, *Soufraki v. UAE*, ¶24: "…the ad hoc Committee considers that, with regard to the reasoning of the award, if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so".
[660] SCB HK's Counter-Memorial on Annulment, ¶446, footnote 523, referring to **CLA-128**, *Vivendi II*, ¶248: "248. … It is also understood that in the matter of adequate reasoning, upon a hearing, an ICSID *ad hoc* Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision".

522. SCB HK recalls TANESCO's complaint that the Tribunal did not provide sufficient reasons for finding that the investment requirement under Article 25 (1) of the Convention was satisfied and that its consideration was "merely cursory".[661]

523. In response to this assertion, SCB HK states that the Tribunal devoted six paragraphs of the Decision to the requirements under Article 25(1) of the Convention, including the investment requirement. On this point, SCB HK argues that the Tribunal's reasons were clear, and, in its view, the Tribunal correctly explained that the investment requirement was met because SCB HK had an investment by virtue of its purchase of the loan and the assigning of rights under the various agreements. [662]

524. In SCB HK's view, the Tribunal's reasons were perfectly adequate in circumstances where: (i) there was plainly a legal dispute arising from an investment; (ii) SCB HK had set out in its Memorial on Jurisdiction, Merits and Quantum dated February 3, 2012,[663] how the investment requirement was satisfied; and (iii) TANESCO had raised no objection to the Tribunal's jurisdiction under Article 25(1).[664] In this respect, SCB HK states that while TANESCO might not agree with these reasons, the reasons themselves are nonetheless clear.[665]

525. SCB HK addresses TANESCO's complaint regarding: (i) the length of the Decision that was dedicated to the investment issue, in comparison to the remainder of the Decision; and (ii) the Tribunal's failure to consider "a single one" of the "numerous valid reasons why SCB HK did not make a qualifying investment under the ICSID Convention".[666]

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[661] SCB HK's Counter-Memorial on Annulment, ¶448, footnote 524, referring to TANESCO's Memorial on Annulment, ¶202.
[662] SCB HK's Counter-Memorial on Annulment, ¶449, footnote 525, referring to **Annex-1**, Decision on Jurisdiction, ¶¶109-114; see also SCB HK's Rejoinder on Annulment, ¶256.
[663] SCB HK's Counter-Memorial on Annulment, ¶450, (ii), referring to **C-474**, SCB HK's Memorial on Jurisdiction, Merits and Quantum dated February 3, 2012.
[664] SCB HK's Counter-Memorial on Annulment, ¶¶450-451; see also SCB HK's Rejoinder on Annulment, ¶254.
[665] SCB HK's Rejoinder on Annulment, ¶256; The Committee understands that this reference is made to the "Claimant's Memorial of February 3, 2012" mentioned in the List of Defined Terms of the Award, since it is the only memorial dated February 3, 2012.
[666] SCB HK's Rejoinder on Annulment, ¶¶257-258, footnotes 229 and 230, referring to TANESCO's Reply on Annulment, ¶¶251-252.

526. On these issues, SCB HK argues that TANESCO ignores the fact that the investment requirement was plainly met and that, at the time, TANESCO did not raise an objection nor contest that the requirements under Article 25(1) had been met.[667] In SCB HK's view, the notion that the Tribunal should have to write lengthy reasons on uncontested and obvious points is wrong.[668]

527. Accordingly, SCB HK concludes that TANESCO's claim that the Tribunal failed to provide sufficient reasons in respect of its finding that Article 25(1) was satisfied are without merit and must be dismissed.[669]

c) The Tribunal's failure to take into account additional and decisive evidence regarding the Parties' interest in the Escrow Account

528. SCB HK points to TANESCO's assertion that the Tribunal failed to consider evidence submitted by TANESCO regarding the Parties' interest in the Escrow Account.[670] SCB HK states that, in support of its argument, TANESCO quotes SCB HK's email of December 6, 2013, in which SCB HK confirmed it did not consider that the Tribunal had jurisdiction with respect to the Escrow Account.[671]

529. However, SCB HK submits that this assertion misunderstands the reason why the Tribunal considered the emptying of the Escrow Account was relevant to its Award. According to SCB HK, the Tribunal explained that the facts that: (i) TANESCO had agreed to settle the invoice dispute with IPTL on the basis of the full tariff; (ii) IPTL was now in receipt of sufficient funds to pay its creditors; and (iii) the Escrow Account had been emptied, which TANESCO failed to disclose in its December 13, 2013 letter, were all material and would have had an impact on its decision not to order payment.[672]

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[667] SCB HK's Rejoinder on Annulment, ¶¶257-259; see also SCB HK's Counter-Memorial on Annulment, ¶451.
[668] SCB HK's Rejoinder on Annulment, ¶257.
[669] SCB HK's Rejoinder on Annulment, ¶260; see also SCB HK's Counter-Memorial on Annulment, ¶451.
[670] SCB HK's Counter-Memorial on Annulment, ¶452, footnote 526, referring to TANESCO's Memorial on Annulment, ¶¶203-204.
[671] SCB HK's Counter-Memorial on Annulment, ¶452, footnote 527, referring to **Annex-12**, Email from Herbert Smith Freehills LLP to the Tribunal dated December 6, 2013.
[672] SCB HK's Counter-Memorial on Annulment, ¶453, footnote 528, referring to **Annex-1**, Award, ¶¶347-348.

530. SCB HK states that the Tribunal further explained that its Decision was based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of the appointment of a liquidator and concluded that the facts that TANESCO had concealed from the Tribunal changed that assumption.[673]

531. In this respect, SCB HK argues that TANESCO's December 2013 letter sought to persuade the Tribunal that such an appointment remained likely, and that, as such, its concealment of the emptying of the Escrow Account was clearly relevant.[674]

532. Thus, SCB HK argues that it is clear that the Tribunal considered the fact it was misled concerning the emptying of the Escrow Account was relevant not because it considered it had jurisdiction, but because it was relevant to the likelihood of a liquidator being appointed, which, in SCB HK's view, is an entirely separate point.[675]

533. Additionally, SCB HK recalls TANESCO's argument that SCB HK's email of December 6, 2013 to the Tribunal was "effectively a waiver" by SCB HK and the Tribunal "singularly failed to have regard to this waiver".[676] SCB HK considers this argument misconceived, since the reason why the Tribunal considered the emptying of the Escrow Account to be relevant was that it was material to whether IPTL would have sufficient funds to pay its creditors, and the likelihood of a liquidator being appointed.[677]

534. On this point, SCB HK states that "[t]he Tribunal – which disagreed with SCB HK on the significance of the prospect of a liquidator being appointment [sic] – considered that

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[673] SCB HK's Counter-Memorial on Annulment, ¶453, footnote 528, referring to **Annex-1**, Award, ¶¶347-348. The full extract quoted by SCB HK is as follows: "347…[T]he facts that [TANESCO] failed to disclose in its December 13, 2013 Letter were material and would have had an impact on its decision not to make an order for payment. That decision was based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of the appointment of a liquidator. The facts that [TANESCO] had kept from the Tribunal change that assumption. 348. … The fact that TANESCO had agreed to settle the invoice dispute with IPTL on the basis of the full tariff, the fact that IPTL was now in receipt of sufficient funds to pay its creditors and the fact that the Escrow Account had been emptied, were all material to the decision taken by the Tribunal… [Text in brackets added by the Committee]".
[674] SCB HK's Counter-Memorial on Annulment, ¶454.
[675] SCB HK's Counter-Memorial on Annulment, ¶454.
[676] SCB HK's Rejoinder on Annulment, ¶262, footnote 231, referring to **Annex-12**, Email from Herbert Smith Freehills LLP to the Tribunal dated December 6, 2013, and footnote 232, referring to TANESCO's Reply on Annulment, ¶256.
[677] SCB HK's Rejoinder on Annulment, ¶263.

the status of the Escrow Account was relevant to its analysis, and it was thus entitled to take the emptying of the Escrow Account into consideration".[678]

535. Consequently, SCB HK states that given the clear nature of the Tribunal's reasoning (at paragraphs 347-348 of the Award) as to why the emptying of the Escrow Account was relevant, no further reasons were required and thus, SCB HK states that the Tribunal was correct to disregard the confirmation that it had no jurisdiction nor had a claim to that money.[679]

d) The Tribunal's failure to take into account the evidence presented by TANESCO on the continuing existence of the Tariff Dispute

536. SCB HK opposes TANESCO's assertion[680] that it presented the Tribunal with evidence demonstrating that negotiations regarding the level of the tariff payable under the PPA were still ongoing but that the Tribunal "disregarded this important evidence and failed to explain its reasons for doing so".[681]

537. SCB HK argues that, contrary to TANESCO's assertion, the Tribunal set out the Parties' arguments on this point at length at paragraphs 183-198 of the Award. According to SCB HK, at paragraph 331 of the Award, the Tribunal made specific reference to the minutes of the October 8, 2013 meeting between TANESCO and IPTL,[682] and concluded on the basis of the minutes that at that meeting TANESCO had agreed to settle the Tariff Dispute on the basis of the full tariff, entering into a joint recommendation that the monies in the Escrow Account be released to IPTL as soon as possible.[683]

538. Thus, SCB HK submits that the Tribunal clearly considered the evidence and came to its own conclusion as to the nature of the 2013 Settlement Agreement. SCB HK further

[678] SCB HK's Rejoinder on Annulment, ¶263.
[679] SCB HK's Rejoinder on Annulment, ¶¶261-264; SCB HK's Counter-Memorial on Annulment, ¶455.
[680] SCB HK's Counter-Memorial on Annulment, ¶456, referring to TANESCO's Memorial on Annulment, ¶205.
[681] SCB HK's Counter-Memorial on Annulment, ¶456; SCB HK's Rejoinder on Annulment, ¶265.
[682] SCB HK's Counter-Memorial on Annulment, ¶456, footnote 530, referring to **C-314**, Minutes of October 8, 2013 meeting between Tanesco and IPTL.
[683] SCB HK's Counter-Memorial on Annulment, ¶456.

argues that even TANESCO accepts at paragraph 259 of its Reply on Annulment that the issue is "unlikely to be a decisive issue for the Committee".[684]

539. SCB HK states that given TANESCO's inability to provide any evidence to support its allegations, no further reasons were required.[685] Consequently, SCB HK argues that TANESCO's complaint must be dismissed.[686]

e) The Tribunal's failure to take into account contradictory evidence concerning SCB HK's knowledge of the status of the Escrow Account

540. SCB HK submits that TANESCO's complaint that the Tribunal failed to take into account contradictory evidence concerning SCB HK's knowledge of the emptying of the Escrow Account and that it also failed to provide reasons for its findings as to SCB HK's knowledge of the emptying of such account, is not only wrong but also a demonstrably misleading characterisation of the Tribunal's reasons.[687] According to SCB HK, contrary to TANESCO's claim, it is patently clear in the Award that the Tribunal did consider the evidence submitted by TANESCO.[688]

541. In SCB HK's view, TANESCO is, in substance, re-arguing its allegation that SCB HK knew about the emptying of the Escrow Account, missing the key point which, according to SCB HK, was explained in paragraphs 460 to 466 of its Counter-Memorial.[689]

542. There, SCB HK stated that TANESCO's first complaint about the Tribunal's consideration of the evidence that Ms Renju "had a copy of the settlement agreement" when she filed an injunction to prevent the dissipation of the Escrow Account, is opportunistic since it relies on an obvious mix-up by the Tribunal about the agreement that was available to Ms Renju and the timing of her injunction application.[690] On this point, SCB HK explains that, as paragraph 336 of the Award correctly records, the

[684] SCB HK's Rejoinder on Annulment, ¶¶266-267.
[685] SCB HK's Counter-Memorial on Annulment, ¶456.
[686] SCB HK's Rejoinder on Annulment, ¶267.
[687] SCB HK's Counter-Memorial on Annulment, ¶¶457-458; SCB HK's Rejoinder on Annulment, ¶268.
[688] SCB HK's Counter-Memorial on Annulment, ¶458.
[689] SCB HK's Rejoinder on Annulment, ¶269.
[690] SCB HK's Counter-Memorial on Annulment, ¶459, footnote 531, referring to TANESCO's Memorial on Annulment, ¶207, citing **Annex-1**, Award, ¶336.

injunction application was made on September 6, 2013 (*i.e.* before the 2013 Settlement Agreement settling the Tariff Dispute) and the application exhibited the PAP-VIP agreement for sale and purchase of VIP's shares in IPTL of August 2013, not the 2013 Settlement Agreement. SCB HK highlights that it is important to distinguish between these agreements, notwithstanding TANESCO's efforts to take advantage of the confusion.[691]

543. SCB HK argues that, in any event, even if Ms Renju did have a copy of the 2013 Settlement Agreement (which SCB HK claims she did not), this was not evidence that the Escrow Account had in fact been emptied, a point that, according to SCB HK, was made by the Tribunal at paragraph 336 of the Award.[692] Thus, SCB HK argues that the Tribunal did consider the evidence, but explained why it did not support the conclusion that TANESCO was advocating. Consequently, in SCB HK's view, TANESCO's allegation that the Tribunal did not take Ms Renju's application into account is baseless.[693]

544. Further, SCB HK states that TANESCO also claimed that it submitted evidence that the Managing Director of SCB HK, Mr Joe Casson, had direct knowledge of the emptying of the Escrow Account. SCB HK refutes TANESCO's allegation that the Tribunal hurriedly dismissed this evidence labelling SCB HK's procedural negligence as a "tactical mistake" and stating that it was "inconceivable" that SCB HK would not have sought to

[691] SCB HK's Counter-Memorial on Annulment, ¶459, footnote 532, referring to **R-164**, Plaint of Martha Renju vs PAP and VIP in Commercial Case No. 123 of 2013 dated September 6, 2013, p. 10.
[692] SCB HK's Counter-Memorial on Annulment, ¶460, footnote 533, referring to **Annex-1**, Award ¶336: "[t]he Tribunal notes that the actual factual situation as set out by the Parties is unclear and even at times self-contradictory. However, the Tribunal is not convinced that there is proof that SCB HK was aware of the terms of the 2013 Settlement Agreement between TANESCO and IPTL/PAP. In its letter of November 27, 2013, [SCB HK] indicates that it had been informed of the existence of an agreement settling the tariff dispute and facilitating the release of the Escrow Funds and states that the agreement had not been disclosed to it. It could be inferred from the fact that the Administrative Receiver, Martha Renju, had a copy of the agreement when she filed a request for an injunction to prevent the monies in the Escrow Account from being dispersed, some ten days before [SCB HK] wrote its November 27 letter that [SCB HK] must have had some knowledge of the 2013 Settlement Agreement. But there is no evidence that [SCB HK] knew that the Escrow Account had in fact been emptied. [Text in brackets added by the Committee]"
[693] SCB HK's Counter-Memorial on Annulment, ¶460.

capitalise on the reversal of TANESCO's position in its submissions had it known about it.[694]

545. SCB HK explains that the Tribunal carefully considered the evidence about Mr Casson's knowledge before concluding that it did not establish that SCB HK knew about the emptying of the Escrow Account.[695] However, according to SCB HK, TANESCO misrepresents both the evidence before the Tribunal and what the Tribunal said in its Award.[696]

546. SCB HK explains that at paragraph 337 of its Award, the Tribunal quoted a passage from the witness statement of Mr Casson in which he records Mr Sethi as stating: "SCB HK [would have] received no cash now because (Mr Sethi said) none of the USD$100,000,000 sitting in the escrow account would be left after paying VIP, the Tanzanian Revenue Authority and 'other creditors'".[697] SCB HK states that TANESCO in its Reply on Annulment quoted the next paragraph (paragraph 338), to draw the conclusion that "the Tribunal also did not give reasons as to why it interpreted the evidence of Joe Casson in the way that it did. […] It is undeniable on Joe Casson's evidence that SCB HK knew that the Escrow Account was likely to be emptied or had already been emptied…"[698]

547. However, SCB HK states that the passages quoted by TANESCO are contrary to what the Tribunal stated in the very next paragraph of its Award, where it held that: "[w]hat the statement by Mr Casson does not show is that the Escrow Account had been emptied at that time; indeed Mr. Sethi stated that there was US$100 million sitting in the Escrow Account…"[699]

[694] SCB HK's Counter-Memorial on Annulment, ¶461, footnote 534, referring to TANESCO's Memorial on Annulment, ¶209.
[695] SCB HK's Counter-Memorial on Annulment, ¶465.
[696] SCB HK's Rejoinder on Annulment, ¶271; SCB HK's Counter-Memorial on Annulment, ¶¶464-465, footnote 537, referring to **Annex-1**, Award, ¶¶338-339.
[697] SCB HK's Rejoinder on Annulment, ¶272.
[698] SCB HK's Rejoinder on Annulment, ¶273.
[699] SCB HK's Rejoinder on Annulment, ¶274.

548. Thus, in SCB HK's view, the status of the Escrow Account was not clear, and the better evidence was that it had not yet been emptied. Accordingly, SCB HK argues that while it had knowledge of the existence of the 2013 Settlement Agreement, this is distinct from knowledge of the terms of the 2013 Settlement Agreement, or that they involved settling the tariff dispute at a level inconsistent with TANESCO's position in the Arbitration Proceeding.[700]

549. With respect to TANESCO's allegation that "[t]here is simply no reason why SCB HK or the Tribunal could not have requested further information at the time. Instead, the Tribunal came to the conclusion that although 'with hindsight SCB HK might have wished that it pushed further', the Tribunal's view that the 13 December 2013 letter was misleading somehow excused SCB HK's negligence in failing to make further disclosure enquiries".[701] SCB HK asserts that this statement is misleading for the following reasons.

550. First, SCB HK submits that it assumes that the reason the Tribunal did not request further information in December 2013 was that it was misled by TANESCO as to the content of the 2013 Settlement Agreement. Thus, in SCB HK's view, after having misled the Tribunal, it is no response for TANESCO to say now that the Tribunal could have caught TANESCO out had it sought further information at the time.[702]

551. Second, SCB HK explains that it believed that pursuant to the valid statutory assignment of the PPA, SCB HK should be entitled to payment by TANESCO regardless of a liquidator being appointed, and that considering those circumstances, it is not surprising that SCB HK did not delay the proceedings to seek disclosure from TANESCO regarding the 2013 Settlement Agreement.[703] SCB HK states that as of November 2013, TANESCO had already failed without excuse to produce for nine months invoices that were clearly relevant and would have contributed to a more accurate quantum calculation. Therefore, in SCB HK's view, it was unlikely that TANESCO would have willingly provided such

[700] SCB HK's Rejoinder on Annulment, ¶274, footnote 235, referring to **Annex-1**, Award, paragraph 339.
[701] SCB HK's Rejoinder on Annulment, ¶¶275-276, referring to TANESCO's Reply on Annulment, ¶269.
[702] SCB HK's Rejoinder on Annulment, ¶276, (i).
[703] SCB HK's Rejoinder on Annulment, ¶276, footnote 236, referring to SCB HK's Counter-Memorial on Annulment, ¶¶165-166.

production, in circumstances where such disclosure would have revealed the deliberately misleading approach it had taken.[704]

552. Finally, SCB HK opposes TANESCO's assertion that the Tribunal concluded that SCB HK was negligent. On this point, SCB HK submits that the Tribunal did not "label SCB HK's procedural negligence as a tactical mistake" but explains that it noted that counsel for SCB HK had stated in the August 2015 Hearing that it may have been a "tactical mistake" not to have requested more documents and information.[705]

553. In addition, SCB HK submits that the Tribunal concluded that SCB HK's failure to make further enquiries "[could] not be characterized as negligent". According to SCB HK, TANESCO does not engage with this point and instead continues, without excuse or explanation, to assert that the Tribunal's finding was the opposite.[706]

554. SCB HK states that the Tribunal found the opposite of what TANESCO alleged in its Memorial on Annulment and it stated that "342. …While with hindsight SCB HK might have wished that it had pushed further, the Tribunal considers that, in light of Respondent's [TANESCO's] December 13, 2013 Letter, it had no obligation to do so and thus its actions cannot be characterized as negligent".[707]

555. SCB HK submits that, in any case, it is wrong for TANESCO to suggest, as in its opinion it did repeatedly in its submissions, that any such negligence by the Tribunal or SCB HK would excuse TANESCO's own deliberately misleading conduct.[708]

556. Furthermore, SCB HK recalls paragraph 270 of TANESCO's Reply on Annulment, which, in its view, is another misrepresentation of the Award. According to SCB HK, in the first sentence of paragraph 270 TANESCO argued that: "[i]t [seemed] that the Tribunal itself was at a loss to understand why SCB HK if it had known (which of course it did) would not have sought to capitalise on its knowledge of the existence of the [2013

[704] SCB HK's Rejoinder on Annulment, ¶276, (ii).
[705] SCB HK's Rejoinder on Annulment, ¶276, (iii); see also SCB HK's Counter-Memorial on Annulment, ¶463.
[706] SCB HK's Rejoinder on Annulment, ¶276, (iii).
[707] SCB HK's Counter-Memorial on Annulment, ¶¶463-464, footnote 536, referring to **Annex-1**, Award, ¶342.
[708] SCB HK's Rejoinder on Annulment, ¶276, (iv).

Settlement Agreement] prior to the issuance of the Decision, which it described as 'illogical' and 'unconceivable'". According to SCB HK, this is another misrepresentation of the Award made by TANESCO since it was the terms of the 2013 Settlement Agreement (not its existence), and the emptying of the Escrow Account (not the risk), that the Tribunal felt unconceivable that SCB HK would not have drawn to its attention.[709]

557. In support of this, SCB HK quotes the Award as follows: "340. … it is relevant to note that it would have been illogical for [SCB HK] not to have brought the terms of the [2013 Settlement Agreement] and the fact the Escrow Account had been emptied to the attention of the Tribunal immediately, had it been informed of these facts prior to the Tribunal's Decision […]. In the months leading up to the Tribunal's Decision, it resolved to pay the full tariff to IPTL. It is inconceivable that [SCB HK] would not have sought to capitalise on that reversal of position by [TANESCO] in its submissions to this Tribunal had it known about it".[710]

558. SCB HK also submits that paragraph 340 of the Award is in fact another of the reasons, which TANESCO claims are non-existent, for the Tribunal's conclusion that SCB HK did not know of these facts.[711]

559. As to the second part of TANESCO's argument,[712] SCB HK states that this conflates two periods of time. It explains that it is the factual position as at late 2013 that the Tribunal considered unclear and even at times self-contradictory and argues that it was three years late - in 2016 - that the Tribunal "felt comfortable taking the step of reconsideration".[713] SCB HK further states that, at that point in time, it did not need to require disclosure of

[709] SCB HK's Rejoinder on Annulment, ¶¶277-278.
[710] SCB HK's Rejoinder on Annulment, ¶278, footnote 239, referring to **Annex-1**, Award, ¶340.
[711] SCB HK's Rejoinder on Annulment, ¶279.
[712] SCB HK's Rejoinder on Annulment, ¶280, referring to TANESCO's Reply on Annulment, ¶270, second part: "[d]espite the Tribunal itself admitting the 'actual factual situation as set out by the parties [being] unclear and even at time self-contradictory', it somehow felt comfortable taking the unprecedented step of reconsideration without taking the simple step of requiring disclosure of the October 2013 Agreement".
[713] SCB HK's Rejoinder on Annulment, ¶281.

the 2013 Settlement Agreement, as by that stage it had already been produced and the Tribunal had it in front of it when writing its Award.[714]

560. Therefore, SCB HK argues that all of TANESCO's arguments on this point are without merit, since the Tribunal did consider the arguments made by the Parties, considered the evidence adduced by them, reached its conclusion as to SCB HK's knowledge and provided reasons for reaching that conclusion.[715] In SCB HK's view, TANESCO cannot claim that just because it disagrees with the Tribunal's reasoning, no adequate reasoning was provided.[716]

561. Thus, SCB HK submits that TANESCO's challenge to the Award is an attempt to bring an appeal on the merits under the guise of a complaint about a lack of reasons and that, as such, it is groundless and must be dismissed.[717]

f) The Tribunal's reversal of its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement

562. According to SCB HK, TANESCO's complaint is that, in reconsidering the decision not to order TANESCO to pay a specific sum to SCB HK, the Tribunal failed to address how the 2013 Settlement Agreement affected its earlier decision.[718]

563. SCB HK starts by recalling TANESCO's statement that "…nothing resulting from the new facts had any impact whatsoever on the several distinct reasons originally given in the Decision as to why the Tribunal was unable to order Tanesco to pay a specific sum to SCB HK".[719] In SCB HK's view, there is a fundamental flaw in TANESCO's understanding of the Tribunal's reasoning in the Decision on Jurisdiction and the relief granted later in the Award.[720]

[714] SCB HK's Rejoinder on Annulment, ¶281.
[715] SCB HK's Rejoinder on Annulment, ¶¶269 and 281.
[716] SCB HK's Rejoinder on Annulment, ¶282.
[717] SCB HK's Rejoinder on Annulment, ¶282.
[718] SCB HK's Counter-Memorial on Annulment, ¶467.
[719] SCB HK's Counter-Memorial on Annulment, ¶467, footnote 538, referring to TANESCO's Memorial on Annulment, ¶¶10-11.
[720] SCB HK's Counter-Memorial on Annulment, ¶468.

564. SCB HK explains that, in the Decision on Jurisdiction, the Tribunal concluded the following.

565. First, that it had jurisdiction over TANESCO and SCB HK as the assignee of IPTL's rights under the PPA, but that it could not order TANESCO to pay a specific sum owing to SCB HK under the PPA as such order would be enforceable in the Tanzanian court. According to SCB HK, the Tribunal's concern when deciding this was the potential for its decision to interfere with the question of priority among IPTL's creditors in view of the possibility of a liquidator being appointed (SCB HK refers to this as the "Liquidation Ground").[721]

566. Second, that it did not have jurisdiction over the relationship between SCB HK and IPTL under the Facility Agreement as IPTL was non-party to the Arbitration Proceeding (SCB HK refers to this as the "Third-Party Contract Ground"). Thus, according to SCB HK, the Tribunal could not engage with SCB HK's calculation of the amount owing under the Facility Agreement and could not make an order requiring TANESCO to pay that amount, as SCB HK had requested.[722]

567. SCB HK submits that, because the Tribunal declined jurisdiction to order payment of a sum owed under the Facility Agreement, SCB HK did not seek to challenge the Third-Party Contract Ground any further.[723] However SCB HK states that, following the discovery of TANESCO's misrepresentation after the Decision had been issued, SCB HK sought to explain the errors regarding the Liquidation Ground and sought an order from the Tribunal for the full amount due from TANESCO to IPTL under the PPA.[724]

568. Consequently, SCB HK states that by the time of the Award, the Third-Party Ground had fallen away considering SCB HK had not sought the payment of an amount to discharge the debt under the Facility Agreement. SCB HK explains that the question was whether

[721] SCB HK's Counter-Memorial on Annulment, ¶469, (i).
[722] SCB HK's Counter-Memorial on Annulment, ¶469(ii), footnotes 541 and 542, referring to **Annex-1**, Decision on Jurisdiction, ¶¶239-244.
[723] SCB HK's Counter-Memorial on Annulment, ¶470.
[724] SCB HK's Counter-Memorial on Annulment, ¶471, footnote 544, referring to **Annex-1**, Award, ¶247; **C-453**, SCB HK's Submissions on Tariff dated November 11, 2014, ¶139.

the Liquidation Ground ought to be reconsidered, in light of the facts that the Tribunal had become aware of since the Decision.[725]

569. According to SCB HK, the Tribunal's predominant concern in its Decision was the possibility of a liquidator being appointed and this had an impact on what was dealt with and decided.[726] SCB HK argues that TANESCO's misrepresentation of facts resulted in "the context in which the Decision of the Tribunal was made [to be] substantially different from that which the Tribunal had been led to believe".[727]

570. In support of this, SCB HK quotes the Tribunal as follows: "354. The concern of the Tribunal was that, given the likelihood that the liquidation of IPTL would be back before the courts of Tanzania, the Tribunal should not make an order for the payment of a sum of money that would be binding in Tanzania and thus potentially interfere with the jurisdiction of a liquidator and the Tanzanian courts to determine priority amongst creditors. […] 355. … Given that TANESCO has agreed to pay the equivalent of the full amount owing under the tariff dispute to IPTL/PAP, the possibility of IPTL being placed in liquidation seems much more remote".[728]

571. SCB HK explains that this led the Tribunal to reconsider its Decision on the Liquidation Ground, and to hold that "in addition to making a declaration of the amount owing by TANESCO to SCB HK, it [the Tribunal] can also make an order for payment of that amount".[729] Considering this, TANESCO's assertion that the fact of the 2013 Settlement Agreement had no "impact whatsoever" on the Tribunal's reconsideration of the Decision on Jurisdiction is simply incorrect.[730]

572. SCB HK recalls TANESCO's complaint that in the Award the Tribunal did not address or explain how the 2013 Settlement Agreement affected the "other independent legal

[725] SCB HK's Counter-Memorial on Annulment, ¶472.
[726] SCB HK's Counter-Memorial on Annulment, ¶473.
[727] SCB HK's Counter-Memorial on Annulment, ¶473, footnote 546, referring to **Annex-1**, Award, ¶346.
[728] SCB HK's Counter-Memorial on Annulment, ¶¶473-474, footnotes 548 and 549, referring to **Annex-1**, Award, ¶¶354-355, respectively.
[729] SCB HK's Counter-Memorial on Annulment, ¶475, footnote 550, referring to **Annex-1**, Award, ¶360.
[730] SCB HK's Counter-Memorial on Annulment, ¶475, footnote 551, referring to TANESCO's Memorial on Annulment, ¶11.

bases" which led the Tribunal not to order payment in the Decision (such as the finding that TANESCO could not be ordered to pay amounts to SCB HK independently of IPTL). SCB HK states that these "other independent legal bases" are just expressions of the Tribunal's finding that it can only address debts between TANESCO and IPTL under the PPA, not debts as between IPTL and SCB HK under the Facility Agreement. SCB HK explains that, as discussed above, this ground fell away when SCB HK chose not to pursue its claim for an amount to discharge the debt under the Facility Agreement.[731]

573. SCB HK argues that, had it sought the payment of a sum representing the amount owing under the Facility Agreement, the Third-Ground Party would have barred the order because the same limitation on the Tribunal exercising jurisdiction in respect of the Facility Agreement would have remained. However, SCB HK highlights that it did not seek such an order, and hence the Third-Party Contract Ground did not come into play.[732]

574. Consequently, SCB HK denies that the Tribunal did not provide reasons for "revers[ing] its earlier decision that it had no jurisdiction over claims related to the Facility Agreement". According to SCB HK, this issue did not arise and did not need to be addressed in the Award.[733]

575. Therefore, SCB HK submits that TANESCO's complaints about a supposed lack of reasons in respect of the Tribunal's jurisdiction over the Facility Agreement and its reconsideration of its jurisdiction to order payment, are misconceived and must be rejected.[734]

g) The Tribunal's holding that the tariff must be calculated on the basis of an IRR of 22.1% which directly contradicted its earlier finding that this rate cannot apply

576. SCB HK recalls TANESCO's complaint that, by ordering that the tariff be based on a 22.31% IRR on a shareholder loan basis, the Tribunal has, without adequate reasons, contradicted its finding at paragraph 339 of the Decision, that a 22.31% IRR would not

[731] SCB HK's Counter-Memorial on Annulment, ¶476.
[732] SCB HK's Counter-Memorial on Annulment, ¶477.
[733] SCB HK's Counter-Memorial on Annulment, ¶478.
[734] SCB HK's Counter-Memorial on Annulment, ¶479.

be appropriate.[735] In SCB HK's view, this argument is unfounded and seeks to sow confusion about how the 22.31% IRR calculation works.[736]

577. SCB HK explains that, in order to understand the Tribunal's decision in this respect, it is necessary to appreciate how the point was argued and decided in the Decision on Jurisdiction. SCB HK explains the Tribunal's Decision in respect of the IRR dividing its analysis into: (i) background to Decision; (ii) finding in Decision that 30% equity contribution should have been by way of share capital; (iii) finding in Decision that tariff must be recalculated to reflect the shareholder loan; (iv) different views on paragraph 339 of the Decision expressed by Parties in the tariff phase of the Arbitration Proceeding; and (v) finding in the Award that the 22.31% IRR on the shareholder loan was appropriate.[737]

Background to the Decision on the IRR

578. SCB HK states that a large part of the Tribunal's Decision focused on the meaning of the 70% debt / 30% equity split in the financing of the Power Plant, which was mentioned in the May 31, 1995 letter.[738] SCB HK highlights that neither the May 31, 1995 letter nor the ICSID 1 tribunal provided a definition of the term "equity".[739] SCB HK further states that, despite the lack of an express definition of "equity", precision around this concept was needed because the tariff under the PPA was to be calculated by reference to, among other things, a 22.31% IRR on equity.[740]

579. According to SCB HK, it was common ground that Mechmar had in fact provided the 30% funding largely by way of a shareholder loan to IPTL, rather than by paid-up share capital in IPTL.[741] SCB HK submits that this is important because a higher tariff is needed

[735] SCB HK's Counter-Memorial on Annulment, ¶480.
[736] SCB HK's Counter-Memorial on Annulment, ¶481.
[737] SCB HK's Counter-Memorial on Annulment, ¶481.
[738] SCB HK's Counter-Memorial on Annulment, ¶482, footnote 553, referring to **C-038**, Letter from IPTL to the Ministry of Water Energy and Minerals dated May 31, 1995.
[739] SCB HK's Counter-Memorial on Annulment, ¶482, footnote 554, referring to **Annex-1**, Decision on Jurisdiction, ¶249.
[740] SCB HK's Counter-Memorial on Annulment, ¶482.
[741] SCB HK's Counter-Memorial on Annulment, ¶483, footnote 556, referring to **Annex-1**, Decision on Jurisdiction, ¶42.

to provide a 22.31% IRR on share capital than is needed to provide a 22.31% IRR on a shareholder loan.[742]

580. Thus, SCB HK states that the key issue before the Tribunal was whether the 30% equity contribution needed to be made by way of share capital or could be made by way of a shareholder loan.[743]

Finding in the Decision that 30% equity contribution should have been by way of share capital

581. SCB HK explains that, in considering what type of equity contribution was required, the Tribunal concluded that because the financial model that was subsequently agreed by the parties to the PPA before commencement of operations ("**Implementation Model**") which calculated the tariff did so based on a 30% equity contribution by way of share capital, IPTL's equity contribution should not have been provided by way of a shareholder loan.[744]

582. SCB HK states that an important factor in this decision was Mr Ehrhardt's evidence, TANESCO's own expert, that higher tariffs are needed to provide an equivalent internal rate of return on share capital than on shareholder loans, because shareholder loans are repaid before tax, while dividends to shareholders are paid from profits after tax and are subject to more constraints.[745]

583. According to SCB HK, the Tribunal quoted Mr Ehrhardt's explanation about this feature in the Decision, where he stated that the Implementation Model showed that all of the payments made to achieve the 22.31% return on equity are to be made through dividend payments subject to dividend payment constraints, rather than by payments on a loan (which would not be subject to the dividend payment constraints). SCB HK submits that Mr Ehrhardt concluded that if the shareholder loan had been permitted in lieu of an equity

[742] SCB HK's Counter-Memorial on Annulment, ¶483.
[743] SCB HK's Counter-Memorial on Annulment, ¶484.
[744] SCB HK's Counter-Memorial on Annulment, ¶485, footnote 557, referring to **Annex-1**, Decision on Jurisdiction, ¶¶249 and 324.
[745] SCB HK's Counter-Memorial on Annulment, ¶486.

contribution, the payments to shareholders would not have been subject to the dividend payment constraints, which would have eliminated or reduced the "trapped cash" and would have required a much smaller Capacity Payment[746] to provide the agreed 22.31%, after-tax return on equity.[747]

584. SCB HK's explains that the Tribunal was concerned that the contribution by way of shareholder loan rather than share capital meant that the same 22.31% IRR could have been delivered with a lower tariff than that computed by the Implementation Model. According to SCB HK, the Implementation Model assumed that taxes would need to be paid before dividends were paid to the shareholder, but explains that, in fact, taxes did not need to be paid, and those tax savings were not returned to TANESCO under the Model, as explained by the Tribunal in its Decision as follows from this extract as follows:[748]

> "[…] The Capacity Payment is deemed to pay for the cost of capital, i.e. for the reimbursement of the loans, the taxes to be paid and the dividends on equity. Because loans are repaid before taxation and dividends after taxation, the replacement of equity by loans necessarily has an influence on the amount of taxes to be paid. The simple explanation is that, if taxes are paid on the amount earned less repayment of the debt, then they are higher because they are calculated on a higher amount of income than if they are calculated on the amount earned after both repayment of the senior debt and repayment of the shareholders' loan. The difference in the global cost – on which the Capacity Payment's calculation was based – is the economy realized in tax payments, which has not been taken into account in the calculation of the Capacity Payment. The Tribunal concurs with [TANESCO]'s observation that: '[a]s a result, TANESCO was being charged to 'reimburse' IPTL for millions of dollars in taxes that would

[746] This term has been defined in the Award as: "The Capacity Payment is reimbursement for the cost of capital in the construction of the plant, i.e. the loans, the taxes to be paid and the dividends on equity".
[747] SCB HK's Counter-Memorial on Annulment, ¶¶487-488, footnotes 558 and 559, both referring to **Annex-1**, Decision on Jurisdiction, ¶267-268, respectively.
[748] SCB HK's Counter-Memorial on Annulment, ¶489, footnote 560, referring to **Annex-1**, Decision on Jurisdiction, ¶271.

never be incurred'. Whilst the Tribunal has not made its own calculation of the amount in taxes, it is clear that in principle TANESCO was effectively reimbursing IPTL for taxes that would only have been incurred if the project sponsors had contributed paid-up capital instead of shareholders' loans [Text in brackets added by the Committee]".[749]

585. SCB HK argues that in these circumstances, the Tribunal concluded that there was an assumption built into the Implementation Model under which the tariffs were calculated that IPTL would contribute equity by way of "true equity" (*i.e.* paid-up share capital) and not by way of a shareholder loan, and that "before this Tribunal [could] quantify the amount owing by TANESCO to IPTL under the PPA, the tariff must be recalculated to take account of that fact that there had not been a 30% equity contribution in the form of paid up share capital".[750]

Finding in the Decision that tariff must be recalculated to reflect the shareholder loan

586. On this point, SCB HK explains that, in the Decision on Jurisdiction, the Tribunal concluded that the tariff must be recalculated to reflect that the equity contribution was by way of a shareholder loan and not by way of paid up share capital, and thus, it ordered the Parties to attempt to agree on the recalculation tariff taking into account the considerations set by the Tribunal in paragraphs 337-343.[751]

587. According to SCB HK, these considerations include the view expressed by the Tribunal at paragraph 339 of the Decision, which forms the basis of TANESCO's Application for Annulment, that:

> "…[T]he Tribunal does not believe that a tariff of 22.31% would be appropriate. That tariff was based on an assumption that IPTL's equity contribution could be made by way of shareholder loan, which the Tribunal

[749] SCB HK's Counter-Memorial on Annulment, ¶489, footnote 560, referring to **Annex-1**, Decision on Jurisdiction, ¶271.
[750] SCB HK's Counter-Memorial on Annulment, ¶490, footnote 561, referring to **Annex-1**, Decision on Jurisdiction, ¶¶275 and 324.
[751] SCB HK's Counter-Memorial on Annulment, ¶491, footnote 563, referring to **Annex-1**, Decision on Jurisdiction, ¶381.

has rejected. Furthermore, as the Tribunal has pointed out in this Decision, the substitution of a shareholder loan for equity resulted in benefits accruing to IPTL, in particular in relation to taxation, which were not contemplated under the PPA. Simply, to agree on a tariff of 22.31% would effect no change in the situation between the Parties".[752]

588. SCB HK states that the Tribunal concluded that, if the Parties failed to reach an agreement within a stipulated timeframe, the Tribunal would decide whether a further hearing on recalculation was necessary.[753]

589. Different views on paragraph 339 of the Decision expressed by Parties in the tariff phase of the Arbitration

590. In its Submissions on Tariff on November 11, 2014, SCB HK explained its understanding that when the first sentence of paragraph 339 is read in the context of the remainder of the paragraph, it does not rule out a tariff based on an IRR on shareholder loans.[754] In this respect, SCB HK submits that it understood the references to "a tariff of 22.31%" to be shorthand for a tariff calculated to give an IRR of 22.31% on the assumption that the shareholder's equity would be invested by way of paid up share capital.[755]

591. In support of this, SCB HK refers the Tribunal to the supplemental report of its expert, Mr Johnson, in which he explained that "…if […] the required IRR [was] left unchanged at 22.31%, but the assumption instead [was] made that the shareholder's contribution is invested by way of shareholder loan, and appropriate taxation levels on shareholder loans are included in the model, then the tariff will be reduced by US$81.6 million over the course of the PPA".[756]

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[752] SCB HK's Counter-Memorial on Annulment, ¶491, footnote 564, referring to **Annex-1**, Decision on Jurisdiction, ¶339.
[753] SCB HK's Counter-Memorial on Annulment, ¶492.
[754] SCB HK's Counter-Memorial on Annulment, ¶493.
[755] SCB HK's Counter-Memorial on Annulment, ¶493, footnote 565, referring to **C-453**, SCB HK Submissions on Tariff dated November 11, 2014, ¶¶98-100.
[756] SCB HK's Counter-Memorial on Annulment, ¶493, footnote 565, referring to **C-453**, SCB HK Submissions on Tariff dated November 11, 2014, ¶99.

592. SCB HK argues that an agreement that the tariff be set at a level providing an IRR of 22.31% on a shareholder loan would therefore effect a change in the situation between the Parties and result in a reduction in the tariff to reflect the benefits accruing to IPTL as regards taxation. Accordingly, SCB HK submits that it understood paragraph 339 of the Decision to rule out a tariff based on an IRR of 22.31% on share capital, not an IRR of 22.31% in shareholder loans.[757]

593. SCB HK states that its expert, Mr Colin Johnson, confirmed that it is possible to calculate the tariff using a 22.31% IRR on a shareholder loan basis, which preserves the agreed rate of return on the investment but recognises that the shareholder loan will be repaid before taxes.[758]

594. SCB HK recalls TANESCO's Submissions on Tariff of February 13, 2015, where, according to SCB HK, TANESCO quoted the first sentence of paragraph 339 of the Decision out of context, in support of an argument that paragraph 339 in fact excluded the possibility of a tariff based on an IRR of 22.31% on shareholder loans.[759] In response, SCB HK explained why, when the context is taken into account, including the remainder of paragraph 339, a tariff based on an IRR of 22.31% on shareholder loans is not ruled out by paragraph 339 of the Decision.[760]

595. SCB HK states that the debate between the Parties as to their understanding of paragraph 339 of the Decision continued and was addressed at the August 2015 hearing and in post-hearing briefs.[761]

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[757] SCB HK's Counter-Memorial on Annulment, ¶493, footnote 565, referring to **C-453**, SCB HK Submissions on Tariff dated November 11, 2014, ¶¶98-100.
[758] SCB HK's Counter-Memorial on Annulment, ¶494, footnote 566, referring to **C-487**, Second Supplemental Report of Colin Johnson dated November 10, 2014, ¶¶3.7- 3.8, 3.14, 9.1.2.
[759] SCB HK's Counter-Memorial on Annulment, ¶495, footnote 570 and 571, both referring to **C-478**, Tanesco's Submissions on Tariff dated February 13, 2015, ¶¶139-143.
[760] SCB HK's Counter-Memorial on Annulment, ¶495, footnote 572, referring to **C-476**, SCB HK's Further Submissions on Tariff dated March 26, 2015, ¶¶187-190.
[761] SCB HK's Counter-Memorial on Annulment, ¶495, footnote 574, referring to **C-475**, Transcript of Tariff Hearing (August 2015 Hearing), Day 1, August 19, 2015, p. 84, line 1–p. 85, line 23 (Mr Weiniger QC); p. 154, line 24–p. 155, line 1 (Mr Molina); p. 157, line 14–p. 158, line 4 (Mr Molina), and footnote 575, referring to **C-469**, SCB HK's Post-Hearing Brief dated November 2, 2015, ¶104; **Annex-10**, Tanesco's Post-Hearing Brief dated November 2, 2015, ¶¶90-95.

596. Finally, SCB HK submits that TANESCO pretends to be confused about why the Tribunal was saying that a 22.31% IRR was inappropriate in the Decision but settled on a 22.31% IRR in the Award. According to SCB HK, TANESCO knows that the answer to this is that the 22.31% IRR is applied on different bases (share capital basis versus shareholder loan basis) and produces different results. On this point, SCB HK explains that: "changing the basis of calculation from a share capital basis to a shareholder loan basis reverses the tax savings that would accrue to SCB HK (which was the Tribunal's concern in the Decision) and returns those savings to Tanesco. Accordingly, the Tribunal fixed the tariff by reference to a 22.31% IRR on a shareholder loan basis, rather than the share capital basis that had previously been used".[762]

Finding in the Award that 22.31% IRR on shareholder loan was appropriate

597. SCB HK explains that, when drafting the Award, the Tribunal had before it two understandings of paragraph 339 of its Decision. According to SCB HK, the Tribunal decided that SCB HK's understanding was correct, and confirmed SCB HK's argument that TANESCO's reliance on the first sentence of paragraph 339 took that sentence out of context. On this point, SCB HK quoted paragraphs 370, 378, and 382-386 of the Award.[763]

598. In addition, SCB HK claims that, in its Memorial on Annulment, TANESCO again takes the first sentence of paragraph 339 of the Decision out of context, quoting that sentence in isolation without acknowledging the sentences that follow. Contrary to TANESCO's assertions that the Tribunal's reasons for its conclusions in its Award are inadequate, the reasons it gave are entirely adequate. SCB HK states that TANESCO's argument only attempts to conflate a tariff based on a 22.31% IRR on share capital with a tariff based on a 22.31% IRR on shareholder loans.[764]

[762] SCB HK's Counter-Memorial on Annulment, ¶496.
[763] SCB HK's Counter-Memorial on Annulment, ¶497, footnote 576, referring to **Annex-1**, Award, ¶¶370, 378, and 382-386.
[764] SCB HK's Counter-Memorial on Annulment, ¶¶498-499, footnote 577, referring to TANESCO's Memorial on Annulment, ¶215.

599. SCB HK highlights that these two calculations are different and that paragraph 339 only ruled out the former but not the latter. In SCB HK's view, TANESCO can only argue to the contrary by taking an isolated sentence in the Decision out of context, giving it a meaning which, according to SCB HK, even the Tribunal has confirmed it does not have.[765]

600. Therefore, SCB HK submits that in making its complaint of contradictory reasons, TANESCO has actually made a claim that the Tribunal's reasons were factually incorrect. According to SCB HK, they were not, and in support refers to the *ad hoc* committee in *MCI v. Ecuador*, which concluded that: "contradictory reasons should be distinguished from reasons which are claimed to be legally or factually wrong".[766]

601. Consequently, SCB HK submits that the Tribunal gave clear reasons for why it was adopting a tariff based on a 22.31% IRR on shareholder loans, and thus, it holds that TANESCO's argument that the Tribunal provided inadequate reasons is baseless and must be rejected.[767]

iii) Analysis and Decision of the Committee

602. For the sake of good order, the Committee will divide its analysis regarding the Parties' arguments on the "failure to state reasons" ground into: (a) standard of the "failure to state reasons" ground; (b) the Tribunal's failure to state reasons on which the Award is based by holding on purely formalistic grounds that SCB HK had made an investment within Article 25(1) of the Convention; (c) the Tribunal's failure to take into account additional and decisive evidence regarding the Parties' interest in the Escrow Account; (d) the Tribunal's failure to take into account the evidence presented by TANESCO on the continuing existence of the tariff dispute; (e) the Tribunal's failure to take into account contradictory evidence concerning SCB HK's knowledge of the status of the Escrow Account; (f) the Tribunal's reversal of its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement; and (g) the Tribunal's holding that the tariff

[765] SCB HK's Counter-Memorial on Annulment, ¶499.
[766] SCB HK's Counter-Memorial on Annulment, ¶500, footnote 578, referring to **CLA-109**, *M.C.I. v. Ecuador*, ¶85.
[767] SCB HK's Counter-Memorial on Annulment, ¶501.

must be calculated on the basis of an IRR of 22.1% which directly contradicted its earlier finding that this rate cannot apply.

a) Standard of the "failure to state reasons" ground

603. The Committee agrees that, as correctly stated by TANESCO, Article 48(3) of the ICSID Convention imposes upon a tribunal the duty of ensuring that an award states the reasons on which it is based. If the tribunal does not comply with this obligation, any party can request annulment of the award under Article 52(1)(e) of the Convention. Therefore, in the Committee's view, there is a clear link between the provision requiring the tribunal to state reasons and the ground for annulment when there has been a failure by the tribunal to do so.[768]

604. The Committee is aware that the ICSID Convention does not provide further guidance as to when a failure to provide reasons has occurred, nor does it specify the manner in which the tribunal's reasons should be stated.[769] However, the Committee considers that the Parties' arguments and the case law quoted by them shines some light on this matter.

605. The Committee notes that the Parties have stated that ICSID jurisprudence confirms two elements: (i) that an award must enable the reader to understand the reasoning of the tribunal, and (ii) that reasons that are contradictory amount to a failure to state reasons.[770] The Committee shares this view.

606. However, the Committee is also aware that, as correctly stated by SCB HK, not only must there be a failure to state reasons, but the reasons themselves must be necessary to the tribunal's decision. The Committee shares the view of the *ad hoc* committee in *Joseph C. Lemire v. Ukraine*, which stated that annulment under Article 52(1)(e) should only occur when two conditions are met: (i) the failure to state reasons must leave the decision

[768] **CLA-112**, Background Paper on Annulment, ¶102.
[769] **CLA-112**, Background Paper on Annulment, ¶102.
[770] Application for Annulment, ¶18; TANESCO's Memorial on Annulment, ¶198, footnote, 131, referring to **Annex-77**, *MINE v. Guinea*, ¶5.08; see also SCB HK's Counter-Memorial on Annulment, ¶437, footnote 511, referring to TANESCO's Memorial on Annulment, ¶198, referring to *MINE v. Guinea* at ¶5.09; see also **CLA-112**, Background Paper on Annulment, ¶107, footnote 208.

on a particular point essentially lacking in any expressed rationale; and (ii) that point must itself be necessary to the tribunal's decision.[771]

607. Other *ad hoc* committees, especially the one in *Vivendi I*, have held that the ground of failure to state reasons is a remedy concerned only with a failure to state any reasons, and not with a failure to state correct or convincing reasons.[772] The requirement to state reasons is "…intended to ensure that parties can understand the reasoning of the [t]ribunal, meaning the reader can understand the facts and law applied by the [t]ribunal in coming to its conclusion".[773] It is irrelevant whether the parties agree with that conclusion or with the interpretation given by the tribunal.

608. SCB HK argues that a tribunal's reasons may be implicit in the award and that the *ad hoc* committee may clarify and explain those reasons in its decision, without adding new elements previously absent. In support of this, SCB HK quotes the *ad hoc* committees in *Soufraki v. UAE*[774] and *Vivendi II.*[775]

609. The Committee is of the view that a clarification of the Tribunal's reasoning would not amount to filling gaps in the Tribunal's reasoning if it only clarifies an already existing reasoning and proves that: (i) apparent obscurities in the Award are not real; (ii) that

[771] SCB HK's Counter-Memorial on Annulment, ¶439, footnote 515, referring to **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶279.
[772] SCB HK's Counter-Memorial on Annulment, ¶438, footnote 514, referring to **Annex-78**, *Vivendi I*, ¶64; see also **CLA-108**, *Joseph C. Lemire v. Ukraine*, ¶278; **Annex-73**, *Wena Hotels v. Egypt*, ¶79; **Annex-35**, *El Paso v. Argentina*, ¶¶217 and 221; **Annex-4**, *Soufraki v. UAE*, ¶¶123-128; **CLA-111**, *CDC v. Seychelles*, ¶75; **Annex-68**, *MTD v. Chile*, ¶¶90 and 92; **CLA-119**, *Continental Casualty Company v. Argentina*, ¶100; **CLA-117**, *Rumeli v. Kazakhstan*, ¶104; **CLA-100**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ¶¶139-141.
[773] **CLA-112**, Background Paper on Annulment, ¶105.
[774] SCB HK's Counter-Memorial on Annulment, ¶445, footnote 522, referring to **Annex-4**, *Soufraki v. UAE*, ¶24: "…the *ad hoc* Committee considers that, with regard to the reasoning of the award, if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so".
[775] SCB HK's Counter-Memorial on Annulment, ¶446, footnote 523, referring to **CLA-128**, *Vivendi II*, ¶248: "248. … It is also understood that in the matter of adequate reasoning, upon a hearing, an ICSID *ad hoc* Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision".

inadequate statements have no consequence on the solution; or (iii) that succinct reasoning does not actually overlook decisive facts or evidence.[776]

610. As to the existence of contradictory reasons, the Committee recalls TANESCO's argument that contradictory reasons amount to a failure to state reasons. The Committee accepts this position but points out that, as noted in *Rumeli v. Kazakhstan*,[777] only contradictory reasons that cancel each other out, leaving the award with a total absence of reasons, will amount to a failure to state reasons and thus to a ground for annulment.[778] This view is also held by SCB HK.[779]

611. Having established that annulment will only occur if: (i) the Tribunal's failure to state reasons left the decision on a particular point essentially lacking in any expressed rationale and if that point was itself necessary to the Tribunal's decision, or (ii) if the Tribunal stated contradictory reasons that completely cancel each other out, leaving the Award with a total absence of reasons, the Committee will now address the Parties' arguments.

b) The Tribunal's failure to state reasons on which the Award is based by holding on purely formalistic grounds that SCB HK had made an investment within Article 25(1) of the Convention

612. The Committee starts by recalling TANESCO's argument that the Tribunal held on purely formalistic grounds that there was an investment with no engagement of the Tribunal on whether the alleged investment satisfied the threshold of Article 25(1) of the Convention or met the criteria established in the *Salini* test and ICSID jurisprudence.

613. TANESCO asserts that it did raise the issue of the investment requirements under Article 25(1), but the Tribunal did not engage in any consideration of the "numerous valid

[776] See, for example, **Annex-4**, *Soufraki v. UAE*, ¶24.
[777] **CLA-117**, *Rumeli v. Kazakhstan*, ¶82.
[778] Application for Annulment, ¶20; TANESCO's Memorial on Annulment, ¶199, footnote 132, referring to **Annex-50**, *Klöckner v. Cameroon*, ¶116; **Annex-4**, *Soufraki v. UAE*, ¶125.
[779] SCB HK's Counter-Memorial on Annulment, ¶442, footnote 519, referring to **CLA-117**, *Rumeli v. Kazakhstan*, ¶82; **CLA-126**, *Ioan Micula v. Romania*, ¶299; **CLA-104**, *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, ¶¶109 and 110; **Annex-78**, *Vivendi I*, ¶65; **CLA-116**, *Alapli Elektrik B.V. v. Turkey*, ¶¶200-202.

reasons" as to why SCB HK had not made a qualifying investment.[780] TANESCO refers to its Counter Memorial dated August 24, 2012,[781] in which, according to TANESCO, it stated that the purchase of the debt by SCB HK could not be treated as an investment in Tanzania.

614. The Committee finds that, as raised by SCB HK, TANESCO makes this assertion only as part of the background of the dispute when referring to arbitration No. ARB/10/12 ("**BIT Arbitration**") but not as part of its arguments opposing the Tribunal's jurisdiction in the Arbitration Proceeding, where it focuses primarily on SCB HK's failure to register the security interest.[782]

615. When the Tribunal considered its jurisdiction under the ICSID Convention, it stated in the Decision that "[TANESCO] did not raise any objections to the Tribunal's jurisdiction under the ICSID Convention".[783] Therefore, the Tribunal considered that the fulfilment of the requirements under Article 25(1) was an uncontested and obvious point.

616. Nevertheless, and as stated by SCB HK, it is evident from the record that the Tribunal addressed the requirements of Article 25(1) of the Convention, including the investment requirement, in the Decision on Jurisdiction (which was later incorporated into the Award) on its own initiative. The exact finding of the Tribunal was as follows:

> "Regarding the second condition, the Tribunal is satisfied that by virtue of its purchase of the outstanding debt under the loans to IPTL and the assigning of the rights under the relevant agreements, SCB HK has an investment for the purposes of the ICSID Convention. There is undoubtedly a legal dispute arising out of the investment".[784]

617. The Committee is of the view that a succinct reasoning does not, *per se*, imply that decisive facts or evidence have been overlooked by the Tribunal. In this case, the length

[780] TANESCO's Reply on Annulment, ¶251.
[781] TANESCO's Reply on Annulment, ¶¶174-175, footnote 172, referring to **Annex-8**, Counter-Memorial by Tanzania Electric Supply Company Limited, dated August 24, 2012, ¶133.
[782] **Annex-8**, Counter-Memorial by Tanzania Electric Supply Company Limited, dated August 24, 2012, ¶133.
[783] **Annex-1**, Decision on Jurisdiction, ¶109.
[784] **Annex-1**, Decision on Jurisdiction, ¶111.

of the Tribunal's reasoning regarding the investment requirement does not, on its own, amount to a failure to state reasons. Instead, the Committee must analyse if this succinct paragraph provides the Decision and thus the Award with reasons as to why the Tribunal considered that Article 25(1) of the Convention was complied with.

618. On this point, the Committee applies the standard for a failure to state reasons: (i) the failure to state reasons leaves the decision on a particular point essentially lacking in any expressed rationale, and that point was itself necessary to the tribunal's decision, or (ii) the tribunal stated contradictory reasons that completely cancel each other out, leaving the award with a total absence of reasons.

619. The Committee notes that the Tribunal stated that "by virtue of its purchase of the outstanding debt" and "the assigning of the rights under the relevant agreements" SCB HK had an investment for the purposes of the ICSID Convention. Thus, in the Committee's view, the Tribunal did not leave this particular point lacking <u>any</u> expressed rationale: it considered that the purchase of the outstanding debt and the assigning of the rights under the relevant contracts were reasons enough to conclude that the investment requirement under Article 25(1) of the Convention was met. In addition, the Committee is of the opinion that, since the Tribunal considered the investment requirement not to be a contested point, it did not consider it necessary to write lengthy reasons on this point.

620. Finally, the Committee does not find any contradictory reasons given by the Tribunal on this point.

621. Consequently, the Committee finds no reasons for annulment of the Award under the "failure to state reasons" ground with respect to the Tribunal's decision that the requirements under Article 25(1) of the Convention were met.

c) The Tribunal's failure to take into account additional and decisive evidence regarding the Parties' interest in the Escrow Account

622. The Committee now turns to TANESCO's argument that the Tribunal failed to take into consideration additional decisive evidence submitted by TANESCO regarding the Parties' interest in the Escrow Account. Specifically, TANESCO argues that the Tribunal

did not consider an email from SCB HK dated December 6, 2013, where, according to TANESCO, SCB HK confirmed that: (i) it did not consider the Tribunal had jurisdiction with respect to the Escrow Account; and (ii) it did not assert any claim to the monies held in that account.[785]

623. In TANESCO's view, this email was effectively a waiver by SCB HK, which should have precluded SCB HK from asserting that the Escrow Account was material to the Tribunal's determinations in the Arbitration Proceeding. TANESCO states that the Tribunal failed to have regard to this waiver.[786]

624. The Committee's conclusions on this point are, as follows.

625. First, the Tribunal referred to this email in paragraphs 182 and 271 of the Award, indicating that it was aware of the existence and content of that email. Therefore, contrary to TANESCO's allegations, the Tribunal did "have regard to" said email, regardless of whether its decision reflected the position TANESCO wanted the Tribunal to adopt.

626. Second, the Tribunal's reasons for considering that the emptying of the Escrow Account was relevant to the Award were entirely different from the issue of whether the Tribunal considered it had jurisdiction over the account.

627. In the Award, the Tribunal explained that "What the Tribunal was not able to do was to assess the impact of the Respondent having agreed to pay the full tariff in its 2013 Settlement Agreement with IPTL/PAP, the impact of the fact that IPTL/PAP had now received substantial funds under the 2013 Settlement Agreement which reduced even further the likelihood of the appointment of a liquidator, and that the Escrow Account had been emptied. In short, the context in which the Decision of the Tribunal was made was substantially different from that which the Tribunal had been led to believe".[787] Additionally, the Tribunal held that the likelihood of a liquidator being appointed also played a material role in its Decision.[788]

[785] TANESCO's Memorial on Annulment, ¶¶203-204.
[786] TANESCO's Reply on Annulment, ¶256.
[787] **Annex-1**, Award, ¶346.
[788] SCB HK's Rejoinder on Annulment, ¶263.

628. Bearing this in mind, the Committee shares SCB HK's view that, given the Tribunal's reasoning in the Award, especially at paragraphs 347-348, as to why the emptying of the Escrow Account was relevant to its analysis, the Tribunal's decision was based to a significant extent on the likelihood that priorities of claims would have to be determined in the courts of Tanzania in the context of the appointment of a liquidator and that some protection for the interests of SCB HK in collecting any judgement remained because of the existence of funds within the Escrow Account.[789]

629. Accordingly, the Committee finds that the Tribunal provided the Parties with an expressed rationale as to why the emptying of the Escrow Account was material to its decision. Consequently, TANESCO does not have any possible explanation as to why the Tribunal disregarded the alleged waiver made by SCB HK.

630. Therefore, the Committee does not find any failure by the Tribunal to state reasons on the evidence presented by the Parties regarding their interest in the Escrow Account, and thus there is no ground for annulment in this respect.

d) The Tribunal's failure to take into account the evidence presented by TANESCO on the continuing existence of the tariff dispute

631. The Committee recalls TANESCO's argument that the Tribunal was presented with evidence demonstrating that negotiations regarding the level of the tariff payable under the PPA by TANESCO to IPTL were ongoing and that the tariff dispute continued even after the signing of the 2013 Settlement Agreement. According to TANESCO, the Tribunal failed to engage with this argument.[790]

632. According to SCB HK, in the Award the Tribunal clearly considered the evidence presented by TANESCO, specifically the Minutes of October 3, 2013. However, it reached its own conclusion as to the nature of the 2013 Settlement Agreement, finding

[789] SCB HK's Counter-Memorial on Annulment, ¶455.
[790] TANESCO's Reply on Annulment, ¶258.

that TANESCO had agreed to settle the tariff dispute on the basis of the full tariff.[791] The Committee agrees with this position for the following reasons.

633. From the Award, it can be seen that the Tribunal made specific reference to the existence and content of the Minutes of the October 3, 2013 meeting between TANESCO and IPTL, at which the 2013 Settlement Agreement was reached.[792]

634. When analysing this document, the Tribunal found not only that TANESCO had concluded an agreement to settle the tariff dispute on the basis of the full tariff, but also that: (i) TANESCO participated with IPTL in a joint recommendation that "monies in the escrow account be released to IPTL as soon as possible", despite having declared in its December 13, 2013 letter that it had no control over the Escrow Account;[793] (ii) eight days before the December 13, 2013 letter was written, the Escrow Account had already been emptied;[794] and (iii) although the December 2013 Letter neither admits nor denies that there was an agreement between TANESCO and IPTL to settle the outstanding tariff payments under the PPA, TANESCO had given the clear impression that there was no new arrangement and that it knew nothing about the account. TANESCO had given that impression by responding to SCB HK's allegation that there was an agreement facilitating the release of the funds held in escrow, claiming that since SCB HK had produced no proof of any such arrangement there was nothing to respond to, and that the Escrow Account was beyond its control.

635. The Tribunal concluded that TANESCO's failure to disclose these facts was anything other than deliberate since it knew of the agreement's existence, having entered into it. Thus, the Tribunal found that TANESCO's response in its December 2013 Letter was misleading and that the facts TANESCO failed to disclose in that letter would have had an impact on its decision not make an order for payment of the amounts owing to SCB HK under the PPA.[795]

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[791] **Annex-1**, Award, ¶331; see also SCB HK's Counter-Memorial on Annulment, ¶456.
[792] **Annex-1**, Award, ¶¶331-332.
[793] **Annex-1**, Award, ¶¶331-332, footnote 419, referring to **C-314**, Minutes of October 3, 2013 meeting between TANESCO and IPTL.
[794] **Annex-1**, Award, ¶332.
[795] **Annex-1**, Award, ¶¶333 and 344-347.

636. On this point, the Tribunal explained that "what [it] was not able to do was to assess the impact of [TANESCO] having agreed to pay the full tariff in its 2013 Settlement Agreement with IPTL/PAP, the impact of the fact that IPTL/PAP had now received substantial funds under the 2013 Settlement Agreement which reduced even further the likelihood of the appointment of a liquidator, and that the Escrow Account had been emptied. In short, the context in which the Decision of the Tribunal was made was substantially different from that which the Tribunal had been led to believe".[796]

637. The Committee applies the standard for the failure to state reasons to this situation: the failure must leave the decision on a particular point essentially lacking in any expressed rationale and that point must itself be necessary to the Tribunal's decision.

638. The Committee notes here that whether TANESCO agreed to settle the tariff dispute on the basis of the full tariff was relevant to the Tribunal's decision as to whether to reopen its decision to order payment to SCB HK. The Committee finds that the Tribunal concluded that it would reopen its decision not only on the basis of its finding that TANESCO had agreed to pay the full tariff, but also on the fact that the Escrow Account had been emptied and that IPTL had received "substantial funds under the 2013 Settlement Agreement which reduced even further the likelihood of the appointment of a liquidator".[797] According to the Tribunal, its prior decision was based to a significant extent on the likelihood of the appointment of a liquidator. These facts had changed that assumption.[798]

639. Consequently, the Committee finds that, although the Tribunal did not explain why it concluded that TANESCO had agreed to settle the tariff dispute on the basis of the full tariff, this was not essential to its determination to reopen its Decision and this step does not create a lack of expressed and coherent reasoning. Whether TANESCO had agreed to pay the full tariff was not "necessary" to the decision to reopen, but merely one of the many factors the Tribunal considered to reach its conclusion to order payment under the PPA.

[796] **Annex-1**, Award, ¶346.
[797] **Annex-1**, Award, ¶346.
[798] **Annex-1**, Award, ¶347.

e) The Tribunal's failure to take into account contradictory evidence concerning SCB HK's knowledge of the status of the Escrow Account

640. TANESCO argues that the Tribunal failed to take into account contradictory evidence concerning SCB HK's state of knowledge of the emptying of the Escrow Account when concluding that there was no evidence that SCB HK knew that the Escrow Account had in fact been emptied.[799]

641. Specifically, TANESCO refers to: (i) negotiations held between Mr Sethi and SCB HK's managing director, Mr Joseph Casson, regarding the release of the funds in the Escrow Account from November 13, 2013 at the latest (before the Decision on Jurisdiction was issued); (ii) the fact that the administrative receiver, Ms Martha Renju, had a copy of the agreement when she filed a request for an injunction to prevent the monies in the Escrow Account from being released;[800] and (iii) SCB HK's letter of November 27, 2013, by which, according to TANESCO, it confirmed that it knew TANESCO had entered into an agreement with IPTL that purported to settle the outstanding tariff payment under the PPA, thereby facilitating release of the funds placed in escrow.

642. The Committee disagrees with TANESCO for the following reasons.

643. It is clear to the Committee that, in the Award, the Tribunal explicitly addressed the question of SCB HK's state of knowledge.[801] When examining this question, the Tribunal, at paragraph 336 of the Award, explained the content of SCB HK's November 27, 2013 letter and addressed the fact that Ms Martha Renju had a copy of the 2013 Settlement Agreement, stating that: "… [SCB HK] indicates that it had been informed of the existence of an agreement settling the tariff dispute and facilitating the release of the Escrow Funds and states that the agreement had not been disclosed to it. It could be inferred from the fact that the Administrative Receiver, Martha Renju, had a copy of the agreement when she filed a request for an injunction to prevent the monies in the Escrow Account from being dispersed, some ten days before [SCB HK] wrote its November 27

[799] TANESCO's Reply on Annulment, ¶260.
[800] TANESCO's Memorial on Annulment, ¶¶207-208.
[801] **Annex-1**, Award, ¶¶335-341.

letter that [SCB HK] must have had some knowledge of the 2013 Settlement Agreement. But there is no evidence that [SCB HK] knew that the Escrow Account had in fact been emptied. [Text in brackets added by the Committee]".[802]

644. Later, at paragraph 337 of the Award, the Tribunal referred to negotiations between Mr Casson of SCB HK and Mr Sethi of PAP on November 13, 2013, as related in Mr Casson's witness statement. The Tribunal quoted that statement as follows: "it was made clear [to him] by Mr Sethi that 'there was no cash available to SCB HK because USD$75,000,000 was being paid to settle PAP's purchase of VIP's 30% shareholding in IPTL' and that SCB HK [would have] received no cash now because (Mr Sethi said) none of the USD$100,000,000 sitting in the escrow account would be left after paying VIP, the Tanzania Revenue Authority and 'other creditors'".[803]

645. The Tribunal stated that "[w]hat the statement by Mr Casson does not show is that the Escrow Account had been emptied at that time; […] And it certainly does not show that TANESCO had been involved in approving the release of the Escrow Funds, something that was quite contrary to TANESCO's assertion in the December 13, 2013 Letter that it had no control over the Escrow Account. Moreover, Mr Sethi's alleged statement says nothing about the terms of any settlement of the tariff dispute. As a result, the Tribunal cannot agree that Mr Casson's witness statement supports a claim of knowledge by SCB HK either in respect of the emptying of the Escrow Account or the settlement of the tariff dispute".[804]

646. Finally, the Tribunal explained that it considered it would have been illogical for SCB HK not to have brought the terms of the 2013 Settlement Agreement and the fact the Escrow Account had been emptied to the attention of the Tribunal immediately, had it been informed of these facts prior to the Tribunal's Decision.[805] The Committee recalls SCB HK's assertion that it was the terms of the 2013 Settlement Agreement – not its

[802] **Annex-1**, Award, ¶336.
[803] **Annex-1**, Award, ¶337.
[804] **Annex-1**, Award, ¶339.
[805] **Annex-1**, Award, ¶340.

existence – and the emptying of the Escrow Account – and not the risk – that the Tribunal felt unconceivable that SCB HK would not have drawn to its attention.

647. Consequently, the Tribunal concluded that TANESCO had failed to prove that SCB HK had knowledge of the facts that TANESCO had withheld from the Tribunal in the December 2013 letter.[806]

648. Thus, contrary to TANESCO's assertions, the Tribunal clearly considered the evidence submitted regarding SCB HK's state of knowledge and stated reasons why it did not believe the evidence was persuasive to conclude that SCB HK knew these facts.

649. In any event, the Committee recalls its previous decision that annulment proceedings are not concerned with how the tribunal appreciated the evidence and arguments submitted by the parties or the conclusion it arrived therefrom but are only concerned with ensuring that the evidence and arguments were fairly evaluated. In the Committee's opinion, this was the case in the Arbitration Proceeding.[807]

650. Additionally, TANESCO argues that when the Tribunal was unable to understand why SCB HK, had it known of the existence of the 2013 Settlement Agreement, would not have sought to capitalise on this knowledge prior to the issuance of the Decision, it hurriedly dismissed the evidence by labelling SCB HK's procedural negligence as a "tactical mistake", somehow excusing SCB HK's negligence.[808]

651. On this point, the Committee disagrees with TANESCO. At paragraph 343 of the Award, after conducting an analysis of the Parties' arguments and evidence, the Tribunal found that it was unable to conclude that SCB HK was negligent in respect of its lack of knowledge of the fact that TANESCO had settled the tariff dispute with IPTL or that the funds had been released from the Escrow Account. This was due to the fact that TANESCO's letter of December 13, 2013 "…was an implicit denial of any new agreement and a statement that suggested that TANESCO had no involvement with the Escrow Account". Therefore, the Tribunal considered that SCB HK had no obligation to

[806] **Annex-1**, Award, ¶341.
[807] See supra. ¶329.
[808] TANESCO's Memorial on Annulment, ¶209.

make further enquires about the October 2013 Settlement and its actions could not be characterised as negligent.[809] In the Committee's view, this is not the same as "excusing" SCB HK's negligence.

652. Finally, with regard to TANESCO's assertion that there is no reason why the Tribunal and SCB HK did not request further information regarding the Escrow Account at the time,[810] the Committee does not find this to be a ground for annulment under a failure to state reasons. This was not an issue submitted by the Parties to the decision of the Tribunal and thus it is not a matter upon which the Tribunal has ruled in the Award. Therefore, the Committee does not deem it necessary to deal with the Parties' argument in this respect.

653. Accordingly, the Committee does not find any failure by the Tribunal to state reasons when assessing TANESCO's evidence concerning SCB HK's knowledge of the status of the Escrow Account.

f) The Tribunal's reversal of its earlier decision that it had no jurisdiction over claims relating to the Facility Agreement

654. TANESCO states that the Tribunal based its reconsideration on the existence of the 2013 Settlement Agreement between TANESCO and IPTL and on the fact that the Escrow Account had been emptied but failed to address the other independent legal bases on which it had based its Decision on Jurisdiction.[811] Accordingly, TANESCO submits that when premising its reconsideration of the scope of its jurisdiction on one of the previously established legal bases, without addressing or rejecting the other independent legal bases for its Decision, the Tribunal failed to state reasons on which the Award is based and that this must lead to annulment.[812]

655. The Committee disagrees with TANESCO for the following reasons.

[809] **Annex-1**, Award, ¶¶342-343.
[810] TANESCO's Reply on Annulment, ¶269.
[811] TANESCO's Memorial on Annulment, ¶210.
[812] TANESCO's Memorial on Annulment, ¶211.

656. First, as can be seen from the Decision on Jurisdiction, the Tribunal found that it did not have jurisdiction over the Facility Agreement nor over IPTL, since the only parties to the Arbitration Proceeding were SCB HK and TANESCO. Accordingly, the Tribunal held that it only had jurisdiction in respect of IPTL's rights against TANESCO under the PPA and that it could make a declaration as to the amount owed by TANESCO to IPTL, but that it could not make an order for payment of such amounts. The Tribunal stated that "SCB HK has no rights as against TANESCO as the lender to IPTL in these arbitration proceedings; it only has rights against TANESCO as the assignee of IPTL's rights under the PPA".[813]

657. Second, the Committee recalls that the Tribunal held in the Decision that the potential appointment of a liquidator or administrator in respect of IPTL had an impact not to order payment, but also held that "for independent reasons" it had no jurisdiction to make an order for payment.[814]

658. Later in the Decision, the Tribunal explained what those "independent reasons" were. At paragraph 241 of the Decision, the Tribunal held that, considering the potential appointment of a liquidator for the winding up of IPTL, an order by the Tribunal that TANESCO pay a specific sum to SCB HK, which would be enforceable in domestics courts, would potentially interfere with the question of priority amongst creditors, which, according to the Tribunal, was a matter for the Tanzanian courts to decide. By contrast, the Tribunal held that a declaration that TANESCO owes a specific sum under the PPA left to the Tanzanian courts any question of priority amongst creditors.[815]

659. At paragraph 242, the Tribunal held that an order for the payment of a specific amount would potentially encroach on the power of Tanzanian courts to determine priority amongst IPTL's creditors, stating that: "[t]his limitation on the jurisdiction of the Tribunal applies whether the Tribunal were to make an order for the full amount owing by TANESCO to SCB HK as the assignee of IPTL's rights or whether it were to make an order for an amount equivalent to the sum needed to discharge IPTL's obligations to SCB

[813] **Annex-1**, Decision on Jurisdiction, ¶¶182-183 and 244.
[814] **Annex-1**, Decision on Jurisdiction, ¶183.
[815] **Annex-1**, Decision on Jurisdiction, ¶241.

HK".[816] The Committee finds two important points in this statement: (i) the Tribunal recognised the possibility of making an order for payment of the amount owed by TANESCO to SCB HK under the PPA; and (ii) the Tribunal considered the interference that any order for payment by TANESCO to SCB HK might have on the power of the Tanzanian courts to decide priority amongst creditors, was a "limitation on [its] jurisdiction".

660. Later, at paragraph 243, the Tribunal stated that "[t]here [were], however, further reasons why the Tribunal [was] unable to make an award of an amount owing sufficient to discharge the debt of IPTL to SCB HK". Here, the Tribunal explained that, in its post-hearing brief, SCB HK had identified the sum of US$138,726,761.95 as the amount sufficient to discharge the debt of IPTL to SCB HK. However, the Tribunal found that this amount had been calculated only by SCB HK and that it had not been put to the methods of proof that are normally undertaken before a tribunal makes an order.[817]

661. Additionally, the Tribunal explained that since it did not have jurisdiction over the relationship between SCB HK and IPTL under the Facility Agreement, it was not in a position to make an order determining what amount was allegedly owed by IPTL to SCB HK, nor could it take into account what SCB HK stated was the amount owing under the Facility Agreement in the framework of the calculation of the debt under the PPA.[818]

662. Finally, the Tribunal concluded that the only relief it was able to provide in the Arbitration Proceeding was a declaration of any amount owing by TANESCO to IPTL to which SCB HK has a claim as assignee of all of IPTL's rights.[819]

663. The Committee finds that the reasons why the Tribunal did not order payment to be made by TANESCO to SCB HK under the PPA were: (i) the potential appointment of a liquidator; (ii) the fact that SCB HK was claiming amounts to discharge IPTL's debt to SCB HK under the Facility Agreement, without having put such amounts to the methods of proof normally undertaken by tribunals before issuing an order for payment; and (iii)

[816] **Annex-1**, Decision on Jurisdiction, ¶242 [emphasis added by the Committee].
[817] **Annex-1**, Decision on Jurisdiction, ¶243.
[818] **Annex-1**, Decision on Jurisdiction, ¶244.
[819] **Annex-1**, Decision on Jurisdiction, ¶245.

the Tribunal's lack of jurisdiction regarding the Facility Agreement, and thus the impossibility of using the calculation made by SCB HK under that agreement to determine the amount owed under the PPA.

664. Having established these reasons, the Committee will now analyse the Award in order to determine whether the Tribunal addressed these reasons when it reconsidered its Decision.

665. The Committee starts by referring to paragraph 344 of the Award. Here, the Tribunal addressed whether the existence of the 2013 Settlement Agreement between TANESCO and IPTL to settle the tariff dispute and the status of the Escrow Account were material to its decision.[820]

666. The Tribunal explained that what it knew at the time of the Decision was that: (i) TANESCO had contested any obligation to pay the full tariff; (ii) that although the winding up petition had been withdrawn, the likelihood of the appointment of a liquidator remained a real possibility; and (iii) that some protection for the interest of SCB HK in collecting any judgement remained because of the existence of the funds in the Escrow Account.[821]

667. The Tribunal further stated that what it was not able to do at the time it issued its Decision was to assess the impact of, among other things, the fact that IPTL had now received substantial funds under the 2013 Settlement Agreement, which reduced even further the likelihood of the appointment of a liquidator and that the Escrow Account had been emptied. These facts substantially changed the context in which the Decision had been made.[822]

668. The Committee finds that the fact that IPTL had received substantial funds is a consequence of the emptying of the Escrow Account, from where these monies were taken, and this reduced the likelihood of the appointment of a liquidator. In the Committee's view, the Tribunal's statement in the Award that the reconsideration of the

[820] **Annex-1**, Award, ¶¶344-349.
[821] **Annex-1**, Award, ¶345.
[822] **Annex-1**, Award, ¶346.

Decision was based on the existence of the 2013 Settlement Agreement and on the fact that the Escrow Account had been emptied, was not "completely independent" of the legal reasons in the Decision (*i.e.* the likelihood of the appointment of a liquidator), which originally led the Tribunal to limit its jurisdiction to only making a declaration.

669. As to the fact that SCB HK was claiming amounts enough to discharge IPTL's debt to SCB HK under the Facility Agreement and the impossibility to use this quantification to determine the amount owed by TANESCO under the PPA, the Committee refers first to SCB HK's argument whereby it states that "…these 'other independent legal bases' are just expressions of the Third Party Ground *i.e.* that the Tribunal can only address debts between Tanesco and IPTL under the PPA, not debts as between IPTL and SCB HK under the Facility Agreement".[823] Second, SCB HK states that, since it did not choose to pursue its claim for an amount to discharge the debt under the Facility Agreement, but instead sought payment of the amount owing by TANESCO under the PPA, the "Third Party Ground" fell away.[824]

The Committee agrees with SCB HK's position in this respect. The issue of determining an amount under the Facility Agreement did not arise when the Tribunal issued the Award. Therefore, it did not need to be addressed by the Tribunal. However, the Committee finds that the Tribunal did consider SCB HK's new approach to seek payment of the amount owing by TANESCO under the PPA instead of claiming any amount under the Facility Agreement in the Award. In paragraph 247 of the Award the Tribunal stated that:

> "c) [SCB HK] seeks an order for the full amount due under the PPA
>
> 247. In the event that the Tribunal accepts to reconsider its previous Decision and order payment to SCB HK, [SCB HK] has now changed its approach from seeking payment of only the amount it calculates as necessary to discharge its loan to IPTL to seeking the full amount due from TANESCO to IPTL, even though in excess of the amount due to IPTL to

[823] SCB HK's Counter-Memorial on Annulment, ¶476.
[824] SCB HK's Counter-Memorial on Annulment, ¶¶476-477.

SCB HK under the Facility Agreement. [Text in brackets added by the Committee]".[825]

670. In the Committee's opinion, from this statement it can be logically concluded that the Tribunal did not address in the Award the matter of its jurisdiction under the Facility Agreement or the impossibility of ordering payment of an amount calculated pursuant to it as the other "independent legal reason", because this was no longer SCB HK's request. Thus, the Committee does not believe that the decision on this point was "essentially lacking" in any rationale, leaving the Parties without the possibility to follow the Tribunal's reasoning.

671. Consequently, the Committee does not find a failure of the Tribunal to state reasons regarding the reconsideration of its decision not to order payment.

g) The Tribunal's holding that the tariff must be calculated on the basis of an IRR of 22.1% which directly contradicted its earlier finding that this rate cannot apply

672. TANESCO asserts that the Tribunal's determination that the tariff must be recalculated on the basis of an IRR of 22.31%, directly contradicts its previous finding in the Decision on Jurisdiction. There, the Tribunal had concluded that an IRR of 22.31% would not be appropriate. Additionally, TANESCO states that it brought this inconsistency to the Tribunal's attention but that it was dismissed by the Tribunal without adequate reasons. Additionally, the Tribunal sought to justify its new decision with a witness statement that pre-dates both the Award and the Decision.[826]

673. In support of its argument, TANESCO refers to paragraph 339 of the Decision on Jurisdiction,[827] which stated:

"[T]he Tribunal does not believe that a tariff of 22.31% would be appropriate. That tariff was based on an assumption that IPTL's equity contribution could be made by way of shareholder loan, which the Tribunal

[825] **Annex-1**, Award, ¶247.
[826] TANESCO's Memorial on Annulment, ¶¶215-216, footnote 144, referring to **Annex-1**, Award, ¶¶382–384.
[827] TANESCO's Memorial on Annulment, ¶215, footnote 143, referring to **Annex-1**, Decision on Jurisdiction, ¶339.

has rejected. Furthermore, as the Tribunal has pointed out in this Decision, the substitution of a shareholder loan for equity resulted in benefits accruing to IPTL, in particular in relation to taxation, which were not contemplated under the PPA. Simply to agree on a tariff of 22.31% would effect no change in the situation between the Parties".[828]

674. The Committee disagrees with TANESCO's position for the following reasons.

675. At paragraph 371 of the Award, the Tribunal recalled its Decision with regard to the recalculation of the tariff where it set out the parameters for the Parties to negotiate it. At this paragraph, the Tribunal expressly stated that it had concluded that "…a 22.31% IRR would not be appropriate because it had been calculated on the basis of paid-up equity and not a shareholder loan. […] Third, the calculation of the tariff could not be based on any new assumptions…"[829]

676. Later, at paragraph 375, the Tribunal stated that the main problem it identified in the Decision on Jurisdiction regarding the tariff was that "…it had been calculated on the basis of paid up equity and not on the basis of a shareholder loan with the result that 'in replacing equity by a shareholder loan, IPTL was incurring less costs than the costs used for the recalculation of the Capacity Payment'". The Tribunal, at paragraphs 377-384, went on to consider the Parties' arguments on which IRR to use: 26.08%, proposed by SCB HK, and 13.69%, proposed by TANESCO.

677. Regarding these IRRs, the Tribunal concluded that both approaches were based on new assumptions of what the Parties would have decided if they had abandoned the 22.31% IRR and stated that neither of those calculations "focus[ed] on permitting TANESCO to recapture what it was paying in excess of the actual costs that IPTL was incurring".[830]

678. Under those considerations, the Tribunal rejected these proposals and turned to the suggestion of an unchanged IRR of 22.31% based on a shareholder loan and not paid up share capital. When conducting this analysis, the Tribunal pointed out that the result of

[828] **Annex-1**, Decision on Jurisdiction, ¶339.
[829] **Annex-1**, Award, ¶371.
[830] **Annex-1**, Award, ¶¶375-377.

this approach would be "a transfer of the tax savings from the use of a shareholder's loan to TANESCO".[831]

679. Additionally, the Tribunal specifically addressed TANESCO's assertion that an IRR of 22.31% was not permitted by the terms of the Decision, referring to the first sentence of paragraph 339 of the Decision.[832] The Tribunal stated that: "[TANESCO] [took] this out of context ignoring the following sentence, which provide[d] that such tariff 'was based on an assumption that IPTL's equity contribution could be made by way of a shareholder loan, which the Tribunal has rejected'".[833] In the Committee's view, this is a clear statement by the Tribunal that in its Decision it did not consider the IRR of 22.31% to be appropriate because it was applied on a shareholder's loan basis and not because of the percentage of the IRR (*i.e.* 22.31%).

680. TANESCO asserts that the Tribunal sought to justify its decision on the basis of a witness statement that was fully before it prior to the issuance of both the Award and the Decision on Jurisdiction. Therefore, according to TANESCO, it is unclear why the Tribunal reached a wholly different conclusion as to the nature and level of the tariff in its Award, despite relying on evidence that was already in its possession at the time it issued the Decision on Jurisdiction.[834] The Committee disagrees with TANESCO for the following reasons.

681. As it can be seen from the Decision on Jurisdiction at paragraphs 268-271, the Tribunal took into consideration and addressed thoroughly Mr Ehrhardt's expert report. Specifically, the Tribunal quoted Mr Ehrhardt's assertion that "[i]f the shareholder loan had been permitted in lieu of an equity contribution, the payments to shareholders would not have been subject to the dividend payment constraints, which would have eliminated or reduced the 'trapped cash' and would have required a much smaller Capacity Payment to provide the agreed 22.31 percent, after-tax return on equity…"[835] The Tribunal agreed

[831] **Annex-1**, Award, ¶378.
[832] **Annex-1**, Decision on Jurisdiction, ¶339: "[f]irst, the Tribunal does not believe that a tariff of 22.31% would be appropriate…".
[833] **Annex-1**, Award, ¶382.
[834] TANESCO's Memorial on Annulment, ¶¶217-218.
[835] **Annex-1**, Decision on Jurisdiction, ¶¶268, 269 and 271; footnotes 302 and 303, referring to Expert Report of David Ehrhardt, August 10, 2012, ¶¶110-111.

with the expert and concluded that "[t]he financial effect of replacing true equity, *i.e.* paid up capital by a shareholder loan, was explained by Mr Ehrhardt. The Tribunal is persuaded that a shareholder's loan would cost a substantial amount less than true equity over the life of the project, even if both earned exactly the same rate of return… [emphasis added by the Committee]".[836]

682. In the Award, the Tribunal referred again to Mr Ehrhardt's statement, explaining that "[TANESCO] itself was saying that the IRR could remain the same, but the tariff should have been lower because payments to shareholders under a shareholder loan would not have been subject to dividend payment constraints. The fundamental point is that the tax savings that IPTL gained from the actual use of shareholder loans rather than equity should have been transferred to TANESCO. The objective of the recalculation was to transfer those tax savings to TANESCO and that was what the negotiations between the Parties were to be directed to".[837]

683. It its clear to the Committee that, both in the Decision on Jurisdiction and in the Award, the Tribunal interpreted the expert report as allowing the possibility of the IRR to remain the same (22.31%). In the Committee's view, the Tribunal's approach in the Award with respect to the tariff was perfectly consistent with its determination in the Decision on Jurisdiction. Therefore, there is no contradictory reasoning behind the Tribunal's determination in the Award regarding the applicability of an IRR of 22.31%.

684. Additionally, the Tribunal explained that, since tax savings were transferred to TANESCO on the basis of an IRR of 22.31%, which was the whole point of the recalculation, it could not see on what basis a deviation from that IRR would be justified without speculating on what the Parties might have done under a theoretical negotiation at the time the PPA was entered into, had the Parties been on notice that shareholder loans rather than equity would be used.[838]

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[836] Emphasis and text in brackets added by the Committee; **Annex-1**, Decision on Jurisdiction, ¶271.
[837] **Annex-1**, Award, ¶384, footnote 441: "the Tribunal is persuaded that a shareholder's loan would cost a substantial amount less than true equity over the life of the project, even if both earned exactly the same rate of return". The Tribunal made explicit reference to ¶271 of the Decision on Jurisdiction.
[838] **Annex-1**, Award, ¶385.

685. Finally, the Tribunal stated that, when the Parties explained their arguments regarding the IRR to the Tribunal, both their approaches were inconsistent with the parameters set out in the Decision. Thus, the Tribunal concluded that the tariff had to be determined on the basis of an IRR of 22.31% applied to a shareholder loan.[839]

686. The Committee concludes that the Tribunal provided the Parties with explicit reasoning as to why it considered that an IRR of 22.31% applied to a shareholder loan was suitable. The Committee does not find contradictory reasons nor any failure by the Tribunal to state reasons as to why in the Award it considered that the tariff should have been determined on the basis of an IRR of 22.31%. Consequently, there is no ground for annulment under this argument.

VII. Costs

687. The Committee will now address the Parties' arguments regarding the allocation of costs in this proceeding.

i) TANESCO's arguments

Relief sought

688. Pursuant to both its Costs Submissions and the Reply Cost Submissions, TANESCO seeks the following relief:

689. In the event that the Committee annuls the Award, in whole or in part, on the basis of the Tribunal's reconsideration of its Decision of Jurisdiction, an order that SCB HK (i) bears the full costs of this Annulment Proceeding, including the fees and expenses of the Members of the Committee; and (ii) reimburses TANESCO for its legal costs and expenses.[840]

690. In the event the Committee annuls the Award, in whole or in part, on any basis other than the Tribunal's reconsideration of its Decision on Jurisdiction, an order that the Parties (i)

[839] **Annex-1**, Award, ¶386.
[840] TANESCO's Reply Costs Submissions, ¶29(a); see also TANESCO's Costs Submissions, ¶5.

share in equal proportions the full costs of this Annulment Proceeding, including the fees and expenses of the Members of the Committee; and (ii) each bear their own legal costs and other expenses.[841]

691. In the event that the Committee does not annul the Award, in whole or in part, an order that the Parties (i) share in equal proportions the full costs of this Annulment Proceeding, including the fees and expenses of the Members of the Committee; and (ii) each bear their own legal costs and other expenses.[842]

Costs Incurred by TANESCO

692. TANESCO states that during the annulment phase of this Proceeding, it was and remains represented by Tanzania-based counsel from the law firms Crax Law Partners and R.K. Rweyongeza & Co. in Dar es Salaam, together with international law firm Clyde & Co LLP. The remuneration of both firms is based upon on a joint lump-sum fixed fee of 10,291,160,000 TZS. This sum is inclusive of expenses and disbursements incurred during the course of the Annulment Proceeding, including the fees and expenses of TANESCO's expert witness, Professor August Reinisch. TANESCO explains that it selected its counsel in this Annulment Proceeding on the basis of a tender process on December 21, 2016. As of that date, the US$/TZS exchange rate was 1/2174.4999. Accordingly, the US$ equivalent of the joint lump-sum fixed fee is US$ 4,732,656.00.[843]

693. Additionally, TANESCO indicates that it has made the following advance payments to ICSID in accordance with Regulation 14 of the Centre's Administrative and Financial Regulations: US$ 94,972.84 (allocated from the original proceedings at TANESCO's request); US$ 100,000 (confirmed as received by way of the Centre's letter dated May 11, 2017); and US$ 200,000 (confirmed as received by way of the Centre's letter dated August 2, 2017). To these amounts, the Committee adds US$ 200,000 (confirmed as received by way of the Centre's letter dated June 6, 2018).

Allocation of costs

[841] TANESCO's Reply Costs Submissions, ¶29(b); see also TANESCO's Costs Submissions, ¶13.
[842] TANESCO's Reply Costs Submissions, ¶29(c).
[843] TANESCO's Costs Submissions, ¶¶3-4, footnote 1.

694. In its Costs Submissions, TANESCO states that in the event that the Committee determines that the Award ought to be annulled, in full or in part, on the basis of the Tribunal's reconsideration of its Decision on Jurisdiction, SCB HK should cover the full costs that TANESCO has incurred.[844]

695. TANESCO argues that annulment proceedings concern the actions of the tribunal in producing an award and not necessarily the actions of the parties to the proceedings. However, it considers that the genesis of this Annulment Proceeding was SCB HK's application that the Tribunal reconsider its Decision. Thus, it submits that this initial step, and SCB HK's subsequent conduct, justifies an order that SCB HK pay TANESCO's costs.[845]

696. First, TANESCO considers that SCB HK opportunistically grasped the chance to have a second bite at the jurisdictional cherry through its application contained within its Submissions on Tariff dated November 11, 2014. TANESCO considers that the Tribunal was induced to adopt SCB HK's position in the Award.[846]

697. Second, TANESCO argues that SCB HK waited almost a year to file the application for reconsideration. It is TANESCO's position that SCB HK either knew or had the means to know of the emptying of the funds in the Escrow Account far earlier than it maintained in its application for reconsideration. The application itself made reference to articles from the Citizen newspaper dated March 9 and 17, 2014 which, according to TANESCO, described the emptying of funds in escrow, published *circa* eight months in advance of SCB HK's application for reconsideration.[847]

698. Third, TANESCO argues that SCB HK littered its application for reconsideration with accusations of corruption within the various Tanzanian judicial and political institutions and that this influenced the Tribunal to adopt the course that led to this Annulment

[844] TANESCO's Costs Submissions, ¶5.
[845] TANESCO's Costs Submissions, ¶6.
[846] TANESCO's Costs Submissions, ¶¶7-8.
[847] TANESCO's Costs Submissions, ¶¶9-10.

Proceeding. SCB HK subsequently withdrew the allegations within the course of this Annulment Proceeding.[848]

699. In sum, TANESCO submits that but for the actions of SCB HK relating to its belated application for reconsideration and its conduct in respect of that application, it is likely that these proceedings would not have been necessary or, alternatively, that the proceedings would have required far less resources.[849]

700. In its Reply Costs Submissions, TANESCO states that an *ad hoc* committee has the power to award costs as it deems fit and is not bound to follow any general rules or practices of other *ad hoc* committees, as provided for in Articles 52(4) and 61(2) of the Convention. Furthermore, it argues that pursuant to Arbitration Rules 47(1)(j) and 53, the Decision of the Committee should also include its decision with respect to the cost of the Annulment Proceeding.[850]

701. In response to SCB HK's arguments, TANESCO states that the Committee is not required to adopt a "costs follow the event" approach in respect of the administrative costs of the annulment proceedings. TANESCO refers to Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations which provides that advance payments are made "without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid". Accordingly, the Committee retains its discretion as to who ought to be responsible for these costs.[851]

702. TANESCO opposes SCB HK's argument that there is a "default" position to the effect that administrative costs follow the event in the case of an unsuccessful application. It explains that, in *Azurix v. Argentina* it was acknowledged that rendering an order that an unsuccessful applicant pay the full costs of the annulment proceedings was a departure from previous practice. That previous practice had been that administrative costs be shared between the parties even in the event of an unsuccessful application and was

[848] TANESCO's Costs Submissions, ¶11.
[849] TANESCO's Costs Submissions, ¶12.
[850] TANESCO's Reply Costs Submissions, ¶2.
[851] TANESCO's Reply Costs Submissions, ¶¶4-5.

established in the decisions in *Wena Hotels v. Egypt, MTD v. Chile, Soufraki v. UAE* and *Lucchetti v. Peru.*[852]

703. Furthermore, TANESCO notes that in *Wena Hotels v. Egypt*, the *ad hoc* committee rendered its decision "in light of the importance of the arguments advanced by the Parties in connection with this case…" TANESCO considers that its Application for Annulment raises highly significant issues going to the very heart of the ICSID arbitration process which the Committee ought to take into account when considering the issue of the allocation of administrative costs.[853]

704. TANESCO states that the cases cited by SCB HK in its Cost Submissions may suggest a trend, but that there is no such "default" or "normal" rule that the Committee either ought to, or is bound to, apply in the event that the Application for Annulment is unsuccessful. In the event the Committee rejects the Application for Annulment, it should nonetheless render an order that the administrative costs of the Annulment Proceeding be shared between the Parties in equal proportions.[854]

705. TANESCO states that the Parties ought to each bear their own legal costs in the event that the Committee rejects the Application for Annulment. TANESCO notes that *ad hoc* committees have consistently determined that, even in the event of an unsuccessful application, each party bears its own legal costs. TANESCO points out that this was the approach adopted by each of the *ad hoc* committees in the decisions expressly referred to in SCB HK's Cost Submissions (in alleged support of its position that TANESCO ought to be responsible for the administrative costs of the Annulment Proceeding).[855]

706. TANESCO indicates that SCB HK makes no reference to a recent decision whereby an *ad hoc* committee considered that the proposed threshold for a costs order against an unsuccessful applicant is when the case is "fundamentally lacking in merit" and "to any

[852] TANESCO's Reply Costs Submissions, ¶¶7-8.
[853] TANESCO's Reply Costs Submissions, ¶8.
[854] TANESCO's Reply Costs Submissions, ¶9.
[855] TANESCO's Reply Costs Submissions, ¶¶10-12; See also SCB HK´s Costs Submissions, ¶¶13—15, footnote 5 referring to *Azurix v. Argentina.*

reasonable and impartial observer, most unlikely to succeed", *thereby ordering that* each party bear its own costs.[856]

707. Applying this same reasoning, TANESCO argues that its Application for Annulment clearly has significant merit. It argues that, by contrast, the three decisions that SCB HK seeks to rely upon contain minimal justification in respect of the adverse cost order against the unsuccessful applicant and that none of these cases assist the Committee in respect of the exercise of its discretion on costs in these proceedings.[857]

708. Finally, TANESCO states that there are strong policy grounds against *ad hoc* committees adopting the approach suggested by SCB HK in its Cost Submissions. TANESCO explains that annulment is the only recourse that an unsuccessful party has under the ICSID Convention and Arbitration Rules. To apply a general "costs follow the event" approach to both legal and administrative costs would risk deterring bona fide applications.[858]

709. If the Application for Annulment is unsuccessful, TANESCO requests that the Committee orders that each party bear its own legal costs.[859]

710. TANESCO considers that it ought not to be responsible for SCB HK's costs in the event that the Application for Annulment is unsuccessful. In addition, TANESCO disputes SCB HK's alleged position that even in the event the Annulment Application is successful, the Committee ought to punish TANESCO with an adverse cost order based on its bad conduct.

711. To the contrary, TANESCO states that its conduct in respect of this Annulment Proceeding has been at all times professional and in good faith. TANESCO explains that it has had no choice but to respond to SCB HK's accusations in order to correct the record. TANESCO does so by reference to the paragraph numbering contained in SCB HK's

[856] TANESCO's Reply Costs Submissions, ¶13; See also *Suez v. Argentina*.
[857] TANESCO's Reply Costs Submissions, ¶¶13-14, footnote 10, referring to **CLA–106**, *Adem Dogan v. Turkmenistan*; **CLA–116**, *Alapli Elektrik B.V. v. Turkey*; **CLA–173**, *Togo Electricité B.V. and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, September 6, 2011.
[858] TANESCO's Reply Costs Submissions, ¶15.
[859] TANESCO's Reply Costs Submissions, ¶16.

Cost Submissions: a) Paragraph 23(i) and (ii): it was the application for reconsideration that led the Tribunal to reconsider its Decision on Jurisdiction. In any event, and notwithstanding their complete lack of merit, SCB HK's submissions at paragraph 23(i) and (ii) are nothing more than further belated additional submissions in respect of the substantive proceedings. TANESCO submits that the Committee ought to ignore and/or disregard paragraph 23(i) and (ii) on the basis that they are unauthorised; b) Paragraph 23(iii): SCB HK asserts that costs have been "substantially" increased as a result of TANESCO allegedly (i) raising new objections not argued before the Tribunal, (ii) raising new objections previously conceded before the Tribunal, (iii) re-opening issues of fact from the underlying arbitration and, (iv) making new allegations of fact not argued before the Tribunal. First, SCB HK provides no detail as to the level of time spent addressing any of these alleged issues. Its bare assertion that costs were increased substantially has no factual or evidential foundation and ought to be ignored by the Committee on that basis. Second, TANESCO states that it has already responded to SCB HK's incorrect accusations in respect of these alleged issues in the context of both its written and oral submissions; c) Paragraph 23(iv): TANESCO rejects any accusation that it has sought to mislead the Committee in any way during this Annulment Proceeding. TANESCO has relied upon, *inter alia*, contemporaneous documentation in respect of demonstrating that SCB HK's level of knowledge regarding the 2013 Settlement Agreement was in excess of that put before the Tribunal.[860]

712. TANESCO states that SCB HK is at least correct in saying that it is common practice for international tribunals to take into account the conduct of the parties when allocating costs. It further argues that SCB HK could have found specific support for this proposition from certain *ad hoc* committee decisions referred to elsewhere in its Cost Submissions.[861] Those decisions, explains TANESCO, refer to the conduct of the parties and counsel throughout the respective annulment proceedings as well as the general

[860] TANESCO's Reply Costs Submissions, ¶¶17-18.
[861] *M.C.I. v. Ecuador*, *Tulip Real Estate v. Turkey* and *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic.*

importance of the issues raised by the applicant in considering adequate cost orders. Each of these decisions provided for each party to bear their own legal costs.[862]

713. TANESCO submits that the conduct of SCB HK during the course of this Annulment Proceeding fell short of that expected of a party to ICSID arbitration. TANESCO considers that SCB HK: (i) deployed a number of guerrilla tactics during the proceeding, including when it attacked Professor Reinisch's standing to present a legal opinion in support of TANESCO's position via unfounded allegations concerning his connection with a member of the Committee, and (ii) instigated a smear campaign against TANESCO and Tanzania. TANESCO was forced to respond to this unwarranted attempt to prejudice the Committee against TANESCO and the Tanzanian judiciary and SCB HK soon abandoned its efforts in this respect. Nonetheless, TANESCO was required to set the record straight, devoting significant time to explain the true nature of CAG and PAC reports, Tanzanian law, and the integrity of Tanzania's legal system.[863]

714. TANESCO states that its conduct during the Annulment Proceeding was as required by a party applying in good faith for the annulment of an award and that it is clear that the issues raised by way of the Application for Annulment are of significant importance to the integrity of the ICSID framework. Accordingly, it considers that under no circumstances should TANESCO be faced with a costs order requiring it to reimburse SCB HK for its legal costs and other expenses – especially in the event that its Application is successful.[864]

715. With respect to the volume of costs incurred by TANESCO and SCB HK, respectively, TANESCO notes that the costs incurred by it in respect of the Annulment Proceeding are in excess of those incurred by SCB HK. However, it explains that SCB HK's counsel has remained constant throughout the duration of its dispute with TANESCO and thus possessed an extensive and recyclable fount of knowledge. By contrast, Clyde & Co LLP were instructed only after the Application for Annulment had been lodged with the ICSID secretariat (*i.e.* circa one year ago) and did not enjoy the same level of knowledge of the

[862] TANESCO's Reply Costs Submissions, ¶19.
[863] TANESCO's Reply Costs Submissions, ¶20.
[864] TANESCO's Reply Costs Submissions, ¶21.

extensive and detailed factual background, and the spectrum of legal argument, as counsel for SCB HK. TANESCO further explains that its counsel had to perform the substantial exercise of reviewing information exchanged during the course of almost a decade to understand the arguments raised and positions taken during the course of the underlying proceedings in order to fully plead TANESCO's case on annulment before the Committee. Furthermore, it argues that TANESCO, as applicant, had the burden of positively asserting its annulment case, including by reference to expert evidence provided by Professor August Reinisch. This allegedly required significant resources to be devoted to this matter by TANESCO and for appropriate provision to be made when determining the fixed fee allocated to the case. It explains that this allocation was justified when it came to the Annulment Proceeding and, in particular, in response to SCB HK's tactics and approach to written pleadings, which required TANESCO's counsel to expend significant time and resources.[865]

ii) SCB HK's arguments

716. SCB HK seeks the following relief: (i) an order that TANESCO bear the full costs and expenses incurred by ICSID in relation to this Annulment Proceeding, including the fees and expenses of the Members of the Committee; and (ii) an order that TANESCO reimburse SCB HK for the legal costs and expenses SCB HK has incurred in defending this Annulment Proceeding within sixty days of the date of dispatch of the Committee's decision on annulment, increased by simple interest at the rate of three month LIBOR plus 4% (rate of interest under the PPA and rate of interest used by the Tribunal in its Award), until full payment is received.[866]

Costs Incurred

717. SCB HK states that this Annulment Proceeding had lasted over 13 months at the date of its Costs Submissions and has involved the submission of lengthy written pleadings, as well as oral proceedings before the Committee. In light of these considerations, SCB HK considers that its costs in defending the Application for Annulment were reasonably

[865] TANESCO's Reply Costs Submissions, ¶¶22-27.
[866] SCB HK's Costs Submissions, ¶28; see also SCB HK's Reply Costs Submissions, ¶41.

incurred and are reasonable in amount. The legal fees of Herbert Smith Freehills LLP and Linklaters LLP were charged on an hourly basis.[867]

718. SCB HK claims the following costs from TANESCO: Herbert Smith Freehills LLP – legal services and disbursements (to March 2, 2018) £593,692.21. Linklaters LLP – legal services and disbursements (to March 2, 2018) £69,670.21. Total costs (to March 2, 2018): £663,362.42.[868]

719. SCB HK explains that it is well established that a party recovering costs from the other party in investment arbitration can only recover costs which were incurred reasonably. The costs TANESCO claims are not reasonable and SCB HK should not be ordered to pay those costs, regardless of the Committee's decision on annulment.[869]

720. SCB HK considers the costs claimed by TANESCO are entirely disproportionate to these proceedings and therefore unreasonable, because: (i) they are far higher than is usual in ICSID annulment proceedings. A recent study into costs in investment arbitration found that the average costs claim for applicants in annulment proceedings was US$ 1.26 million. TANESCO has claimed costs of over US$ 4.7 million (US$ 4,732,656.00), nearly four times this amount; and (ii) they are disproportionately high compared with the costs incurred by SCB HK in this Annulment Proceeding. SCB HK's costs amount to £663,362.42, or approximately US$ 912,541.25.35.[870]

721. SCB HK notes that there is no reason why TANESCO's costs should be so much higher than SCB HK's because of the following considerations: (i) on average, applicants claim less costs in annulment proceedings than respondents; (ii) the fixed fee of US$ 4,732,656.00 bears no resemblance to the length and complexity of these proceedings (*e.g*. TANESCO has presented no factual witnesses and only one expert witness. The Hearing was short); (iii) TANESCO claims that it informed its counsel of their success in a tender process on December 21, 2016. Taking this as a starting point for when their

[867] SCB HK's Costs Submissions, ¶25.
[868] SCB HK's Reply Costs Submissions, ¶40.
[869] SCB HK's Reply Costs Submission, ¶26.
[870] SCB HK's Reply Costs Submission, ¶27, (i) and (ii).

work began on these proceedings, TANESCO's counsel has done around 11 months of work for their fixed fee.[871]

722. SCB HK further notes that TANESCO's changes of counsel have inflated its costs unreasonably, as Clyde & Co LLP is the third international law firm TANESCO has used during the Arbitration Proceeding and this Annulment Proceeding. Each time TANESCO changes its counsel, the new counsel must necessarily spend time familiarising themselves with the case.[872]

723. Additionally, SCB HK notes that TANESCO has offered no explanation of: how these fees were split between local and international counsel; how the fixed fee relates in any way to the anticipated length and complexity of these proceedings; and the disbursements actually incurred on behalf of TANESCO and how much of the fixed fee was apportioned to an estimated allocation for disbursements and expenses.[873]

724. Finally, SCB HK notes that TANESCO has not confirmed in its Costs Submissions when the fixed fee lump sum falls due, or if there are any conditions attached to payment, or whether it has actually paid the fixed fee lump-sum to its local and international counsel.[874]

Allocation of Costs

725. SCB HK states that if the Application for Annulment fails the Committee should follow the principle of "costs follow the event" and if it succeeds the Committee should make a costs order against TANESCO in any event.[875]

726. SCB HK provides that Article 61(2) of the Convention grants ICSID tribunal's broad discretion as to how to allocate the costs of the arbitration between the parties.[876]

[871] SCB HK's Reply Costs Submission, ¶27, (ii), (iii) and (iv).
[872] SCB HK's Reply Costs Submission, ¶32.
[873] SCB HK's Reply Costs Submission, ¶¶34-36.
[874] SCB HK's Reply Costs Submission, ¶37.
[875] SCB HK's Costs Submissions, ¶7.
[876] SCB HK's Costs Submissions, ¶4.

727. SCB HK also refers to ICSID Arbitration Rules 47(1)(j) and 53, which provide that the annulment decision should contain "any decision of the [Committee] regarding the cost of the proceeding". Therefore, the Committee has the power to award costs as it deems appropriate in these proceedings and is not bound to follow any general rules or the practices of previous annulment committees.[877]

728. In consideration of the previous, SCB HK asks the Committee to exercise its discretion to award SCB HK its costs in any event, and in particular to order that TANESCO: (i) bear the full costs and expenses incurred by ICSID in this Annulment Proceeding, including the fees and expenses of the Members of the Committee; and (ii) reimburse SCB HK for the legal costs and expenses it has incurred in defending this Annulment Proceeding.[878]

729. The following sections address in more detail the elements of the Committee's discretion as stated by SCB HK.

730. SCB HK states that, whilst there is no default rule for costs allocation in the ICSID Convention or ICSID Arbitration Rules, two main approaches may be identified in the case law: (i) each party should bear its own costs and (ii) costs follow the event. SCB HK notes that the conduct of the parties and the nature of their cases are relevant considerations as stated by the tribunal in *Caratube v. Kazakhstan*.[879]

731. SCB HK explains that, in international arbitration generally, it is common practice for the losing party to bear the costs of the arbitration and to compensate the successful party for its fees and expenses reasonably incurred. According to SCB HK, it is increasingly becoming the norm in investment arbitration for the successful party to be awarded costs, and a substantial number of ICSID tribunals have adopted the rule when exercising their discretion in allocating costs.[880]

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[877] SCB HK's Costs Submissions, ¶¶5-6.
[878] SCB HK's Costs Submissions, ¶6.
[879] SCB HK's Costs Submissions, ¶9, footnote 2, referring to **CLA-164**, *Caratube v. Kazakhstan*, ¶1253.
[880] SCB HK's Costs Submissions, ¶¶10-11, footnote 3, referring to **CLA-165**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, ¶¶207-212; **CLA-166**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, July 26, 2016, ¶¶220-224; **CLA-167**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland)*

732. Also, SCB HK explains that in ICSID annulment proceedings, there are further compelling reasons why the starting point of the Committee's costs analysis should be that costs follow the event, in relation to both the costs of the arbitration (i.e. ICSID costs and the costs of the Committee) and the parties' legal costs.

Annulment Proceeding costs

733. Regarding the costs of the Annulment Proceeding, SCB HK explains that Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations requires an applicant for annulment alone to make advance payments to cover the expenses of the annulment proceedings following the constitution of the Committee. Whilst this is expressed to be "without prejudice to the right of the Committee … to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid", a number of *ad hoc* Committees have adjudged that it establishes a default position that the applicant bears the costs of the annulment proceedings in the event of an unsuccessful application for annulment.[881]

734. Thus, SCB HK states that in one of the more detailed analyses of the allocation of costs in annulment proceedings, the committee in *Azurix v. Argentina* stated that: "… as a matter of discretion, the normal course should be for a wholly unsuccessful applicant for annulment carry the burden of the whole of the costs of the Centre advanced by it associated with the proceedings, including the fees and expenses of the members of the *ad hoc* committee. Of course, the Committee does not exclude the possibility that circumstances might justify a departure from this normal rule, but the Committee finds no such exceptional circumstances in the present case".[882]

and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶586; **CLA-168**, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, ¶529.

[881] SCB HK's Costs Submissions, ¶13.

[882] SCB HK's Costs Submissions, ¶14, footnote 6, referring to **Annex-71**, *Azurix v. Argentina*, ¶378.

735. SCB HK submits that, in the event the Application for Annulment is rejected, the Committee should follow the "normal rule" outlined by the committee in *Azurix v. Argentina*, as there are no circumstances which justify a departure from this principle.[883]

Legal costs

736. SCB HK states that an unsuccessful applicant should bear the risk of its application failing and, as well as paying for the annulment proceeding itself, should reimburse the respondent for its expenses incurred in protecting the award. SCB HK supports this approach with the decision issued by the committee in *Adem Dogan v. Turkmenistan*, which ordered that the unsuccessful applicant bear the costs of the annulment proceedings and the respondent's legal costs in full, stating that: "[i]n deciding how to allocate the costs of this proceeding, the [c]ommittee has been guided by the principle that 'costs follow the event', unless a different approach is called for. The Committee has found no such indication in this case. The Claimant has prevailed in totality and should not be burdened by having to pay for his defence in this annulment proceeding". Further, SCB HK, also states that a similar conclusion was reached by several other committees.[884]

737. To sum up, SCB HK states that TANESCO paid the advance payment requested by the Secretary-General in accordance with Regulation 14(3)(e). If the Application for Annulment fails, there is no reason for the Committee to depart from the "normal rule" in annulment proceedings that the applicant should bear this cost. Having been successful in the Arbitration Proceeding, SCB HK was forced to defend these proceedings and should not be required to pay for them if it does so successfully. SCB HK states that the same reasoning applies to the costs of SCB HK's legal representation. If the Application for Annulment fails, the Committee should follow the approach of the committees in

[883] SCB HK's Costs Submissions, ¶15.
[884] SCB HK's Costs Submissions, ¶¶16-18, footnotes 7-9, referring to **CLA-106**, *Adem Dogan v. Turkmenistan*, ¶¶279 and 281; **CLA-116**, *Alapli Elektrik B.V. v. Turkey*, ¶263; **CLA-173**, *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, September 6, 2011, ¶260.

Adem Dogan v. Turkmenistan, *Alapli Elektrik B.V. v. Turkey* and *Togo Electricité and GDF-Suez Energie Services v. Togo*.[885]

738. In the case that the Application for Annulment succeeds, SCB HK states that the Committee should make a costs order against TANESCO in any event for the following reasons.

739. SCB HK states that it is common practice for international tribunals to take into account the conduct of the parties when allocating costs. This may be a reason to depart from the general rule that costs follow the event. SCB HK further explains that procedural misconduct is often cited by tribunals and *ad hoc* committees as a reason for ordering that costs be borne by a particular party. For example, in *LETCO v. Liberia* the tribunal awarded LETCO the full costs incurred in the arbitration (including costs of legal representation) because of Liberia's "procedural bad faith" in the proceedings. In *Telenor v. Hungary*, one of the reasons the tribunal ordered Telenor to pay Hungary its full costs was that Telenor's claims had "been put differently at different stages of the arbitral proceedings".[886]

740. According to SCB HK, exceptional circumstances exist that justify the Committee making a costs award against TANESCO. SCB HK notes that it was TANESCO's misleading conduct that led the Tribunal to reconsider its Decision. If the Application for Annulment succeeds on the narrow ground that the Tribunal's original incorrect Decision not to order payment was *res judicata* and should not have been reconsidered, then this incorrect Decision will have to be reinstated. In such a scenario TANESCO will have profited from its own wrong in misleading the Tribunal. In turn, SCB HK argues that as

[885] SCB HK's Costs Submissions, ¶¶19-20.

[886] SCB HK's Costs Submissions, ¶¶21-22, footnotes 10 and 11, referring to **CLA-174**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009, ¶158; **CLA-175**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008, ¶729; **CLA-176**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, ¶304 (tribunal took into account that the Respondent "insufficiently cooperated in providing documents and testimonial evidence"); **CLA-177**, *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999, ¶126 (tribunal took into account that the "Claimants presented their case in an efficient and professional manner" and that the Respondent "may be said to some extent to have invited litigation"); **CLA-178**, *Liberian Eastern Timber Corporation [LETCO] v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, March 31, 1986, page 53, reprinted in 26 I.L.M. 647 (1987).

a result of TANESCO's misleading conduct, it will be penalised by not receiving the order for payment of the sums due under the PPA to which the Tribunal concluded it should legally be entitled. In such a scenario it would be wrong for SCB HK to be further penalised by having to bear the cost of these annulment proceedings.[887]

741. SCB HK explains that only two of TANESCO's grounds of annulment (that there was no qualifying investment under Article 25(1) of the Convention, and/or that the Tribunal failed to give reasons for concluding there was a qualifying investment) would, if accepted, result in the annulment of the entire Award. The acceptance of any other ground could, at most, result in only a partial annulment of the Award. Therefore, SCB HK explains that even if the Application for Annulment is successful on the narrow basis that the Decision should not have been reconsidered, and the Award is partially annulled, this does not affect TANESCO's liability under the PPA. In such circumstances, the Tribunal's finding in its Decision that TANESCO is liable under the PPA will still stand and therefore it should pay for these proceedings and SCB HK's costs in defending them.[888]

742. SCB HK notes that TANESCO raised a number of other grounds for annulment that it considers were simply unarguable and should not have been raised, substantially increasing the cost of the annulment proceedings. SCB HK states that TANESCO raised new objections to jurisdiction which were not argued before the Tribunal and objections which it had previously conceded before the Tribunal. In addition, it considers that TANESCO has attempted to re-open issues of fact from the Arbitration Proceeding and has made new allegations of fact that were not argued before the Tribunal. In responding to these arguments, SCB HK indicates that it has been forced to incur considerable legal fees.[889]

743. SCB HK further notes that many of TANESCO's factual allegations have been inappropriate, often inaccurate and at times misleading. For example, TANESCO has repeatedly attempted to mischaracterise SCB HK's knowledge of the 2013 Settlement

[887] SCB HK's Costs Submissions, ¶¶23-24.
[888] SCB HK's Costs Submissions, ¶23, (ii).
[889] SCB HK's Costs Submissions, ¶23, (iii).

Agreement, despite the Tribunal finding, as a matter of fact, that SCB HK did not have knowledge of the terms of the 2013 Settlement Agreement and that there was "no evidence that [SCB HK] knew that the Escrow Account had in fact been emptied".[890]

744. In sum, SCB HK, states that TANESCO's conduct in the Arbitration Proceeding (where it misled the Tribunal) and in these proceedings (where it has tried to avoid the consequences of its misleading conduct) falls far short of the conduct expected of a party bringing an application for annulment in good faith. Therefore, exceptional circumstances exist which justify the Committee making a costs award against TANESCO in any event.[891]

745. SCB HK does not agree with TANESCO's proposed allocation of costs, whereby in the event the Committee determines that the Award ought to be annulled on the basis of the Tribunal's reconsideration of its Decision, SCB HK should be ordered to pay the full costs that TANESCO has incurred.[892]

746. In response to TANESCO's Costs Submissions, SCB HK states that: (i) TANESCO had requested the Tribunal to issue a Decision rather than an Award; (ii) TANESCO's suggestion that SCB HK "induced" or adversely influenced the Tribunal is extraordinary and unwarranted; (iii) TANESCO's claim that SCB HK showed a "blatant disregard" for the effect that its request for reconsideration would have on the integrity of the ICSID rule-based system is unwarranted; (iv) TANESCO attempts to mischaracterise SCB HK's knowledge of the 2013 Settlement Agreement and its motivation for bringing the application for reconsideration; and (v) TANESCO is incorrect to allege that the Tribunal was improperly influenced by allegations of corruption, or that such allegations are "baseless".[893]

747. SCB HK asserts that it was, and still is, entitled to protect its rights pursuant to ICSID arbitration, including by bringing an application for reconsideration of the Tribunal's

[890] Text in brackets added by the Committee; SCB HK's Costs Submissions, ¶23, (iv), footnote 20, referring to **Annex-1**, Award, ¶336.
[891] SCB HK's Costs Submissions, ¶24.
[892] SCB HK's Reply Costs Submissions, ¶5.
[893] SCB HK's Reply Costs Submissions, ¶¶8-19.

Decision. There is no settled rule that decisions of ICSID tribunals should not be open to reconsideration, and SCB HK should not be penalised for raising the argument, particularly where the need to reconsider the Decision in the current case was caused by misleading conduct by TANESCO, disclosed after the Decision.[894]

748. SCB HK asserts that it is TANESCO's case which, if accepted by the Committee, would adversely impact the integrity of the ICSID rule-based system. Its effect would be to render impotent any tribunal which was confronted with evidence of fraudulent misrepresentations. It would force a tribunal to find in favour of a party on the basis of information that it knows to be untrue, in the knowledge that on the basis of the true facts it should find in favour of the other party. At the heart of this case is TANESCO's blatant disregard for the integrity of the ICSID system, as evidenced by the Tribunal's finding that TANESCO had deliberately misled it on crucial matters.[895]

749. SCB HK explains that the delay in bringing the application for reconsideration can be explained by developments in Tanzania in 2014. Between April and September 2014, SCB HK was subject to a broad interim *ex parte* injunction obtained by PAP-controlled IPTL and PAP against TANESCO and SCB HK in the High Court of Tanzania which restrained the Parties from doing anything towards enforcing, complying with or operationalising the Decision. Following an *inter partes* hearing in September 2014, SCB HK was no longer restrained from operationalising the Decision. This, in SCB HK's view, explains the delay in bringing the Application for Reconsideration.[896]

750. SCB HK states that the articles from the Citizen newspaper dated March 9 and 17, 2014, on which TANESCO relied to argue that SCB HK knew of the emptying of the funds in escrow, were published after the Decision, and weeks before the imposition of the *ex parte* injunction.[897]

751. SCB HK further states that SCB HK has always been careful to draw a distinction between the findings of fraud and corruption in the CAG and PAC reports, on the one

[894] SCB HK's Reply Costs Submissions, ¶11.
[895] SCB HK's Reply Costs Submissions, ¶12.
[896] SCB HK's Reply Costs Submissions, ¶17.
[897] SCB HK's Reply Costs Submissions, ¶18.

hand, and the factual evidence unearthed by those investigations – in particular of TANESCO's actions with respect to the 2013 Settlement Agreement – on the other. In its Tariff Submission (i.e. its application for reconsideration) SCB HK made clear to the Tribunal that it relied upon the evidence unearthed by the CAG and PAC Reports about how the Tariff Dispute was settled and the Escrow Account emptied, rather than their conclusions about corruption. Moreover, in its Award, the Tribunal did not base its reconsideration on corruption. The reconsideration was based on the fact that it had been misled by TANESCO about the settlement of the Tariff Dispute.[898]

752. SCB HK notes that it did not rely on allegations of corruption before the Tribunal, or during the substantive phase of the Annulment Proceeding. Therefore, SCB HK has not "withdrawn" these allegations. They are not, SCB HK explains, allegations made in the first instance by SCB HK – they are allegations made in the CAG and PAC Reports. SCB HK does not believe that the conclusions of corruption in those reports are "baseless". In this regard, SCB HK notes that this also appears to be the view of the Tanzanian prosecutors which brought corruption charges against Mr Rugemalira (of VIP) and Mr Sethi (of PAP) in June 2017.[899]

iii) Analysis and Decision of the Committee

753. The starting point for this Committee to decide on the allocation of costs is Article 61(2) of the Convention, which grants ICSID tribunals broad discretion as to how to allocate the costs of the arbitration between the Parties: "[i]n the case of arbitration proceedings the [t]ribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees of the members of the [t]ribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award". Article 52(4) of the Convention provides that this provision applies *mutatis mutandis* to proceedings before an *ad hoc* Committee. The ICSID Arbitration Rules do not limit this discretion.

[898] SCB HK's Reply Costs Submissions, ¶20, footnote 32, referring to SCB HK's Counter-Memorial on Annulment, ¶¶204-26.
[899] SCB HK's Reply Costs Submissions, ¶¶19-23.

754. Additionally, ICSID Arbitration Rules 47(1)(j) and 53 provide that the decision of the Committee should contain "any decision of the [Committee] regarding the cost of the proceeding". Therefore, the Committee has the power to award costs as it deems appropriate in these proceedings and is not bound to follow any general rules or the practices of previous annulment committees.

755. The Committee in interpreting these provisions, considers that it is clear that they do not provide for any default rule for costs allocation. Neither the ICSID Convention nor the ICSID Arbitration Rules contain such a default rule.

756. Nonetheless, the Committee has reviewed and considered similar cases, and notes that three main approaches may be identified: (i) each party should bear its own costs; and (ii) costs follow the event. As stated by *Caratube v. Kazakhstan*: "[t]wo main approaches may be distinguished in awarding costs in investment arbitrations. Some tribunals apportion ICSID costs equally where they were incurred and rule that each party should bear its own costs. Others apply the principle 'costs follow the event', making the losing party bear all or part of the costs of the proceedings, including those of the prevailing party; [and (iii)] Furthermore, another criterion commonly adopted is the general conduct of a party and the more or less serious nature of the case it has defended".[900]

757. The Committee, after considering the conduct of the Parties and the nature of their cases, determines to allocate costs as follows. Considering that TANESCO did not prevail in its Application for Annulment and applying the principle of "costs follow the event", TANESCO shall bear the costs of this Annulment Proceeding. Taking into consideration that the Parties acted dutifully during the Annulment Proceeding and that TANESCO had a reasonable case, the Committee decides that each party shall bear its own legal costs incurred in presenting their positions.

[900] **CLA-164**, *Caratube v. Kazakhstan*, ¶1253 [emphasis added].

VIII. Decision

758. For the reasons set forth above, the Committee decides unanimously that:

(1) The Application for Annulment of the Award rendered on September 12, 2016, submitted by TANESCO is dismissed in its entirety;

(2) TANESCO shall bear the entire costs of the proceeding, including the fees and expenses of the Members of the Committee; and

(3) Each party shall bear its own legal costs.

[Signed]

Ms Bertha Cooper-Rousseau
(Member)

Date: August 21, 2018

[Signed]

Dr Christoph Schreuer
(Member)

Date: August 16, 2018

[Signed]

Mr Claus von Wobeser
(President)

Date: August 9, 2018