

**International Centre for Settlement  
of Investment Disputes**

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**ICSID CASE NO. ARB/05/22**

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**BIWATER GAUFF (TANZANIA) LTD.,  
CLAIMANT  
V.  
UNITED REPUBLIC OF TANZANIA,  
RESPONDENT**

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**AWARD**

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**RENDERED BY AN ARBITRAL TRIBUNAL COMPOSED OF**

**GARY BORN, ARBITRATOR  
TOBY LANDAU QC, ARBITRATOR  
BERNARD HANOTIAU, PRESIDENT**

Date of dispatch to the parties: July 24, 2008

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## GLOSSARY

| Abbreviation                    | Definition   |
|---------------------------------|--|
| <i>Amici</i> or Petitioners     | Petitioners for <i>amicus curiae</i> status  |
| Arbitration Rules               | ICSID Rules of Procedure for Arbitration Proceedings   |
| BGT or Claimant                 | Biwater Gauff (Tanzania) Limited   |
| BIT or Treaty                   | The Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 7 January 1994 |
| Biwater                         | Biwater International Limited  |
| CIEL                            | Center for International Environmental Law   |
| City Water or Operating Company | City Water Services Limited  |
| CRDB                            | CRDB Bank Limited  |
| DAWASA                          | Dar es Salaam Water and Sewerage Authority   |
| DAWASA Act                      | The Dar es Salaam Water and Sewerage Authority Act   |
| DAWASCO                         | Dar es Salaam Water and Sewerage Corporation   |
| DCF                             | Discounted Cash Flow   |
| DFID                            | The United Kingdom Department for International Development  |
| EMP                             | Enhanced Monitoring Period   |
| EWURA                           | Energy and Water Utilities Regulatory Authority  |
| EWURA Act                       | Energy and Water Utilities Regulatory Authority Act  |
| FTNDWSC                         | First Time New Domestic Water Supply Connection Tariff   |
| Gauff                           | HP Gauff Ingenieure GmbH and Co. KG-JBG  |
| ICSID                           | International Centre for Settlement of Investment Disputes   |
| IISD                            | International Institute for Sustainable Development  |
| ILC Articles                    | International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts  |
| IPPs                            | International Professional Partners  |
| Lease Contract                  | Water and Sewerage Lease Contract of 19 February 2003 between City Water and DAWASA  |
| LEAT                            | Lawyers' Environmental Action Team   |
| LHRC                            | Legal and Human Rights Centre  |
| Minister                        | Minister of Water and Livestock Development  |
| NUWA                            | National Urban Water Authority   |
| Operating Company               | City Water   |
| Petitioners or <i>Amici</i>     | Petitioners for <i>amicus curiae</i> status  |
| POG                             | Contract for the Procurement of Goods of 19 February 2003 between City Water and DAWASA  |
| Project                         | The Dar es Salaam Water Supply and Sanitation Project  |
| Project Contracts               | Lease Contract, SIPE and POG   |
| PSRC                            | Presidential Parastatal Sector Reform Commission   |
| PwC                             | PricewaterhouseCoopers   |
| Republic or the UROT            | United Republic of Tanzania  |
| Secretariat                     | ICSID Secretariat  |

| <b>Abbreviation</b> | <b>Definition</b>   |
|---------------------|---|
| SIPE                | Supply and Installation of Plant and Equipment Contract of 19 February 2003 between City Water and DAWASA |
| STM                 | Super Doll Trailer Manufacture Co. (T) Limited  |
| STWI                | Severn Trent Water International  |
| TGNP                | Tanzania Gender Networking Programme  |
| TIA                 | Tanzanian Investment Act of 1997  |
| TIC                 | Tanzanian Investment Centre   |
| TRA                 | Tanzania Revenue Agency   |
| TRC                 | TRC Economic Solutions  |

## CHAPTER I. PARTIES AND GENERAL BACKGROUND TO THE DISPUTE

1. *Parties:* The Claimant in this arbitration is Biwater Gauff (Tanzania) Limited, a company incorporated under the laws of England and Wales on 8 January 2003 and having its principal place of business at Biwater House, Station Approach, Dorking, Surrey RH4 1TZ, United Kingdom (hereinafter “**BGT**” or “**Claimant**”). BGT was represented in these proceedings by Judith Gill, Matthew Gearing, Hannah Ambrose, Michelle de Kluyver, Autumn Ellis and Andrew Pullen of Allen & Overy LLP, One New Change, London EC4M 9QQ, UK.
2. The Respondent in this arbitration is the United Republic of Tanzania (hereinafter the “**Republic**” or the “**UROT**”), which was represented in this arbitration by Julius Mallaba, Attorney-General’s Chambers, Dar es Salam, Tanzania, Hon. Nimrod E. Mkono MP, Dr. Wilbert B. Kapinga, Carel Daele and Bart Williams of Mkono & Co., 9<sup>th</sup> Floor, PPF Tower, Garden Avenue/Ohio Street, P.O. Box 4369, Dar es Salaam, Tanzania and Jan Paulsson, D. Brian King, Jonathan J. Gass and Marijn Heemskerk of Freshfields Bruckhaus Deringer, Strawinskylaan 10, 1077 XZ , Amsterdam, The Netherlands.
3. *The Project:* In 2003, the Republic was awarded World Bank, African Development Bank and European Investment Bank funding in the amount of USD 140,000,000 for the purpose of commissioning a comprehensive program of repairs and upgrades to, and the expansion of, the Dar es Salaam Water and Sewerage Infrastructure: the Dar es Salaam Water Supply and Sanitation Project (the “**Project**”). As a condition of the funding, the Republic was obliged to appoint a private operator to manage and operate the water and sewerage system, and carry out some of the works associated with the Project. The Republic therefore invited tenders for the Project in 2002 (the “**Bid Process**”).



4. Biwater International Limited (“**Biwater**”), a company incorporated under the laws of England and Wales, and HP Gauff Ingenieure GmbH and Co. KG-JBG (“**Gauff**”), a German corporation, submitted a joint tender for the Project and were awarded preferred bidder status by the Republic in December 2002. Biwater and Gauff incorporated BGT for the purpose of their investment. Biwater holds 80% of BGT’s shares and Gauff holds the remaining 20%.
5. Under the terms of the request for tender, the parties submitting a successful tender were obliged to incorporate a local Tanzanian operating company to enter into the contracts associated with the Project (the “**Operating Company**”). The request for tender also required that a minimum number of shares in the Operating Company were to be held by a local Tanzanian company or a Tanzanian national. BGT decided to cooperate in this respect with Super Doll Trailer Manufacture Co. (T) Limited (“**STM**”), a company incorporated in Tanzania. Biwater and Gauff incorporated City Water Services Limited (“**City Water**”) under the laws of Tanzania on 17 December 2002, as the Operating Company. STM subsequently agreed to acquire a minority shareholding in City Water. BGT holds 51% of the shares in City Water, and STM holds the remaining 49%.
6. *Contracts:* City Water, as the Operating Company, entered into three key contracts for the implementation of the Project with the Dar es Salaam Water and Sewerage Authority (hereinafter “**DAWASA**”) on 19 February 2003:
  - the Water and Sewerage Lease Contract (the “**Lease Contract**”);
  - the Supply and Installation of Plant and Equipment Contract (“**SIPE**”); and
  - the Contract for the Procurement of Goods (“**POG**”);together the “**Project Contracts**”.

7. In the Lease Contract, the parties were described as City Water and the Republic, as represented by DAWASA. With regard to the SIPE and POG Contracts, the parties were described as City Water and DAWASA, with no express reference to the Republic.
8. DAWASA is a Tanzanian public corporation, established under the DAWASA Act 1981, partially repealed by the DAWASA Act 2001. Prior to the handover of operations to City Water on 1 August 2003 (the “**Handover**”), DAWASA was responsible for the provision of water and sewerage services to the residents of Dar es Salaam and the surrounding area. The existing infrastructure proved to be insufficient to provide adequate services to the majority of the City’s population. After the Handover from DAWASA, City Water’s role was to operate the water production, transmission and distribution systems, operate and maintain the sewerage system, and to build and collect revenue from the customers receiving these services.
9. *The Lease Contract:* Under the Lease Contract, City Water agreed to provide water and sewerage services on behalf of DAWASA, pursuant to the terms of the Lease Contract, for a ten year period. City Water also agreed to implement and manage the implementation of certain capital works associated with the Project, including under Appendix P of the Lease Contract (“**Delegated Capital Works**”), the design and expansion of the distribution network. The services were to be provided within the City of Dar es Salaam and neighbouring coastal regions as shown on the map attached as Map 1 to Appendix 1 to the Lease Contract. When the Handover took place, DAWASA passed to City Water all of its day-to-day activities and City Water took over the operation of the water and sewerage services within the designated areas. Under the Lease Contract, City Water assumed certain tariff and rental fee payment obligations to DAWASA and DAWASA in turn agreed to facilitate City Water’s operations, including:

- by allowing City Water exclusive access to and use of the Assets (as defined in the Lease Contract) which City Water leased from DAWASA and without interruption from any other person (Article 1.6 (b)(i));
  - by not retaining any other operator to operate the designated water services and by not operating in any way so as to hinder or conflict with City Water's operations (Article 1.6 (b)(ii)).
10. *The SIPE & POG Contracts:* Under the SIPE, City Water agreed to “*design, manufacture, test, deliver, install, complete and commission*” certain plant and equipment, including pumps, ancillaries, and water meters. Under the POG, City Water agreed to supply potable water meters.
  11. With regard to the SIPE, the supply part of the contract was subcontracted to BGT and in turn subcontracted by BGT to Biwater Pty, another Biwater group company. The installation part of the contract was retained by City Water (although staff from Biwater Pty were seconded to City Water to perform the installation). Similarly, with regard to the POG Contract, performance was subcontracted to BGT, and in turn subcontracted by BGT to Biwater Pty.
  12. *Performance Bonds & Guarantees:* CRDB Bank Limited (“CRDB”), a bank operating under the laws of the Republic, provided Performance Bonds to DAWASA on behalf of City Water in respect of City Water's performance under the Project Contracts, and Advanced Payment Bonds in respect of the SIPE and POG Contracts. CRDB received bank counter-guarantees from Barclays Bank Plc. and Bayerische Hypo-und Vereinsbank AG, and also from STM, in respect of its liability under the Lease Contract Performance Bond. Biwater Plc. (BGT's ultimate parent) and Gauff stood as surety in respect of this counter-guarantee. CRDB received a separate bank counter-guarantee from the Standard

Bank of South Africa Limited on behalf of Biwater Pty in respect of the SIPE and POG Performance and Advance Payment Bonds.

13. *Tanzanian Investment Act:* City Water also applied to the Tanzanian Investment Centre (“TIC”) for a “Certificate of Incentives” under Section 17(1) of the Tanzanian Investment Act (the “TIA”). City Water was registered with the TIC on 24 June 2003 and was awarded a Certificate of Incentives dated 15 July 2003. Pursuant to this Certificate, City Water was entitled to a range of benefits including, *inter alia*, an exemption from VAT.
14. *The Dispute:* Following the Handover, and until the events which took place in May 2005, and which culminated in the seizure of City Water’s operations on 1 June 2005, City Water supplied water and sewerage services under the Lease Contract. The nature of this performance, the problems which were encountered by the parties during this period, and the discussions which took place with respect to the financial terms of the Lease Contract, are all in issue in this dispute and are examined in detail later in this Award.<sup>1</sup>
15. Between 13 May 2005 and 1 June 2005, a series of events took place which, according to BGT, constituted breaches by the Republic of its obligations under international and domestic law. These events are considered in detail later in this Award<sup>2</sup> but by way of overview:
  - on 13 May 2005, the Minister of Water and Livestock Development (“**the Minister**”) purported to terminate the Lease Contract;
  - on 16 May 2005, a call was made on the entire amount of the Performance Bond established by City Water in connection with the Lease Contract;
  - on 17 May 2005, DAWASA issued a cure notice for the reinstatement of the Performance Bond under Article 50.1 of the Lease Contract;

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<sup>1</sup> See Chapter III.

<sup>2</sup> See Chapter III.E.

- on 24 May 2005, the Tanzania Revenue Authority withdrew a VAT exemption;
  - on 25 May 2005, DAWASA issued a Notice to Terminate under Article 51.3 of the Lease Contract, on the ground of failure to remedy the alleged breach notified in the cure notice of 17 May 2005; and finally
  - on 1 June 2005, City Water's senior management were deported, and representatives of the Republic and DAWASA seized the company's assets, installed a new management (representatives of DAWASCO, a newly formed Government entity) and took over City Water's business.
16. According to BGT, these events constitute the expropriation of BGT's investment and amount to a breach of the Republic's international and domestic obligations, in particular its obligations to grant fair and equitable treatment, not to take unreasonable and discriminatory measures, the obligation to grant full protection and security to investors and to guarantee the unrestricted transfer of funds.
17. BGT bases its case on the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments signed at Dar es Salaam on 7 January 1994, and entered into force on 2 August 1996 (the "BIT" or the "Treaty") and also on the TIA, which entered into force on 9 September 1997.
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## CHAPTER II. PROCEDURAL HISTORY

### A. INSTITUTION OF THE PROCEEDINGS

18. On 5 August 2005, ICSID received a Request for the institution of arbitration proceedings under the ICSID Convention on behalf of Biwater Gauff (Tanzania) Limited against the United Republic of Tanzania.
19. On 11 August 2005, the ICSID Secretariat (the “**Secretariat**”) transmitted copies of the Request and of its accompanying documentation to the Republic of Tanzania.
20. On 17 August 2005, the Secretariat asked BGT to provide more information concerning the parties’ mutual agreement to submit TIA claims to ICSID arbitration and concerning certain internal actions necessary to authorise the filing of the Request. BGT answered in two letters which were transmitted by the Secretariat to the Republic of Tanzania.
21. In a first letter, dated 23 August 2005, BGT answered that Section 23.2(b) of the TIA constitutes a unilateral offer to submit a dispute arising under the TIA to ICSID arbitration, and that no further written consent is required from the Republic. BGT further answered that, in the alternative, if it was determined that Section 23.2(b) of the TIA does not constitute a unilateral offer to arbitrate, such consent is constituted by either: (i) the consent to arbitration which appears in the BIT (Article 8); or (ii) the consent to arbitration which appears in the Certificate of Incentives delivered to Claimant by the Tanzanian Authorities. BGT specified that in both cases, its consent to the submission of the dispute to ICSID arbitration under Section 23.2 of the TIA is constituted by the Request.
22. In the second letter, dated 1 September 2005, BGT enclosed a document purportedly proving that it had complied with all necessary actions required to authorise the commencement of the arbitration proceedings, and a document confirming BGT’s Counsel’s authority to act on its behalf in this matter.

23. By letter of 2 November 2005, in accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID registered the Request for Arbitration and, on the same day, notified the parties of the registration, inviting them to proceed to the constitution of the Arbitral Tribunal as soon as possible.
24. On 8 December 2005, the Secretariat took note of the parties' agreement on the method of constitution of the Arbitral Tribunal as set out in BGT's letter of 30 November 2005 and as confirmed by the Republic in its letter of 8 December 2005. The Secretariat accordingly informed the parties that the Arbitral Tribunal was to consist of three members, one appointed by each party and a third arbitrator, who was to be the President of the Tribunal, to be designated by the two party-appointed arbitrators, all within the time limits set out in Claimant's letter of 30 November 2005. The Secretariat further informed the parties that failing appointment by a party or agreement by the two party-appointed arbitrators on a President, within the established time limits, either party could request the Secretary-General of ICSID to make the necessary appointments.
25. Also on 8 December 2005, the Secretariat acknowledged receipt of a letter sent by BGT providing notice that it had appointed Mr. Gary Born, a national of the United States of America, as its arbitrator.
26. On 6 January 2006, the Republic notified the Secretariat that it had appointed Mr. Toby Landau, a national of the United Kingdom, as its arbitrator. The Republic confirmed by letter of 9 January 2006 its agreement to the appointment of Mr. Landau in view of Rule 1(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**").
27. On 6 February 2006, the Secretariat informed the parties that Messrs. Born and Landau had notified them the same day of their appointment of Mr. Bernard Hanotiau, a national of Belgium, as the President of the Tribunal.

28. By letter dated 9 February 2006, ICSID informed the parties that, having received from each arbitrator the acceptance of his appointment, the Arbitral Tribunal was deemed to have been constituted, and the proceedings were deemed to have begun, on that date.
29. In accordance with Arbitration Rule 6, Mrs. Martina Polasek, Counsel at ICSID, was designated to serve as Secretary of the Tribunal (On 31 May 2007, the Secretariat informed the Arbitral Tribunal and the parties that Mrs. Polasek would be temporarily replaced by Mr. Ucheora Onwuamaegbu, Senior Counsel, from 1 June 2007. Mrs. Polasek returned to her functions on 12 October 2007).
30. On 21 February 2006, BGT filed an amended Request for Arbitration.

**B. FIRST SESSION OF THE TRIBUNAL AND *PROCEDURAL ORDER NO. 1***

31. The first session of the Arbitral Tribunal with the parties took place in Paris on 23 March 2006, at the offices of the World Bank, located at 66 avenue d'Iéna.
32. At this session, the parties agreed on procedural rules and a timetable for the arbitration. Among other things, it was agreed that the Arbitration Rules which entered into force on 10 April 2006 would govern the proceedings on a prospective basis. The minutes of the session, signed by the President and the Secretary of the Tribunal, were transmitted to the parties on 1 June 2006.
33. *Claimant's Request for Provisional Measures:* Both in BGT's original Request for Arbitration (paragraph 138) and in its amended Request dated 21 February 2006 (paragraph 137), BGT sought provisional measures pursuant to Arbitration Rule 39(1). In particular, pending a final determination in this arbitration, BGT requested the Arbitral Tribunal to recommend binding provisional measures to preserve its rights to the following:
  - (i) monies in City Water's "Contracting Works Account";



- (ii) cheques issued to City Water; and
- (iii) the payment of certain monies due to City Water, in respect of works subcontracted to BGT under the SIPE and POG.

34. In this regard, BGT alleged that:

“items (i) and (ii) are held by City Water on trust for BGT. However, following the expropriation of its operations, City Water has been unable to access, or pay cheques into, its bank accounts at CRDB. Once received, item (iii) will also be held on trust for BGT”.

35. Further, BGT requested the recommendation of provisional measures to preserve its rights in respect of City Water’s records, papers, documents and mail, again pending the final determination of the Arbitral Tribunal.

36. On 10 February 2006, the Arbitral Tribunal invited BGT to submit any further observations concerning its request by 17 February 2006, and invited the UROT to submit its reply observations by 27 February 2006. This latter date was subsequently extended to 1 March 2006. Each party filed written submissions pursuant to these directions.

37. In its submission dated 17 February 2006, BGT clarified that its request was based both on Article 47 of the ICSID Convention and Arbitration Rule 39(1). It also re-formulated its request as follows:

**“1. Preservation and provision of documentation in respect of:**

**(i) City Water’s Bank Accounts**

The Respondent to procure that all of the bank statements which have been sent (and which will be sent) from CRDB to City Water’s former Dar es Salaam address in respect of all of City Water’s accounts with CRDB (including its Contracting Works Accounts, Operational Accounts, Collection Account and Deposit Account) be delivered by courier without delay by DAWASA / DAWASCO to City Water’s new postal address (to be notified).

**(ii) City Water’s Assets**

(i) The Respondent to procure a Statement of Account from DAWASA / DAWASCO in respect of all dealings with City Water's assets (including without limitation dealings with monies owed in respect of the SIPE & POG contracts). The Statement of Account to include:

(a) a statement of all monies collected from City Water's debtors by the Respondent, including by the Respondent's entities DAWASA/DAWASCO or their agents and representatives, since 1 June 2005 (accompanied by copies of all invoices, receipts and related correspondence) including details of the accounts into which the monies have been paid (and a statement of which debtors, if any, remaining outstanding); and

(b) a statement of all monies paid to City Water's creditors by the Respondent, including by the Respondent's entities DAWASA / DAWASCO or their agents and representatives, since 1 June 2005 (accompanied by copies of all invoices, receipts and related correspondence), including details of the source of the monies paid (and a statement of which creditors, if any, remain outstanding).

## **2. Preservation and provision of City Water's Papers, Records and Correspondence**

The Respondent to procure that DAWASA / DAWASCO collect, take and provide an inventory of, and provide copies of all of City Water's ledgers, papers, records, documents and correspondence (electronic and hard copy) seized at the time of the occupation of City Water's offices on 1 June 2005, and to include all correspondence received subsequently.

## **3. Additional Provisional Measures**

Such other provisional measures as the Tribunal in its discretion sees fit to recommend in order to preserve the rights of the Parties and safeguard the efficient conduct of these proceedings".

38. The Republic responded to BGT's Re-Formulated Request for Provisional Measures on 1 March 2006. It invoked jurisdictional objections and alleged that the request did not comply with the requirements contained in Article 47 of the ICSID Convention and Arbitration Rule 39(1).

39. On 7 March 2006, the Arbitral Tribunal invited BGT to submit a further reply to the UROT's response by 13 March 2006, and the UROT to submit a rejoinder by 20 March 2006. Each party filed written submissions pursuant to these directions.

40. At the first session of the Arbitral Tribunal in Paris on 23 March 2006, the parties made oral submissions on the Re-Formulated Request for Provisional Measures.
41. *Procedural Order No. 1*: After careful consideration of the parties' submissions, the Tribunal issued *Procedural Order No. 1* dated 31 March 2006, in which, pursuant to Article 47 of the ICSID Convention, it was recommended that:
- for purposes of their possible presentation during these proceedings, the UROT preserve, and take no adverse step in relation to, all documents (electronic and hard copy) within each of items 1(i),1(ii), and 2 of BGT's Re-formulated Request dated 17 February 2006;
  - by 18 April 2006, the UROT take all necessary steps to procure that DAWASA/ DAWASCO provide an inventory with respect to (a) documents (electronic and hard copy) seized or taken over or otherwise existing at City Water's offices at the time of the latter's occupation on 1 June 2005 and (b) documents (as defined) relating to what was City Water's operation that had been received subsequently;
  - the parties cooperate in establishing a workable and non-burdensome inventory;
  - by 18 April 2006, the UROT take all necessary steps to procure that all of the bank statements (if any) which had been sent from CRDB to City Water's former Dar es Salaam address (or otherwise received by the UROT) in respect of all of City Water's accounts with CRDB (including its Contracting Works Accounts, Operational Accounts, Collection Account and Deposit Account) be delivered by courier by DAWASA / DAWASCO to City Water's new postal address (to be notified), and that all such statements received thereafter be similarly delivered.
42. In so far as items 1(ii) and 2 in BGT's Re-formulated Request concerned requests for production of documents, the Tribunal considered that there were no case management advantages in accelerating these requests, and consequently these applications were denied

for the time being. For the same reasons, the Tribunal also denied for the time being BGT's request for a "Statement of Account" in item 1(ii) of its Re-formulated Request.

**C. FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS: *PROCEDURAL ORDER NO. 2***

43. The agreed timetable for the arbitration provided for a first joint submission of requests for production of documents to be filed by 28 April 2006. Following the parties' agreement, this latter date was subsequently extended to 5 May 2006. The parties filed a joint submission in tabular form with their respective requests on that date.
44. In its *Procedural Order No. 2* dated 23 May 2006, the Arbitral Tribunal allowed some of the requests, and dismissed others, as well as ruling on certain points of principle regarding the role of public interest immunity in international investment arbitration.

**D. CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES ON CONFIDENTIALITY: *PROCEDURAL ORDER NO. 3***

45. By letter dated 17 July 2006, BGT filed a request for provisional measures on confidentiality.
46. On 19 July 2006, the Arbitral Tribunal invited the UROT to submit its observations by 4 August 2006 and the BGT to reply by 11 August 2006. The Arbitral Tribunal also granted the Republic an opportunity to file a rejoinder no later than 18 August 2006. The parties filed written submissions pursuant to these directions.
47. On 23 August 2006, BGT submitted additional remarks on the UROT's rejoinder (BGT's sur-reply). Although it was not provided for in the calendar, the Arbitral Tribunal accepted the submission on 24 August 2006 and granted the UROT three days to respond.
48. On 25 August 2006, in a letter which crossed with the Arbitral Tribunal's letter of 24 August 2006, the UROT requested the Tribunal to disregard BGT's pleading on the ground

that it was not authorised by the Tribunal's directions as contained in its letter of 19 July 2006. Alternatively, the UROT requested the Arbitral Tribunal to give it the opportunity to respond.

49. On 29 August 2006, the UROT filed its comments on BGT's sur-reply.

50. In its request, BGT asked the Tribunal to order the following measures:

“that, for the duration of the arbitration proceedings, the parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process and / or which might aggravate or exacerbate the dispute, and in particular that:

- a. the parties undertake to discuss on a case by case basis the publication of all Decisions other than the Award made in the course of the proceedings, with the object of achieving mutual agreement, and if agreement cannot be reached, the parties refer the matter to the Tribunal for decision;
- b. the parties refrain from disclosing to third parties any of the Minutes of the Hearings;
- c. the parties refrain from disclosing to third parties any of the Pleadings;
- d. the parties refrain from disclosing to third parties any of the documents produced in respect of the First Round Disclosure and the Second Round Disclosure; and
- e. the parties refrain from disclosing to third parties any correspondence between the parties and / or the Tribunal exchanged in respect of the arbitration proceedings.”

51. In its *Procedural Order No. 3* dated 29 September 2006, the Arbitral Tribunal set out a detailed analysis of the issue of confidentiality, and its interrelationship with the requirements of procedural integrity. The Arbitral Tribunal recommended that:

“for the duration of these arbitration proceedings, and in the absence of any agreement between the parties:

- (a) all parties refrain from disclosing to third parties:
  - i. the minutes or record of any hearings;

ii. any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise;

iii. any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and

iv. any correspondence between the parties and / or the Arbitral Tribunal exchanged in respect of the arbitral proceedings.

(b) All parties are at liberty to apply to the Arbitral Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis.

(c) Any disclosure to third parties of decisions, orders or directions of the Arbitral Tribunal (other than awards) shall be subject to prior permission by the Arbitral Tribunal.

(d) For the avoidance of doubt, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order.

Further it is Recommended that:

(e) all parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process and / or which might aggravate or exacerbate the dispute.

#### **Disclosure of this Procedural Order**

This Procedural Order No 3 shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.

#### **Reservation**

The recommendations and orders above are made strictly without prejudice to all substantive issues in dispute and without prejudice to further requests (by either party) for production of documents or other disclosure. The Arbitral Tribunal is obviously not yet in a position to form any views whatsoever on the merits of the parties' cases, and it has been careful not to prejudge any issues of fact or law in the formulation of this procedural order."

**E. CLAIMANT’S REQUEST FOR A SWORN STATEMENT FROM THE REPUBLIC: LETTER OF THE ARBITRAL TRIBUNAL DATED 22 NOVEMBER 2006**

52. On 6 November 2006, BGT complained about the inadequacy of the Republic’s document production and asked the Arbitral Tribunal to order the Republic to produce a confirmation on oath from the Republic, by its Attorney-General, that its document production in response to the requests was complete and was as set out in the Republic’s correspondence.
53. By letter dated 14 November 2006, the Republic disputed BGT’s allegations and refused to produce a confirmation on oath. In a subsequent letter dated 20 November 2006, BGT further disputed the Republic’s position and confirmed its request.
54. On 22 November 2006, after due consideration of the parties’ respective positions and explanations, the Tribunal dismissed the request.

**F. SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS: PROCEDURAL ORDER NO. 4**

55. The agreed agenda of the arbitration provided for a second joint submission of requests for production of documents to be filed by 17 November 2006. This latter date was subsequently extended to 12 December 2006.
56. The Tribunal, in its *Procedural Order No. 4* dated 22 December 2006, took note of the parties’ undertaking to produce certain documents, and of the non-pursuance of certain requests. It allowed some of the parties’ requests, and dismissed others.

**G. PETITION FOR AMICUS CURIAE STATUS: PROCEDURAL ORDER NO. 5 AND SUBSEQUENT PROCEDURE**

57. On 27 November 2006, the following five Petitioners filed with the Secretariat a Petition for *amicus curiae* status:
- the Lawyers’ Environmental Action Team (LEAT);

- the Legal and Human Rights Centre (LHRC);
- the Tanzania Gender Networking Programme (TGNP);
- the Center for International Environmental Law (CIEL); and
- the International Institute for Sustainable Development (IISD)

(collectively referred to as the “**Petitioners**” or “**Amici**”).

58. The Secretariat forwarded the Petition and its appendices to the Arbitral Tribunal on 27 November 2006.
59. On 1 December 2006, the Secretariat informed the parties that the Arbitral Tribunal invited the parties to submit by 18 December 2006: (i) in accordance with Arbitration Rule 37(2), any observations they might have regarding the Petitioners’ participation in the written phase of the proceedings; and (ii) in accordance with Arbitration Rule 32(2), any observations they might have on the Petitioners’ attending or observing all or part of any forthcoming hearing in the case.
60. On 14 December 2006, the Republic communicated its observations. On 15 December 2006, the Secretariat informed the parties that upon request of BGT, the Arbitral Tribunal had decided to grant the parties an extension until 12 January 2007 for their submissions on the Petition. BGT communicated to the Arbitral Tribunal its observations on the Petition.
61. On 22 January 2007, the Arbitral Tribunal notified the parties, through the ICSID Secretariat, that it was sufficiently informed about the Petition and that it would render its decision shortly.
62. On 2 February 2007, the Arbitral Tribunal issued *Procedural Order No. 5*, granting the Petitioners the opportunity to file a written submission in the arbitral proceedings, pursuant to Arbitration Rule 37(2).



63. The Arbitral Tribunal took note of the concerns expressed by the parties, and in particular BGT, as to the timing of the Petition, given the proximity of the substantive hearing (April 2007), and the tight procedural timetable. In view of these concerns, the Arbitral Tribunal recommended a two-stage process, as follows:
- *First Stage:* (i) in the first instance, and no later than 26 March 2007, the Petitioners, jointly, were to file a single, initial written submission; (ii) on or before 2 April 2007, each disputing party would then consult with the other as to whether each intended to address or respond to the Petitioners' written submission at the April hearing; (iii) on the basis of the exchange of views, on or before 9 April 2007, each party would confirm finally to the Arbitral Tribunal whether or not it intended to address or respond to the Petitioners' written submission at the April hearing.
  - *Second Stage:* following the conclusion of the April hearing, and having consulted with the disputing parties on this matter, the Arbitral Tribunal would issue procedural directions for responses from both parties to the Petitioners' written submission (in so far as any party wished to respond further or at all), as well as for any further written submissions, documents or evidence from the Petitioners, in so far as the Arbitral Tribunal deemed this appropriate.
64. As explained in detail in *Procedural Order No. 5*, the Tribunal further decided that, for the time being, and pending a further ruling after the April hearing, the Petitioners' application for access to the documents filed by the parties in the arbitration ought not to be granted (in particular given the ambit and function of the Petitioners' submission).
65. Pursuant to Arbitration Rule 32(2), and taking into account BGT's objection to the presence of the Petitioners at the hearing, the Arbitral Tribunal also noted that it had no power to permit the Petitioners' presence or participation at the hearing, and accordingly rejected the application in this regard. On the other hand, it reserved the right (if needed)

to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners' position, whether before or after the hearing.

66. By letter dated 8 February 2007, BGT requested that *Procedural Order No. 3* be applied to the Petitioners. By letter dated 19 February 2007, the Republic commented on BGT's request. BGT replied to the Republic's comments on 20 February 2007.
67. The Arbitral Tribunal issued its decision on BGT's request on 7 March 2007. Taking into consideration (i) the parties' comments; (ii) the fact that the dispute was a very public and widely reported one; (iii) the fact that the Tribunal had decided in *Procedural Order No. 5* that the Petitioners did not need disclosure of documents from the arbitration; (iv) the fact, consequently, that the Petitioners would not have access to the pleadings and the documentary records and that their submissions would therefore not refer to the documents exchanged in the arbitration (except if they had previously been made available to the public), the Tribunal did not see any reason to restrict the Petitioners' liberty in relation to the briefs to be submitted on or before 2 April 2007.
68. On 26 March 2007, the Petitioners filed their joint *amicus curiae* submission. The parties filed observations on the *amicus curiae* submission on 10 April 2007.

## **H. APPLICATION FOR SECURITY FOR COSTS**

69. On 9 May 2006, the Republic made an application requesting that the Tribunal recommend that BGT post security for any award of costs that might be made against it.
70. By letter of 4 April 2007, the Republic informed the Tribunal that the parties had reached a mutually acceptable resolution of the issues raised in the application and that, accordingly, the Republic withdrew the application. The Arbitral Tribunal took note of the withdrawal.

## I. EXCHANGE OF WRITTEN MEMORIALS

71. The timetable contained in the Minutes of the first session of the Arbitral Tribunal was amended by letters dated 26 October 2006 and 14 March 2007. Each party filed its written submissions pursuant to these directions.
72. BGT filed in the first place:
- a Memorial dated 7 July 2006 together with supporting documents;
  - a witness statement of Cliff Quentin Stone; and
  - an expert report of Antoinette Pincott.
73. The Republic then filed:
- a Counter-Memorial dated 3 November 2006, together with supporting documentation;
  - statements of the following witnesses: Dr. Tony Ballance, Peter Cox, Barbara Harris, B.N.M. Kasiga, Haruna Masebu, Raymond Mndolwa, Archard Mutalemwa, John Sitton;
  - reports of the following experts: David Ehrhardt (the “**Castalia Report**”), Clive Harrison (the “**Harrison Report**”), Dr. Chris Shugart (the “**Shugart Report**”).
74. BGT subsequently filed:
- a Reply dated 26 January 2007, together with supporting documents;
  - a second witness statement of Cliff Quentin Stone;
  - a witness statement of David Lawrence Magor;
  - a second expert report of Antoinette Pincott; and
  - an expert report of Dr. William Baker.
75. The Republic finally filed:
- a Rejoinder dated 23 March 2007, together with supporting documentation;

- statements of the following witnesses: Dr. Tony Ballance (second statement), Peter Cox (second statement), Maj Fiil, Barbara Harris (second statement), Archard Mutalemwa (second statement), Haruna Masebu (second statement), John Sitton (second statement);
- reports of the following experts: David Ehrhardt (the “**Second Castalia Report**”), Clive Harrison (the “**Second Harrison Report**”), Dr. Chris Shugart (the “**Second Shugart Report**”).

**J. HEARINGS AND *PROCEDURAL ORDER NO. 6***

76. A telephone conference took place on 23 February 2007 between Counsel for the parties and the Secretary of the Tribunal regarding the arrangements for the evidentiary hearing to be held at the Peace Palace in The Hague and scheduled from 16 to 22 April 2007.
77. On 22 March 2007, the parties filed a joint document enclosing an agreed hearing bundle proposal and setting out the parties’ agreement on the conduct of the hearing as well as their comments on the Tribunal’s proposals and the outstanding issue concerning a possible choice between oral closing arguments and written post-hearing briefs.
78. On 26 March 2007, both parties sent supplemental comments on this last issue and agreed on the submission of post-hearing briefs.
79. On 29 March 2007, the Secretary of the Arbitral Tribunal informed the parties that the Tribunal agreed with their proposals, including the submission of post-hearing briefs.
80. On 5 April 2007, the parties transmitted an agreed hearing schedule to the Secretary of the Arbitral Tribunal.
81. The evidentiary hearing took place at the Peace Palace in The Hague, as scheduled, from 16 to 21 April 2007. The hearing was audio-recorded and transcribed by a court reporter.

82. After opening statements by Counsel, the hearing was devoted to the cross-examination of the parties' witnesses. In the first place, Counsel for the Republic cross-examined the following of BGT's factual witnesses: Mr. David Lawrence Magor, Chief Executive Officer of Biwater Plc. from April 2002 until September 2006, and Mr. Cliff Quentin Stone, Director of City Water between 17 December 2002 and 11 June 2003, and subsequently Chief Executive Officer of City Water from 1<sup>st</sup> September 2004. Counsel for BGT then cross-examined the following of the Republic's factual witnesses: Mr. Archard Mutalemwa, Chief Executive Officer of DAWASA; Mr. Peter Cox, Engineering Advisor of DAWASA from June 2001 to September 2006; Mr. John Sitton, Financial Adviser at DAWASA since April 2001; Mr. Haruna Masebu, Director General of the Energy and Water Utilities Regulatory Authority (EWURA) and Mr. Raymond Mndolwa, Chief Commercial Officer of DAWASCO. Dr. William Baker and Dr. Christopher Shugart, the regulatory experts, were subsequently questioned together by the Arbitral Tribunal, as agreed by the parties. This was followed by the cross-examination of the quantum experts, Ms. Antoinette Pincott, expert for BGT and Mr. David Erhardt, expert for the Republic. The final witness to be cross-examined was Dr. Tony Ballance, the Republic's witness, a specialist in regulatory and policy matters, engaged in 2005 to assist the parties in an attempted renegotiation of the Lease Contract.
83. At the end of the hearing, three issues were submitted for discussion to the parties: (i) the Petitioners' intervention, (ii) the post-hearing briefs and (iii) the final oral arguments. In this regard, on 25 April 2007, the Arbitral Tribunal issued *Procedural Order No. 6*, which read in part as follows:

***“The Amici***

By reference to its Procedural Order N° 5, the Arbitral Tribunal asked the Parties how they intended to deal with the Amici brief, and whether they considered that any further intervention of the Amici was necessary.

The Parties expressed the following agreement:

- i. that they will address the issues raised by the Amici in their final oral submissions;
- ii. that no further intervention of the Amici in these proceedings is necessary.

### **Post-hearing Briefs**

The Arbitral Tribunal expressed the view that it did not need further written submissions, but only an analysis of the oral evidence adduced at the hearing, by reference to each side's existing pleaded case. Full quotations from the transcript should be made whenever appropriate. The briefs may contain a short summary of the relevant party's case. The Arbitral Tribunal declined to impose restrictions on the length of the submissions.

By agreement of the Parties, the post-hearing briefs shall be filed simultaneously and exchanged on Wednesday, June 6, 2007.

### **Oral Closing Arguments**

By agreement of the Parties, there shall be a one-day hearing for closing oral arguments. The date which has been reserved is July 6, 2007. The Parties shall suggest a venue to the Arbitral Tribunal."

84. The parties' post-hearing briefs were filed, according to the Tribunal's directions, as subsequently revised, on 26 June 2007.
85. The hearing for closing oral arguments took place as scheduled at Freshfields' offices, 65 Fleet Street, in London on 6 July 2007. The hearing was transcribed by a court reporter.

### **K. SUBMISSIONS ON COSTS**

86. With respect to costs, the parties agreed that they would exchange the body of their cost submissions on 5 October 2007, with the schedule of costs to follow on Tuesday, 9 October. Each party filed its costs submissions accordingly.
87. On 19 October 2007, each party filed a reply submission on costs.

## L. FURTHER EXCHANGES

88. On 8 January 2008, the Republic forwarded to the Tribunal a copy of an Award that had been rendered on 31 December 2007 in an arbitration (under the UNCITRAL Rules) that had taken place between City Water and DAWASA, pursuant to the arbitration agreement contained in the Lease Contract (the “UNCITRAL Award”). In its covering letter, the Republic drew attention to a number of aspects of the UNCITRAL Award, which were said to have significance for this arbitration.
89. On 9 January 2008, BGT responded to the Republic’s letter, and set out its position as to why no weight should be given by this Tribunal to the UNCITRAL Award.
90. By a letter dated 16 January 2008, the Republic made further submissions on BGT’s reply, taking issue with a number of points with respect to the procedural history of the UNCITRAL arbitration, and the significance of the UNCITRAL Award.
91. On 18 January 2008, the Secretariat acknowledged the parties’ submissions concerning the UNCITRAL Award, and informed the parties that the Tribunal would give due consideration to them.
92. On 21 January 2008, BGT forwarded further correspondence to the Tribunal on the significance of the UNCITRAL Award, as well as issues of confidentiality arising out of *Procedural Order No. 3*.
93. By letter of 28 January 2008, the Tribunal reminded the parties of its recommendation with respect to public discussion of this case in *Procedural Order No. 3*.
94. By letter of 20 March 2008, the Secretary of the Tribunal informed the parties that the Arbitral Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 38.

### CHAPTER III. RELEVANT FACTS AND CONTRACTS

95. In the course of these arbitral proceedings, the Arbitral Tribunal has benefited from extensive documentary and oral evidence, as well as detailed oral and written submissions. Although it has been the subject of very full and careful consideration by the Arbitral Tribunal, it is neither practical nor necessary to recite the complete factual record in this Award. Instead, this Chapter provides a brief distillation of the relevant background facts, as well as the contracts in issue, by way of context for the subsequent portions of this Award. The following Chapters focus upon specific factual matters, in so far as these are relevant to the issues in dispute.

#### A. BACKGROUND TO THE CONCLUSION OF THE LEASE CONTRACT

96. *The Water Situation in Dar es Salaam*: The Lease Contract concluded by City Water and the Republic, represented by DAWASA, was signed on 19 February 2003. At that time, in the words of the World Bank, the water situation in Dar es Salaam was precarious.<sup>3</sup> Poor management, lack of resources, increased demand and insufficient capital expenditures over a period of decades had led to a progressive worsening of the situation. Although Tanzania has sufficient surface and ground water to meet most of its needs, water was not equally available in all regions. When City Water took over, infrastructure had degraded over time. The low tariffs historically charged – before 1991 water was provided without charge to users – had been insufficient to fund capital expenditures. The situation regarding sanitation was even worse.

97. In a long term effort to address the serious public health and economic effects of the poor state of water and sewerage services, the Republic had decided in the 1990s to reform its policies in these areas. The leasing of the Dar es Salaam water and sewerage system to a

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<sup>3</sup> Exhibit R-61. World Bank Supervision Mission *Aide Mémoire* of 17-31 January 2004, p. 2.



private operator was a keystone of the reform process for residents of the City and the nearby coastal region.

98. Indeed, at that time, in Dar es Salaam as in other urban areas, the power to regulate and supply water was formally granted to the National Urban Water Authority (“NUWA”). NUWA provided water free of charge until 1991. As the system was unsuccessful and unsustainable, a new National Water Policy was developed in 1991. The overall policy was one of decentralisation and having users pay for the costs of service. Rural communities were moved from a centrally governed system to a system of community management. In urban areas, NUWA was replaced by independent and autonomous local water authorities known as Urban Water and Sewerage Authorities.
99. In Dar es Salaam, NUWA was replaced by DAWASA by an Act of Parliament (the “DAWASA Act”) in 1997. While NUWA had provided only water services, DAWASA merged the NUWA water operations and the sewerage operations of the former Dar es Salaam Sewerage and Sanitation Department.
100. At the same time, the Republic embarked on a more general programme of privatising hundreds of government-owned entities across all sectors of the economy. In particular, the Republic began seeking some form of private sector participation in the Dar es Salaam Water and Sewerage Systems.
101. *Background to the Bid Process:* Before explaining the bid process itself, it is important to explain the context in which it took place. In the late 1990s, the Government began negotiations with international lenders to obtain funding for the Project, with a view to addressing the chronic problems undermining the city’s water and sewerage system. The

United Kingdom Department for International Development (“DFID”), in an Update Report on Tanzania, summarised the main problems as follows:<sup>4</sup>

“The high number of damaged and undersized pipes and the high levels of leakage.

The high number of illegal connections and low billing and payment collection efficiency which have led to the low commercial performance of the water utility.

The high incidence of customers getting water from vendors (small scale services providers) and the potentially high water revenue losses for the water authority.

The large number of unplanned areas with alternative forms of land ownership and very difficult to access due to high population density and the lack of roads.

To address this, Government has set up the Dar es Salaam Water and Sanitation Project under the responsibility of DAWASA”.

102. The total cost of the Project was USD 164,600,000. In 2003, the Republic was awarded funding in the amount of USD 140,000,000 by a combination of the World Bank, African Development Bank and European Investment Bank, for the purpose of commissioning a comprehensive program of repairs and upgrades to, and the expansion of, the Dar es Salaam Water and Sewerage infrastructure. The shortfall was to be funded by DAWASA and the newly appointed Operating Company: approximately USD 12,500,000 by DAWASA and USD 8,500,000 by the Operating Company.
103. Of this USD 8,500,000, BGT, as a 51% shareholder in City Water (the Operating Company, following its successful bid), had an obligation to pay a total of USD 4,335,000. As will be seen later, by 1 June 2005, BGT had only paid USD 3,120,000.
104. The World Bank prepared three key documents in respect of the Project:
  - the Project Information Document (4 February 2003);<sup>5</sup>
  - the Integrated Safeguards Data Sheet (20 February 2003);<sup>6</sup> and

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<sup>4</sup> Exhibit C-91.

<sup>5</sup> Exhibit C-92.

<sup>6</sup> Exhibit C-83.

- the Project Appraisal Document (10 April 2003).<sup>7</sup>

105. The Project Information Document set out the objectives of the Project which included:

“Rehabilitating existing DAWASA drinking water production, transmission, storage and distribution facilities and waste water collection and treatment facilities that have lacked maintenance over the years...

Upgrading DAWASA commercial operations to industry standards...

Enhancing DAWASA financial situation by raising the Customer Tariff to a level that would initially cover operation and maintenance costs ...”<sup>8</sup>.

106. The Integrated Safeguards Data Sheet described various safeguard issues and impacts associated with the Project. In respect of the Environment the datasheet stated:

“The advanced stage of disrepair of water supply and waste water facilities causes extensive pollution and health hazards. Currently water quality in the water mains is suspect due to numerous leakages in the system. Septage and sludge arising from the sewer network, septic tanks and the numerous pit latrines do not receive adequate treatment. The project is just basically a rehabilitation project”<sup>9</sup>.

107. In respect of the key stakeholders and the mechanism for consultation and disclosure on safeguard policies, the datasheet stated:

“DAWASA’s main challenge is now to carefully manage expectations that may be higher after a very long preparation period; obviously the quality of the WSS [Water and Sewerage Service] service cannot improve overnight with the mobilization of the Operator”<sup>10</sup>.

108. The Project Appraisal Document identified three categories of “Critical Risks” in respect of the Project as follows: (i) “Contractual arrangements and regulatory framework”; (ii) “Accountability of various Actors”; (iii) “Tariff Policy”. Various risk factors were highlighted under these categories including:

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<sup>7</sup> Exhibit C-84.

<sup>8</sup> Exhibit C-92, p. 3.

<sup>9</sup> Exhibit C-83, p. 4.

<sup>10</sup> *Ibid.*, p. 6.

“Contractual arrangements and regulatory frameworks: a) inexperience of DAWASA in ... dealing with requests to adjust the terms of Lease Contract to the Operator Tariff to reflect changing conditions ...;

Accountability of various Actors: ... e) poor performance of DAWASA in implementing the construction programs. Eventually affecting the performance of the Operator ...; g) poor discipline of GOT [Government] agencies in budgeting and paying their water bills;

Tariff Policy: a) inadequate adjustment of the Operator Tariff leading to low profits or losses of the Operator; b) inadequate adjustment of the Customer Tariff leading to insufficient counterpart funding of the project ...”<sup>11</sup>.

109. *The First Bid Process:* A first bid process was initiated in 1997 but was a failure. As indicated on the Presidential Parastatal Sector Reform Commission (“PSRC”) Official Website, terms of reference soliciting private sector participation in DAWASA were issued in 1997. Of the initial 7 International Professional Partners (“IPPs”) interested, only four prequalified. It was decided that supplementary information was needed to reach a common ground for comparison. Severn Trent Water International (“STWI”) were appointed in June 1998 to assist in the preparation of the Supplementary Information Paper. In May 1999, PSRC carried out a prequalification update on the IPPs. Three IPPs, Bewater PLC, Saur International and Vivendi (Générale des Eaux) passed the prequalification update. After various pre-bid meetings, the Bid Process began in August 1999. On 31 January 2000, only two bids were received, one from Saur International and the other one from Vivendi. The Republic rejected both bids. In June 2000, it was decided to carry out a full Re-Bid open to all international water operators.
110. *The Re-Bid Process:* As a prelude to the Re-Bid process, the Energy and Water Utilities Regulatory Authority Act 2001 was made law in Tanzania. The Act established the Energy and Water Utilities Regulatory Authority (“EWURA”) whose functions included the regulation of energy and water utilities, and in particular the issue and renewal of licenses, the regulation of rates and charges, and the resolution of complaints and disputes

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<sup>11</sup> Exhibit C-84, pp. 18-21.

(Section 7 (1)(e) of the Act). As set out in greater detail below, following a significant delay in the appointment of members of the Authority, the Minister took on the role and functions of EWURA in respect of DAWASA and City Water as the “Interim Regulator”, by an amendment to the DAWASA Act in May 2003.

111. In November 2001, Parliament passed the DAWASA 2002 legislation which consolidated earlier legislation governing DAWASA and set out the regulatory environment for DAWASA.
112. The Re-Bid process was initiated in July 2002 when the Republic once again invited tenders for the project. The three pre-qualified bidders were Biwater/Gauff joint venture, Générale des Eaux (France) and Saur International (France). In the event, only one bid was in fact tendered - by the Biwater/Gauff joint venture.
113. For this tender process, PSRC had decided that the private Operating Company of the system should also have responsibility for the capital improvements that would be most important for a rapid improvement in performance. Therefore, alongside the Lease Contract, bidders were to bid on two other contracts (the SIPE and POG), and all three contracts would be awarded jointly. The SIPE and the POG were to provide funding for the winning bidder to install meters, undertake emergency repairs, and perform other time-critical tasks. Together, the SIPE and the POG were referred to as the “**Priority Works**”.
114. PSRC was assisted in the bidding process by a technical adviser, STWI.
115. PSRC (assisted by STWI) and the potential bidders negotiated and clarified the terms of the three agreements to be awarded before bids were submitted. The three bidders submitted several rounds of written questions and comments on the draft contracts. The bidders’ questions and comments were compiled and answered in writing. PSRC also convened two bidders’ meetings, one in Tanzania and one in England.

116. Bidders also conducted due diligence throughout the bidding process. Among the sources of information were: an analysis prepared by STWI, which was given to all prospective bidders; a data room that was available for a period of several months; and senior DAWASA management and advisers in charge of the system, who were available to answer bidders' questions. During his testimony, Mr. Larry Magor recognised expressly that Biwater had conducted due diligence;<sup>12</sup> that Biwater had had the benefit of three visits to the Dar es Salaam Water and Sewerage System;<sup>13</sup> that Biwater had good access to DAWASA's records and staff;<sup>14</sup> and finally, that Biwater had the benefit of the experience of their partner Gauff that had been working in Tanzania for decades.<sup>15</sup>

117. Moreover, all bidders were clearly advised (immediately upon turning over the cover of the request for proposals) that:

“whilst the information in the Bidding Documents has been prepared in good faith, it does not purport to be comprehensive or to have been independently verified. Neither the BPRSC, GoT, DAWASA nor any of its advisers accepts any liability or responsibility for the adequacy, accuracy or completeness of, or makes any representation or warranty, express or implied, with respect to, the information contained in the bidding documents or on which such documents are based, or with respect to any written or oral information made, or to be made, available to any interested recipient or its professional advisers, and any liability therefore is hereby expressly disclaimed”<sup>16</sup>.

118. In recognition of the poor quality of the available information, an Enhanced Monitoring Period (“EMP”) was incorporated into the Lease Contract. The EMP (which is considered in more detail below) enabled the Operating Company to collect more complete and reliable data during the first twelve to eighteen months of the Project, in order to assess and

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<sup>12</sup> Hearing Transcript, Day 1, pp. 180-181.

<sup>13</sup> *Ibid.*, p. 182, 16-17.

<sup>14</sup> *Ibid.*, p. 183, 17-19.

<sup>15</sup> *Ibid.*, p. 183, 24-25.

<sup>16</sup> Exhibit R-4. Bidding Document General Procedures and Instructions, December 2001, p. ii.

if necessary recalibrate base values, and then, if appropriate, to request a tariff adjustment in light of the new information.

119. After the Biwater/Gauff joint venture became the preferred bidder, there was a period of further discussions leading to the signing of the Lease Contract and the SIPE and POG Agreements on 19 February 2003. Meanwhile, in accordance with the terms of the request for tender (requiring that the parties submitting a successful tender incorporate a local Tanzanian company), Biwater and Gauff incorporated City Water under the laws of Tanzania on 17 December 2002, as the Operating Company.
120. Subsequently, on 8 January 2003, Biwater and Gauff formed BGT, for the purpose of channelling their investment in City Water. The shareholding in BGT was divided 80% to Biwater and the remaining 20% to Gauff.
121. Finally, since the request for tender also required that a minimum of 20% of the shares in the Operating Company be held by a local Tanzanian company or a Tanzanian national, BGT agreed to cooperate with STM, a company incorporated in Tanzania, and STM subsequently agreed to acquire a minority shareholding in City Water. On 10 February 2003, 49% of the shares in City Water were transferred to STM with BGT retaining a majority (51%) of the shares.
122. On 19 February 2003, City Water signed the three contracts for which the Biwater / Gauff joint venture had bid: the Lease Contract, SIPE and POG. Each of them is considered in turn below.

## **B. THE LEASE CONTRACT**

123. The most important of the three contracts was the Lease Contract. It had a duration of ten years.<sup>17</sup> By its terms, City Water was to lease certain defined “Assets” belonging to DAWASA and to use them to supply water and sewerage services to customers on DAWASA’s pipeline network. Overall, City Water was responsible for running the water and sewerage systems for ten years and for billing and collecting tariff payments from customers. DAWASA continued to own all of the assets, including the building City Water used as its offices, the pipelines, etc. The Lease Contract provided that:

“for the avoidance of doubt, the ownership of the Assets, including Small Equipment, shall remain vested in the Lessor ... and, at the end of this Contract, the Operator shall hand back the Assets to the Lessor in accordance with the provisions of this Contract”.<sup>18</sup>

124. In exchange for using the assets, City Water was required to make monthly rental payments to DAWASA, defined in the Lease Contract as the “Rental Fee”.<sup>19</sup> The more significant financial terms, however, were those concerning the “Customer Tariff”, i.e., the amounts that customers would be billed. The Customer Tariff comprised three components:

- the Operator Tariff;
- the Lessor Tariff; and
- the First Time New Domestic Water Supply Connection Tariff (“FTNDWSC”).<sup>20</sup>

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<sup>17</sup> Exhibit C-5. Article 3.1(a) of the Lease Contract.

<sup>18</sup> Article 8.2(d) of the Lease Contract.

<sup>19</sup> Article 39.4 of the Lease Contract.

<sup>20</sup> Articles 34.2-34.3 of the Lease Contract. For completeness, it may be noted that there were separate Customer Tariffs for water and sewerage service. The water tariff consisted of the three components listed in the text, whereas the sewerage tariff had only two components: the Operator Tariff and the Lessor Tariff. Further, the water tariff was subdivided into domestic and non-domestic tariffs.



125. City Water's duty was to collect the full Customer Tariff and then disburse the three components as described below.
126. The Operator Tariff was City Water's portion. With the Operator Tariff (sewerage) for sewerage service, it represented City Water's essential source of cash.
127. The Lessor Tariff was DAWASA's portion. DAWASA depended on it as the main source of cash for its own operating expenses.
128. As far as the FTNDWSC Tariff is concerned, City Water was supposed to deposit this into a trust account in order to subsidise the connection of poor customers to the system. More precisely, City Water was required to "*pay all amounts received by way of First Time New Domestic Water Supply Connection Tariff into the First Time New Domestic Water Supply Connection Fund*", a separate bank account that City Water was required to establish and maintain under the Lease Contract.
129. The Lease Contract explicitly fixed the Customer Tariff, and the three underlying components, for the first five Contract Years, that is, from August 2003 to August 2008.<sup>21</sup> The tariffs were fixed in real terms. Under an Indexation Formula adjustment, they were to be adjusted at least annually to account for inflation and exchange-rate fluctuation.<sup>22</sup> During City Water's tenure, one application was made for an adjustment on this basis: on 12 August 2004, the Interim Regulator approved in full the increase sought by City Water.
130. Apart from the adjustment of tariffs under the Indexation Formula, the Lease Contract contained three provisions under which the Operator Tariff might be revised in real terms:
- the Annual Review;<sup>23</sup>
  - the Interim Review;<sup>24</sup> and

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<sup>21</sup> Article 35 of the Lease Contract.

<sup>22</sup> Articles 34.6 (b) and 36 of the Lease Contract.

<sup>23</sup> Article 41.5 of the Lease Contract.

- the Major Review.<sup>25</sup>

131. *Annual Review*: The Annual Review was to take place after the EMP during which City Water was required to collect more reliable data than that available to the bidders. The Lease Contract defined the EMP as “*a period of twelve (12) months commencing on the Commencement Date and to end maximum of eighteen (18) months after the Commencement Date*”.<sup>26</sup> In practice, the parties interpreted this to mean that the EMP could begin after the Commencement Date (i.e., 1 August 2003, when City Water took over the system) but had to last for twelve months and had to be completed no more than eighteen months after the Commencement Date. During the EMP, City Water was to “*determine [...] Base Values and Water and Sewage quality data ...*”<sup>27</sup> A “Base Value” was defined as: “*the value of Performance Targets or Key Performance Targets as existed at the Commencement Date such value being determined after the end of Enhanced Monitoring Period as agreed between the Operator and Lessor*”.<sup>28</sup> “Performance Targets” and “Key Performance Targets” included such things as collection efficiency; percentage of customers with inadequate water pressure or no service at all; water quality; and the amount of water lost during transmission and distribution.
132. If, based on the data collected by BGT during the EMP, it appeared that BGT’s original assumptions turned out to be sufficiently inaccurate to affect the Operator Tariff by at least 5%, either City Water or DAWASA could request an Annual Review to obtain the necessary upward or downward adjustment. No Annual Review was in fact requested either by City Water or DAWASA.

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<sup>24</sup> Article 41.4 of the Lease Contract.

<sup>25</sup> Article 41.3 of the Lease Contract.

<sup>26</sup> Article 1 of the Lease Contract.

<sup>27</sup> *Ibid.*

<sup>28</sup> Article 1 of the Lease Contract.

133. *Interim Review:* Besides the Annual Review, the Lease Contract provided for an Interim Review. As noted below, the parties disagree on the conditions on which an Interim Review could take place. According to Article 41.4 (a) of the Lease Contract, such a review could be undertaken at the request of either the Lessor or the Operator, where either party could demonstrate that an event of “Material Change of Circumstances”, as defined in Article 42, had occurred. Any proposed changes as a result of such an Interim Review were subject to the approval of the Regulator. Article 41.4(b) further provided that the Regulator could direct the parties to undertake an Interim Review where the Regulator had reasonable grounds to believe that the Operator Tariff needed revision or could demonstrate that a Material Change of Circumstances had occurred.
134. Within six weeks of the receipt of a request for an Interim Review, the Lessor would appoint a Technical Auditor to investigate and report to the Lessor, the Regulator and the Operator. Upon receipt of the report, after applying to the Regulator for its approval, the Lessor had to make its determination with all reasonable expedition. If the Lessor, acting reasonably, concluded that there had been a Material Change of Circumstances, he had to authorise appropriate specific modifications or variations to the levels of the Operator Tariff following approval by the Regulator.<sup>29</sup> Finally, there could not be more than two Interim Reviews in any continuous period of twelve months.
135. As set out in greater detail below, City Water applied for an Interim Review in 2004, and, at the direction of the Interim Regulator, PricewaterhouseCoopers (PwC) and technical experts Howard Humphreys were appointed as auditors. They concluded that City Water had not demonstrated any of the grounds that would justify a tariff adjustment under the Lease Contract Interim Review provisions.

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<sup>29</sup> Article 41.4 (c) and (d) of the Lease Contract.

136. *Major Review:* Finally, a Major Review was also to take place half way through the lease period, during the fifth year of operation (i.e., 2008). Tariffs were fixed for the first five years, subject to Index Formula adjustments and the possibility that the criteria for an Annual or Interim Review would be met. The Major Review would have provided an opportunity for a more extensive analysis taking into account factors such as the progress of the capital works, experience over the first five years concerning efficiency gains, and so on. On the basis of such factors, tariffs would have been set for the second five years of the Lease Contract. Since the Contract was terminated during the second year of operations, the Major Review never occurred.
137. *Financial projections:* The financial projections BGT submitted with its bid showed that City Water would lose Tsh 7.9 billion over the first two years of operation, and would not reach a break-even point until year 7.<sup>30</sup> Therefore, City Water would require a significant injection of capital to get it through the first two years of operating losses and survive for four more years thereafter. That capital was to come from two sources: equity from City Water's shareholders, and the related Sub-Loan from DAWASA.
138. BGT's bid promised a contribution of USD 8.5 million in equity, which BGT proposed would be made entirely during the first two years of operation: USD 2.5 million initially, USD 3 million during the first year, and a further USD 3 million during the second year.<sup>31</sup>
139. In addition to equity capital, City Water was also to have access to up to USD 5.5 million from a Sub-Loan facility provided by DAWASA. The basic agreement was that City Water would draw down one dollar from the Sub-Loan for every dollar of equity contributed by City Water's shareholders.<sup>32</sup> Under the schedule to BGT's bid, the

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<sup>30</sup> Exhibit R-20.

<sup>31</sup> Exhibit R-15.

<sup>32</sup> Exhibit C-104. Government Subloan Agreement.

shareholders were to put in USD 5.5 million in the first year, enabling City Water to draw down the entire Sub-Loan and giving it access to a total of USD 11 million of debt and equity capital during its first year of operations.<sup>33</sup>

140. In the long run, City Water's source of funds would be the Operator Tariff.

### **C. THE SIPE, POG AND DELEGATED CAPITAL WORKS**

141. Besides the Lease Contract, City Water and DAWASA entered into two main ancillary agreements, the SIPE and the POG (the Priority Works).

142. *SIPE*: The SIPE called for capital improvements to the critical elements of the water system. City Water was to install or refurbish pumps at the treatment plants, enabling more water to be drawn from the Upper and Lower Ruwu River and, after treatment, to be pumped into the transmission mains toward the reservoirs. The transmission mains themselves were also to be repaired and modernised, mostly in order to reduce leakage. The effect of the work on the treatment plants and the transmission mains would be more water in the reservoirs. To measure the amount of water flowing through these major portions of the system, City Water was required to install 15 zonal bulk meters under the SIPE. The latter also covered emergency repairs to eliminate known major sources of water loss.

143. *POG*: The POG was a contract for the supply of customer meters, that is, meters that would measure water consumption by an individual household or institutional customer. The goal was universal metering. Data from customer meters would help to correct assumptions about the quantity of water that different categories of customers were using. The data could also help in making a more accurate hydraulic model of the system.

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<sup>33</sup> *Ibid.*

Customers' meters could in addition enhance City Water's collection ratio by increasing customers' payment of bills. This was especially true of institutional customers.

144. *Delegated Capital Works:* In addition to the SIPE and POG works, City Water also took responsibility for design and management of the so-called "Delegated Capital Works". The Delegated Capital Works were likewise important to City Water's overall operations, but they were not set out in a separate contract as were the SIPE and POG works. City Water's role in the Delegated Capital Works was that of contract manager for works to be carried out by others. City Water's obligations in this respect and the payment it would receive, were attached to the Lease Contract as Appendix B.
145. The purposes of the Delegated Capital Works were twofold: to bring piped drinking water to more people in Dar es Salaam; and to help City Water meet the performance targets in the Lease Contract.
146. *Sub-contracting:* City Water subcontracted the SIPE and POG to BGT, which in turn subcontracted to Biwater Pty, a South African affiliate of Biwater Plc. SIPE and POG payments were to pass through City Water to Biwater Pty, and City Water would in principle retain nothing. Similarly, a significant portion of the Delegated Capital Works were subcontracted first to BGT and then to Gauff, with the same effect.<sup>34</sup>

## **D. PERFORMANCE OF THE LEASE CONTRACT**

### **1. Overview**

147. As set out below, serious difficulties were experienced by both City Water and DAWASA in their respective performance of the Lease Contract. Overall, however, although City Water made improvements to the water system, in difficult operating conditions, its

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<sup>34</sup> The value of the various contracts was as follows: SIPE, USD 4.8 million; POG, USD 4.2 million; Delegated Capital Works, around USD 39 to 40 million. Cliff Stone Testimony, Hearing Transcript, Day 2, p. 275, 12 and ff; Peter Cox Testimony, Hearing Transcript, Day 3, p. 223, 19-22.

performance failed to achieve the level that was anticipated at the time of conclusion of the Lease Contract - even taking into account the complications that DAWASA's own failures posed.

148. Dr. Ballance, the expert mediator in the 2005 renegotiation, testified (inter alia) that:

“in an overriding way [City Water's] performance had been pretty poor ... the performance, it was pretty much regarded by everybody, really, that their performance had not been very good at all”,<sup>35</sup>

“the cash collections ... had clearly deteriorated substantially over the course of the contract period ...”,<sup>36</sup>

“from DAWASA's perspective, City Water's performance in that regard ... had been worse than theirs...”<sup>37</sup>

149. The failure of the Project is certainly to be attributed to numerous factors. The task, on any view, was formidable. When City Water took over, DAWASA had left the water system in a very poor condition. On the other hand, it is clear from the evidence before this Tribunal, taken overall, that BGT had seriously underestimated the amplitude of the task. It had submitted a poorly structured bid, and then failed to perform as anticipated during the Mobilisation Period and the EMP, with the consequence that it encountered serious financial problems at a very early stage.

150. As far as the bid is concerned, by way of example, the report of Mr. White's<sup>38</sup> visit to Dar es Salaam in January 2005<sup>39</sup> recognised in terms that:

“[City Water's] bid was poorly structured with insufficient safeguards and qualifications and action has to be taken to consider the ability of those who

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<sup>35</sup> Hearing Transcript, Day 5, p. 48, 16-25.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, p. 49, 13-17.

<sup>38</sup> Mr. White is the majority shareholder in Biwater. He founded the company in 1968. He and his family's interests are beneficial owners of 70 % of the share capital of Biwater Plc.

<sup>39</sup> Exhibits R-251; C-122.

put the bid together and those who implemented the management, as it could quite easily have become a mini-Mafraq”<sup>40</sup>.

151. Mr. White noted further that:

“Our City Water staffing was totally with non-Biwater staff with a weak leader, no clear experience or qualified business plan”<sup>41</sup>.

“No professionally installed accounting and Corporate Governance and an overall corporate failure all the way to Dorking”<sup>42</sup>.

152. Major problems were also encountered early with the SIPE and POG, as evidenced (for example) by a letter that David Baker from City Water wrote on 19 April 2004 to Mike O’Leary, the then CEO of the company, stating that:

“The situation on these two contracts subcontracted to Biwater Pty goes from worse to worse, and Gavin and I get increasingly frustrated as it seems to those not in the know that it is we who are the incompetent ones ... The situation is little short of a fiasco.

On POG, ... the virtually total failure to move this procurement forward is now so serious that City Water is likely to be in default not only on year one installation but on years one plus two also.

It is also going to have a progressively relative impact on City Water’s revenue as we cannot even schedule the non-domestic consumer metering whilst the flat rate billing of domestic customers is, as you know, increasingly being rejected by the populace and so the percentage who pay will continue to decline.

Whilst there may be little we can do to improve the situation on SIPE other than indicate our dissatisfaction, it is clear that from DAWASA’s viewpoint Pty is non-performing and I fear that Biwater will simply be wasting time and money in submitting a bid for CP1.

On POG, I strongly recommend that you propose to Brian and the board that we cancel the contract with Pty ...”<sup>43</sup>.

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<sup>40</sup> Larry Magor Testimony, Hearing Transcript, Day 1, pp. 153-154. “Mini-Mafraq” refers to the construction of a sewage treatment plant in Abu Dhabi where Biwater lost a substantial amount of money.

<sup>41</sup> *Ibid.*, p. 154, 20-22.

<sup>42</sup> *Ibid.*, pp. 154-155. Dorking is the location of Biwater’s headquarters in the UK.

<sup>43</sup> Exhibit R-67.



## 2. The Mobilisation Period: 19 February – 1 August 2003

153. During the Mobilisation Period, City Water’s CEO was Michael O’Leary, and the Chairman of the Board was Brian Winfield.
154. According to the Lease Contract, the Mobilisation Period extended from the signature of the contract on 19 February 2003 until 1 August 2003.
155. BGT’s bid<sup>44</sup> emphasised the importance of the mobilisation period in the following terms:
- “the transition from the current operational structure to the new structures envisaged under the Lease Contract represents one of the major challenges facing all the parties involved. ... The success or failure of the transition, of which the mobilisation is a part, may influence the way the delivery of the contracts develops especially in the critical early years.
- It is therefore essential that the Operator, the Lessor and the other agencies and authorities involved work together and apply significant levels of effort to the transition. The intention must be to make the transition as seamless as is possible. However, by the nature and scale of the proposals it will be a period of great change. It is in this transition period that the Operator will begin not only to prepare for the management of the water and sewerage utility service but will also need to initiate the management of “change” itself”.
156. The bid also detailed all the tasks that BGT intended to operate during the Mobilisation Period.<sup>45</sup>
157. From the record in this case, it is clear that City Water did not take the full benefit of the Mobilisation Period, and did not accomplish during that period what it had anticipated doing.

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<sup>44</sup> Exhibit R-16, p. 2. *See also* Exhibit R-22, p. 1.

<sup>45</sup> *Ibid.*

### 3. The Enhanced Monitoring Period: 1 August 2003 (Commencement) – 1 August 2004

158. During the EMP, Brian Winfield remained Chairman of the Board of City Water, but as of 1 September 2004, Cliff Stone replaced Mike O’Leary as the CEO of the company.
159. Once again, it is clear from the record before us that City Water did not perform during the EMP as was originally anticipated.
160. For example, City Water had planned to replace the old DAWASA outdated billing system by a new system within six months of the Commencement. Indeed, the billing software was the lifeblood of the system.<sup>46</sup> In a letter dated 19 March 2004,<sup>47</sup> Mr. Mutalemwa wrote to City Water in relation to “*DAWASA’s poor billing system*”, stating that:
- “we all knew this would be a problem from the beginning and that is why CWS promised in their mobilization plan to replace the old system within six months of commencement. We are now eight months into the process and you haven’t yet replaced it, and yet your staff publicly blame DAWASA!”.
161. In fact, City Water did not approve the acquisition of the new billing system until March 2004<sup>48</sup> and it was not actually in place until December 2004.<sup>49</sup>
162. Moreover, one of the main – and vital – purposes of the EMP was for City Water to collect data, in order to re-calibrate base values, and thereby address the known inadequacies in the initial data for the Project. Yet this collection of data was not performed as anticipated; the EMP was delayed; and the record evidences that this is the reason why City Water did not take the benefit of an Annual Review.<sup>50</sup>

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<sup>46</sup> John Sitton Testimony, Hearing Transcript, Day 4, p. 40, 9-10.

<sup>47</sup> Exhibit R-229.

<sup>48</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, pp. 137, 138.

<sup>49</sup> John Sitton Testimony, Hearing Transcript, Day 4, p. 2, 3-5.

<sup>50</sup> Larry Magor Testimony, Hearing Transcript, Day 1, p. 236.

#### 4. August 2004: Request for Interim Review

163. After the first eleven months of operations, in July 2004, City Water was collecting far less revenue than had been projected. It reached the conclusion that in order for the company to continue to function on a financially viable basis, the Lease Contract needed to be reviewed and in particular, the Operator Tariff needed to be increased.<sup>51</sup>

164. In a letter dated 8 July 2004, City Water requested an Interim Review of the Operator Tariff, and further requested that some of the base assumptions of its bid be re-examined. It indicated as the basis for its request the fact that:

“- The operating costs, especially those for local staff, exceed those assumed in the economic evaluation of the project and the determination of the base Operator Tariff used in the Contract.

- The assumed volume of water available for distribution in Dar es Salaam may not be in line with bid expectations”.<sup>52</sup>

165. On 20 August 2004, a meeting was held between City Water and Minister Lowassa, in his capacity as Interim Regulator, to discuss the request. The minutes of the meeting record that:

“... after one year of operations, a number of problems has arisen that threatens the well being of the project. These problems, which include contractual breaches amounting to non-performance by the operator, are listed below as follows:

...

City Water Services Ltd was supposed to contribute Tshs 5.5 bn in equity and to borrow Tshs 4 bn from the government subloan by the end of their first year. However, by the end of the year City Water Services shareholders had contributed only Tshs 3,340,633,728 and borrowed only Tsh 2,378,200,000 from the subloan. The remaining deficit has been substantially financed by not paying DAWASA amounts due under the Lease Contract and using collections of the First Time New Domestic Water Supply

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<sup>51</sup> Claimant’s Memorial, p. 75.

<sup>52</sup> Exhibits R-71 and C-93.

Connection Tariff that properly should be held in trust for making connections to poor domestic customers”.<sup>53</sup>

166. The minutes also emphasise failures on the part of City Water to report to DAWASA; substantial delays in SIPE and POG; and lack of improvement in collection performance which had decreased to approximately one per cent.
167. At the same time, the relationship between BGT and STM substantially deteriorated. STM was refusing to put any more equity into City Water. This resulted in a shortfall of the equity that the company was expecting. According to Larry Magor,<sup>54</sup> there were at least three reasons why STM adopted such an attitude: it was unhappy with the financial and operational performance of City Water; it complained about the incompetence of BGT’s appointed management; and also it complained about the fact that the SIPE and POG contracts had been subcontracted entirely to Biwater and Gauff entities. According to Mr. Magor, the poor relationship with STM created management and operational problems for City Water.<sup>55</sup>
168. Following the 20 August meeting with Minister Lowassa, City Water produced a report entitled “*A summary of Issues giving rise to the Request for a Review of the City Water Lease Contract*”, which was forwarded under cover of a letter dated 25 August 2004.<sup>56</sup>
169. The Interim Regulator ordered DAWASA to appoint an auditor. The purpose of the audit was to determine “*whether there are reasonable grounds for interim review of tariff as provided for in the lease contract*”. The auditor was mandated to investigate “*parameters relevant to the material changes of circumstances as stipulated in Article 42.1 of the lease*

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<sup>53</sup> Exhibit R-76.

<sup>54</sup> Larry Magor Testimony, Hearing Transcript, Day 1, pp. 149-150.

<sup>55</sup> *Ibid.*, p. 160.

<sup>56</sup> Exhibits R-77 and C-94.

*contract*". The Interim Regulator also directed that the auditor review and verify the equity injections made by City Water's shareholders.<sup>57</sup>

170. PwC was appointed auditor, together with engineering firm Howard Humphreys. City Water prepared a submission entitled "*Interim Review of Operator Tariff*", which it transmitted to PwC under cover of a letter dated 4 October 2004. City Water's submission was said to:

"describe[ ] the issues which form the basis for an Interim Review under the terms of Clause 41.4 (b) of the Lease Contract."<sup>58</sup>

171. On 10 November 2004, PwC sent a draft report to City Water for further comments before finalising the same.<sup>59</sup> City Water had discussions with PwC but did not send any comments as such.<sup>60</sup> On 15 November, however, Brian Winfield emailed Cliff Stone to express the view that the report was unacceptable:

"and will bring about the end of the contract if it is not fundamentally changed or the government does not provide an olive branch of some kind".

172. *The PwC Final Report*: PwC issued its final report on 26 November 2004.<sup>61</sup> It concluded that no tariff adjustment was warranted.

173. Section I of the PwC Report considered each of the nine possible events proposed by City Water and concluded that City Water had not established the grounds for a Material Change of Circumstances. In respect of the issue of water available for billing (a change of more than 10% could have qualified as such a material change), PwC concluded that insufficient data had been gathered to enable it to reach a determination:

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<sup>57</sup> Exhibit R-80. Regulator Directive to DAWASA of 31 August 2004.

<sup>58</sup> Exhibit R-83.

<sup>59</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 172, 8 and ff.

<sup>60</sup> *Ibid.*, p. 172, 24- 25 and p. 173, 1-9.

<sup>61</sup> Exhibit R-88.

“historically, there has been little accurate data collected on flows in the water supply system. The Operator has made no progress during the first year of operation in installing bulk flow meters or in refurbishing existing meters at the treatment works. There is therefore no reliable flow meter data on which to base an audit of actual volumes supplied during year one of the Lease Contract. ... We made use of the information and the data provided by the Operator, especially flow values taken with portable ultrasonic flow meters. The Operator had concluded that there had been a 20,9 % reduction in water available for distribution and that this equated to a loss of revenue of over Tshs 3 billion. Our audit concluded that there was insufficient data submitted to be able to confirm a reduction in water available for billing”<sup>62</sup>.

174. In Section II of its Report, PwC considered matters raised by City Water which fell outside the scope of the definition of Material Change of Circumstances in Article 42.1 but which City Water believed constituted a change from assumptions at the time of the bid, including: historic over-billing of customers by DAWASA leading to the inflation of DAWASA’s revenue figures; inaccurate calculation of the Customer Tariff at the start of the Lease Contract; significant increase in staff costs; and poor repair of boreholes. PwC concluded that these issues fell outside the scope of the grounds for an Interim Review.
175. In Section III, PwC considered “*other issues raised by [City Water] in their submission on 4 October 2004*”, including: DAWASA withholding the 10% commission owed to City Water in respect of collections from customers of amounts outstanding at the effective date of the Lease Contract; the impact of the 2003 drought; and the failure of government agencies to pay their water/sewerage bills. PwC concluded that these matters fell outside the scope of the grounds for an Interim Review.

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<sup>62</sup> *Ibid.*, p. 18.

## 5. October – December 2004: The Request for Re-Negotiation

176. Following receipt of the PwC Report, City Water continued to supply water and sewerage services under the Lease Contract. However, the problems identified by City Water in July 2004 remained unresolved and its financial viability continued to worsen. City Water and DAWASA held meetings in October and November 2004 to try to develop a new financial model to serve as the basis for future discussions.
177. Between October and December 2004, at the shareholders' level, Mr. Adrian White (on behalf of Biwater), corresponded, and discussed the situation, directly with Minister Lowassa (outside of the contractual methods of review). The matter was discussed, in particular, at a meeting on or around 11 October 2004, one week after City Water had made its Interim Review submission.
178. On 3 December 2004, Mr. White wrote to the Minister putting forward proposals for the rescue of the Project. The letter recounted a very serious situation, stating that:

“City Water is not viable with its current cost base and revenue projections. The financial analysis based on the agreed assumptions made from the information provided, shows that the company will require a total of Tsh 13 billion of cash flow support in its current financial year to the end of June 2005 and that this will rise to a total of Tsh 25 billion by the end of year 4. ... There are many ways in which the problem can be solved but the solutions capable of creating a viable business are radical ... I do not believe it is in your or my interest to reach a short term solution which does not provide us with confidence about the future. I know that City Water cannot survive beyond this year when faced with its current projections of cost and revenues”.<sup>63</sup>

179. Minister Lowassa answered Biwater on 10 December 2004, in the following terms:

“I agree with you entirely that City Water is in serious financial problems, but I believe that the answer to this is equity injection and improvement in revenue collection. Without capital injection and radical improvements in revenue collections, I do not see how City Water can survive. Currently collections are at Tshs 1.0 billion per month, which is, even without considering the tariff increases, way below the performance by DAWASA just prior to commencement.

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<sup>63</sup> Exhibit R-89.

The financial situation in City Water is so bad that they are unable to pay fully all the DAWASA dues and are not making payments into the First Time New Connection Funds. This is in contravention of my regulatory Order of 31 August 2004 issued pursuant to the EWURA Act 2001. Continued nonpayment of DAWASA dues including the Lease fees means that there is material breach of the Lease Contract.

I have taken note of the options that you propose to improve the financial position of City Water. However these options, based on the new financial model, are in departure from the Lease Contract, and their discussion amounts to a renegotiation of the current contract ... [I]n view of your new proposals, I recommend that City Water formally make a submission of the proposals confirming that they wish the contract to be renegotiated. We will after that determine the way the renegotiations will take place, together with their timing.

I am in the meantime intending to engage a regulatory expert to assist in the review of the current situation and determining the due process.

I hope you will rapidly make the submission that I propose, in order for the necessary procedures to take place without delay”.<sup>64</sup>

180. On 14 December 2004, Mr. White wrote to Minister Lowassa, indicating that he was happy to consider his proposal as a “*last resort*”.<sup>65</sup>
181. On 6 January 2005, a formal request for a renegotiation of the Lease Contract was made by City Water.<sup>66</sup>
182. The serious financial distress to which City Water was confronted at this time appears clearly from two internal emails sent respectively on 8 and 10 December 2004 to the top management of City Water and Biwater. Both discuss strategies. In the first email, Brian Winfield suggested such drastic action as “*stop all payments to DAWASA immediately*” or “*inform the government that with immediate effect we will be reducing staff salary payments ...*” or “*place STM in default so that we can continue to run the business without being dependent upon the views of a delinquent shareholder*”. Mr. Winfield said that he realised that such courses of action were “*contentious*”, but that if City Water could not get

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<sup>64</sup> Exhibit R-91 and C-96.

<sup>65</sup> Exhibits R-98 and C-98.

<sup>66</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 85, 22 to p. 86, 1.



the tariff increased, and if STM did not inject funds, “*then either we need to just lock the doors or try to force the government’s hand*”.<sup>67</sup>

183. In the second internal email, Mr. Winfield indicated that “bold actions are needed to bring City Water’s problems to the fore ... Publicity or the threat of publicity (involving staff retrenchment for instance) would be a major embarrassment to the government, particularly in advance of next year’s national elections”. Mr. Winfield therefore suggested drastic actions such as “stop payment of DAWASA’s fees ...”, “announce retrenchment of up to 30% of City Water’s staff with immediate effect ...”, “stop payment of allowances, levies and taxes that were inherited from DAWASA ...”, etc.
184. On 16 December 2004, Mr. White sent an email to Mr. Stone indicating that “*until renegotiation, we suspend payments to government*”.<sup>68</sup>

## **6. January – May 2005: The Re-Negotiation Process**

185. It is clear from the above that as the parties convened in January 2005 to discuss how the renegotiation process would proceed, they were faced with an extremely difficult situation. Resources were constrained, and both DAWASA and City Water were under financial pressure: without radical changes in the Lease Contract, it was manifest that City Water could not survive.<sup>69</sup> It is in this context that on 25 January 2005, the parties met with the Interim Regulator to discuss the framework. According to an internal Biwater memo at the time:

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<sup>67</sup> Exhibit R-90.

<sup>68</sup> Exhibits R-244 and C-120.

<sup>69</sup> See also Cliff Stone Testimony, Hearing Transcript, Day 2, p. 88, 6- 9 and p. 89, 12-24. Mr. Magor also testified that City Water needed radical changes to the Lease Contract in order to be sustainable and financially viable. See Larry Magor Testimony, Hearing Transcript, Day 1, p. 237, 4-22. He further testified that even if the PwC report had been positive, in any case, they needed a total renegotiation of the contract, “*a fundamental recalibration.*” *Ibid.*, p. 44, 18-24.

“the meeting was contentious in that after eighteen months into a ten year Management Contract, City Water are alleged to have achieved little, and overall revenue from tariff collection has gone down substantially”.<sup>70</sup>

186. In the context of the renegotiation, the World Bank recommended the appointment of TRC Economic Solutions (“TRC”) as expert mediator. On 17 February 2005, the Government of Tanzania appointed TRC and more specifically Dr. Tony Ballance. TRC then circulated draft terms of reference which, following discussion, were amended to provide for the renegotiations to encompass the whole Lease Contract, rather than any particular division or article.

187. In the meantime, and over the following weeks, the financial situation of City Water remained critical. On 22 February 2005, Cliff Stone wrote to STM and Stephan Richer as follows:

“further to my email 12.01.05, we reduced our outgoings as much as possible and have had a slight improvement in revenue during the month of February. This has enabled us to survive into the third week February, but to enable us to meet our commitments at the end of this month we do require to receive additional funds as indicated”<sup>71</sup>.

188. The day after, Brian Winfield wrote to Larry Magor and Stephan Richer asking:

“do we transfer \$200 k on Friday (25th Feb) to allow the business next week?”<sup>72</sup>

189. On 26 February 2005, City Water’s Board noted that:

“[r]umours about arguments between the shareholders and City Water’s poor financial health/impending collapse ... has taken staff morale to an all time low”<sup>73</sup>.

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<sup>70</sup> Exhibits C-122 and R-251. Memo from Adrian White of 28 January 2005.

<sup>71</sup> Exhibit R-256. See also Cliff Stone Testimony, Hearing Transcript, Day 2, p. 120, 20-24: “by mid-February 2005, it is correct, isn’t it, that City Water was really out of cash and that DAWASA was on the verge of calling the performance bond? Answer: yes”.

<sup>72</sup> Exhibit R-108.

<sup>73</sup> Exhibit R-259.

190. Given that, since January 2004, City Water had not been remitting the full collections and had not been paying DAWASA all the monthly lease fees, DAWASA's financial position was also in a very precarious state.<sup>74</sup>
191. The Republic demanded a tight timetable to complete the renegotiation process. Initially, the work plan devised by Dr. Ballance provided for a final report on 4 July 2005. However, the Republic forced a far shorter timetable on the parties. Permanent Secretary Mrisho – Permanent Secretary to the Minister – initially proposed a period of one week. After discussion with the parties, he accepted a period of three weeks.<sup>75</sup>
192. In March 2005 and continuing into April 2005, DAWASA and City Water discussed the financial arrangements that would apply during the renegotiation, particularly whether City Water would remit the Lessor Tariff on a current basis and whether DAWASA would call the Performance Bond if City Water failed to do so.
193. It is clear from the evidence that at this time, the parties realised that the situation was extremely delicate and that a successful and quick renegotiation was the last chance to salvage the Project. In a letter dated 11 March 2005, the chairman of DAWASA's board of directors wrote to Minister Lowassa to confirm his directions.<sup>76</sup> These included the following:

“4) there should be a fallback position which would be evaluated to discern the needs and ensure the possibility of its immediate implementation in the event the Lease Contract is terminated”.

194. On 15 March, Cliff Stone wrote to Stephan Richer as follows:

“I have been saying for some time now that if we are not prepared to pay the Lessor Tariff, we should start putting together our exit plans ... I see only three courses of action: A) agree to pay Lessor Tariff and negotiate terms. Obtain a

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<sup>74</sup> Exhibit R-110. Letter of DAWASA to Cliff Stone of 28 February 2005.

<sup>75</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 13, 19-24.

<sup>76</sup> Exhibits R-262 and C-129.

good renegotiation outcome. B) allow DAWASA to call the bond, full or partial. Then either go legal (we do not have a strong case) or accept it and renegotiate under difficult terms. C) agree to walk and negotiate the best exit terms we can”.

195. In mid-March 2005, Dr. Ballance came to Dar es Salaam and met with a variety of interested parties, including not only DAWASA and City Water, but also BGT and its corporate parents; STM; the Ministry; and World Bank officials. The parties presented their respective views on what might be an acceptable compromise.
196. In late March 2005, Dr. Ballance prepared an “Inception Report”<sup>77</sup>, summarising the situation and the parties’ positions, and setting forth a plan for substantive negotiations. He mentioned *inter alia* that “*the Lease Contract as currently structured may not be financially sustainable*”, that “*CWS’s own performance has contributed to its poor financial situation*” and that “*CWS is not in compliance with the terms of the Lease Contract*”. Mr. Stone had the opportunity to comment on this report, and he did so,<sup>78</sup> although he did not challenge any of these basic preliminary conclusions (according to him) “*in order to facilitate the negotiation process*”.<sup>79</sup>
197. On 8 April 2005, the interested parties met to set the stage for intensive negotiations. A deadline of 29 April 2005 was set for reaching an agreement.
198. The formal renegotiation process commenced on 19 April 2005. From that date until 28 April 2005, the parties negotiated with the assistance of Dr. Ballance, who was back in Dar es Salaam.
199. On 28 April 2005, Dr. Ballance prepared an *aide-mémoire* setting forth the progress of the negotiations. He noted that the deadline had been extended by one week<sup>80</sup> and proposed

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<sup>77</sup> Exhibit R-111.

<sup>78</sup> Exhibit R-130.

<sup>79</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 199, 3-25.

<sup>80</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 15, 2-4.

the program for the first week of May to enable “*the renegotiation to reach a conclusion by 6 May 2005*”.

200. Dr. Ballance’s last day in Tanzania was 5 May 2005 (one day before the final deadline), when he presented a final compromise proposal for the parties’ consideration. Instead of simply accepting the proposal, Mr. Stone wrote to DAWASA on 9 May 2005 setting out his comments and suggesting a further meeting “*to clarify certain details*”. There was no follow-up to this letter.

**E. TERMINATION OF THE LEASE CONTRACT: 12 MAY – 7 JUNE 2005**

201. On the evidence before the Tribunal, it had been clear to City Water for some time that if the renegotiations failed, DAWASA would likely terminate the Lease Contract.<sup>81</sup>

202. Three days after Mr. Stone’s letter of 9 May, on 12 May 2005, DAWASA’s Board of Directors convened. The same day, the Chairman of the Board wrote to advise Minister Lowassa that the renegotiation had failed because:

- City Water’s proposals were inadequate and would have left DAWASA with a shortfall of Tsh 10 billion;
- DAWASA’s counterproposal would have extended the Lease Contract by five years, but only after City Water’s shareholders had put in the USD 8.5 million of promised equity and a further additional USD 1.5 million;
- TRC made a compromise proposal that limited the shortfall to Tsh 2 billion; but
- City Water rejected both the DAWASA proposal and the TRC compromise.

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<sup>81</sup> *E.g.*, Cliff Stone Testimony, Hearing Transcript, Day 2, p. 231, 15-20.

203. Following its meeting, DAWASA's Board endorsed the following course of action:<sup>82</sup>
- the steps for terminating the Lease Contract would commence immediately;
  - a transitional company should be created to take over operations;
  - the Performance Bond should be called;
  - TRC should write to City Water and DAWASA and formally note the failure of the renegotiation; and
  - "a fallback position" should be put in place to safeguard essential equipment and supplies and avoid disruption during the transition.
204. Also on 12 May 2005, DAWASA started to implement this course of action. Mr. Mutalemwa wrote to CRDB Bank and made a call on the full amount of the Performance Bond.<sup>83</sup> The Chairman of DAWASA also informed Minister Lowassa of the recommendations of the Board.
205. The following day, the 13 May 2005, Mr. Mutalemwa faxed two letters to Mr. Stone.<sup>84</sup> One confirmed that the renegotiation had terminated unsuccessfully and that consequently "DAWASA will take other actions to ensure that its rights under the Lease Contract are protected". The other notified Mr. Stone of the call on the Performance Bond. Mr. Mutalemwa also requested a face to face meeting with Mr. Stone on the following day. Mr. Stone received the two letters the day they were sent.<sup>85</sup>
206. Also on 13 May 2005, during the normally scheduled meeting of the Cabinet, Minister Lowassa, in his capacity as the Minister responsible for the water sector, tabled the 12 May

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<sup>82</sup> Exhibit R-153. Minister Extraordinary Board Meeting DAWASA of 12 May 2005.

<sup>83</sup> Exhibit R-154.

<sup>84</sup> Exhibit R-156.

<sup>85</sup> Witness Statement of Cliff Stone, para. 37.

letter he had received from DAWASA's Chairman. The Cabinet discussed and largely accepted the course of action set out in that letter. It resolved as follows:

- the Lease Contract should be terminated;
- the Performance Bond should be called;
- DAWASCO should be established as a public corporation as soon as possible and should act as the interim operator;
- the proceeds of the Performance Bond should be used in part to pay City Water's debts to DAWASA and in part to fund the transition to DAWASCO; and
- the Minister should meet with the UK High Commissioner to explain the situation.

207. The same day, at around 7:00 pm, Minister Lowassa spoke to reporters, informing them of the situation. As to the issue of termination, a written press statement released by the Minister read, *inter alia*, as follows:

“[f]ollowing the failure of the renegotiations the DAWASA Board convened and decided to advise the Government that the Lease Contract should be terminated. The Government, after giving due consideration to the way things were and the request from DAWASA, has agreed that the contract be terminated and has directed DAWASA to initiate the process of terminating the said contract forthwith”<sup>86</sup>

208. The Minister's communication was summarised by the Tanzanian newspaper *The Guardian* as follows:

“the government has terminated the contract with City Water Services effective from today, Lowassa told a packed news conference at the Ministry headquarters”<sup>87</sup>.

209. On 14 May 2005, Mr. Stone wrote a letter to Mr. Mutalemwa in which he stated:

“we have yesterday seen the Hon. Minister of Water and Livestock Development on the television (ITV) giving a press conference and have read in today's newspapers that the [UROT], on advice from DAWASA, have yesterday

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<sup>86</sup> Exhibits R-276 and C-209.

<sup>87</sup> Exhibit C-25.

terminated the Lease Contract between DAWASA and City Water ... Please advise the status of such statements as we have at the time of writing received no information (verbal or written) from DAWASA in this regard”.<sup>88</sup>

210. On 16 May 2005, City Water was notified that the entire amount of the Lease Contract Performance Bond (a total of Tsh 5,490,845,296) had been called. According to Mr. Mutalemwa,<sup>89</sup> DAWASA applied the bond money to the payment of the Lessor Tariff, rental fees and also penalties for non-payment of those items under the Lease Contract. The money for the FTNDWSC was also recovered from the bond, leaving, according to Mr. Mutalemwa, a surplus of Tsh 79 million. He also testified that the surplus was given to DAWASCO,<sup>90</sup> while confirming that the correct action would have been to give the money back to City Water rather than to DAWASCO.<sup>91</sup>
211. Also on 16 May 2005, City Water issued a Notice of Arbitration pursuant to Article 66 of the Lease Contract. On 17 May, DAWASA issued a Cure Notice under Article 50.1 of the Lease Contract, stating that City Water was in breach of its obligation under Article 47.1 to “procure the maintenance of the performance guarantee” for the duration of the Lease Contract. DAWASA requested that City Water remedy this alleged breach within seven days.
212. On the same day, Minister Lowassa, acting with the assistance of DAWASA, called a meeting of all City Water’s staff.<sup>92</sup> At this meeting, he stated that the Lease Contract had been terminated, and that the staff would be transferred to the new UROT entity which was to take over City Water’s operations. The Minister also stated that City Water’s expatriate management had either left the country or were about to do so.

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<sup>88</sup> Exhibits R-158 and C-27.

<sup>89</sup> Second Witness Statement of Archard Mutalemwa, p. 46, para. 19.

<sup>90</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 108, 9-17.

<sup>91</sup> *Ibid.*, p. 110, 8-13.

<sup>92</sup> Exhibit C-31.



213. On 19 May 2005, Counsel for BGT notified the Republic that the call upon the Performance Guarantee was considered totally unjustified, and therefore that they had decided to start an arbitration procedure pursuant to the Lease Contract, and in accordance with Article 7(1) of the UNCITRAL Rules.<sup>93</sup>
214. On 20 May 2005, Counsel for BGT notified the Republic that they considered that the Republic had breached its obligations under the BIT, and that all rights to pursue claims were preserved, including the right to file a request for arbitration with ICSID.
215. On 23 May 2005, City Water applied to the English High Court for an interim injunction to restrain DAWASA from taking any steps to terminate the Lease Contract, or purporting to give notice of termination, other than in accordance with the termination provisions contained in Articles 51 and 52; and terminating or purporting to give notice of termination of the Lease Contract on the basis of the Cure Notice of 17 May 2005, or on the basis of any matter specified therein.
216. The interim injunction was granted by the English court, and was served on DAWASA by fax on the evening of 23 May 2005.<sup>94</sup>
217. On 23 May 2005, Cliff Stone gave a press conference,<sup>95</sup> during which he indicated that City Water had not received any contractual termination notice and would therefore continue to provide water and sewerage services to customers. He ended his speech by asserting that business was as normal.

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<sup>93</sup> Exhibit R-161.

<sup>94</sup> Exhibits C-36 and R-172. Ultimately, the Tanzanian Court denied enforcement of the English injunction on the ground that foreign interim measures were not enforceable as a matter of Tanzanian law.

<sup>95</sup> Exhibits C-34 and R-286.

218. On 24 May 2005, City Water was notified by the TRA that, as of 30 May 2005, it had lost its entitlement to VAT relief. City Water wrote to the TRA disputing this decision. No reply was received.<sup>96</sup>
219. On 25 May 2005, DAWASA issued a Notice to Terminate under Article 51.3 of the Lease Contract, on the ground of failure to remedy the alleged breach notified in the Cure Notice of 17 May 2005. The 25 May notice gave City Water a further 30 days in which to remedy the alleged breach, expiring on 24 June 2005.<sup>97</sup>
220. On 26 May 2005, DAWASA wrote to City Water, stating that they feared “*that there are high chances of service interruption at this stage due to the termination notice*” and that since termination was imminent, it was imperative to mutually agree upon an amicable way to part company, in an expedited manner. It was suggested that the parties jointly appoint a management team that would assist in this regard. DAWASA also reminded Mr. Stone that in a meeting held on Friday 20 May 2005, he had promised to provide, by Monday 23 May 2005, names of the City Water’s officers who would work jointly with DAWASA to effect the handing over process. DAWASA invited City Water to attend to this issue immediately.<sup>98</sup>
221. On 30 May 2005, City Water wrote to Mr. Mutalemwa indicating that City Water was determined to continue to perform the contract and would do so unless and/or until the UNCITRAL arbitration tribunal (to be constituted pursuant to the arbitration agreement in the Lease Contract) decided otherwise, or unless and/or until there was any agreement between the parties to the contrary. He invited DAWASA to issue a common statement confirming that the contract would remain in effect pending the outcome of the arbitration

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<sup>96</sup> Exhibit C-164.

<sup>97</sup> Exhibit C-35.

<sup>98</sup> Exhibit R-167.

or agreement, since the purported notice of 25 May 2005 was – according to City Water – invalid and in breach of the English injunction.<sup>99</sup>

222. In the same vein, Mr. Stone also wrote to Mr. Mutalemwa on 31 May 2005, stating that since City Water remained committed to performing the contract, he was sending him the usual weekly report for the weeks ending 21 May 2005<sup>100</sup> and 28 May 2005.<sup>101</sup>
223. On 1 June 2005, representatives of the Republic effected the deportation of City Water’s senior management: Cliff Stone, the CEO; Michael Livermore, the CFO; and Roger Harrington, Senior Adviser. Mr. Stone and the other senior management were detained by police officers at about 11:30 am local time on the morning of 1 June 2005, and were held in custody, and without formal arrest, for the entire day. They were subsequently deported from Tanzania that evening<sup>102</sup> on the ground that they were “*prohibited immigrants*” within the meaning of Section 10 of the Immigration Act 1995 and that their “*presence in the United Republic of Tanzania is unlawful*”.<sup>103</sup>
224. Simultaneously with the detention of City Water’s senior management, representatives of the Republic and DAWASA entered City Water’s offices with the purpose of taking control of the company’s assets and installing new management, i.e., representatives of DAWASCO, a newly formed government entity. The CEO of DAWASA, Archard Mutalemwa, personally attended City Water’s offices on the morning of 1 June 2005 to supervise the seizure of City Water’s assets and to introduce to City Water’s employees,

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<sup>99</sup> Exhibit R-168.

<sup>100</sup> Exhibit C-162.

<sup>101</sup> Exhibit C-163.

<sup>102</sup> Exhibit C-166.

<sup>103</sup> Exhibits C-38 and C-42.

the new management, headed by Felix Kaaya. The City Water logo and signage were removed from outside City Water's head office.<sup>104</sup>

225. From 1 June 2005, DAWASCO replaced City Water in the supply of water and sewerage services in Dar es Salaam, and announced this to the general public in Tanzania by, for example, a full page notice taken out in the Tanzanian *The Guardian*.

226. On 7 June 2005, City Water's solicitors notified DAWASA of City Water's acceptance of DAWASA's repudiation of the Lease Contract.<sup>105</sup>

227. According to the evidence before this Tribunal, as of 1 June 2005, City Water owed DAWASA approximately Tsh 3.4 billion in unpaid tariff and rental fees, including Tsh 184 million of collections of pre-commencement tariff; Tsh 2.3 billion of Lessor Tariff; Tsh 586 million of Lease fees; and Tsh 306 million of consumables and office equipment.<sup>106</sup> According to John Sitton<sup>107</sup>, an amount of Tsh 1.1 billion of penalties had to be added, making a total of Tsh 4.9 billion. Moreover, City Water had not been paying into the First Time Connection Fund.<sup>108</sup>

228. At the same time, DAWASA owed City Water USD 1.3 million<sup>109</sup>. According to Mr. Mutalemwa,<sup>110</sup> the money overdue was paid by DAWASA to City Water on 24 and 25

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<sup>104</sup> Exhibit C-166.

<sup>105</sup> Exhibit R-171.

<sup>106</sup> Exhibit R-173. Memo of Archard Mutalemwa of 9 June 2005, p. 167; Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 111, 18-23. *See also* Cliff Stone Testimony, Hearing Transcript, Day 2, p. 101, 12-15.

<sup>107</sup> John Sitton Testimony, Hearing Transcript, Day 4, p. 13, 12-14.

<sup>108</sup> *Ibid.*, p. 101, 19-22.

<sup>109</sup> Second Witness Statement of Cliff Stone, para. 40.

<sup>110</sup> Second Witness Statement of Archard Mutalemwa, para. 31.

May 2005. According to Mr. Stone, however, the payments had not been received before he left Dar es Salaam on 1 June 2005.<sup>111</sup>

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<sup>111</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 60.

## CHAPTER IV. JURISDICTION OF THE ARBITRAL TRIBUNAL

229. The first issue to be decided in this arbitration is the jurisdiction of this Arbitral Tribunal which, as explained below, is disputed by the Republic.

### (1) BGT'S POSITION

#### A. BGT HAS STANDING UNDER THE ICSID CONVENTION

230. According to BGT, this Arbitral Tribunal has jurisdiction over the present dispute, since the four preconditions in Article 25(1) of the ICSID Convention are satisfied. Article 25(1) provides that the dispute must:

- be "*legal*";
- arise "*directly out of an investment*";
- be "*between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State*"; and
- the parties to the dispute must "*consent in writing*" to submit the dispute to ICSID.

#### 1. Legal dispute

231. According to BGT, the purpose of requiring the dispute to be "*legal*" in character is to exclude from the Centre's jurisdiction "*moral, political or commercial claims*" which do not involve the consideration of legal rights and obligations.

232. In this case, the matter at issue is a "*legal dispute*" within the meaning of Article 25(1) of the ICSID Convention, as it turns on the alleged breach by the Republic of rights accruing to BGT under international and domestic law.

## 2. Arising directly out of an investment

233. BGT points out that whilst the ICSID Convention does not define the term “investment”, commentators have identified certain common features of projects / transactions which have qualified as “investments” in ICSID case law, namely:

- (a) duration: the parties must have an expectation of a relationship of a certain length;
- (b) regularity of profit and return: an agreement premised on a one-off lump sum payment is unlikely to qualify as an “investment”;
- (c) risk: one or both parties would normally assume a risk as a result of the project / transaction;
- (d) substantial commitment: one or both parties would normally have devoted a significant amount of resources, financial or otherwise, to the project / transaction;
- (e) development: the project / transaction would normally have significance for the host State’s development.

234. BGT concludes that the Project, in which BGT participated through City Water, contains all the five elements outlined above and therefore qualifies as an investment within the meaning of Article 25(1) of the ICSID Convention.

### *(a) Duration*

235. Both the Republic and BGT contemplated that BGT’s involvement in the Project, through City Water, would be on a long-term basis. Under Article 3.1(a) of the Lease Contract, City Water undertook to provide services to DAWASA for a ten-year period. Subject to certain conditions, Article 3.5 of the Lease Contract allowed for extensions beyond this ten-year period.

236. Both the SIPE and POG contracts also contemplated an ongoing participation by BGT in the Project, through City Water, until completion of performance under both contracts.

**(b) Regularity of profit and return**

237. BGT's involvement in the Project, through City Water, was based on a presumption that the Project would generate regular and sustainable profit in the mid-long term. With regard to the Lease Contract, BGT recognized that in the short term, the Project would be loss-making. However, based on the information provided to it during the bid process, BGT had anticipated that the Lease Contract would then begin to generate regular and sustainable profits. With regard to SIPE and POG, both contracts generated regular returns.

**(c) Risk**

238. BGT submits that it assumed significant risk in the Project including:

- the requirement of substantial equity injections into City Water by the shareholders, BGT's contribution amounting to a total of USD 4.34 million over five years (of which USD 2.2 million had been contributed as at the date of termination of the Lease Contract); and
- in respect of the posting of substantial Performance Bonds in respect of the Project Contracts, and Advance Payment Bonds in respect of SIPE and POG; and
- advancing a shareholder loan of USD 1 million to City Water and additional support and development funds.

**(d) Substantial commitment**

239. In order to perform its obligations under the Shareholders Agreement, BGT was required to make substantial commitments to City Water in respect of:

- equity injections;
- the provision of a shareholder loan;
- the Performance Bonds and the SIPE and POG Advance Payment Bond;



- the provision of key personnel; and
- the provision of technology and know-how.

*(e) Development of the host State*

240. According to BGT, the Project has led to significant development in the water and sewerage infrastructure of Dar es Salaam. In particular, over the course of its operations, City Water initiated in conjunction with DAWASA a comprehensive review, redesign and repair of the water and sewerage supply system; a program of installation of new water meters; and achieved improvements in water quality, quantity and distribution, and significant reduction in water leakage.
241. *The BIT and the TIA:* It is BGT's case that the Project also qualifies as an investment under the terms of the BIT, and also under the terms of the TIA.
242. The BIT defines "investment" in extremely broad terms. Under Article 1(a), an "investment" means "*every kind of asset*", including (without limitation):
- “(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
  - (ii) shares in and stock and debentures of a company and any other form of participation in a company;
  - (iii) claims to money or to any performance under contract having a financial value;
  - (iv) intellectual property rights, goodwill, technical processes and know-how;
  - (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”
243. According to BGT, its "investment" included, at least, its stake in: (i) the property and property rights of City Water; (ii) the shares of City Water, and the equity invested in, and loans made to, City Water; (iii) City Water's rights to performance under the Lease Contract and SIPE and POG; (iv) City Water's goodwill and the technical processes and

know-how made available to City Water through BGT's personnel; and (v) the business concessions granted to City Water in SIPE and POG.

244. As a company "*incorporated under the law in force in any part of the UK...*", BGT is a qualifying investor under Article 1(d)(i) of the BIT.
245. Finally, on BGT's case, the TIC's provision of a Certificate of Incentives to City Water demonstrates that BGT's investment had been deemed to qualify as an "investment" under the TIA.

### **3. Between Contracting State and National of another Contracting State**

246. BGT points out that the parties to the dispute are a State (the UROT) and a UK company (BGT). Both the UROT and the UK have signed and ratified the ICSID Convention. Both are contracting States within the meaning of Article 25(1) of the Convention.
247. The UROT signed the ICSID Convention on 10 January 1992. It deposited instruments of ratification on 18 May 1992 and the ICSID Convention entered into force for it on 17 June 1992. The UK signed the ICSID Convention on 26 May 1965. It deposited instruments of ratification on 19 December 1966 and the ICSID Convention entered into force for it on 18 January 1967.
248. BGT is a UK company duly incorporated under the laws of England and Wales. From the date of incorporation until the present date, BGT's seat and place of incorporation has been Dorking, England.
249. The dispute is therefore between a Contracting State and a national of another Contracting State and therefore satisfies the third precondition of Article 25(1) of the ICSID Convention.

#### 4. Written consent

250. Consent to ICSID jurisdiction may be given through any of the following:
- a direct agreement between the Host State and the investor;
  - a bilateral investment treaty between the Host State and the State of the investor;
  - domestic investment legislation; or
  - a multilateral investment treaty, to which both the host state and the state of the investor are signatories.
251. BGT submits that the UROT's consent to refer this dispute to ICSID arbitration was given in both the BIT and the TIA. BGT's written acceptance of UROT's offer was constituted by the Request for Arbitration.
252. The BIT provides in Article 8(1) that:
- “Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes ( ... the “Centre”) for settlement by conciliation or arbitration under the [ICSID Convention] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former”.
253. On BGT's case, the date the UROT is deemed to have given its unilateral and generic consent to ICSID jurisdiction over the present dispute, for the purposes of ICSID Institution Rule 2(1)(c), is 2 August 1996, the date the BIT entered into force.
254. On the other hand, the TIA provides in its Section 23.2 that:
- “A dispute between a foreign investor and the [Tanzania Investment] Centre or [the UROT] in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say ...
- b) In accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes”.
255. BGT submits that Section 23.2(b) constitutes a unilateral offer to submit a dispute to ICSID jurisdiction, capable of acceptance by BGT, for the following reasons:

- (a) The TIC promotes Tanzania to investors on the basis that holders of a Certificate of Incentive enjoy “*unrestricted rights to international arbitration in case of a dispute with Government*”;
- (b) The UROT routinely offers to submit investment disputes to ICSID jurisdiction;
- (c) The object of the TIA as described in its preamble, is to provide for more favourable conditions for investors. It would be inconsistent with this express purpose if the terms of the TIA were in fact less favourable than those agreed to by the UROT in its investment treaties. If the words “*as may be mutually agreed*” were interpreted to require a further written consent on the part of the UROT, the TIA would in effect establish a less favourable regime than that offered to investors such as BGT under its investment treaties. It is therefore for the investor to select between the alternatives set out in Section 23.2 sub-paragraph (a). In this case, BGT has chosen to proceed with an ICSID arbitration under sub-paragraph (b).
- (d) BGT’s right to submit a dispute to ICSID is consistent with, and gives effect to, Section 22.2 of the TIA which provides for “*fair adequate and prompt compensation*” through “*a right to arbitration for the determination of the investor’s interest or rights and the amount of compensation to which he is entitled*”. It is not consistent with the object and purpose of the TIA for disputes concerning expropriation and the compensation payable for it, an inherently sovereign act, to be resolved by arbitration within UROT’s sovereign territory. The TIA therefore provides for an unconditional right to international arbitration to determine both liability and quantum issues.

256. In respect of the TIA, the date of the UROT's written consent to ICSID jurisdiction, for the purpose of ICSID Institution Rule 2(1)(c), is therefore said to be 9 September 1997, the date the TIA entered into force.
257. In the alternative, if, which BGT denies, it is found that further written consent of the UROT is required before disputes arising out of the TIA may proceed to ICSID, such consent is provided by either:
- (a) the consent to arbitration which appears in the BIT; or
  - (b) the consent to arbitration which appears in the Certificate of Incentives.
258. Finally, BGT's consent to the submission of the dispute to ICSID arbitration under Article 8(1) of the BIT, or Section 23.2 of the TIA, is constituted by the Request for Arbitration, therefore perfecting the parties' arbitration agreement.

## **5. Prior attempts at settlement**

259. Under both the BIT (Article 8(3)) and the TIA (Section 23.1), there is a requirement for the parties to attempt to reach an agreement prior to referral of the dispute to ICSID. Under the BIT, a six-month period is prescribed, but under the TIA, no specific period of time is stipulated.
260. Under Article 8(3) of the BIT, the parties are required to pursue "*local remedies or otherwise*" for a six-month period:
- "if any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then ... either party may institute proceedings by addressing a request to that effect to the Secretary General of the Centre ...".
261. BGT submits that the six-month period had elapsed when the Request for Arbitration was filed with ICSID on 2 August 2005. It maintains that attempts to resolve the dispute with the Republic commenced by at least April 2004, when Mr. Brian Winfield, a director of

BGT, and other BGT/City Water representatives held discussions with the Minister. Between at least April 2004 and May 2005, BGT and the Republic engaged in the “*pursuit of local remedies or otherwise*” directly and through the medium of City Water and DAWASA. In particular:

- between April 2004 and September 2004, City Water (on behalf of BGT) and DAWASA (on behalf of the Republic) directly sought to resolve the dispute through a process of negotiation;
- between September 2004 and November 2004, City Water (on behalf of BGT) and DAWASA (on behalf of the Republic) made submissions to PwC as an independent expert in the course of the interim review, and Biwater Plc’s principal shareholder (Mr. Adrian White) visited the UROT in order to hold discussions with the Minister; and
- between December 2004 and May 2005, City Water (on behalf of BGT) and DAWASA (on behalf of the UROT) sought to resolve the dispute through a process of negotiation, and arranged for a second expert review by TRC with a view to renegotiating the core provisions of the Lease Contract.

262. The final set of negotiations was effectively terminated on 13 May 2005, when the Minister announced the termination of the Lease Contract. Following the Minister’s statement on 13 May 2005, and again after the seizure of City Water’s operations on 1 June 2005, BGT attempted to engage the UROT in discussions to resolve the dispute, in particular by two letters dated 20 May 2005 and 1 June 2005 respectively. Having received no response to either letter, Allen & Overy wrote again to the UROT on 24 June 2005, stating that:

“no response having been received, our clients assume that you are unwilling to engage in any form of discussion, or to pursue any other possible avenue of resolution. If this assumption is incorrect, would you please respond immediately indicating a willingness to enter into discussions without further delay”.

263. According to BGT, the parties have therefore complied with the requirement in Article 8(3) of the BIT to seek to resolve the dispute through a pursuit of local remedies or otherwise. They have attempted amicable negotiations followed by reference to two experts, PwC and TRC. Further attempts to reopen discussions have been ineffectual.
264. In the alternative, in the event that the Tribunal finds that the six-month period prescribed under Article 8(3) has not yet elapsed, BGT submits that:
- (a) Article 11 of the BIT, in conjunction with Section 23.1 of the TIA, eliminates the six-month requirement;
  - (b) the six-month requirement should be overridden by the most-favoured-nation clause in the BIT;
  - (c) there would be a lack of utility in complying with the BIT's requirement;
  - (d) the BIT jurisdictional requirements should be set aside because they would result in a duplication of proceedings;
  - (e) there would be a denial of justice if BGT were required to go to the Tanzanian courts pursuant to the BIT's requirement to pursue resolution "*through local remedies or otherwise*".
265. As to point (a) above, BGT submits that by reason of Article 11 of the BIT, local law prevails over the BIT to the extent that its provisions are more favourable to the investor. Article 11 provides that:
- "[i]f the provisions of law of either Contracting Party ... contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement".

266. Section 23.1 of the TIA, a provision of law of a Contracting Party, does not stipulate any minimum time period for negotiations for an amicable settlement. The obligation under Section 23.1 is confined to the exertion of “*all efforts*” by the parties:

“where a dispute arises between a foreign investor and the [Tanzanian Investment] Centre or the UROT in respect of a business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement”.

267. On BGT’s case, it follows that, by Article 11 of the BIT, to the extent that Section 23.1 of the TIA is more favourable to an investor than Article 8(3) of the BIT by not including any six-month requirement, Section 23.1 prevails.

268. As to point (b) above, the second alternative argument invoked by BGT, it is said that Article 3 of the BIT, the most favoured nation (“MFN”) clause, allows BGT to rely on the settlement dispute provisions of the TIA to the extent that they are more favourable than those of the BIT.

269. Article 3(2) of the BIT provides as follows:

“Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords its own nationals or companies or to nationals or companies of any third State”.

270. BGT argues that Article 3(2) of the BIT allows it to rely on the dispute settlement provisions in Section 23.2 of the TIA, to the extent that they are more favourable than the equivalent provisions of the BIT. BGT relies on *Maffezini v. Spain*.<sup>112</sup> It recognises that the ICSID Tribunal in *Plama v. Bulgaria*<sup>113</sup> (among others) has reached an opposite

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<sup>112</sup> Exhibit C-52. *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Award of 13 November 2000, 5 ICSID Rep. 219 (2002), para. 82 [hereinafter *Maffezini v. Spain*].

<sup>113</sup> *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction of 8 February 2005, 20 ICSID Rev.—FILJ 262 (2005); 44 ILM 721 (2005) [hereinafter *Plama v. Bulgaria*].



conclusion, but argues that the facts of the present case are very different from those at issue in *Plama*.

271. As to point (c) above, BGT's further alternative argument, it is submitted that BGT has fully utilised all reasonable available "local remedies" through the pursuit of negotiations, reference of the dispute to two local experts and persistent attempts (following the seizure of 1 June 2005) to instigate discussions with the UROT. BGT contends that no further local remedies were reasonably open to BGT at the time the Request for Arbitration was filed.
272. BGT adds that Article 8(3) of the BIT is not a condition to the Republic's consent to arbitration, nor any form of bar to the jurisdiction of the Tribunal or to the admissibility of BGT's claims. The underlying purpose of the six-month period is to facilitate opportunities for amicable settlement. In August 2005, further delay would not have served this purpose. A long process of negotiation and renegotiation had already failed and the UROT had shown itself to be unwilling to discuss the matter at all since the Minister's statement on 13 May 2005.
273. In support of its position that the six-month waiting period is not a jurisdictional provision, and that non-compliance therewith would not therefore preclude this Tribunal from proceeding in his arbitration, BGT relies on *Ethyl v. Canada*,<sup>114</sup> *Lauder v. Czech Republic*,<sup>115</sup> *Wena Hotels v. Egypt*,<sup>116</sup> *SGS v. Pakistan*,<sup>117</sup> *Sedelmayer v. Russian Federation*,<sup>118</sup> and *Link Trading v. Moldova*.<sup>119</sup>

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<sup>114</sup> *Ethyl Corporation v. Canada* (UNCITRAL Arbitration), Decision on Jurisdiction of 24 June 1998, 7 ICSID Rep.12 (2004), para. 84 [hereinafter *Ethyl v. Canada*].

<sup>115</sup> *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Arbitration), Final Award of 3 September 2001, 4 World Trade and Arbitration Materials 35 (2002), paras. 187, 190-191 [hereinafter *Lauder v. Czech Republic*].

<sup>116</sup> *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Jurisdiction of 29 June 1999, 6 ICSID Rep. 74 (2004); 41 ILM 881 (2002), p. 891 [hereinafter *Wena Hotels v. Egypt*, Decision on Jurisdiction].

274. BGT also relies on *CMS v. Argentina*,<sup>120</sup> in which the Arbitral Tribunal stated that:
- “provided the parties have had an opportunity to engage in negotiations, and in particular where the Host State has shown no willingness to take this opportunity, the registration period requirement must be deemed to be satisfied. Moreover, it is concluded, [the Contracting State] has suffered and will suffer no prejudice [as a result] ...”<sup>121</sup>
275. It is BGT’s position that the UROT has shown no willingness to engage in further negotiations. Moreover, it will not suffer any prejudice if the six-month requirement is deemed satisfied.
276. As to point (d) above, BGT further alleges that the dispute under the BIT and the TIA are actions based on identical facts. To allow the second action to proceed whilst the first is subject to a six-month delay would lead to an inefficient duplication of proceedings, with the prospect of potentially conflicting findings.
277. Finally, BGT submits that should the Tribunal hold that the requirement in Article 8(3) of the BIT has not been satisfied, BGT relies in the alternative on Section 23.2 of the TIA as a separate ground for founding ICSID’s jurisdiction in respect of this dispute.

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<sup>117</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, 18 ICSID Rev.—FILJ 301 (2003), para. 184 [hereinafter *SGS v. Pakistan*].

<sup>118</sup> *Franz J. Sedelmayer v. The Russian Federation*, Award of 7 July 1998, p. 82, available at: <[www.investmentclaims.com](http://www.investmentclaims.com)>.

<sup>119</sup> *Link-Trading Joint Stock Company v. Department for Customs Control of Republic of Moldova* (UNCITRAL Arbitration), Decision on Jurisdiction of 16 February 2001, available at: <[www.investmentclaims.com](http://www.investmentclaims.com)>.

<sup>120</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of 17 July 2003, 7 ICSID Rep. 494 (2005); 42 ILM 788 (2003) [hereinafter *CMS v. Argentina*, Decision on Jurisdiction].

<sup>121</sup> *Ibid.*, para. 122.

**B. BGT QUALIFIES FOR PROTECTION UNDER THE TREATY**

278. In addition to qualifying under the ICSID Convention, BGT maintains that it qualifies for protection under the terms of the BIT itself.

**1. BGT is a protected investor for the purposes of the BIT**

279. As already stated, BGT observes that it is a company incorporated under the laws of England and is therefore a qualifying UK company as defined in Article 1(d)(i) of the BIT. Having made an investment in the Republic, it is entitled to the protection afforded to such companies under the Treaty.

**2. BGT's investment is protected by the BIT**

280. The Project qualifies as an investment under the terms of Article 1(a) of the Treaty, and as such, the Republic has consented to treat assets falling within the categories enumerated therein as investments which may be the subject of disputes submitted to the Centre for arbitration.

281. As set out previously, the BIT defines "investment" in extremely broad terms in its Article 1.

282. According to BGT, the following categories of assets, addressed in the Grant Thornton Report, separately and together, comprise BGT's investment, all of which fall within the definition of "investment" in Article 1 of the BIT, and are therefore protected by the Treaty:

- (a) BGT's shares, loans and interests in City Water. In particular, BGT's USD 2.2 million equity stake in the property and property rights of City Water, the investment vehicle incorporated to implement in part the Project. In addition, BGT's USD 1 million loan to City Water.

- (b) BGT's interest in City Water's contractual rights. In particular, the aggregation of rights provided for under the Lease Contract entered into by City Water and DAWASA constitute an investment of BGT for the purposes of the Treaty, whether BGT's valuable interest in the Lease Contract is recognised as "*every kind of assets*" in the introductory part of the definition of investment in Article 1(a), or as "*claims to money or to any performance under a contract having a financial value*" in Article 1(a)(iii), or "*business concessions conferred by law or under a contract*" in Article 1(a)(v). The Lease Contract constitutes an investment of BGT in the territory of the Republic in and of itself.
- (c) BGT's interest in all other property rights of City Water. BGT enjoyed certain other valuable rights through its stake in City Water, and in particular, BGT's interest in the value accruing from certain rights and interests of City Water itself. According to BGT, these are valuable assets of BGT and constitute an investment falling within the protection of the Treaty. In addition to City Water's rights to performance under the Lease Contract, BGT's investment also encompasses:
- City Water's valuable rights under certain related contracts, including SIPE and POG;
  - City Water's rights under the Certificate of Investment awarded to it by the TIC; and
  - the technical processes and know how made available to City Water through BGT's personnel.

283. On BGT's case, in light of its ownership interest in City Water, BGT is entitled to claim from the Republic the damages it has suffered arising out of the Republic's alleged expropriation of the Lease Contract and other unlawful conduct *vis à vis* City Water. The

entitlement of shareholders to make such a claim is widely recognised in ICSID jurisprudence. BGT cites by way of example *SPP v. Egypt*<sup>122</sup> and *GAMI. v. Mexico*.<sup>123</sup>

### 3. BGT's causes of action arise under the BIT

284. According to BGT, this dispute concerns self-standing claims brought by a UK investor entitled to, and seeking to enforce its right to, protection for its investments under the BIT. Accordingly, BGT seeks an award ordering the Republic to pay to it damages or compensation for the harm caused to it as a result of the Republic's violation of the Treaty and the TIA.
285. Following an amendment to its Request for Arbitration (by which a series of contractual complaints were deleted), BGT confirmed that it did not plead any contractual cause of action in this arbitration. Rather, it directly invoked the international responsibility of the Republic for its violations of the Treaty, as a result of the wrongful conduct of its organs, agencies, controlled entities and individuals for which the Republic is responsible according to international law principles of attribution. According to BGT, the issues in this case are therefore totally distinct from the issues raised in the contractual UNCITRAL arbitration between City Water as claimant and DAWASA as respondent, and which relate to questions of performance under the Lease Contract.

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<sup>122</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award of 20 May 1992, 3 ICSID Rep. 189 (1995), para. 164 [hereinafter *SPP v. Egypt*, Award on Merits].

<sup>123</sup> *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL Arbitration), Award of 15 November 2004, para. 33, available at: [www.state.gov/documents/organization/38789.pdf](http://www.state.gov/documents/organization/38789.pdf) [hereinafter *GAMI v. Mexico*].

**(2) THE REPUBLIC’S POSITION**

286. The Republic contends that the Tribunal does not have jurisdiction over BGT’s claims for four reasons:

- (a) the claims do not arise directly out of an investment within the meaning of Article 25 of the ICSID Convention;
- (b) insufficient evidence has been provided to show that BGT authorised the submission or prosecution of these arbitral proceedings;
- (c) the claims arising under the TIA do not fall within the TIA’s jurisdictional clause;
- (d) the claims were brought in violation of the BIT’s requirement that BGT first attempt to resolve disputes through other means for a period of six months.

**A. BGT’S CLAIMS DO NOT ARISE DIRECTLY OUT OF AN INVESTMENT**

287. According to the Republic, on the basis of BGT’s own financial projections and the report of BGT’s own experts in this case, the 51% ownership of City Water does not constitute an “investment” within the meaning of the ICSID Convention. Among the well recognised characteristics of an Article 25 “investment”, the putative investor must have an expectation of regular return. According to the Republic, a protected investment should be one undertaken on the basis of a reasonable expectation that the investor will benefit economically. In other words, the investment should, *ex ante*, have an economic value that would be recognised by a rational investor.

288. Under this criterion, BGT’s ownership of 51% of City Water’s shares, and the shareholder loan it made to City Water, do not qualify as “investments” under Article 25. On the evidence in this case, BGT, or more accurately Biwater, used the Dar es Salaam Project as a “loss leader”, i.e., an undertaking that was not economically rational standing alone, but that might have led to other profitable opportunities later. City Water’s shares and the shareholder loan might satisfy the BIT’s definition of “investment”, being within the

notion of “every kind of asset”, since this notion could possibly include worthless assets. However, on the Republic’s case, the Tribunal’s jurisdiction is founded upon the objective requirements of Article 25 of the Convention, and the scope of that jurisdiction cannot be expanded through the BIT or otherwise. Under Article 25 of the Convention, a “loss leader” is not an investment, nor would the criteria of “risk” and “substantial commitment” be satisfied in these circumstances.

289. Depending on assumptions, the internal rate of return implied by BGT’s model at the time it bid was approximately 9 to 12%.<sup>124</sup> According to BGT’s own expert, however, a rational investor would have required an internal rate of return of 20 to 25% to justify the risks of this project. From the point of view of a potential investor deciding where to invest its capital, and according to BGT’s own expert, BGT’s bid would simply not have qualified as an option. Therefore, BGT acquired shares in an operating company that no rational investor would have regarded as likely to produce economically valuable returns. Consequently, the Republic concludes, BGT did not make an “investment” within the meaning of Article 25 of the Convention, and this Tribunal has no jurisdiction over BGT’s claims.

**B. BGT HAS NOT ESTABLISHED THAT THIS PROCEEDING HAS BEEN AUTHORISED**

290. On the Republic’s case, BGT has refused to file a document proving that it had properly authorised the commencement and prosecution of this arbitration procedure.
291. The Request for Arbitration was submitted on 2 August 2005. At that time, Rule 2(1)(f) of the ICSID Institution Rules provided as follows:

“the request shall ... state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request”.

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<sup>124</sup> Castalia Report, p. 75.

292. In response to the Secretariat's request to confirm that the filing of the Request had been authorised, BGT submitted letters dated 23 August 2005 and 31 August 2005 from Larry Magor, Chairman of BGT. The 23 August 2005 letter purported to authorise Allen & Overy to submit the Request for Arbitration. However, according to the Republic, Mr. Magor's letters left it unclear as to what actions (if any) had been taken, and when they had been taken, to authorise the commencement of this arbitration.
293. The parties exchanged further correspondence on this issue, and on 18 August 2006, BGT asserted that although a BGT Board Resolution authorising the ICSID proceedings was not required, the Board had in fact agreed at its 20 September 2005 meeting that the arbitration should continue. BGT's counsel inquired whether the Republic had a copy of the minutes of that meeting. BGT agreed to produce these minutes in redacted form, omitting material that was purportedly privileged or irrelevant, provided that the Republic accepted that it would not argue that by producing the redacted document BGT had waived any legal privilege. After a further exchange of correspondence, on 25 October 2006, BGT's Counsel wrote to the Republic, stating that since the Republic had not adequately accepted BGT's conditions, BGT refused to disclose the redacted minutes.
294. Consequently, on the Republic's case, it is not in a position to determine whether the actions that BGT claims provided due authorisation for these proceedings have in fact been taken. Whilst contending that BGT's failure to comply with Rule 2(1)(f) of the ICSID Institution Rules does not automatically require the dismissal of these proceedings, the Republic concludes that since BGT has not met its evidentiary burden of establishing due authorisation, in all the circumstances the proceedings should be dismissed.



### **C. ICSID LACKS JURISDICTION OVER BGT'S TIA CLAIMS**

295. According to the Republic, even if the Tribunal were to exercise jurisdiction over the BIT claims, the TIA claims should be dismissed.
296. On the Republic's case, Section 23.2 of the TIA plainly provides that the arbitral forum must be "*mutually agreed by the parties*". The "*parties*" are the "*foreign investor*" and the "*Centre or the Government*" who are referred to earlier in the provision, and between whom there is a "*dispute*". BGT and the Republic have not agreed to resolve BGT's TIA claims before ICSID, and ICSID therefore has no jurisdiction over such claims.

### **D. BGT DID NOT OBSERVE THE REQUIRED "COOLING-OFF" PERIOD**

297. The Republic observes that Article 3 of the BIT conditions the Contracting Party's consent to ICSID arbitration by a six-month negotiation or "cooling-off" period. In its haste, the Republic contends, BGT submitted this matter to ICSID two months and one day after the alleged expropriation. The Republic submits that it did not consent to arbitrate disputes under such circumstances, and ICSID therefore lacks jurisdiction over this dispute.
298. *Elapse of the Six-Month Period:* BGT's first argument is that the six-month period passed before it submitted its request to ICSID in August 2005. According to the Republic, this cannot be the case, for the simple reason that the events giving rise to BGT's claims began on 13 May 2005.
299. *Article 11 of the BIT:* The Republic also dismisses BGT's second argument, that Article 11 of the BIT, in conjunction with Section 23.1 of the TIA, eliminates the six-month requirement. Section 23.1 of the TIA provides that:
- "... where a dispute arises between a foreign investor and the Tanzanian Investment Centre or the Government in respect of a business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement".

300. On the Republic's analysis, Section 23 does not entitle investors to treatment that is more favourable than the treatment received under the BIT. Under Section 23.2, if a dispute is not settled through negotiations after all efforts to do so have been made, the dispute may be submitted to arbitration under rules and/or at an institution to be mutually agreed. Thus, while Section 23.1 does not specify a minimum period that would satisfy the "*all efforts*" requirement, a UK investor is not entitled to proceed directly to ICSID arbitration once "*all efforts*" have been made; there is the further condition of mutual agreement to the ICSID forum.
301. Further, it cannot be presumed that the period under the TIA is necessarily shorter than under the BIT. In this particular case, according to the Republic, it would not be reasonable to consider a two-month period tantamount to the exercise of "*all efforts*". (Hence, also, ICSID lacks jurisdiction over the TIA claims).
302. *The MFN Provision:* As to BGT's third argument that the six-month requirement should be overridden by the most-favoured nation provision in the BIT, the Republic submits that BGT has failed to identify any nation other than the United Kingdom whose nationals are subject to a different arbitral regime.
303. *Lack of Utility:* As to BGT's argument that complying with the BIT requirements would lack all utility, the Republic takes issue with this approach. Despite BGT's premature filing of the Request for Arbitration, the Republic expressed its willingness to negotiate and asked BGT to present an offer.<sup>125</sup> BGT responded by accusing the Republic of a "*transparent attempt to delay this ICSID arbitration*".<sup>126</sup> The Republic wrote back, saying that its offer was not conditioned on a stay of the ICSID proceedings, and that those

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<sup>125</sup> Letters from Mkono & Co. to Allen & Overy of 27 October 2005 and 3 November 2005.

<sup>126</sup> Letter from Allen & Overy to Mkono & Co. of 14 November 2005, p. 2.

proceedings could continue in parallel with any negotiations. According to the Republic, BGT then dropped the matter.

304. *Duplication of Proceedings:* The Republic further submits that BGT’s fifth argument, according to which the BIT’s jurisdictional requirements should be set aside because they would result in a duplication of proceedings, is unfounded. BGT could have waited to file its claims until the six-month period required by the BIT had elapsed, and then submitted both sets of BIT and TIA claims together.

305. *Alleged Denial of Justice:* Finally, the Republic considers moot the sixth argument invoked by BGT, that there would be a denial of justice if BGT were required to go to the Tanzanian courts pursuant to the BIT’s requirement to pursue a resolution “*through local remedies or otherwise*”. On the Republic’s case, the quoted text does not require litigation before the Tanzanian courts, so long as appropriate efforts are made to resolve the dispute otherwise.

306. The Republic concludes that it and the United Kingdom included the six-month requirement in the BIT for a reason. It was a condition of both Contracting Parties’ consent to ICSID arbitration, and the disregard of this condition therefore means that the Tribunal lacks jurisdiction over BGT’s claims.

### **(3) DECISION OF THE ARBITRAL TRIBUNAL**

#### **A. THE MEANING OF “INVESTMENT”**

307. The Republic accepts that (inter alia) the City Water shares and shareholders’ loans satisfy the BIT’s definition of “investment”, being within the broad category of “*every kind of asset*”. The Republic focuses instead on Article 25 of the Convention, and submits that the Project was a “*loss leader*”, and that as such, being an inevitably unprofitable venture, designed only to further BGT’s interests in other possible future investments, it cannot itself be regarded as an “investment” within the meaning of the Convention. In particular,

the criteria of “*risk*” and “*substantial commitment*” would not be satisfied in such circumstances.

308. As noted earlier, the Republic relies upon BGT’s own expert evidence to assert that a rational investor would have required an internal rate of return on this Project of 20 to 25% to justify the risks, whereas BGT based its bid on an internal rate of return of 9 to 12%. According to the Republic, if the Project does not qualify as an “investment” for the purposes of Article 25 of the Convention, the fact that it may qualify as an “investment” under the relevant BIT is of no relevance, since Article 25 has an autonomous meaning which cannot be expanded by agreement.
309. The Arbitral Tribunal does not agree with the Republic’s analysis for a number of reasons, as set out below.
310. *The Criteria for an “Investment”*: An initial point arises as to the relevant test to be applied. In advancing submissions on Article 25 of the ICSID Convention, parties not infrequently begin with the proposition that the term “investment” is not defined in the ICSID Convention, and then proceed to apply each of the five criteria, or benchmarks, that were originally suggested by the arbitral tribunal in *Fedax v. Venezuela*,<sup>127</sup> and re-stated (notably) in *Salini v. Morocco*,<sup>128</sup> namely (i) duration; (ii) regularity of profit and return; (iii) assumption of risk; (iv) substantial commitment; and (v) significance for the host State’s development.<sup>129</sup>

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<sup>127</sup> *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Jurisdiction of 11 July 1997, 5 ICSID Rep. 183 (2002) [hereinafter *Fedax v. Venezuela*].

<sup>128</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, 42 ILM 609 (2003) [hereinafter *Salini v. Morocco*].

<sup>129</sup> *Ibid.*, para. 199.

311. This was the approach of both BGT and the Republic in this case, and it is the alleged failure of the so-called “*Salini Test*” that gives rise to the Republic’s jurisdictional objection.
312. In the Tribunal’s view, there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of “investment” were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States.<sup>130</sup> Hence the following oft-quoted passage in the Report of the Executive Directors:

“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”<sup>131</sup>

313. Given that the Convention was not drafted with a strict, objective, definition of “investment”, it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes. As noted by one commentator:

“There is no multilateral grant of authority over objective interpretation granted to individual tribunals sitting in cases of particular investor-State disputes.”<sup>132</sup>

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<sup>130</sup> See e.g., Ch. Schreuer, *The ICSID Convention: A Commentary* (2001), pp. 121-125, paras. 80-88.

<sup>131</sup> International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), in 1 ICSID Reports 28 (1993), para. 27.

<sup>132</sup> D. Krishan, “A Notion of ICSID Investment” in *Investment Treaty Arbitration: A Debate and Discussion* (T. Weiler, ed. 2008).

314. Further, the *Salini Test* itself is problematic if, as some tribunals have found, the “typical characteristics” of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of “investment” (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of “investment” more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.
315. Equally, the suggestion that the “special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged”<sup>133</sup> does not, in this Arbitral Tribunal’s view, lead to a fixed or autonomous definition of “investment” which must prevail in all cases, for the “type of investment” which the Contracting States to the Convention in fact envisaged was an intentionally undefined one, which was susceptible of agreement.
316. The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of “investment” is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.

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<sup>133</sup> Per *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No ARB/99/7), Decision on the Application for Annulment of the Award of 1 November 2006, para. 25.

317. The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of the meaning of “investment” by reference to the parties’ agreement, rather than imposing a strict autonomous definition, as per the *Salini Test*.<sup>134</sup>
318. To this end, even if the Republic could demonstrate that any, or all, of the *Salini* criteria are not satisfied in this case, this would not necessarily be sufficient – in and of itself - to deny jurisdiction.
319. *The Evidence*: Upon a consideration of the evidence, the Arbitral Tribunal rejects the Republic’s characterisation of the Project as a “*loss leader*”. Anticipated rates of return may well vary as between different investors, and may depend upon a range of different factors. There is therefore no basis to impose a rate of return of 20 to 25% upon BGT, as an absolute standard, in order for its investment to qualify under Article 25 of the ICSID Convention.
320. BGT intended the project to be profitable, albeit with a relatively low rate of return.<sup>135</sup> It invested substantial amounts of equity into City Water; it posted substantial Performance Bonds; and it advanced to the company a shareholder loan of USD 1 million, together with additional support and development funds. It also considered the Project to be in its economic interest and supplied the company with key personnel and also with technology and know-how. The Arbitral Tribunal considers that, viewed overall, and against the

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<sup>134</sup> *E.g. Philippe Gruslin v. Malaysia* (ICSID Case No. ARB/99/3), Award of 27 November 2000, 5 ICSID Rep. 484 (2002); *AES Corporation v. Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/03/30), Decision of 11 May 2005; *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/7), Decision on Jurisdiction of 10 June 2005; *IBM World Trade Corp. v. Republic of Ecuador* (ICSID Case No. ARB/02/10), Decision on Jurisdiction of 22 December 2003; *Lanco International, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), 8 December 1998, 40 ILM 457 (2001); *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003, 44 ILM 404 (2005) [hereinafter *Generation Ukraine v. Ukraine*]; *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2), Award of 15 March 2002; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of 16 August 2007.

<sup>135</sup> *E.g.* Second Witness Statement of Cliff Stone, para. 58; Witness Statement of Larry Magor, paras. 5-6.

backdrop of the scope of consent to ICSID jurisdiction as expressed in the BIT, this was clearly an “investment” within the meaning of Article 25 of the ICSID Convention. Further, even if such are required for the purposes of Article 25 of the Convention, the conditions of “*risk*” and “*commitment*” which are disputed by the Republic were present in BGT’s investment.

321. *Difficulties with the Republic’s Approach:* Even if the Arbitral Tribunal had concluded that the Project was a “loss leader”, it remains unclear why it should not then benefit from the protection of the ICSID Convention. Put another way, the Tribunal considers that if a party has ulterior motives for undertaking a project, and perhaps anticipates only a possible long-term and indirect benefit (e.g. other profitable opportunities), it does not thereby disqualify itself or its project from the ICSID regime. Indeed, the Republic’s suggested approach would entail a difficult and possibly protracted investigation into the economic profile of any given project, as well as the particular motivation of those behind it, as an initial jurisdictional issue. The Arbitral Tribunal considers that this was not the intention of Article 25 of the ICSID Convention, which was premised neither upon any particular IRR threshold, nor any particular conception of economic return or benefit.
322. For all these reasons, the Arbitral Tribunal dismisses the Republic’s first jurisdictional objection.

## **B. BGT’S AUTHORISATION OF THESE PROCEEDINGS**

323. As to the Republic’s second jurisdictional objection, the Shareholders Agreement between Biwater and Gauff deals with the requirements for corporate acts of BGT, and is expressed as taking precedence over the Articles of Incorporation or By-Laws of the Company. Under the Shareholders Agreement, certain corporate acts require the affirmative vote of shareholders representing at least 81% of the shares of the company (the so-called “Reserved Matters”). Commencing arbitration or litigation proceedings is not a Reserved



Matter. The decision to commence arbitration proceedings may therefore be taken by a majority vote of 51%. The Shareholders Agreement further provides that the business of the board of directors may be conducted in any manner approved by the directors. As an 80% shareholder of BGT, Biwater had authority to approve the conduct of its business. Accordingly, as Biwater holds 80% of the voting equity in BGT, the Arbitral Tribunal is satisfied that it had the authority to commence and continue these arbitration proceedings and could authorise them retrospectively, if required.

324. Further, the Arbitral Tribunal has no reason to question BGT's confirmation that the continuation of these proceedings was the subject of unanimous approval at a BGT board meeting held on 20 September 2005.
325. The Arbitral Tribunal therefore dismisses the Republic's second jurisdictional objection.

### **C. JURISDICTION OVER THE TIA CLAIMS**

326. Section 23.2 of the TIA provides as follows:

“A dispute between a foreign investor and the [Tanzania Investment] Centre or the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say -

- (a) in accordance with arbitration laws of Tanzania for investors;
- (b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes;
- (c) within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic and the Government of the country where the investor originates”.

327. The issue of ICSID's jurisdiction over TIA claims was raised for the first time by the Secretariat in a letter of 17 August 2005 addressed to BGT, in the following terms :

“It would appear that the requesting party and the United Republic of Tanzania have not mutually agreed to submit the dispute to ICSID arbitration under

Section 23.2 of the Tanzania Investment Act. Please provide us with any observation that you may have in this respect”.

328. On 23 August 2005, BGT answered that Section 23.2(b) of the TIA constitutes a unilateral offer to submit a dispute arising under the TIA to ICSID arbitration, and that no further written consent was required from the Republic. BGT further submitted that even if it was determined that Section 23.2(b) of the TIA did not constitute a unilateral offer to arbitrate, such consent is constituted by either: (i) the consent to arbitration which appears in Article 8 of the BIT; or (ii) the consent to arbitration which appears in the Certificate of Incentives delivered to BGT by the Tanzanian Authorities. BGT further specified that in both cases, its consent to the submission of the dispute to ICSID arbitration under Section 23.2 of the TIA was constituted by the Request.
329. *Unilateral Standing Offer:* The first stage in BGT’s argument with respect to the TIA claims is its characterisation of Section 23.2 of the TIA as a unilateral, standing offer by the Republic to submit disputes to ICSID. This analysis faces the immediate - and in the Arbitral Tribunal’s view insurmountable - difficulty that the options for dispute resolution in Section 23.2(a)-(c) are conditioned by the words “*as may be mutually agreed by the parties*”. In the present context, these words are most naturally read as meaning that a dispute may be referred to any one of the three options, but only depending upon the agreement of the parties. In other words, a subsequent agreement between the parties is required – which is very different from a standing unilateral offer which simply requires acceptance by an investor. Indeed, there is no other language at all in Section 23 to suggest a standing unilateral offer by the Republic.
330. Hence the difference in wording between Section 23.2 of the TIA and Article 8 of the BIT (which only requires written consent to conciliation or arbitration by the investor).

331. The Arbitral Tribunal notes that a possible counter-argument to this interpretation of Section 23.2 of the TIA could be that it renders the three listed options in Section 23.2(a) to (c) somewhat superfluous, since if each option is dependent upon a further agreement between the parties, there is no need to list different options – as the parties could agree any option, even beyond the three so listed. In the current context, this argument is not compelling. Given that one of the contracting parties will be a State, there are many reasons why its options for future agreements might be carefully defined and delimited in advance. Section 23.2 clears the way for the State to conclude specific types of dispute resolution agreement, without internal issues such as *ultra vires* arising, and as such it provides a degree of certainty for investors. Further, this type of provision (i.e. one or more options, conditioned by a requirement for a further agreement) is not uncommon, for example in certain generations of bilateral investment treaties. As noted by Dolzer & Stevens:

“A handful of BITs provide (in terms the mandatory phrasing of which is somewhat illusory) that investment disputes ‘shall’ be submitted to ICSID arbitration but only if there is a subsequent agreement to that effect between the disputing parties. Thus, for example, the 1979 treaty between Sweden and Malaysia provides that:

‘In the event of a dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party, it *shall upon the agreement by both parties to the dispute be submitted* for arbitration to [ICSID] ... ‘

Two other Swedish BITs contain nearly identical provisions. Such provisions appear merely to acknowledge the possibility that the parties to the dispute might conclude ICSID arbitration agreements. While these provisions therefore certainly do not themselves embody consents to ICSID arbitration, one should not discount the moral force that they may exercise, once an investment dispute has arisen, upon the parties to agree, if necessary, to resort to arbitration as suggested by the BIT.

Certain BITs concluded by the Netherlands have developed this approach in provisions that, while they again do not themselves constitute consent to ICSID arbitration, explicitly either urge or

require the States concerned to give such consents if requested by aggrieved investors. ...

Several more treaties of the Netherlands go one step further and appear to make mandatory the giving of consent to ICSID arbitration. ...

Similar provisions appear in Japanese BITs and in a few BITs concluded by Australia, France and the U.K. Under none of these provisions, however, would the investor have an immediate right to resort to ICSID arbitration. Such right would in each case depend upon the granting by the host State of the required 'assent' or consent. ...<sup>136</sup>

332. If BGT's analysis is adopted, no sensible meaning could be given to the words "*as may be mutually agreed by the parties*". Even if one were to somehow construe the optional language of "may" as a mandatory "shall" (as might be the approach in certain commercial arbitration regimes), the result would be no different – there would still be no existing consent by the Republic, but only some sort of obligation on the part of the Republic to provide its consent. Following the analysis set out in Dolzer & Stevens (above), this would still not provide the investor with an immediate right to arbitration.
333. BGT also argues that the language in the preamble to the TIA, in which the TIA is said "*to provide more favourable conditions for investors*", must be taken to be a promise to investors such as BGT of the more favourable treatment found in the BIT, including its dispute resolution settlement procedures. The Arbitral Tribunal considers this an extremely strained reading of this part of the TIA preamble. It seeks to elevate generalised introductory language into a specific and operative MFN provision, and then to apply this in accordance with the reasoning in cases such as *Maffezini v. Spain*.<sup>137</sup> This latter reasoning remains a controversial matter in this field, but one that this Arbitral Tribunal need not broach given that the words relied upon in the preamble of the TIA cannot be

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<sup>136</sup> R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, (1995), p. 132-134 [hereinafter Dolzer & Stevens]. A similar analysis is applied by the learned authors to a generation of BITs that provide a list of alternative dispute resolution options, as well as a requirement for subsequent consent.

<sup>137</sup> See *Maffezini v. Spain*, Award of 13 November 2000.

construed as an operative MFN provision in any event, and certainly not one that would support BGT's conclusion.

334. *The Republic's Consent:* As an alternative to a unilateral standing consent, BGT argues that a subsequent consent for the purposes of Section 23.2 of the TIA has already been provided by the Republic, namely (i) in Article 8 of the BIT; or (ii) in the Certificate of Incentives delivered to BGT by the Tanzanian Authorities. The Arbitral Tribunal disagrees.
335. As for Article 8 of the BIT, this is a consent to refer disputes under the BIT to ICSID arbitration. It cannot be read as a consent to refer any dispute to ICSID, whether or not arising out of the BIT, and including disputes under the TIA.
336. As for the Certificate of Incentives, this simply refers back to provisions of the TIA, but does not contain any separate consent.
337. *Conclusion:* BGT and the Republic have not agreed to refer BGT's TIA claims to ICSID. It follows that the Republic's (third) jurisdictional objection must be accepted, and accordingly that this Arbitral Tribunal has no jurisdiction over BGT's TIA claims.

#### **D. OBSERVANCE OF THE SIX-MONTH SETTLEMENT PERIOD**

338. The Republic's fourth jurisdictional objection raises a number of separate issues.
339. *Timing:* The six-month period in Article 8(3) of the BIT commences at the point in time when the dispute "arises". Determining when the present dispute arose, however, is by no means a straightforward task. This is a multifaceted dispute. It crystallised with specific events that took place in May and June 2005, but its constituent elements may be traced much further back, for example to November 2004, when BGT's request for a tariff adjustment was denied.

340. As BGT points out, there were attempts to resolve differences between the parties throughout their troubled relationship. As early as April 2004, Mr. Brian Winfield and other BGT / City Water representatives held discussions with the Minister; between April 2004 and May 2005, negotiations between the various interested entities (including City Water and DAWASA) took place; submissions were made by each party to PwC as an independent expert; direct discussions took place between Mr. White and the Minister; and mediated discussions took place under the auspices of TRC.
341. Overall, however, as the Republic points out, the key events about which BGT complains, and upon which it has principally relied in articulating its claims, occurred in May and June 2005, and the Arbitral Tribunal considers that it is these events which must be taken to have triggered the six-month period. It may be noted in this regard that many of BGT's complaints pre-May 2005 concern the conduct of the earlier negotiations between the parties, and it is therefore difficult to count these negotiations, in themselves, as the satisfaction of a post-dispute settlement period.
342. The Arbitral Tribunal therefore proceeds from the premise that at the time the Request for Arbitration was filed in August 2005, the six-month prescribed settlement or "cooling off" period under Article 8(3) of the BIT had not yet elapsed.
343. *The Nature of the Six-Month Period:* The Republic's objection depends upon the characterisation of the six-month period in Article 8(3) of the BIT as a condition precedent to the Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims. In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the

six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.

344. In the Arbitral Tribunal's view, such consequences would not have been contemplated in the framing of Article 8(3), and nothing in the text of this provision requires such, as a matter of treaty interpretation.

345. Equally, this is not to render the relevant wording in Article 8(3) superfluous (as was suggested, *e.g.*, in *Generation Ukraine v. Ukraine*<sup>138</sup>). Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition.

346. Although there are different approaches to this issue, in part depending upon the particular treaty provisions in question, the Arbitral Tribunal notes that its analysis is in line with that adopted in many previous arbitral awards, in respect of equivalent provisions (as cited by BGT).<sup>139</sup>

347. In this case, the course of events amply demonstrated that any further delay on BGT's part would not have served any useful purpose. By the time the Request for Arbitration was filed, a long process of negotiation and renegotiation had already failed, and the Republic's

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<sup>138</sup> *Generation Ukraine v. Ukraine*, Award of 16 September 2003, para. 14.3.

<sup>139</sup> *See above* para. 273.

position was entrenched – in particular by virtue of Minister Lowassa’s public statement of 13 May 2005, and the steps that had since been taken to deport City Water personnel, and take over its operations. It was therefore entirely reasonable for BGT to proceed to arbitration, rather than seeking to resolve the dispute through “*local remedies or otherwise*”. As observed by the ICSID Tribunal in *CMS v. Argentina*:

“provided the parties have had an opportunity to engage in negotiations, and in particular where the host State has shown no willingness to take this opportunity, the registration period requirement must be deemed to be satisfied. Moreover, it is concluded, [the Contracting State] has suffered and will suffer no prejudice [as a result]...”<sup>140</sup>

348. *Waiver*: Even if the six-month period in Article 8(3) constituted a strict condition precedent to this Arbitral Tribunal’s jurisdiction, or the admissibility of BGT’s claims, the Arbitral Tribunal considers that any such condition was waived by the Republic, or cannot be relied upon by it, since it was the Republic’s own actions in May to June 2005 (in particular, its public statements; deportation of City Water staff; and forced takeover of the Project) that effectively precluded any possibility of negotiation between the parties.

349. *Further Issues*: As recorded earlier, arguments were also advanced by the parties as to the effect of Articles 11 and 3(2) of the BIT, and in particular whether the MFN provisions of the BIT might allow for the six-month period in Article 8(3) to be disapplied. Given the conclusions set out above, these issues do not require determination.

350. The Arbitral Tribunal therefore dismisses the Republic’s fourth jurisdictional objection.

## **E. CONCLUSIONS**

351. The Arbitral Tribunal concludes that it has jurisdiction over this dispute, in so far as it concerns alleged violations of the BIT, but does not have jurisdiction over this dispute in so far as it concerns claims under the TIA.

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<sup>140</sup> *CMS v. Argentina*, Decision on Jurisdiction, para. 122.



352. The four conditions in Article 25(1) of the ICSID Convention are satisfied. The dispute is legal; it arises directly out of an investment; and concerns the UROT and a UK company, BGT. The parties to the dispute have consented in writing to submit the dispute to ICSID. The UROT's consent was given pursuant to the BIT. BGT's written acceptance of UROT's offer was constituted by the Request for Arbitration.
353. BGT also qualifies for protection under the BIT. BGT is a company incorporated under the laws of England and Wales and is therefore a protected investor for the purposes of the BIT (Article 1(d)(i)). As is common ground, BGT's investment falls within the BIT's definition of "investment". Finally, BGT's causes of action arise under the Treaty.
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## CHAPTER V. THE CLAIMS

### (1) OVERVIEW

354. According to BGT, the Republic has breached customary international law and the obligations set out in Articles 2, 5 and 6 of the BIT in the following respects:

- (a) *Expropriation*: the Republic has expropriated BGT's investment in breach of Article 5 of the Treaty by failing to: (i) act for a public purpose related to the Republic's internal needs; (ii) act on a non-discriminatory basis; and (iii) provide prompt, adequate and effective compensation;
- (b) *Fair and Equitable Treatment*: the Republic has breached Article 2 of the Treaty by failing to accord at all times to BGT's investment "*fair and equitable treatment*";
- (c) *Unreasonable or Discriminatory Measures*: the Republic has violated its obligation in Article 2 of the Treaty not to "*impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments*" of BGT;
- (d) *Full Protection and Security*: the Republic has breached Article 2 of the Treaty by failing to ensure "*full protection and security*" for BGT's investment;
- (e) *Unrestricted Transfer of Capital and Returns*: the Republic has failed to ensure the right of unrestricted transfer of capital and returns in relation to BGT's investment in breach of Article 6 of the Treaty.

355. Each of these claims is addressed in turn below, following consideration of the *Amici* Brief dated 26 March 2007, which provides a very useful initial context for the Arbitral Tribunal's enquiry.

**(2) THE AMICI BRIEF**

**A. BACKGROUND TO THE AMICI BRIEF**

356. The involvement of the Petitioners in this case was permitted by the Arbitral Tribunal notwithstanding BGT's opposition.

357. BGT argued (inter alia) that the concerns of the Petitioners are factually and legally irrelevant to the issues to be decided by the Arbitral Tribunal in this arbitration. According to BGT, the dispute between the parties arises out of the privatisation and investment that in fact took place, and that no issues arise as to whether the Republic ought to have involved the private sector in the water supply process in the first instance; what form of private sector participation should have been employed (if any); or whether the purported termination of the lease contract was a failure of the concept of private sector participation in general. Further, BGT submitted that no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development. In BGT's view, there was nothing the Petitioners could add regarding the issues to be determined which could not be said by either party and, since it alleged that this is a requirement of ICSID Arbitration Rule 37(2), BGT argued that this factor was enough to justify the Arbitral Tribunal rejecting the Petitioner's application.

358. As set out in *Procedural Order No. 5*, the Arbitral Tribunal did not accept BGT's position. The Arbitral Tribunal noted that it is mandated to resolve claims as between BGT and the Republic, but also recognised that this arbitration raises a number of issues of concern to the wider community in Tanzania. It was therefore not inappropriate that the arbitral process permit some participation of interested non-disputing parties. It was also important that the Arbitral Tribunal be provided with information and submissions on the issues in dispute from all relevant standpoints. To this end, the Arbitral Tribunal respectfully adopted the words of the Arbitral Tribunal in *Methanex v. United States of America*,

“there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal’s willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm”.<sup>141</sup>

359. The five Petitioners comprise NGOs with specialised interests and expertise in human rights, environmental and good governance issues locally in Tanzania. They approach the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings.

360. *Nature of the Petitioners’ Participation:* In order to place the Petitioners’ contribution in context, it is appropriate to record the nature of their participation.

361. In granting the Petitioners an involvement in these proceedings, the Arbitral Tribunal noted that the ICSID Arbitration Rules do not, in terms, provide for an *amicus curiae* “status”, in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of procedural privileges that that might entail. Rather, the Arbitration Rules expressly contemplate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Rule 37(2) of the ICSID Arbitration Rules also provides that:

“the Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and

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<sup>141</sup> *Methanex v. United States of America* (UNCITRAL Arbitration), Decision on Petitions from Third Persons to Intervene as *Amici Curiae* of 15 January 2001, para. 49.

that both parties are given an opportunity to present their observations on the non-disputing party submission”.

362. In this case, the Petition was made at a very late stage in the proceedings, at a time when full memorials had already been exchanged, and the parties were in final preparation for the merits hearing. Serious concerns were therefore raised as to the fairness and integrity of the Petitioners’ participation.
363. In order to address these concerns, and to safeguard the interests of all parties (and non-parties), the Arbitral Tribunal implemented a two-stage process. In the first instance, the Petitioners were permitted to file an initial written submission, articulating their arguments, and providing information. This, however, was to be without attaching evidence or documentation, but rather identifying any such material that the Petitioners may wish to introduce at a later stage. This allowed each party a three week period prior to the main hearing in order to consider the written submission, and decide how best to address it (if at all). Following the conclusion of the hearing, and having consulted with the disputing parties, the Arbitral Tribunal would then issue procedural directions for responses from both parties to the written submission (in so far as any party wished to respond further), as well as for any further written submissions, documents or evidence from the Petitioners, in so far as the Arbitral Tribunal deemed this appropriate (having by then had the benefit of a full merits hearing).
364. The Petitioners duly filed their Brief. Following the merits hearing, however, both parties then agreed that no further filing or intervention in these proceedings by the Petitioners was in fact needed (*Procedural Order No. 6*).
365. *Access to Documents:* In the course of their application, the Petitioners applied to have access to a very wide range of the documents that had been produced by the parties for the purposes of these proceedings. This was resisted by BGT, who suggested that the scope of

documents sought by the Petitioners was suggestive of a broader wish on their part to engage in, and monitor, the proceedings as a matter of general interest, rather than a desire to provide assistance to the Arbitral Tribunal in relation to a particular subject matter.

366. In addressing this issue, the Arbitral Tribunal noted that it was important to be clear as to the proper role of a “non disputing party”, or *amicus curiae* in any given case. In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it was envisaged that the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These, indeed, are the areas that fell within the ambit of Rule 37(2)(a) of the ICSID Arbitration Rules. Given the generalised nature of the Petitioners’ interests and participation, what was not expected was that the Petitioners (a) would consider themselves as simply in the same position as either party’s lawyers, or (b) that they would see their role as suggesting to the Arbitral Tribunal how issues of fact or law as presented by the parties ought to be determined (which is obviously the sole mandate of the Arbitral Tribunal itself).
367. This was a very public and widely reported dispute. The broad policy issues on which the Petitioners are especially qualified are ones which were in the public domain, and about which each Petitioner was already very well acquainted. These, after all, were the very issues that led to their application to intervene in these proceedings. The Arbitral Tribunal concluded that none of these types of issue required – at least for the Petitioners’ first filing – disclosure of documents from the arbitration.
368. This, however, was an issue that was to be revisited after the conclusion of the merits hearing (at stage two of the envisaged procedure). Moreover, as set out in *Procedural Order No. 3*, there were specific reasons of procedural integrity that had led the Arbitral Tribunal to impose certain limitations on disclosure to third parties of documents and

information in this case, and it was envisaged that these concerns may lessen or disappear at that stage. As noted above, as matters transpired, at the conclusion of the merits hearing, all parties agreed that no further intervention by the Petitioners was required, and so this issue was not revisited.

369. *Attendance at Hearing*: It may be noted further that the Petitioners did not attend any of the oral hearings in this arbitration. BGT objected to such attendance and, by ICSID Arbitration Rule 32(2), the Arbitral Tribunal therefore had no power to permit it.

## **B. THE AMICI'S SUBMISSIONS**

370. The Petitioners provided information and views relevant to the Arbitral Tribunal's mandate. Certain key themes are summarised below.
371. *Investor Responsibility*: In a first section, the brief sets out the *Amici*'s arguments on investor responsibility, which are expressed in terms of correlative limitations on the ambit of BIT protections.
372. As a first principle in this regard, it is emphasised, citing a *dictum* in the *Maffezini* case, that “*Bilateral Investment Treaties are not insurance policies against bad business judgments*”.<sup>142</sup> Nor are they insurance policies for all the negative impacts of governmental actions or activities.
373. According to the *Amici*, this is complemented by a second limitation: that “*investors are expected to be intelligent and aware of the environment into which they are investing*”.<sup>143</sup>

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<sup>142</sup> Amici Brief, para.16, citing *Maffezini v. Spain*, Award of 13 November 2000, para. 64. See also *Eudoro A. Olguin v. Republic of Paraguay* (ICSID Case No. ARB/98/5), Award of 26 July 2001, para. 73 [hereinafter *Olguin v. Paraguay*]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No ARB/01/7), Award of 25 May 2004, para. 178 [hereinafter *MTD v. Chile*].

<sup>143</sup> See e.g., *Olguin v. Paraguay*, Award of 26 July 2001, para. 65b; *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, 17 ICSID Rev.—FILJ 395 (2002), para. 348 [hereinafter *Genin v. Estonia*]; *Methanex v. United States of America* (UNCITRAL Arbitration), Final Award on Jurisdiction and Merits of 3 August 2005, p. 5, paras. 9-10 [hereinafter *Methanex v. United States*, Final Award].

On this view, investment agreements cannot be relied upon as a bulwark against factors that investors should know about through good business practices, including the general political economy surrounding the investment. Investors remain responsible for their own actions and omissions during the investment-making and investment implementing processes. They cannot, in the Petitioners' view, seek the protections of international investment agreements in order to avoid the commercial, contractual or regulatory consequences of their acts. In particular, an investor's failure to conduct an adequate risk assessment, or unconscionable behaviour in order to win a bid, will affect its rights under the investment contract and any applicable investment agreement or BIT.

374. According to the *Amici*, these broad principles have specific application to the present arbitration. In particular, the *Amici* emphasise:

- (a) the duty to apply proper business standards to the investment process, including proper due diligence procedures;
- (b) the principle of *pacta sunt servanda*; and
- (c) the duty to act in good faith both prior to and during the investment period.

375. With respect (a) (the duty to apply proper business standards to the investment process, including proper due diligence procedures), the *Amici* submit that an investor investing abroad has the responsibility of making a proper assessment of risks involved before entering into the investment. This is in line with commercial contract law and practice on due diligence whereby the investor is expected to assess and carry the responsibility for regular commercial risks. Hence, for example, the observation in *Waste Management v. Mexico* that:

“... it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and



dependent for its success on unsustainable assumptions about customer uptake and contractual performance.”<sup>144</sup>

376. It is said further that investors cannot expect the ‘easiest’ investment climate when investing in developing countries or countries in transition, and that the business risks that an investor has to accept may well be greater than they would be in another investment climate. The *Amici* refer to Professor Muchlinski for the proposition that:

“The recent case-law on the scope of protection offered by IIAs appears to be developing a principle that the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk-high return location. Any losses that subsequently arise out of an inaccurate risk assessment will be borne by the investor. They will not be recoverable under the terms of the investment treaty ... The development of such a principle is justified by the view that IISs, ‘are not insurance policies against bad business judgments.’”<sup>145</sup>

377. With respect to (b) (*pacta sunt servanda*) it is said that an investor’s failure to meet obligations undertaken in a contract with a host State, especially in an infrastructure project, can uproot the entire foundation of the contract, jeopardise its basic goals for the community involved, and create significant risks to human health, the operation of businesses, and the achievement of development and other societal objectives. The principle of *pacta sunt servanda* lies at the core of any contract and, according to the *Amici*, its application to this dispute cannot be doubted. The *Amici* note that the sanctity of contract is critical in the privatisation process, where monopoly services are moved, usually as ongoing monopolies, from the public to private sector. When private sector investors fail to meet their obligations, it is not simply the commercial bargain that is put at risk, but the very welfare of the citizens that the privatisation was mandated to enhance. In

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<sup>144</sup> *Waste Management, Inc. v. United Mexican States* (ICSID Case No ARB/AF/98/02), Award of 2 June 2000, 15 ICSID Rev.—FILJ 214 (2000); 40 ILM 56 (2001), para. 177 [hereinafter *Waste Management v. Mexico (No. 1)*].

<sup>145</sup> P. Muchlinski, “Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard”, 55 ICLQ 527, 530 (2006) [hereinafter Muchlinski, *Fair and Equitable*].

the *Amici's* submission, the principle of *pacta sunt servanda* remains the most critical bulwark against such a result.

378. Finally, with respect to (c) (the duty to act in good faith both prior to and during the investment period), relying on previous ICSID decisions, the *Amici* submit that the duty of good faith is a foundation for the entire investor-State process. For host governments, it is reflected in the obligation for fair and equitable treatment. For investors, according to the *Amici*, the duty of an investor to act in good faith exists as a general principle of law, which is not necessarily tied to any specific treaty provision. For this, the *Amici* cite a series of previous awards, including *Inceysa v. El Salvador*<sup>146</sup>, *World Duty Free v. Kenya*,<sup>147</sup> *Azinian v. Mexico*,<sup>148</sup> and *Genin v. Estonia*.<sup>149</sup>
379. Against the background of these principles, the *Amici* submit that, given the nature of the Project, the issue of investor responsibility in this case must be assessed in the context of sustainable development and human rights. It is noted that the Millennium Development Goals, adopted by the United Nations in 2000, include the target of reducing by half the number of people without proper access to potable water, by 2015. The implementation of this target has since been the subject of many conferences, statements and declarations, which have declared that “water is a key to sustainable development”. Access to clean water is, moreover, characterised as a basic human right by the United Nations Committee on Economic, Social and Cultural Rights in 2002. BGT itself has acknowledged the

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<sup>146</sup> *Inceysa Vallisoletana S.L. v. El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, paras. 230-239 [hereinafter *Inceysa v. El Salvador*].

<sup>147</sup> *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7), Award of 4 October 2006 [hereinafter *World Duty Free v. Kenya*].

<sup>148</sup> *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award of 1 November 1999, 14 ICSID Rev.—FILJ 538 (1999); 39 ILM 537 (2000) [hereinafter *Azinian v. Mexico*].

<sup>149</sup> *Genin v. Estonia*, Award of 25 June 2001, paras. 362-363.

existence and importance of this right, stating that “every man, woman and child has the right to reliable system of clean water and good sanitation”.<sup>150</sup>

380. The *Amici* submit that human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host State. They conclude that foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development (such as the project here), have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law. This is precisely because such investments necessarily carry with them very serious risks to the population at large.
381. *BGT’s Alleged Failures:* Having analysed the scope and nature of investor responsibility in general, the *Amici* contend that, in this case, BGT failed to meet its specific responsibilities, and that it is BGT’s own acts and omissions, rather than those of the Republic, which caused the investment to fail. In particular, it is said that BGT did not apply proper business standards and necessary care either in the pre-investment or the investment phases. On the *Amici’s* analysis, BGT submitted a bid that was too low for it to be able to meet the costs of providing the water services it promised to provide. Its business plan was based on unsustainable assumptions about contractual performance, and it did not carry out proper due diligence to determine the feasibility and viability of the investment in the pre-establishment phase.
382. According to the *Amici*, these are failures for which BGT alone is responsible. The *Amici* note in this regard that, at the time of the bid submission, BGT (and Biwater) affiliated entities had already invested in a number of developing countries, including water supply,

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<sup>150</sup> Citing Biwater “World Water Forum” in *Biwater Focuss*, 16 March 2003, p. 15, available at: <[www.biwater.com/library](http://www.biwater.com/library)>.

treatment and sanitation operations in Guatemala, Indonesia, Mexico, Malaysia, Nigeria, Panama, Philippines and South Africa. According to the *Amici*, this experience ensured – or should have ensured – that BGT was aware of “*the notorious state of financial and operational data on water systems in developing countries*”, and BGT therefore should have undertaken due diligence with particular care.

383. Further, the *Amici* contend that BGT’s performance during the investment phase itself was poor, and in breach of the basic principle of *pacta sunt servanda*. The number of new connections was less than promised in the contract. BGT failed to deposit the “social connection tariff” into the “First Time New Domestic Water Supply Connection Fund”. According to the *Amici*, there was a decline in the availability of water in many parts of Dar es Salaam over the period the lease was in force. Overall, BGT’s performance resulted in an income that was lower than projected and, ultimately, the failure of the contract. It is observed that BGT’s poor performance affected not only BGT’s income, but also the people of Dar es Salaam who were dependent on BGT for water delivery during the contract period and in the future.

384. *Alleged “Renegotiation Strategy”*: The *Amici* also submit that the pattern of BGT’s behaviour suggests a pre- and post-investment “renegotiation strategy” – in other words a strategy of bidding low in order to secure the contract, with a view to forcing its renegotiation thereafter. This entails so-called “opportunistic” bidding, which is explained by the *Amici* as follows:

“... This strategy is well known in the infrastructure investment business. In the main, analysts have focused on renegotiations initiated by host states in order to increase their share of royalties, taxes, ownership in a joint venture, etc. Such cases have made for large public headlines. While global figures do not appear to be available, recent analysis of renegotiations in Latin America across all major sectors shows that water privatizations are significantly more subject to renegotiation than any other sectors, with a 74% renegotiation rate, and 66% of those initiated by the investor. The average time frame for such renegotiations in the water sector in Latin America has been 1.6 years. These figures suggest that

renegotiation is a well known business strategy. Its potential benefits for the private sector operator when initiated by them, and losses for the public and government interlocutor, are clear:

‘If concessions are renegotiated shortly after their award, as often happens, the initial bidding or auction turns into a bilateral negotiation between the winning operator and the government – undermining competitive discipline of the auction. At that stage the operator has significant leverage, because the government is often unable to reject renegotiation and is usually unwilling to claim failure – and let the operator abandon the concession – for fear of political backlash and additional transaction costs. In such cases the operator, through renegotiations, can undermine all the benefits of the bidding – or auction led competitive process.’<sup>151</sup>

Costs not noted here, in particular in the water and sanitation sectors, may include significant losses in service to the public, increased costs for service, increased health risks during renegotiation and transition periods, and public security issues resulting from water problems, amongst others.”<sup>152</sup>

385. In alleging that such a strategy was deployed here, the *Amici* adopt an approach outlined by the Tribunal in *Methanex v. United States*,<sup>153</sup> i.e. the drawing of “appropriate inferences” from the facts, or “joining the dots”. The *Amici* rely upon numerous points in this regard, including (inter alia) the allegations that (a) BGT submitted the lowest possible level of bid on tariffs, the basic source of income from the project; (b) BGT bid below the level of its own cost projections; (c) BGT failed to undertake a proper due diligence examination of the water services operation before submitting the bid, despite the notoriety of the poor operational and financial shape of the service; (d) BGT agreed to keep all previous staff of the public water company and supervising authority, thereby keeping costs high; (e) City Water failed to deposit the “social connection tariff” into the FTNDWS Connection Fund, thereby minimising new sunk capital costs that otherwise would have been lost if the investment failed; (f) BGT sought an interim tariff review in August 2004; (g) efforts to renegotiate the Lease Contract then began no later than 16 months after the Lease Contract

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<sup>151</sup> Quotation from José Luis Guasch, *Doing it Right*, p. 33.

<sup>152</sup> *Amici* Brief, pp. 33-34.

<sup>153</sup> *Methanex v. United States*, Final Award, paras. 2-3, 19, 37-38.

entered into force; (h) the scope of demands by BGT included many key elements of the Project; (i) City Water held back from investing the full amount of equity required from it under the Lease Contract, and refused to inject further capital until the renegotiation was complete.

386. If indeed BGT pursued an intentional renegotiation strategy, the *Amici* contend that its conduct constitutes bad faith and this must have serious consequences as a matter of law. These consequences are developed in the last section of the brief.
387. According to the *Amici*, the Lease Contract was validly terminated. The termination was an action by the Republic to prevent further deterioration of water delivery services. Citizens were suffering as a direct consequence of the failed investment. BGT had failed to meet the agreed performance targets and had caused a decline in the availability of water in many parts of Dar es Salaam. By not fulfilling the promises contained in its bid, BGT had created a situation of urgency requiring governmental action. In fact, the Government, carrying the duty to provide access to water to its citizens, had to take action under its obligations under human rights law to ensure access to water for its citizens. In this light, terminating the agreement cannot be found to be a breach of a contract whose very purpose was to promote and enhance the achievement of human rights.
388. Finally, the *Amici* submit that what is termed international investment “case law” provides a sound basis for the concept that investor’s conduct has consequences for claims against the host State under investment treaties.
389. First, investor’s conduct can affect the validity of the claim altogether. This is the case where the investor is not in good faith or where its conduct is unconscionable. Examples include fraudulent behaviour, misrepresentation, or abuse of power. The *Amici* submit that the Arbitral Tribunal should come to the same conclusion if it concludes that BGT’s bid was submitted as part of a renegotiation strategy.

390. It is contended further that, should the Arbitral Tribunal not find the presence of a renegotiation strategy, BGT's lack of due diligence in the bidding phase and poor business practices during the investment should be taken into account when considering any alleged bilateral investment treaty violation.
391. It is also submitted that if the Arbitral Tribunal finds in accordance with the *Amici's* submission, an award of costs against BGT would be appropriate. Using the investor-State process to seek compensation for the failure of a renegotiation strategy should be discouraged. An award of costs is said to be the appropriate means for sending this clear signal.

### **C. RELEVANCE**

392. As noted earlier, the Arbitral Tribunal has found the *Amici's* observations useful. Their submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici's* submissions are returned to in that context.

## **(3) EXPROPRIATION**

### **A. BGT'S POSITION**

#### **1. Acts constituting expropriation**

393. According to BGT, the Republic's conduct amounted to the expropriation of BGT's investment in two respects, namely:
- the repudiation of the Lease Contract and more precisely, the means by which the Government sought to implement the termination; and
  - the occupation of City Water's facilities, usurpation of management control and deportation of City Water's senior managers.
394. Under Article 5(1) of the Treaty, investments of nationals or companies of either Contracting Party shall not be:

“nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. ...”.

395. By inclusion of the words “*measures having effect equivalent to ... expropriation*”, BGT observes that Article 5 encompasses both direct expropriation, in the sense of formal governmental takings, and *de facto* or indirect expropriations, which are the product of measures short of an actual taking of title, but which nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor. As stated in the *Metalclad* case,<sup>154</sup> indirect expropriation includes:

“not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably – to – be expected economic benefit of property even if not necessarily to the obvious benefit of the host State”.

396. BGT further emphasises that it is not an essential element of an expropriation that its investment may or may not have been taken for the direct benefit of the Republic. In *AMCO Asia v. Indonesia*,<sup>155</sup> an ICSID tribunal observed that :

“It is generally accepted in international law, that a case of expropriation exists not only when a state takes over private property but also when the expropriating state transfers ownership to another legal person or natural person”.

397. BGT submits that the Republic has either directly expropriated its investment, by an open, deliberate and acknowledged taking of property or, in the alternative, the Republic has indirectly expropriated BGT’s investment. In either case, the Republic has failed to comply with the following requirements of Article 5:

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<sup>154</sup> *Metalclad Corp. v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2000, 5 ICSID Rep. 212 (2002), para. 103 [hereinafter *Metalclad v. Mexico*].

<sup>155</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award of 20 November 1984, 1 ICSID Rep. 413 (1993), p. 455 [hereinafter *AMCO Asia v. Indonesia*].



- the Republic has not acted for a legitimate “public purpose related to the internal needs of the [Republic]”;
- the Republic has failed to act “on a non-discriminatory basis”; and
- the Republic has failed to pay BGT “prompt, adequate and effective compensation”.

398. According to BGT, beyond the obligation that the Republic pay prompt, adequate and effective compensation, the failure of the Republic to comply with the other conduct requirements of Article 5 places the Republic in breach of Article 5, thus invoking its international responsibility and, in principle, entitling BGT to seek full *restitutio in integrum* or its monetary equivalent.

## 2. Repudiation of the Lease Contract

399. BGT submits that its investment has been expropriated, or effectively expropriated by “*measures having effect equivalent to ... expropriation*”, by the Republic’s procurement of DAWASA’s repudiation of the Lease Contract. BGT’s interest in the Lease Contract constitutes an asset qualifying as an investment for the purposes of the Treaty and therefore may be expropriated. Indeed, the Lease Contract was the crucial economic asset at the heart of BGT’s investment.

400. According to BGT, it is long-established as a matter of international law, since at least the 1922 award concerning the *Norwegian Shipowners’ Claims*,<sup>156</sup> that an investor’s contractual rights may be expropriated. This principle is well-established in the jurisprudence of ICSID tribunals. In *SPP v. Egypt*, the tribunal declared that:

“contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore. ... it has long been recognized that contractual rights may be indirectly expropriated”<sup>157</sup>

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<sup>156</sup> *Norwegian Shipowners’ Claims* (Norway v. USA) (Permanent Court of Arbitration), Award of 13 October 1922, 1 RJAA 307.

<sup>157</sup> *SPP v. Egypt*, Award on Merits, paras. 164-165.

401. BGT acknowledges that there had been disagreements between DAWASA and City Water concerning their respective rights and obligations under the Lease Contract. These had been the subject of a structured series of negotiations. Renegotiation of the Lease Contract was a matter for consideration even though the Lease Contract had not yet been in effect for a full two years. Given the subsequent forcible seizure of BGT's interests in the Project and executive termination of the Lease Contract, BGT contends that it is not necessary for the Arbitral Tribunal to address any questions concerning the parties' respective obligations under the Lease Contract.
402. For BGT, the present dispute bears remarkable similarity to that in *Wena Hotels v. Egypt*, where there had been serious disagreements over the parties' respective performances under long term leases of certain hotels in Egypt. The tribunal in that case decided that it was not necessary to determine the truth of these conflicting allegation; rather it was sufficient:
- “for this proceeding simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases”.<sup>158</sup>
403. The tribunal in that case further held that the supervening seizure and occupation of the hotels by EHC eclipsed any contractual issue. These events constituted a deprivation on the part of Egypt of Wena's fundamental rights of ownership and involved a failure to accord fair and equitable treatment and full protection and security to Wena's investments in breach of the applicable investment protection treaty.
404. BGT concludes that, in the same manner as in the *Wena Hotels*, the present Arbitral Tribunal need not delve into any of the disputed questions of performance under the Lease Contract given the Republic's subsequent unilateral termination of the contract “by

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<sup>158</sup> *Wena Hotels v. Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, 6 ICSID Rep. 89 (2004), p. 94, para. 19 [hereinafter *Wena Hotels v. Egypt*, Final Award].

executive fiat”, the forcible seizure and occupation of City Water’s premises and the “outrageous” deportation, the same day, of City Water’s senior management.

405. BGT further recalls in this context that arbitral tribunals have repeatedly recognised and applied the principle that not only rights *in rem* may be expropriated but also intangible rights including contractual rights.<sup>159</sup>
406. BGT alleges that, in this case, the Lease Contract was summarily announced to have been terminated by executive authority, outside of the process of contractual negotiation in which the parties to the Lease Contract had been proactively engaged. Without notice, Minister Lowassa unilaterally declared on television that the Lease Contract was terminated. According to BGT, this declaration cannot be equated to the normal act of a co-contractor, acting pursuant to a legitimate contractual right. It was a governmental edict bearing no relation to the procedure for termination stipulated under the Lease Contract, nor to what BGT describes as the normal commercial negotiations which were ongoing between City Water and DAWASA concerning the Project. In BGT’s words, this was “*the headline-grabbing policy statement of a political candidate in populist campaign mode*”. By this executive act, the Minister sought to escape the Republic’s contractual bargain with a foreign investor without paying compensation, apparently in order to win popular support in the forthcoming elections, by installing in its place the Government’s own favoured business.
407. BGT also claims that the Republic subsequently instructed or procured its tax authority, the TRA, to repudiate the agreed tax treatment of BGT’s investment even during the contractual notice period. The Republic’s arbitrary and unjustified cancellation, with effect

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<sup>159</sup> See for example *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 183 (1994), p. 209 [hereinafter *Biloune v. Ghana*]; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, 18 ICSID Rev.—FILJ 602 (2003); 7 ICSID Rep. 178 (2005), paras. 127, 128, 178 [hereinafter *Middle East Cement v. Egypt*].

from 24 May 2005, of the VAT relief to which City Water was entitled, fell within a pattern of violations of BGT's rights as a foreign investor and further contributes, according to BGT, to the inescapable conclusion that the Republic effectively expropriated BGT's investment.

### **3. Occupation of City Water's facilities, usurpation of management control and deportation of City Water's managers**

408. According to BGT, the expropriation, or the *de facto* expropriation, of BGT's investments is further evidenced and confirmed by the occupation of City Water's facilities, usurpation of management and seizure of City Water's operations, and the deportation of City Water's management.
409. On BGT's case, the Republic's abusive treatment of BGT and its business in Dar es Salaam was made manifest when Minister Lowassa summoned all City Water's staff to a meeting on 17 May 2005, at which the Minister declared that City Water's operations, and all of its staff, would be transferred to new managers.
410. According to BGT, the subsequent occupation of City Water's facilities by DAWASA and DAWASCO, acting under the instructions of the Republic, constituted an expropriatory act. Its direct result was to deprive BGT, through City Water, of any ability to pursue its economic activities in relation to the Project. In BGT's view, the occupation, and the denial of City Water's management's right to access City Water's offices, was not the conduct of a normal private contractual counter-party. A private entity would have found itself in breach of local civil, and potentially, criminal laws, including trespass.
411. Until the expiry of the notice period given in the 25 May Notice of Intention to Terminate (i.e., 24 June 2005), City Water had an exclusive right of access to its premises, guaranteed to it under the Lease Contract. The forcible intrusion of DAWASA and DAWASCO was a

clear assertion of sovereign power, supported and enabled by the acquiescence of government agencies who would otherwise have been called upon by City Water to uphold its rights under local law, in particular, the Tanzanian police force.

412. BGT asserts that the expropriation culminated when the Republic procured first its police force to apprehend City Water’s managers and, secondly, its Immigration Authority to arrange their hasty deportation out of Tanzania in most irregular circumstances.

#### 4. Accumulation of Acts

413. In addition to the separate acts identified above, it is also BGT’s case that the cumulative effect of all of these acts (and omissions) – when taken together – constituted the effective expropriation of BGT’s investment. In other words, even if each particular act (or omission), of itself, is insufficient to amount to an expropriation, the overall effect of all such acts (and omissions) was the wrongful negation of BGT’s investment.

414. BGT here applies the test as articulated by the ICSID tribunal in *TECMED v. Mexico*, where it was stated that in order to establish an indirect expropriation:

“... it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss”<sup>160</sup>.

415. BGT states that it may yet hold its shares in City Water, but as a result of the Republic’s conduct overall, it is the economic reality that those assets have lost their value or economic use for BGT so that they may be said to have been effectively expropriated. A *de facto* expropriation may have occurred where interference rises to the level that

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<sup>160</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, 19 ICSID Rev. —FILJ 158 (2004), para. 115 [hereinafter *TECMED v. Mexico*].

enjoyment of those assets is nullified because the investor's control over the use and operation of its investment is no longer effective.

416. In support of its position that an overall assessment as to the effect of the Republic's conduct must be taken, BGT relies, inter alia, on:

- (a) *Revere Copper & Brass v. Overseas Private Investment Corporation*,<sup>161</sup> in which the Government of Jamaica substantially increased the royalties due to it from a concession (on the basis of a concession contract between itself and a subsidiary of the Claimant) in spite of a stabilisation provision in the concession contract. The company could no longer continue its operations. An AAA arbitration tribunal found that the Government had effectively taken Revere Copper's investment:

“in our view the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA [the subsidiary of Revere Copper], have substantially the same impact on effective control over use and operations as if the properties were themselves conceded by a concession contract that was repudiated....”<sup>162</sup>

- (b) The *Biloune v. Ghana* case in which government officials had caused construction work to cease on the basis that it violated local laws because certain construction permits had not been obtained. The UNCITRAL tribunal in that case decided that not every individual act necessarily constituted an expropriation in and of itself, but that their cumulative effect led to “*the irreparable cessation of work on the project*”<sup>163</sup>. The tribunal further held that:

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<sup>161</sup> *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation*, Award of 24 August 1978, 56 ILR 258, p. 291.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Biloune v. Ghana*, Award on Jurisdiction and Liability of 27 October 1989, p. 209.

“the Government of Ghana, by its acts and omissions culminating with Mr. Biloune’s deportation, constructively expropriated MDCL’s assets and Mr. Biloune’s interests therein”.<sup>164</sup>

- (c) The *Benvenuti & Bonfant v. Congo*<sup>165</sup> case, in which an ICSID tribunal concluded that the cumulative effect of a series of governmental acts, including the host state’s interference with the marketing of the investor’s products by prescribing fixed sales price and winding-up a company incorporated to conduct marketing activities, instituting criminal proceedings against the principal entrepreneur behind the investment causing him to flee the country, and the physical seizure and occupation of the investors’ premises, together constituted a *de facto* expropriation.

## 5. Conclusion

417. According to BGT, the present dispute does not turn on questions of contractual performance, but rather involves serious abuses of governmental power (*puissance publique*) committed by and on behalf of the Republic, which have abrogated BGT’s reasonably-to-be-expected economic benefits accruing from the Lease Contract. These acts (and omissions) were not merely the acts of a private co-contractor in respect of a disputed contractual right; it concerns an expropriation, not a mere contractual termination.
418. BGT concludes that the Republic has, by overwhelming exercise of its governmental power, expropriated BGT’s investment through the combined effect of:
- the executive announcement of “termination” of the Lease Contract;
  - the executive usurpation of management control of City Water’s staff;
  - the unilateral cancellation of City Water’s VAT relief on purchases;
  - the unlawful deportation of City Water’s senior management;

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<sup>164</sup> *Ibid.*, p. 210.

<sup>165</sup> *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of Congo* (ICSID Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Rep. 330, p. 357 [hereinafter *Benvenuti & Bonfant v. Congo*].

- the occupation of City Water's offices; and
- the take-over of City Water's business.

## **B. THE REPUBLIC'S POSITION**

419. According to the Republic, BGT's expropriation claim fails for a number of separate reasons, namely:

- BGT did not have anything that could have been expropriated, even in principle;
- BGT's own decisions and actions defeat its expropriation claim;
- BGT has failed to prove that any alleged expropriatory act caused compensable harm.

### **1. BGT had nothing that could have been expropriated**

420. The Republic accepts that contractual rights can, in principle, be expropriated. It is the Republic's case, however, that BGT had no such rights as of the date of the alleged expropriation. Whatever BGT might have had, it had via its shareholding in City Water. All that City Water ever had were contractual rights, and those were extinguished because of City Water's breaches. Thus, BGT had nothing that could have been expropriated.

421. If legal rights can be expropriated, expropriation implies the existence of "*property*" having some "*value*" or "*economic benefit*". If the "*property*" consists, directly or indirectly, of contract rights, BGT must prove that such rights had value (and still existed) at the time of the alleged expropriation.

422. Therefore, according to the Republic, BGT is wrong when it says that the Arbitral Tribunal need not consider the scope and continuing force of (what on BGT's own case was) "*the crucial economic assets at the heart of BGT's investment*", namely the Lease Contract. City Water's many breaches of contract meant that its contractual rights had been extinguished or were at best terminable at DAWASA's election at any time, and had been so for a year or more before May 2005. In that month, DAWASA finally exercised its



right to terminate the Lease Contract. That being the case, City Water, and by extension, BGT, cannot have been deprived of any valuable right on 1 June 2005, the alleged date of the expropriation.

423. BGT argues that this case is not a private commercial dispute turning on questions of contractual performance. According to the Republic, even if this is true, the existence and scope of City Water's contractual rights and performance are indispensable to BGT's international law expropriation claim.

424. The Republic alleges in this respect that City Water repeatedly breached the Lease Contract by, for example:

- failing to remit the Lessor Tariff on scores of occasions (Article 39.2);
- failing to pay the rental fee in every month from June 2004 through June 2005 and in several months before then (Article 39.4);
- regularly misappropriating the FTNDWSC Tariff (Article 37.2);
- failing on numerous occasions to file obligatory reports or filing them late or with an inadequate content (Articles 59-61);
- failing to provide adequate working capital to carry out City Water's contractual obligations (Article 4.2 (viii)); and
- failing to procure maintenance of a performance guarantee in full force and effect for the duration of the Lease Contract (Article 47.1).

425. Each of these breaches was the subject of detailed elaboration in the Republic's memorials.

426. As a result of City Water's breaches, according to the Republic, DAWASA was entitled to invoke a number of contractual remedies, namely:

- the imposition of penalties (Article 48.1 of the Lease Contract);

- calling the performance bond to compensate City Water’s myriad breaches, since it guaranteed “*all the Operator’s obligations under this Contract including without limitation those under Article 48 (financial penalties)*”;
- setting off City Water’s financial obligations to DAWASA against any of the obligations DAWASA had to City Water (Article 48.8 of the Lease Contract);
- issuing a Cure Notice under Article 50.1 of the Lease Contract, which DAWASA did on 17 May 2005;
- terminating the Lease Contract because of a material breach (Article 51(c)) or failure to pay assessed penalties (51(g)) or failure to maintain a Performance Guarantee (51(h)).

427. Despite its contention that the Arbitral Tribunal need not determine the parties’ obligations under the Lease Contract, BGT argues that, under the Lease Contract, City Water was entitled to remain for a thirty day period after the 25 May 2005 Notice of Termination. BGT’s claim is that by taking possession three weeks too soon, DAWASA (and the Republic) committed not merely a breach of contract, but an expropriation.

428. As to this, the Republic makes a number of points. First, the Republic submits that BGT is incorrect about City Water’s rights under the Lease Contract. DAWASA was lawfully entitled to take any measures before the expiration of the termination period, if it was concerned about the continuity of services and the smooth transition of management control. Articles 3.3 and 55-57 of the Lease Contract required City Water to cooperate in various ways in the transition. Correlatively, under Article 55 of the Lease Contract, DAWASA was entitled to:

“take *any measures* during the last six months of this contract (or as the case may be, upon early termination) necessary to ensure continuity of water supply and sewerage services and to facilitate the progressive change from the provisions of this contract with a new system of management”. [emphasis added]

429. Whilst BGT maintains that City Water had an exclusive right of access to the Gerazani premises, guaranteed to it under the Lease Contract, the Republic argues that (aside from the fact that City Water was leasing the offices from DAWASA in exchange for a monthly Rental Fee that it had not paid for more than a year), Article 55 of the Lease Contract must be construed as giving DAWASA the discretion to determine what steps were necessary upon early termination. In particular, it had a contractual discretion (a) as to whether any measures were necessary and (b) as to what measures ought to be taken. On the Republic's case, this discretion ought not to be second-guessed with the benefit of hindsight, unless its actions were so extreme that they could not reasonably have been thought appropriate at the time. According to the Republic, Mr. Stone's repeated public and private assertions that City Water was not going anywhere, and the fact that City Water did not have enough funds to perform properly and could endanger public health, DAWASA was entitled to judge that it was appropriate to retake possession of the assets as soon as possible.
430. Second, even if DAWASA is held to have made a contractually impermissible decision, it remains that the general rule under international law is not that a breach of BGT's contractual rights is irrelevant to an expropriation claim, but rather that it is *insufficient* to establish such a claim. It is well settled that the performance or breach of contractual obligations by a State-owned corporation is not attributable to the State itself; and even a breach of contract by the State itself does not violate international law. In either instance, there has to be a denial of justice as well in order for an international delict attributable to the State to be established.<sup>166</sup> Given the availability of UNCITRAL arbitration to resolve any complaints about DAWASA's performance, a denial of justice cannot be established

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<sup>166</sup> Citing *Azinian v. Mexico*, Award of 1 November 1999; Oppenheim's International Law, Jennings & Watts, (9<sup>th</sup> Ed., 1992), p. 927; I. Brownlie, Principles of Public International Law (3<sup>rd</sup> Ed., 1979), pp. 522-523 [hereinafter *Brownlie*, Principles of International Law].

here. The Republic relies in this regard on the *Waste Management v. Mexico (No. 2)* award, providing that:

“The availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a [fair and equitable treatment and full protection and security] standard ... [has] been complied with by the State. Were it not so, Chapter 11 [of NAFTA] would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose.”<sup>167</sup>

431. Therefore, even if DAWASA (or the Republic itself) had breached the Lease Contract, that would not be enough to establish expropriation. In the *Azinian* case, where the claimant argued that a fundamental breach of contract by the city council constituted expropriation, the tribunal responded as follows:

“Labelling is ... no substitute for analysis. The words ‘confiscatory,’ ‘destroy contractual rights as an asset,’ or ‘repudiation’ may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder – and that is not satisfactory for present purposes.”<sup>168</sup>

432. Similarly, in the *Waste Management (No. 2)* case, the tribunal held that:

“[a] failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled.”<sup>169</sup>

433. Consequently, on the Republic’s case, BGT must show more than a mere breach of contract by DAWASA. It is also not sufficient for BGT to demonstrate that the Republic assisted DAWASA in the latter’s assertion of its contractual rights (allegedly) three weeks too soon to establish the existence of an expropriation.

434. Further, in deciding how best to address the crisis, including how to carry out the repossession of the leased assets at DAWASA’s request, the Republic was entitled to a

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<sup>167</sup> *Waste Management, Inc. v. United Mexican States (No.2)* (ICSID Case No. ARB(AF)/00/3), Final Award of 30 April 2004, para. 116 [hereinafter *Waste Management v. Mexico (No. 2)*, Final Award].

<sup>168</sup> *Azinian v. Mexico*, Award of 1 November 1999, para. 90.

<sup>169</sup> *Waste Management v. Mexico (No.2)*, Final Award, para.177.

measure of appreciation.<sup>170</sup> Water and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so. City Water's non performance was already threatening the success of a USD 165 million project to upgrade water and sanitation services. Now, the Republic insists, City Water's management was publicly stating that City Water would hold the system hostage irrespective of DAWASA's position on the matter. So long as City Water stayed in control, the very best that could be hoped for was continued decay and lack of progress in light not only of City Water's record but the fact that it had no cash left with which to make any progress.

435. Moreover, that "best case" scenario was hardly guaranteed. City Water's creditors could cause the company to be wound up whenever they chose. According to the Republic, City Water had already stopped paying for essential goods and services, such as the chemicals needed to treat the raw water drawn from the Upper and Lower Ruvu Rivers. Given City Water's lack of cooperation, DAWASA and the Government could not know whether there were sufficient stocks of critical supplies. At any time, City Water could collapse or voluntarily depart, leaving chaos behind. Further, its dwindling resources could make it impossible to pay its employees, resulting in a strike on short notice.

436. In short, City Water had created a real threat to public health and welfare. DAWASA and the Government judged quite reasonably that the system had to be freed of City Water's control. Considering the importance of the issue at hand, the fact that City Water was entitled to remain in control for three weeks at most, and City Water's own responsibility for creating the crisis, the Government acted well within the Republic's margin of appreciation under international law.

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<sup>170</sup> See *Ireland v. United Kingdom* [1978] ECHR 5310/71, paras. 214, 229; *Lithgow and others v United Kingdom* [1986] ECHR 9006/80, para. 122; *Smith & another v. United Kingdom* [1999] ECHR 33985/96, para. 77; *Rasmussen v. Denmark* [1984] ECHR 8777/79, para. 40.

437. Finally, even assuming that City Water was wrongfully deprived of its last three weeks of operating the system, there would be no expropriation. Indeed, on BGT's own formulation of the standard, BGT must prove "*a significant depreciation of value*" of its shares in City Water. As of 1 June 2005, City Water was losing more money every week. Being deprived of three weeks of losses hardly constitutes "*a significant depreciation*" of value. Therefore, BGT's best case is that it was deprived of its "*investment*" for three money-losing weeks. That cannot constitute an expropriation leaving aside the question of what a proper compensation would be for not suffering three weeks of losses.
438. Indeed, expropriation occurs when "the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral".<sup>171</sup> For example, in *Pope & Talbot*, a NAFTA tribunal required that "measures affecting property interests" had to be of a certain "magnitude or severity" to qualify as indirect expropriation.<sup>172</sup> In the *TECMED* case, an ICSID tribunal held that in accordance with international law, the investment could be considered as having been indirectly expropriated if the deprivation of the foreign investor's property was "not temporary".<sup>173</sup>
439. In conclusion, the Republic submits that before anything can be taken from an investor, the investor must *have* something of value capable of being taken. All that BGT had, it had through a company in which it owed 51% of the shares. All that company had were contractual rights governed by Tanzanian law. As a matter of Tanzanian law, those rights were subject to termination because of the company's repeated and incurable breaches. Therefore, BGT cannot have a valid expropriation claim. BGT's contrary contention, that

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<sup>171</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran & Others* (Case No. 7 (141-7-2), Award of 29 June 1984, 6 Iran-US C.T.R. 219, p. 225.

<sup>172</sup> *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL Arbitration), Interim Award of 26 June 2000, para. 96 [hereinafter *Pope & Talbot v. Canada*].

<sup>173</sup> *TECMED v. Mexico*, Award of 29 May 2003, para. 116.

DAWASA breached the thirty-day notice period for termination, does not alter these basic facts, nor would DAWASA's alleged breach itself constitute an expropriation.

## 2. BGT's own decisions and actions defeat its claim

440. The Republic points out that it is a well-established principle of international law that an investor cannot seek compensation from a State because of its own poor performance and weak business planning. The Republic further submits that international courts and tribunals have repeatedly emphasised that international investment law is not intended to protect investors from the normal commercial risk inherent in their business ventures and in the host country's economic environment, including risk arising from an investor's own conduct. In other words, losses caused by BGT's own bad judgment and poor operational performance do not constitute expropriation.
441. According to the Republic, BGT took an informed risk when it decided to bid for the Lease Contract on the terms it did. The fact that such risk materialised, due in large part to its own incompetence and undercapitalisation of City Water, does not entitle it to claim compensation from the Republic.
442. The Republic relies on the *Azinian* award<sup>174</sup> and the *Waste Management* award<sup>175</sup>, both already cited. In the latter case, a concession for waste disposal and street cleaning services in the city of Acapulco was awarded to the claimant's wholly-owned subsidiary. The concession soon encountered financial problems and the claimant alleged that the totality of the treatment to which its investment had been subject amounted to expropriation. The tribunal rejected the claimant's argument and stated that the claimant had entered into the investment on the basis of an overoptimistic assessment of the possibilities. It concluded:

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<sup>174</sup> See *Azinian v. Mexico*, Award of 1 November 1999.

<sup>175</sup> *Waste Management v. Mexico (No. 2)*, Final Award.

“it is not the function of the international law of expropriation as reflected in [NAFTA] Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependant for its success on unsustainable assumptions about customer uptake and contractual performance”.<sup>176</sup>

443. The *Waste Management* tribunal found that the claimant’s venture had not failed because the enterprise had been seized. Rather, the tribunal found that the operation had been persistently uneconomic, as a result of contractual defaults, changes of circumstances and the fragility of the underlying business plan. According to the Republic, the same failings and circumstances are what brought City Water down here.

### 3. Causation

444. According to the Republic, none of the allegedly expropriatory acts caused BGT to lose the economic benefit of any asset or deprived it of any significant value. It notes BGT’s alternative argument that the acts complained of *cumulatively* amounted to expropriation, but rejects this, arguing that the cases BGT relies on in this regard do not show that a series of actions, none of which caused any material economic harm, can add up to an expropriation. The Republic submits that it is conceivable for there to be a sequence of events, each of which *did* affect the value of an investment, but none of which by itself would be significant enough to constitute an expropriation. In such circumstances, the combined effect of these events might amount to expropriation – but that this is not the case here.
445. On the Republic’s case, the loss of value in BGT’s investment was caused by BGT itself and City Water. Even if that had not been the case, any possible remaining value would have been cut off by DAWASA’s decision to terminate the Lease Contract. Once the decision was made, City Water had no prospect of ever making profits to distribute to its

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<sup>176</sup> *Ibid.*, para. 177.



shareholders. The proper forum to challenge that decision is the contractual UNCITRAL forum. The other allegedly expropriatory acts – whether considered separately or as a whole – had no effect on City Water’s value, whether the events are considered separately or as a whole.

446. According to the Republic, BGT does not deny that DAWASA was entitled to terminate the Lease Contract as a matter of Tanzanian law. BGT considers that what constituted expropriation was (i) Minister Lowassa’s announcement on 13 May 2005; (ii) the denial of a VAT exemption application on 24 May 2005; (iii) the removal of City Water from its offices and the installation of DAWASCO; and (iv) the deportation of three expatriate managers. None of these events caused BGT any economic harm that could properly be the subject of an expropriation claim, as set forth above.

447. BGT’s complaint about Minister Lowassa’s 13 May 2005 announcement that the Lease Contract would be terminated recalls the *Waste Management* award. In that case, the claimant argued that the mayor had contributed to the alleged expropriation by making a speech stating that the claimant’s services would be eliminated. The tribunal rejected this argument:

“the mayor’s statement may have added to [claimant’s] difficulties, but in the tribunal’s view did not cause the difficulties, nor did it bring about the failure of the enterprise. Rather it was symptomatic of a public debate about the concession at a difficult time for all concerned”<sup>177</sup>.

448. Minister Lowassa’s statement did not cause BGT difficulties or bring about City Water’s failure. The damage had long since been done. Similarly, BGT cannot show a causal link between the TRA’s denial of a VAT exemption application and any harm to BGT.

449. As for the actions taken on 1 June 2005 are concerned, the Republic contends that the *Biloune* and *Benvenuti* cases do not stand for the proposition that the forced departure of

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<sup>177</sup> *Waste Management v. Mexico (No. 2)*, Final Award, para. 56.

expatriate investors or managers is *ipso facto* an expropriation. Moreover, the facts in the two cases are quite different from those in the case at hand. In *Biloune*, the tribunal paid particular regard to the investor's justified reliance on the government's representations regarding a building permit. Here, City Water had legitimately lost its right to possession of the water and sewerage system and its leased office space. In *Benvenuti*, on the other hand, the facts presented there were almost the inverse of the record here. It was the respondent State that was in repeated and flagrant breach of its contract with the claimant and failed to run a business in which it was a part-owner effectively. In this case, it was City Water that was in perpetual and flagrant breach of contract. For that reason, DAWASA's decision to terminate the Lease Contract and repossess its property was not "bereft of all legal justifications".

450. In the same vein, BGT's allegation that expropriation occurs when the host state substitutes a foreign investor's management with its own, is unfounded. It is true that when the investor has a right to continue managing the assets, depriving the investor's chosen managers of control over the asset can be part of an expropriation. But upon termination of the Lease Contract, whether by expiration of the ten-year term or sooner because of City Water's breaches, City Water's management was obliged to hand over control. There cannot be an expropriation of something to which Claimant never had a legitimate claim.<sup>178</sup> *Wena Hotels* does not lead to another position and if it did, the Republic suggests that it would not be appropriate for this Arbitral Tribunal to follow "its fundamentally mistaken reasoning".

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<sup>178</sup> *Generation Ukraine v. Ukraine*, Award of 16 September 2003, para. 22.1.

## C. DECISION OF THE ARBITRAL TRIBUNAL

### 1. General principles and preliminary issues

451. *The Relevant Standard:* By Article 5(1) of the Treaty, investments of nationals or companies of either Contracting Party shall not be:

“nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. ...”.

452. This is a broadly framed provision. The Treaty encompasses not only direct expropriation (i.e. a formal Government taking) but also *de facto* or indirect expropriations which do not involve actual takings of title but nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor. This was uncontroversial as between the parties.

453. A party’s interest in a lease contract, encompassing by definition the use and enjoyment of the lessor’s assets during a certain time, undoubtedly constitutes an investment within the ambit of this protection. Hence, for example, a contractual right to use the lessor’s assets to supply services to customers, as well as the right to bill these customers and collect money from them for the services rendered, cannot be expropriated except for a public purpose related to the internal needs of that party, on a non-discriminatory basis, and against prompt, adequate and effective compensation.

454. A number of specific facets of this protection may conveniently be addressed at the outset, before applying Article 5 of the BIT to the facts of this case.

455. *Individual and Cumulative Acts:* In terms of what might qualify as “expropriation”, the Arbitral Tribunal accepts BGT’s submission that it must consider the Republic’s conduct both in terms of the effect of individual, isolated, acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, in so far as such a

cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets. As was stated, for example, in *Tradex v. Albania*:

“While the [...] Award has come to the conclusion that none of the single decisions and events alleged by Tradex to constitute an expropriation can indeed be qualified by the Tribunal as expropriation, it might still be possible that, and the Tribunal, therefore, has to examine and evaluate hereafter whether the combination of the decisions and events can be qualified as expropriation of Tradex’s foreign investment in a long, step-by-step process by Albania.”<sup>179</sup>

456. This approach is akin to the accumulation effect that is well-recognised in the specific context of “creeping” expropriation. As it was put by the tribunal in *Siemens v. Argentina*:

“By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.”<sup>180</sup>

457. “*Puissance Publique*”: It is common ground that the breach of a contract or the termination of an agreement does not *per se* constitute an expropriation as a matter of international law. As summarised above, it is the Republic’s case that for a breach of contract to be sufficient as a matter of international law to amount to an expropriation, there has to be a denial of justice as well, in order for an international delict attributable to the State to be established. Hence the Republic argues that the availability of UNCITRAL arbitration to resolve any complaints about DAWASA’s contractual performance means that there can be no allegation of denial of justice in this case.

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<sup>179</sup> *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2), Award of 29 April 1999, 14 ICSID Review-FILJ 197 (1999), para. 191 [hereinafter *Tradex v. Albania*].

<sup>180</sup> *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007, para. 263 [hereinafter *Siemens v. Argentina*].

458. Whatever the force of this analysis in the context of a claim under the “Fair and Equitable Treatment standard”, and specifically in relation to a denial of justice claim, it is unnecessary in the context of an expropriation claim. A denial of justice (including, for example, the absence of any other remedy) need not be established before a breach of contract by a State party can amount to an expropriation. Rather, the critical distinction is between situations in which a State acts merely as a contractual partner, and cases in which it acts “*iure imperi*”, exercising elements of its governmental authority. These are often termed “*actes de puissance publique*”, where the use by the State of its public prerogatives or *imperium* is involved in the actions complained of. As noted by the ICSID tribunal in

***Impregilo v. Pakistan:***

“... the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of Contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.<sup>181</sup> Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.<sup>182</sup>

... Similarly, in the case of *Joy Machinery v. Egypt*, an ICSID tribunal stated that:

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<sup>181</sup> Citing the review of jurisprudence in Stephen M. Schwebel “*Justice in International Law*” (Grotius / CUP), Chapter 26: “*On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*”: “... there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a ‘non-commercial’ act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law. ... when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.”

<sup>182</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 2005, paras. 260-261 [hereinafter *Impregilo v. Pakistan*]; See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No ARB/03/29), Decision on Jurisdiction of 14 November 2005, para. 180.

“A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the Contract involved”.<sup>183</sup>

459. The tribunal concluded in that case that:

“... the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are Contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company’s Contract rights”.<sup>184</sup>

460. Here, there was always the possibility (of which BGT knew or should have known) that the Republic, in its capacity as a shareholder of DAWASA, would intervene in the same manner as a private shareholder might have done in the decisions to be taken during the life of a contract. Indeed, the relationship between the Republic and DAWASA (a State-owned entity exercising key functions) was such that intervention by the Republic was more likely than that of a private shareholder. The type of intervention that may have been expected, however, has to be distinguished from other situations in which the acts of the Republic might properly be characterised as the use of its prerogatives of *puissance publique* to perform acts which exceed the normal course of conduct of a State shareholder of a State-owned company. These are important criteria against which each of the acts that are now complained of must be measured.

461. *The Absence of Economic Damage*: Much of the Republic’s defence was directed at the absence of any damage suffered by BGT on account of the events in question, on the theory that City Water’s contractual performance had been so poor as to render the Lease Contract worthless in any event – quite apart from any alleged conduct by the Republic. This allegation has been deployed by the Republic in many different ways, including - as already addressed earlier - as a jurisdictional objection (i.e. the alleged absence of an

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<sup>183</sup> *Joy Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of 6 August 2004, para. 72 [hereinafter *Joy Machinery v. Egypt*].

<sup>184</sup> *Ibid.*, para. 82.

“investment”); as an alleged missing and necessary element in the cause of action of “expropriation”; as a separate issue of causation; and in response to BGT’s specific allegations on the quantum of compensation.

462. It is important at the outset to position this allegation correctly.
463. The Arbitral Tribunal recognises that many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the effect of relevant acts, rather than the intention behind them. In general terms, a substantial deprivation of rights, for at least a meaningful period of time, is required. The required level of interference with rights has been variously described as “unreasonable”; “an interference that renders rights so useless that they must be deemed to have been expropriated”; “an interference that deprives the investor of fundamental rights of ownership”; “an interference that makes rights practically useless”; “an interference sufficiently restrictive to warrant a conclusion that the property has been ‘taken’”; “an interference that makes any form of exploitation of the property disappear”; “an interference such that the property can no longer be put to reasonable use”.<sup>185</sup>
464. Equally, whilst accepting that effects of a certain severity must be shown to qualify an act as expropriatory, there is nothing to require that such effects be economic in nature. A distinction must be drawn between (a) interference with rights and (b) economic loss. A substantial interference with rights may well occur without actually causing any economic damage which can be quantified in terms of due compensation. In other words, the fact that the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test.

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<sup>185</sup> *Per Y Fortier and SL Drymer, “Indirect Expropriation in the Law of International Investment: I know It When I See It, or Caveat Investor” 19 ICSID Review-FILJ 293, 305 (2004).*

465. In the Arbitral Tribunal’s view, the absence of economic loss or damage is primarily a matter of causation and quantum – rather than a necessary ingredient in the cause of action of expropriation itself. Thus, the suffering of substantive and quantifiable economic loss by the investor is not a pre-condition for the finding of an expropriation under Article 5 of the BIT. There may have been a substantial interference with an investor’s rights, so as to amount to an expropriation, even if that interference has been overtaken by other events, such that no economic loss actually results, or the interference simply cannot be quantified in financial terms. In such circumstances, there may still be scope for a non-compensatory remedy for the expropriation (e.g. injunctive, declaratory or restitutionary relief).
466. The Arbitral Tribunal refers in this regard to Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted by the International Law Commission at its 53<sup>rd</sup> session (the “**ILC Articles**”). By this Article, there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State. The commentary to this article at paragraph 9 points out that:
- “[i]t is sometimes said that international responsibility is not engaged by conduct of a State in this regard of its obligations unless some further element exists, in particular “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure”.
467. In this case, the BIT does not include “economic damage” as a requirement for expropriation, and the Arbitral Tribunal does not consider that it must or should be imported.
468. *The Relevance of Contract Issues:* In their submissions, the parties focused on the issue whether the way in which the Lease Contract was performed by City Water could or should be taken into consideration by the Arbitral Tribunal in determining BGT’s claims in



this arbitration. According to the Republic, the Arbitral Tribunal can and must assess City Water's performance of the Lease Contract given its intimate connection with the treaty claims now advanced. According to BGT, the Arbitral Tribunal need not and should not evaluate the contractual performance, at least in any detail, given that the claims in this arbitration arise exclusively from the Treaty, and not the contract, and given that (on its case) the breaches of treaty overtook and eclipsed any issues that might have existed with respect to the contractual performance. This issue requires clarification.

469. It is not the role of this Arbitral Tribunal to decide contractual issues as between City Water and DAWASA, for example whether the Lease Contract was duly performed, whether the Lease Contract was rightly or wrongfully terminated and what would be the consequences of a wrongful termination. These are matters – as between City Water and DAWASA – that are the preserve of the UNCITRAL Arbitral Tribunal which was constituted pursuant to the arbitration agreement contained in the Lease Contract itself. There are no contractual claims in this BIT arbitration (whether by way of an umbrella clause or otherwise), and no relief is sought on behalf of either City Water or DAWASA.

470. On the other hand, in determining the treaty claims as between BGT and the Republic, it is impossible to disregard the way in which the Lease Contract was concluded, performed, renegotiated and terminated. The Lease Contract was, after all, the principal asset in question in this dispute. Both sides' cases entailed the presentation of extensive evidence on all aspects of the contractual position. None of the acts of the Republic about which BGT complains can be evaluated in the abstract, without considering the precise circumstances in which they occurred, which in turn necessarily involves consideration of the contractual position. To this end, this case may be distinguished from (*e.g.*) *Wena Hotels*, on which BGT relied, since it is not the case here that the Respondent's acts "overtook" or "eclipsed" the contractual issues.

471. Since this Arbitral Tribunal can only discharge its mandate by considering issues relevant to the contractual relationship, it obviously has jurisdiction to do so. Equally, however, any findings this Arbitral Tribunal may make in respect of the Lease Contract could only be binding as between BGT and the Republic, and in the context of the treaty claims. Such findings cannot be binding as between City Water and DAWASA, in the context of their separate contract dispute.
472. Put another way, ICSID tribunals have “*given effect to*” (which includes interpreting) contracts which lie beyond their jurisdiction, and have “*taken into consideration*” such contracts for the purposes of interpreting and applying the agreement which contains the arbitration clause.<sup>186</sup> A similar distinction can also be drawn between actually “*deciding*” issues relating to the conclusion, performance and termination of a contract which is beyond the jurisdiction of the Arbitral Tribunal and “*taking into consideration*” the facts surrounding the conclusion, performance and termination of this contract in order to decide the treaty claims submitted to the Arbitral Tribunal.
473. Further, on a reasonable construction of Article 47 of the ICSID Arbitration Rules, ICSID tribunals are obliged to make their own finding of facts: “1. The award shall be in writing and shall contain: ... (g) *a statement of the facts as found by the tribunal...*”. As was pointed out in *SPP v. Egypt*,<sup>187</sup> an ICSID arbitral tribunal ought not simply to adopt the finding of facts made by another arbitral tribunal concerning a party’s performance of its obligations under the disputed agreements. According to this decision, such an approach is inconsistent with the basic function of evidence in the judicial process, which is to enable

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<sup>186</sup> See for example *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Ad hoc Committee Decision on Annulment of 3 May 1985, 11 Y.B. Com. Arb. 162 (1986), p. 164.

<sup>187</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction of 14 April 1988, 16 Y.B. Com. Arb. 39 (1991)[*SPP v. Egypt*, Decision on Jurisdiction].

the tribunal itself, as part of its own mandate, to determine the truth of the conflicting claims of the parties before it.<sup>188</sup>

474. For the avoidance of doubt, this Arbitral Tribunal has not determined in this arbitration contractual issues which arise specifically as between City Water and DAWASA, and which are not necessary to be decided as ingredients of the treaty claims as between BGT and the Republic. Equally, in order to determine the treaty claims, the Arbitral Tribunal has taken into consideration facts concerning the contractual relationship, on the basis of the extensive evidence adduced by both parties in this regard.
475. This principle is applicable not only to the issue of expropriation but also to the other issues which have to be decided by this panel.
476. *The UNCITRAL Award:* On 31 December 2007, the UNCITRAL tribunal that was constituted pursuant to the arbitration agreement in the Lease Contract rendered an Award that resolved contractual disputes as between DAWASA and City Water. This was received by DAWASA on 7 January 2008, and promptly forwarded to this Arbitral Tribunal by counsel for the Republic. It was pointed out that the memorials submitted by BGT and the Republic in these ICSID proceedings were provided to the UNCITRAL Tribunal, that Mr. Magor had had at least some involvement in the UNCITRAL proceedings (as a director of City Water), and that the UNCITRAL tribunal made a number of findings with respect to the termination of the Lease Contract.
477. This submission by the Republic prompted a number of exchanges between the parties. Counsel for BGT observed that City Water was not represented at the UNCITRAL hearing, that only DAWASA's witnesses gave evidence and were not cross-examined, and that the UNCITRAL tribunal did not have access to the transcripts of the ICSID hearing

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<sup>188</sup> *Ibid.*, pp. 39-40.

and were unaware how the same DAWASA witnesses had testified in this arbitration. For these and numerous other reasons, BGT has maintained that this Arbitral Tribunal ought to give no weight at all to the UNCITRAL Award. Counsel for the Republic for its part contended that BGT's criticisms had been addressed and discounted by the UNCITRAL tribunal itself and were otherwise without foundation, and that the UNCITRAL Award remains relevant to this Arbitral Tribunal.

478. Consistent with this Arbitral Tribunal's analysis of its own mandate as set out above, and in particular its duty to make its own determinations on all matters of fact and law, and given the extensive evidential record in these proceedings, the Arbitral Tribunal has not found it necessary to rely upon the UNCITRAL Award in its decision on the merits of this dispute. This is so for expropriation as well as every other aspect of this case.

479. *General Principles of State Responsibility*: The parties agree as to the general principles governing State responsibility and the attribution of acts and omissions to the State, as they have been restated in the ILC Articles, and in particular Articles 2, 4, 5, 12 and 13. These are set out below by way of background to the Arbitral Tribunal's analysis.

480. Article 2 provides that:

“[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:

- a) is attributable to the State under international law; and
- b) constitutes a breach of an international obligation of that State”.

481. According to Article 4:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State”.

482. Article 5 further provides that:

“[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

483. According to Article 12:

“[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”.

484. And finally, according to Article 13:

“[a]n act of State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs”.

## **2. Conduct Amounting to Expropriation**

485. *Summary:* On the basis of a careful consideration of the full evidential record and all submissions by all parties, the Arbitral Tribunal has reached the conclusion that BGT’s investment, as embodied in the Lease Contract, was the subject of an expropriation by the Republic. However, as explained later in this Award, by the time that this expropriation took place, the termination of the Lease Contract was inevitable in any event, and the losses and damage for which BGT claims in these proceedings had already been (separately) caused.

486. *Performance of the Lease Contract:* It is manifest from the extensive evidence before this Tribunal that serious problems were encountered in the performance of the Lease Contract from the very start. The chronology of events has been set out earlier in this Award. By way of broad summary, the Arbitral Tribunal is in no doubt that:

(a) BGT’s bid was poorly prepared.

- (b) BGT (and City Water) did not take the benefit of the EMP – notwithstanding the fact that this was an available method for re-calibrating base figures, and thereby addressing many of the data inconsistencies for which complaint was made.
- (c) As a result of the poor bid, coupled with numerous management and implementation difficulties, BGT (and City Water) did not generate the income which had been foreseen, and accordingly the project quickly encountered substantial difficulties.
- (d) The position was soon reached where it was clear that City Water simply could not continue without a fundamental renegotiation of the Lease Contract.
- (e) This renegotiation took place, but failed. As had been announced by DAWASA at the beginning of the renegotiation process, this failure, in turn, necessarily implied the termination of the Lease Contract.

487. To this end, by the beginning of May 2005, the normal contractual termination process was underway.

488. Had not the events starting on 13 May 2005 (or similar ones) taken place, the dispute would in all likelihood have been purely contractual, involving only issues such as whether or not termination of the Lease Contract was justified by City Water's breaches thereof, such issues leading to a negotiation, or a contractual arbitration as necessary.

489. *The Republic's Conduct:* However, starting on 13 May 2005, the normal course of the contractual termination was disrupted. As described earlier in this Award, a series of steps were taken by the Republic which could not be characterised as the ordinary behaviour of a contractual counterparty, and which adversely impacted upon City Water's rights (albeit that by this stage, those rights were at most rights to have a contractual termination procedure progress without interference).

490. Each of the relevant acts of which BGT has complained are considered in turn below:

**(a) Repudiation of the Lease Contract**

491. As set out above, it is BGT's case that the termination of the Lease Contract itself (on BGT's case, a "repudiation") was an expropriatory act.

492. The Arbitral Tribunal disagrees. The decision to terminate the Lease Contract was in fact taken by DAWASA, albeit shortly thereafter approved by the Tanzanian Cabinet. It had long been foreshadowed, and was the culmination of a series of alleged contractual failures on City Water's part. It was not "procured" by the Republic in the way BGT contends. Rather, this was the ordinary behaviour of a contractual counterparty, and the fact that the Republic itself was involved can be no surprise, given its ownership of DAWASA, and its expected involvement in the Project. In other words, this was not the exercise of *puissance publique*.

493. Whether or not the termination by DAWASA was justified as a matter of contract, and whether or not it constituted a "repudiation" as BGT alleges, is not a matter that this Arbitral Tribunal need resolve. This is a question as between City Water and DAWASA, to be resolved by the contractual dispute resolution mechanism.

**(b) Call on the Performance Bond and Misappropriate of Funds**

494. No specific claim has been pleaded by BGT to allege that DAWASA's call on the performance bond or the misappropriation of funds were themselves expropriatory acts. However, even if these were so relied upon by BGT, the Arbitral Tribunal does not consider that they amounted to or contributed to a breach of Article 5 of the BIT. The Arbitral Tribunal is satisfied, on all the evidence, that the decision to call the Performance Bond was a decision taken in light of City Water's contractual performance, which had long been foreshadowed. It was an ordinary step of a contracting counterparty, and not the

exercise of any *puissance publique*. Whether or not the Performance Bond was in fact (or law) properly called is obviously a contractual matter as between City Water and DAWASA – and indeed this has already given rise to UNCITRAL arbitration proceedings pursuant to the Lease Contract, as well as litigation.

495. By the terms of the Lease Contract, the Performance Bond could only be called in its entirety – there was no mechanism for a partial call. It was suggested in the course of the proceedings that once the relevant debts had been satisfied, there may have been a surplus of funds that was not returned by DAWASA, but in fact was incorrectly applied for other uses (DAWASCO) at the Republic’s direction. Overall, the evidence on this issue was entirely inconclusive. Whether or not there was in fact any surplus depends upon the interpretation and application of a number of contractual provisions (e.g. provisions in the Lease Contract regarding penalties payable by City Water to DAWASA). Neither Party articulated a clear case on this issue, or tendered evidence to prove any specific surplus amount. The computation of any such surplus (if there was one) is clearly a matter for the UNCITRAL arbitration pursuant to the Lease Contract to resolve. As provided in Article 47.2 of the Lease Contract:

“[a]fter the payment to the Lessor where the Operator is of the opinion that the demand and the entire payment or any part thereof was not due and payable it may invoke the dispute resolution process under Article 66 to seek for refund as appropriate”.

496. In the Arbitral Tribunal’s view, whether or not there were any surplus monies, and whether or not they were misapplied and must therefore be repaid (on which, as stated, the evidence was inconclusive), is a contractual matter. It cannot elevate the prior call on the Performance Bond into an expropriatory act. At most, it would simply give rise to an actionable claim against DAWASA for repayment. Further, even if the misapplication of a surplus from the call on the Performance Bond could itself be characterised as an expropriation in breach of Article 5 of the BIT, the evidence on the existence of any such



surplus and any actual misapplication of the same was ultimately insufficient to found such a claim.

**(c) *The Minister's Press Conference of 13 May 2005 and the Political Rally of 17 May 2005***

497. On 13 May 2005, against the backdrop of forthcoming elections in Tanzania in which Minister Lowassa was running for the office of Prime Minister, the Tanzanian Government issued a press release in which Minister Lowassa announced the termination of the Lease Contract. This was followed by a similar declaration on television.
498. This was an act by the Republic outside of the ordinary activity of a contracting counterparty. It was an exercise of executive authority, which effectively, and publicly, inflamed the dispute, thereby undermining City Water in the general public's eye, and disabling it from progressing the contractual process in an ordinary fashion. Indeed, the decision to terminate was announced in such ambiguous terms that it was understood by the press and the public, not as a process which was being started and would take some time, but as an accomplished fact (i.e. that the Lease Contract with City Water had already been terminated).
499. This was followed by a political rally on 17 May 2005, when Minister Lowassa called a general meeting of the staff and confirmed that the Cabinet had approved the termination of the Lease Contract. As agreed by Mr. Mutalemwa, this event further undermined City Water's standing and authority.<sup>189</sup>
500. In the Arbitral Tribunal's view, this was an *acte de puissance publique* by the Republic. The Arbitral Tribunal considers that the action was an unreasonable disruption of the contractual mechanisms existing between City Water and DAWASA, damaging to City Water and BGT's interests, and motivated by political considerations. As such, these

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<sup>189</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 111, 3-8.

actions were inconsistent with the Republic's obligations under the Treaty. The Tribunal also considers that these actions cannot be justified *ex post facto* by the need to inform the public of an important decision that, taken alone, had a concrete effect on City Water's contractual rights, and taken together with the acts that followed (of which it formed part) ultimately contributed to an expropriation.

***(d) Withdrawal of VAT Exemption on Purchases***

501. On 24 May 2005, the Government (acting through the TRA) unilaterally withdrew a VAT exemption on purchases that City Water had hitherto been granted.

502. The Arbitral Tribunal accepts BGT's characterisation of this act as a further contributing element in the Republic's expropriation. The act was without any justification, and in the Arbitral Tribunal's view, unreasonable and unjustified. The act also was clearly the exercise of sovereign executive authority, which adversely impacted upon City Water's rights, and its ability to continue to perform.

***(e) Occupation of City Water's Facilities, and Usurpation of Management Control***

503. The process of Governmental interference that began in May 2005, then escalated with the occupation of City Water's facilities, and the usurpation of management control. These were acts executed by the Republic with the assistance of its police force, and well beyond the ambit of normal contractual behaviour. They were unreasonable and arbitrary, unjustified by any public purpose (there being no emergency at the time), and the most obvious display of *puissance publique*. In effect, City Water was completely shut out of the Project, in violation of its rights under the Treaty, without any adequate justification.

504. The facts in this case have close parallels in a number of previous decisions, from which the Arbitral Tribunal has drawn some guidance.

505. *Interference, Occupation & Seizure*: In the *Lena Goldfields* case, an analogous seizure was held to be a breach of the Soviet Union’s contractual obligations, as well as applicable general principles of international law. The seizure of the foreign investor’s documents, the arrest of its workers and the seizure of its premises and assets were held to have deprived the investor of the ability to perform under its concession agreement with the Government. This was said to have led to the “total impossibility of either performing its obligations under the Concession Agreement, or enjoying its benefits”. Compounding the breach, “the result of the actions of the government ... was to deprive the company of available cash resources, to destroy its credit, and generally to paralyse its activities”.<sup>190</sup>
506. In both the *AMCO Asia*<sup>191</sup> and *Wena Hotels*<sup>192</sup> arbitrations, the seizure and occupation of the respective investor’s premises was held to be a breach of international law. In the *AMCO Asia* case, the ICSID tribunal held that seizure of the hotel complex may have been performed by private persons, but that this was facilitated or supported by the presence of army and police personnel.<sup>193</sup> In *Wena Hotels*, an acknowledged taking of the investors’ premises also went unpunished, thus compounding the respondent State’s breach.<sup>194</sup>
507. Interference of the type in this case has also been held by other tribunals to constitute “indirect expropriation”.
508. The *Biloune v. Ghana* case<sup>195</sup> concerned the investment of Mr. Biloune, a Syrian national, who held a majority interest in a company incorporated in Ghana (“MDCL”), which was established in order to undertake a hotel construction project. An UNCITRAL tribunal

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<sup>190</sup> *Lena Goldfields* arbitration (1930), 5 AD 3, paras. 21, 25.

<sup>191</sup> See *AMCO Asia v. Indonesia*, Award of 20 November 1984.

<sup>192</sup> See *Wena Hotels v. Egypt*, Final Award.

<sup>193</sup> *AMCO Asia v. Indonesia*, Award of 20 November 1984, paras. 155-156.

<sup>194</sup> *Wena Hotels v. Egypt*, Final Award, paras. 89-91.

<sup>195</sup> *Biloune v. Ghana*, Award on Jurisdiction and Liability of 27 October 1989.

found that a series of acts and omissions attributable to the Government, which collectively obstructed the project, constituted a “constructive expropriation” of Mr. Biloune’s contractual rights (including rights derived through his investment vehicle) in breach of domestic and international law. The Arbitral Tribunal considers that aspects of this case have strong similarities to those in *Biloune* (in particular, the installation of DAWASCO on 1 June 2005 in place of BGT’s appointed managers, to manage and control City Water’s facilities and its assets, thereby preventing BGT (and City Water) from pursuing the Project and enjoying the investment).

509. *Usurpation of Management and Control*: The Arbitral Tribunal notes that there are many instances in international jurisprudence (in particular from the Iran-US Claims Tribunal) where the usurpation of management by a State, or the substitution by a State of the foreign investor’s management with its own, has been analysed as an expropriation, *de facto* expropriation, or equivalent act. For example:

- (a) In *SEDCO v. National Iranian Oil Co.*,<sup>196</sup> the Iran-US Claims Tribunal found that an expropriation of the claimant’s investment occurred on the date when Iran appointed temporary directors to control and manage the claimant’s investment vehicle, SEDIRAN, and prevented the claimant from accessing SEDITAN’s funds or participating in its control or management.
- (b) In *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*,<sup>197</sup> it was held that the claimant’s 50% stake in an engineering and architectural partnership, TAMS-AFFA, was expropriated when in July 1979 the Iranian Government unilaterally appointed its own manager to run TAMS-AFFA.

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<sup>196</sup> *Sedco, Inc. v. National Iranian Oil Company*, Award of 28 October 1985, 9 Iran-US C.T.R. 248, p. 278.

<sup>197</sup> *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award of 29 June 1984, 6 Iran-US C.T.R. 219, p. 225.

That manager was given authority to deal with the partnership's assets and make management decisions. The Iran-US Claims Tribunal held that:

“deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”<sup>198</sup>

Accordingly, the tribunal found that the claimant had been subject to measures depriving it of its property interests in the partnership, thus requiring Iran to pay compensation under international law:

“while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral”.<sup>199</sup>

- (c) In *Starrett Housing Corp v. Iran*,<sup>200</sup> the claimant was an investor in a residential building project being pursued through its locally-incorporated entity, Shah Goli Apartment Company (“SGAC”). Pursuant to the decree of the Iranian Revolutionary Council dated 14 July 1979, the Iranian Minister of Housing had by January 1980 appointed its own temporary manager of SGAC, who was directing all further activities in relation to the project on behalf of the Government. By this act, it was held that the claimant had been deprived of the effective use, control and benefits of its property rights as shareholder in SGAC. The claimant could no longer exercise its right to manage SGAC to such an extent that it had been deprived of any possibility for effective use and control of it. The tribunal

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<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Starrett Housing Corp v. Iran*, Award of 14 August 1987, 4 Iran-US C.T.R. 122.

concluded that the claimant's property interest – i.e. the assets and contractual rights and other property of SGAC – had been expropriated, in breach of general principles of international law, and stated as follow:

“... it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”<sup>201</sup>

- (d) Again, in *ITT Industries, Inc. v. The Islamic Republic of Iran*,<sup>202</sup> it was held that the assumption of control over the claimant's assets by Government-appointed managers, which rendered the claimant's rights of ownership meaningless, amounted to an effective expropriation as a matter of international law, on the basis that:

“... property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits...”

- (e) Lastly, in *Phelps Dodge Corp., et al v. The Islamic Republic of Iran*,<sup>203</sup> the Iran-US Claims Tribunal held that the claimant, Phelps Dodge, was entitled to compensation for the taking by Iran of a factory which was the principal asset of an Iranian company, SICAB, in which the claimant was a minority shareholder. The taking of SICAB's factory occurred by operation of a governmental decree, as a result of which the factory was transferred to certain Iranian state entities. The tribunal held that:

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<sup>201</sup> *Ibid.*, pp. 154-157.

<sup>202</sup> *ITT Industries, Inc. v. The Islamic Republic of Iran et al.*, Award of 26 May 1983, 2 Iran-US C.T.R. 348, pp. 351-352.

<sup>203</sup> *Phleps Dodge Corp., et Al v. The Islamic Republic of Iran*, Award of 19 March 1986, 10 Iran-US C.T.R 121.

“Since that act, there have apparently been no meetings of the Board of Directors or shareholders [of SICAB], and Phelps Dodge has received neither dividends nor any information concerning the operations of the factory or the finances of SICAB. ... The conclusion is unavoidable that, as of 15 November 1980, control of the SICAB factory was taken by the Respondent, thereby depriving Phelps Dodge of virtually all of the value of its property rights in SICAB”.<sup>204</sup>

510. The Arbitral Tribunal concludes that in this case, by a similar act of the Republic, BGT’s rights of management of City Water have been usurped, and BGT has thereby been deprived of the benefit of its investment. Taken together, this was conduct in breach of Article 5 of the BIT.

**(f) *Deportation of Staff***

511. On 1 June 2005, the Republic’s acts culminated in the forced deportation of management staff. The Arbitral Tribunal considers that the Republic’s action was an integral element in its negation of BGT’s contractual and property rights. This was clearly the exercise of *puissance publique*, in violation of BGT’s rights under the Treaty, without any satisfactory justification.
512. The Republic’s conduct in this regard may be equated with that of the Government in *Biloune v. Ghana* (supra), in which the deportation of a senior figure in the implementation of a project in Ghana was held to be an integral element of the tribunal’s conclusion that his and his company’s rights had been effectively expropriated. The tribunal there held that:

“... the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing

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<sup>204</sup> *Ibid.*, pp. 129-130.

MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project.”<sup>205</sup>

513. Similarly, in *Benvenuti & Bonfant v. Congo*,<sup>206</sup> an Italian entrepreneur was subject to governmental investigations and ultimately, criminal proceedings. He fled Congo as the Congolese army occupied the premises of a local company, Plasco, through which he operated. The ICSID tribunal in that case found that the Government had expropriated the claimant’s share in Plasco, and was liable to it in damages.
514. In their testimony, both Mr. Mutalemwa and Dr. Ballance confirmed that there was no real risk at the time of sabotage to the water supply system, that Mr. Stone had never threatened to disrupt the water supply, and that he would never have done anything such as this.<sup>207</sup> Moreover, the level of chemical stocks at the time had been addressed in Mr. Stone’s latest monthly report, and DAWASA had already asked the Chief Water Reservoir Engineer to procure two months’ supply.<sup>208</sup>
515. In all the circumstances, therefore, there was no necessity or impending public purpose to justify the Government’s intervention in the way that took place.
516. *Effect of Republic’s Acts:* In the Arbitral Tribunal’s view, the cumulative effect of these acts was essentially to nullify City Water’s rights in the Lease Contract and in the Project at the time – being a time when the Notice of Termination had not yet expired, and so technically City Water still had the benefit of the Lease Contract.
517. It is to be recalled that on 1 June 2005, according to DAWASA, the Lease Contract had not yet been terminated. Even by 15 June 2005, DAWASA continued to insist that the Lease

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<sup>205</sup> See *Biloune v. Ghana*, Award on Jurisdiction and Liability of 27 October 1989, p. 209.

<sup>206</sup> *Benvenuti & Bonfant v. Congo*, Award of 8 August 1980, p. 357.

<sup>207</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 111, 25 and p. 112, 1-2, 20-22; Tony Ballance Testimony, Hearing Transcript, Day 6, p. 46, 9-17.

<sup>208</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 2, p. 324, 25 and ff. It may be noted that this evidence was apparently not available to the *Amici* at the time they submitted their Brief, and hence they contended that the dearth of chemical stocks justified the Government’s intervention.



Contract had not been terminated, that it remained in existence, and that the alleged breach by City Water remained capable of remedy.<sup>209</sup> Indeed, DAWASA's counsel expressly stated that, on the expiry of the contractual notice period of 24 June 2005, DAWASA "*will be entitled to terminate the [Lease Contract]*" - the clear implication being that, prior to 24 June 2005, neither DAWASA nor the Republic had any entitlement to terminate the Lease Contract.

518. On the other hand, the Arbitral Tribunal agrees with the Republic's position that the termination of the Lease Contract at this time was inevitable, and was going to materialise within a matter of weeks. However, these circumstances cannot avoid the conclusion that an expropriation of BGT's contractual and property rights took place. Having said this, the fact that the Lease Contract was going to be terminated at that time, is directly relevant to the issue of causation – i.e. whether any of the losses and damage for which BGT now seeks compensation were caused by the Republic's acts, or City Water's own contractual performance that had rendered termination inevitable in any event.

### **3. Conclusions**

519. We therefore conclude that, on a cumulative basis, the public announcement of the termination of the contract by Minister Lowassa on 13 May 2005; the subsequent political rally of 17 May; the withdrawal of the VAT certificate by the TRA on 24 May; and finally, the seizing of the assets of City Water, the immediate installation of DAWASCO, and the deportation of City Water's management on 1 June, amount to an expropriation of BGT's investment on the basis of Article 5 of the BIT.
520. The question then is whether this expropriation caused any of the economic loss and damage for which BGT claims compensation.

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<sup>209</sup> Exhibit C-43. DAWASA letter of 15 June 2005.

521. This is addressed separately in **Chapter VI** of this Award.

#### **(4) FAIR AND EQUITABLE TREATMENT**

##### **A. BGT’S POSITION**

522. Article 2(2) of the Treaty provides that:

“investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment ...”.

523. It is BGT’s case that the Republic has failed to accord fair and equitable treatment to BGT’s investment in several respects, thereby violating this standard.

##### **1. The Standard**

524. BGT submits that the fair and equitable treatment principle entails an obligation of vigilance and protection on the part of the Republic; a commitment to due process and transparency; and the promise to refrain from conduct which is arbitrary or constitutes a denial of justice. It is an expression of the international law principle of good faith. BGT gives several examples of the application of these principles in the jurisprudence of investment treaty arbitration tribunals.

525. In *Saluka v. Czech Republic*, in the context of a similar treaty provision, the tribunal held that an equitable treatment provision imposed upon the Czech Republic a positive obligation to ensure for the investor’s investments “*the kind of hospitable climate that would insulate them from political risk or incidence of unfair treatment*”.<sup>210</sup> The tribunal further observed that (as evident from the preamble to many treaties) States generally link the obligation to ensure fair and equitable treatment to investors with an expectation that this will stimulate the flow of capital and technology and the economic development of the

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<sup>210</sup> *Saluka Investments BV v. Czech Republic*, Partial Award of 17 March 2006, para. 286 [hereinafter *Saluka v. Czech Republic*].

contracting parties.<sup>211</sup> The tribunal also reiterated the investor’s entitlement, under this provision, to treatment consistent with principles of good faith, due process and non-discrimination:

“the Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.*, unrelated to some rational policy) or discriminatory (*i.e.* based on unjustifiable distinctions)”.<sup>212</sup>

526. In that case, the Czech Republic’s refusal to negotiate with IPB and its shareholders in good faith prior to the forced administration was judged unreasonable and discriminatory.
527. As held by the tribunal in *PSEG Global Inc. v. Republic of Turkey*,<sup>213</sup> even if negotiations are not conducted in bad faith, if they are conducted with a lack of transparency, negligently or inconsistently, then the fair and equitable treatment standard can be breached.
528. Similarly, in *TECMED v. Mexico*, the tribunal found that the decision not to renew a permit to operate a landfill site was based not on health or environmental concerns as the State had said, but political or social pressure. The tribunal held that the fair and equitable treatment standard includes the general principle of law that the contracting parties must act “*in good faith*” and the underlying notion that capital-receiving States should not defeat foreign investors’ legitimate expectations upon which they have relied.<sup>214</sup> The tribunal in that case also emphasised that there was a lack of transparency on the part of the Mexican State.

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<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*, para. 303.

<sup>213</sup> *PSEG Global Inc. v. The Republic of Turkey* (ICSID Case No. ARB/02/05), Award of 19 January 2007.

<sup>214</sup> *TECMED v. Mexico*, Award of 29 May 2003, para. 154.

529. In *Waste Management Inc. v. Mexico (No. 2)*, a NAFTA tribunal held in respect of the closely related standard in Article 1105 of the NAFTA that:

“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying the standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant”.<sup>215</sup>

530. In *Occidental v. Republic of Ecuador*, an UNCITRAL tribunal observed that the obligation to provide fair and equitable treatment could extend to an obligation on the part of the host State to ensure that it provides a stable, legal and business framework.<sup>216</sup>

531. In *Middle East v. Egypt*, the fair and equitable treatment obligation was said to encompass a duty to act in good faith and to ensure due process.<sup>217</sup>

532. Finally, it was held in *Maffezini v. Spain* that the obligation to ensure fair and equitable treatment implied an obligation to act transparently.<sup>218</sup>

533. On the basis of these authorities, BGT submits that pursuant to Article 2(2) of the BIT, the Republic had an obligation to:

- act with due diligence in the protection of BGT’s investment;
- respect BGT’s legitimate expectations;
- create a stable and predictable investment climate;
- act in a transparent manner; and
- act in accordance with due process and procedural propriety.

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<sup>215</sup> *Waste Management Inc. v. Mexico (No. 2)*, Final Award, para. 98.

<sup>216</sup> *Occidental v. Republic of Ecuador* (LCIA Case No. UN3467), Award of 1 July 2004, 12 ICSID Rep. 59, para. 183.

<sup>217</sup> *Middle East Cement v. Egypt*, Award of 12 April 2002, para. 143.

<sup>218</sup> *Maffezini v. Spain*, Award of 13 November 2000, para. 83.

534. It is BGT's case that each of the events alleged to constitute an expropriation also constituted a breach of the Republic's obligation in Article 2(2) of the BIT to provide fair and equitable treatment.

535. Further, BGT contends that the Republic has also breached Article 2(2) of the BIT in the following respects:

- the Republic did not appoint an independent regulator;
- the Republic failed to ensure that the Minister, as Interim Regulator, carried out the duties he had assumed under the EWURA Act;
- the Republic undermined BGT's investment by failing to manage the expectations of the public with regard to the speed of improvements to the network;
- the Republic undermined BGT's investment by failing to ensure that government agencies paid their water bills promptly; and
- the Republic failed to deal with requests to adjust the terms of the Lease Contract with respect to the Operator Tariff to reflect changing conditions.

536. Each of these further allegations was elaborated in detail in memorials, submissions and evidence. Each is very briefly summarised below.

## **2. The Republic did not appoint an independent regulator**

537. Under Section 4 of the EWURA Act passed in the National Assembly on 4 April 2001, the Republic undertook to establish an independent regulatory authority (the EWURA Authority), as anticipated by the World Bank. A number of safeguards were built into the provisions of the EWURA Act, including:

- (a) the Authority was to be governed by a Board of Directors consisting of seven members, rather than a sole decision maker (Section 8(1));

- (b) any appointment to the Board of Directors was to be scrutinised by a Nomination Committee, and was to include consultation with industry organisations and chambers of commerce, advertisements in “*widely circulating news media within and outside [Tanzania]*”, and the use of specialist consultants “*to secure the best candidates*” (Section 9); and
- (c) members of the Board of Directors were to be required to relinquish any offices which might impinge on their perceived or actual political impartiality, including “*the office of Member of Parliament*” (Section 8(3)(a)).

538. Moreover, the Republic had promised BGT at several occasions an independent regulator.

539. By May 2003, the members of the Board of Directors had still not been appointed and the EWURA Authority was still not functioning. In its place, the Minister was himself appointed as Interim Regulator. By June 2005, the Minister had still not been replaced, nor had any steps been taken to begin the process of replacing him with the functioning EWURA Authority.

540. BGT points out that the World Bank had emphasised the importance of an impartial regulator especially in respect of private participation in water services, and the importance of maintaining a strict divide between the regulator and political concerns and influences:

“One obvious danger with independent regulators is political interference. The contracting authority or other government entity may try to influence decisions to favour particular constituencies or interests for political gain. For example, a politically influenced regulator might refuse justified tariff increases. Thus the regulator needs to be insulated from day to day control by politicians”.

541. The guidelines outlined by the World Bank for the appointment of a regulator, include:

“an arms’ length relationship with political authorities”;

“prescribing professional criteria for appointment”;

“setting terms that do not coincide with election cycles and staggering the terms of the members”;

“ensuring the regulator is accountable for its decision by providing for effective appeal processes ... Allowing appeal to a special purpose expert body in order to review the substance of the regulator’s decision.”<sup>219</sup>

542. According to BGT, Minister Lowassa’s appointment as Interim Regulator breached a number of these guidelines. First, it is not clear what, if any, selection process was used to verify the professional criteria for his appointment. Second, it is unclear why he was not asked to relinquish his position as a member of Parliament, given that this was an express requirement of the EWURA Act. Third, it is not clear on what basis a Minister responsible for the performance of the very sector that Minister is meant to be regulating, could be perceived as “*insulated from day to day control by politicians*” or as having an “*arm’s length relationship with political authorities*”.<sup>220</sup> Indeed, on BGT’s case, it was evident from Minister Lowassa’s conduct that he was aware of his primary audience (i.e. the electorate). Fourth, Minister Lowassa’s position as Interim Regulator was not specified to be subject to any time limit, and thus his tenure continued during the period of the 2005 Tanzanian general election. Ultimately, Minister Lowassa stood for the Premiership and was appointed Prime Minister on 30 December 2005. Finally, no method of accountability, whether through an appeals process or otherwise, appears to have been put in place to provide a check or scrutiny of the substance of the Minister’s decision making.
543. BGT submits that the need for, and lack of, a neutral regulator, was especially felt during May and June 2005, at the culmination of the renegotiation process. On 5 May 2005, TRC circulated a draft “*Outline Agreement*”.<sup>221</sup> One would have expected that when on 9 May 2005, City Water wrote to DAWASA accepting the majority of TRC’s recommendations,

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<sup>219</sup> World Bank and Public Private Infrastructure Advisory Facility (PPIAF), *Approaches to Private Participation in Water Services, a Toolkit*.

<sup>220</sup> *Idem*.

<sup>221</sup> Exhibit C-99.

the Minister as the Interim Regulator would have acted impartially towards both parties.

On the contrary, according to BGT, the Minister:

- presented a report to the Cabinet calling for not only the termination of the Lease Contract and the call of the Performance Bond, but also the misappropriation of the surplus funds released from the call on the Bond;
- convened a press conference, without notice to City Water, announcing to the public that the Lease Contract “*had been terminated*”, notwithstanding the obvious and inevitable confusion and disruption that this would cause;
- summoned a meeting of City Water’s staff on 17 May 2005 to advertise the “*termination*” of the Lease Contract and to explain the installation of DAWASCO.

544. An independent, impartial regulator, insulated from political influences, would not have acted in this way. The failure to put in place the EWURA Authority constitutes a breach of the fair and equitable treatment standard, in as much as it represents a departure from BGT’s legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA. The Minister, as Interim Regulator, did not act in good faith and in accordance with due process, as he would have been expected to do in accordance with the Republic’s international law commitments.

### **3. The Republic failed to ensure that the Minister, as Interim Regulator, carried out the duties he had assumed under the EWURA Act**

545. Under Section 17(1) of the EWURA Act, the EWURA Authority, and thus the Minister, was obliged to carry out regular reviews of rates and charges and, in doing so, to take into account a range of factors including: the “*costs of ...supplying ... services*” (Section 17(2)(a)); the “*financial implications of the determination*” (Section 17(2)(d)); and the “*consumer and investor interest*” (Section 17(2)(g)).



546. On BGT's case, the Minister failed to consider properly these factors either when requested by City Water to initiate a review of the Lease Contract in August 2004, or more particularly at the time of the renegotiation process in May 2005. It was indeed incumbent on the regulator to consider, impartially, whether Section 17 of the EWURA Act had been triggered.
547. In addition, under Section 19(2)(b) of the EWURA Act, the EWURA Authority, and thus the Minister, was obliged to conduct an "inquiry" before exercising a power to "regulate any rate or charge". This inquiry involved, *inter alia*: (i) publishing a notice in the Gazette and in a daily newspaper circulating generally in Tanzania specifying the purpose of the inquiry and the time within which submissions may be made; and (ii) sending written notice of the inquiry to industry and consumer organisations which may have an interest in the matter (Sections 19(4)(a) and (b)).
548. An inquiry of this nature was conducted by EWURA in respect of DAWASCO's request for an increase in the Customer's Tariff. However, no such inquiry was initiated by the Interim Regulator in respect of City Water's request for an increase of the Operator Tariff in August 2005; or during the renegotiation process in May 2005, when a thorough consideration of this issue was clearly crucial to the parties' ability to finalise a workable agreement.
549. According to BGT, this failure to carry out the duties assumed under the EWURA Act constitutes a breach of the fair and equitable treatment standard, in as much as it represents a departure from BGT's legitimate expectations that such duties would be observed.

**4. The Republic failed to manage the expectations of the public with regard to the speed of improvements to the network**

550. BGT points out that the World Bank, in its Integrated Safeguards Datasheets, highlighted the importance of DAWASA's handling of the public perception of the handover from public to private sector:

“DAWASA's main challenge is now to carefully manage expectations that may be high after a very long preparation period; obviously the quality of the WSS [Water and Sewerage Service] service cannot improve overnight with the mobilization of the Operator”.<sup>222</sup>

551. According to BGT, this obligation was disregarded in its entirety in May and June 2005. Far from seeking to “*manage the public's expectations*”, on the contrary the Minister in fact acted in a manner apparently calculated to undermine the public's confidence in City Water, by:

- announcing at a specially convened, televised, press conference on 13 May 2005 that due to City Water's “*poor performance*”, the Lease Contract “*had been terminated*”;
- at the same press conference, announcing that a new entity, DAWASCO was taking over; and
- announcing to City Water's staff on 17 May 2005 that the senior management were leaving the country.

552. This series of public statements, according to BGT, was designed to destroy, rather than maintain, confidence in City Water and inevitably undermined the investment. This failure to manage the public expectations, and the actions taken to undermine the public's confidence in City Water, together constitute a breach of the fair and equitable treatment standard, in as much as they represent a failure to use due diligence in the protection of BGT's investment, and the departure from BGT's legitimate expectation that the

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<sup>222</sup> Exhibit C-83, p.6.

government would at the very least maintain a neutral position and not tarnish City Water's image in the eyes of the public.

553. Moreover, once DAWASCO came in, the Minister's language changed completely. He expressed support to DAWASCO while he was denigrating City Water, when what was required, and what the World Bank had recognised, was the need for public support.

**5. The Republic failed to ensure that government agencies paid their water bills promptly**

554. BGT points out that in its Project Appraisal Document, the World Bank identified a number of "Critical Risks", going to the sustainability of the Project. The ability of the Republic to ensure that its agencies paid their water bills on time, or at all, was one of those risks. Put simply, the World Bank's view was that it was key to the Project that government entities would have to pay their water bills and the Republic had made this undertaking. According to BGT, this they did not do. Public entity indebtedness (from the police, the army, the local council and prisons, etc) reached approximately USD 1,500,000 in City Water's 22 months of operation. City Water requested the Interim Regulator to intervene on its behalf, but no effective help was given.
555. By May 2005, given the continuing nature of the under-payments, BGT states that this was a key issue which City Water wanted to resolve in the renegotiation process.
556. On BGT's case, this failure to ensure the payment of sizable government bills constitutes a breach of the fair and equitable treatment standard, in as much as it represents a departure from BGT's legitimate expectation that such bills would be paid, and a failure to use due diligence in the protection of BGT's investment. According to BGT, this issue seriously undermined the viability of BGT's investment.

**6. The Republic failed to deal with requests to adjust the terms of the Lease Contract in respect of the Operator Tariff to reflect changing conditions**

557. According to BGT, the World Bank expressly anticipated in its Project Appraisal Document<sup>223</sup> that City Water would need to make a request for a review of the Operator Tariff well ahead of the review scheduled for year 5 of the Lease Contract. The World Bank had also identified as a “Critical Risk” DAWASA’s ability to deal appropriately with such a request, given its inexperience.
558. According to BGT, the Interim Regulator and DAWASA failed to respond appropriately to City Water’s request for a review of the Operator Tariff, and more broadly, to City Water’s request for a renegotiation of the Lease Contract as a whole in August 2004: the timetable was artificially truncated by the Government and there was a total lack of commitment on the Republic’s side. The Government’s failure was compounded by the break-off of the renegotiation process on 13 May 2005.
559. On the other hand, it is BGT’s case that the entity installed in City Water’s place, DAWASCO, was being favoured with a sizable hike of up to 35% of the Customer Tariff, after less than a year in operation, with the stated reason that this is a result of “*rising costs*”,<sup>224</sup>
560. BGT submits that the Republic’s failure to deal appropriately with City Water’s request to adjust the Operator’s Tariff and to review the Lease Contract constitutes a breach of the fair and equitable treatment standard, in as much as it departs from BGT’s legitimate expectations; it manifests a lack of good faith on the Republic’s part; and a failure to use due diligence in the protection of BGT’s investment. The subsequent treatment of

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<sup>223</sup> Exhibit C-84.

<sup>224</sup> Exhibit C-46.

DAWASCO also evidences the Republic's discriminatory and unfavourable treatment of BGT and City Water in line with the general absence of proper support shown to BGT.

## **B. THE REPUBLIC'S POSITION**

### **1. The standard**

561. Whether the fair and equitable treatment clause in the BIT is taken to codify the Contracting State's customary international law obligations (the so-called "international minimum standard") or is to be more liberally construed in terms of what the investor could legitimately have expected when it made its investment, and particularly whether the State made any undertakings at that time upon which the investor reasonably relied, the Republic considers that BGT's complaint is unfounded.
562. On the one hand, BGT argues that it was entitled to a radical transformation of the deal it had signed up for. On the other hand, according to the Republic, BGT was told repeatedly and clearly during the bidding period that no such transformation would be available. In other words, on the Republic's case, the only expectations that BGT legitimately could have had were in fact met when DAWASA and the Government "*declined to bail [City Water] out of the consequences of its own poor decisions and mismanagement*" – since this was exactly the position that had been made clear from the outset.
563. According to the Republic, the BIT did not require it to provide whatever benefits BGT subjectively wanted to receive, but only, at most, to maintain the conditions that BGT objectively and legitimately could have expected at the time of its purported investment. Moreover, none of the actions (or failures to act) complained of by BGT violated BGT's *legitimate* expectations, and none of them caused BGT harm in any event.

## 2. Violation of legitimate expectations is necessary but not sufficient to establish a fair and equitable treatment claim

564. According to the Republic, two themes in the jurisprudence on fair and equitable treatment are particularly relevant in this case: (a) the investor's legitimate expectations, especially those formed on the basis of the State's representations at the time of the investment, are significant in determining the scope of the State's obligations under such clauses; and (b) the investor's own conduct, particularly in making a poor investment decision to begin with or in managing its investment badly, is not the responsibility of the State. In short, when the investor takes on unreasonable risks, or when the risks that the investor took on actually come to pass, the investor cannot look to the State as guarantor against such risks.

565. In the *Waste Management (No. 2)* case, already cited, the arbitral tribunal held that:

“... in applying the standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant”.<sup>225</sup>

566. Crucial to the application of the standard is therefore whether the host State breached specific representations the investor reasonably relied on.<sup>226</sup> The question is not what the investor would prefer to have happened, or even what the investor *subjectively* expected to happen, but what the investor was *objectively* entitled to expect.<sup>227</sup> All relevant circumstances, including the governing municipal law, should be considered in determining what was objectively reasonable. In this case, for example, BGT's legitimate expectations must be considered in light of the terms of the Lease Contract, PSRC's answer to bidder's questions, and the economic and other circumstances generally prevailing in Tanzania.

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<sup>225</sup> *Waste Management v. Mexico (No. 2)*, Final Award, para. 98.

<sup>226</sup> Stephen Fietta, *Expropriation and the Fair and Equitable Standard: The Developing Role of Investors' Expectations*, 23 *Journal of International Arbitration* 375 (398) (2006).

<sup>227</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 304.

567. According to the Republic, a related principle is that an investor must act rationally in light of the surrounding circumstances. It must assess the extent of the investment risk before entering into the investment, have realistic expectations as to its profitability, and be on notice of both the prospects and pitfalls of an investment undertaken in a high risk location.<sup>228</sup> Fair and equitable treatment clauses “*are not insurance policies against bad business judgment*”.<sup>229</sup> Determining what fair and equitable treatment consists of in any particular case requires a proper assessment of investment risk at the outset of the investment process. As stated by one commentator:

“Accordingly, where the investor fails to undertake a proper feasibility study they will have to bear the loss that can be attributed to that failure, rather than to any host country action that is contrary to the [investment treaty].”<sup>230</sup>

568. The Republic submits that here, City Water was a risky business proposition from the outset, and BGT’s own judgment and conduct contributed overwhelmingly to City Water’s failure.

569. Finally, on the Republic’s case, the extent of City Water’s rights under the Lease Contract is critical to evaluating BGT’s fair and equitable treatment claim and in order to determine in particular what BGT’s legitimate expectations could have been.

### **3. No act or event alleged to be unfair and inequitable breached BGT’s legitimate expectations**

570. The Republic considers that in any case, none of the five alleged breaches listed by BGT with respect to fair and equitable treatment are well founded. Each act / omission was the subject of detailed analysis in the Republic’s memorials, submissions and evidence. The Republic’s case on each is very briefly summarised below.

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<sup>228</sup> Citing Muchlinski, *Fair and Equitable*, p. 542; *Generation Ukraine. v. Ukraine*, Award of 16 September 2003, para. 20.37.

<sup>229</sup> *Maffezini v. Spain*, Award of 13 November 2000, para. 64.

<sup>230</sup> Muchlinski, *Fair and Equitable*, p. 543.

- (a) *“The Republic did not appoint an independent regulator” and*
- (b) *“The Republic failed to ensure that the Minister as Interim Regulator carried out the duties assumed under the EWURA Act”*

571. The Republic contends that BGT and City Water never requested the Interim Regulator to take the actions that BGT now claims he should have taken under the EWURA Act. Neither BGT nor City Water ever requested the Interim Regulator to refer to Section 17 of the EWURA Act or conduct an inquiry under Section 19 of the EWURA Act. They did not complain when the Interim Regulator granted City Water tariff increases in August 2003 and August 2004, nor when the Interim Regulator granted City Water a licence in 2003 (without citing Section 17 or holding a Section 19 inquiry). They never complained that the EWURA Act was not referred to during the Interim Review in 2004 or the renegotiation in 2005. Indeed, they never complained about the appointment of the Interim Regulator at all nor about the fact that the EWURA Board had not yet been appointed. According to the Republic, the absence of any such complaint at the time undermines BGT’s *post hoc* contentions that not merely the EWURA Act but the Republic’s international obligations as well were being so persistently violated.
572. On the other hand, the Republic contends that neither the appointment of EWURA nor the invocation of Sections 17 or 19 of the EWURA Act would have made any difference to City Water. During the first half of the Lease Contract’s operations, the contractually defined “Regulator” had little or no discretion with respect to City Water, because the Lease Contract itself contained the regulatory regime (and in particular, the tariff-setting rules) under which City Water operated.
573. Sections 17 and 19 of the EWURA Act would not have given EWURA the power to disregard the Lease Contract or to compel DAWASA to accept an amendment of the Lease



Contract's terms. EWURA would have considered itself bound by the contract, even when taking note of other public-interest concerns (such as those in the EWURA Act Section 17). Such concerns might have influenced EWURA's exercise of discretion, but they could not have expanded its scope. As explained in a recent World Bank publication:

“Where private participation is based on a contractual arrangement, the contract is fundamental – it must be respected. In contract-based participation, private firms are not buying an asset. Firms are entering an arrangement in which their risks, rewards, cash flows, and obligations are determined by the contract. The contract is the deal. The contract is also the primary legal instrument that gives the private firm the predictability and enforceability it needs and so leads it to commit management and investment resources and to take risk. All this means that any additional regulatory mechanisms must be consistent with, and supportive of, the contract”.<sup>231</sup>

574. BGT claims that the Interim Regulator should have embarked on a broad “*review of the Lease Contract as a whole*”, instead of holding an Interim Review as provided for in the Lease Contract itself in the fall of 2004. As already mentioned above, on the Republic's case City Water had no right to such a review and indeed it was the bidders themselves who wanted to preclude the Regulator from undertaking a broad review of the contract.
575. In any case, City Water did obtain wide ranging reconsideration of the Lease Contract. Most of the last years of City Water's existence, from August 2004 through early May 2005, was spent on a broad review of the situation and discussion of potential “radical” changes going far beyond the terms of the Lease Contract. Ultimately, no agreement was reached, but that was nothing that EWURA could or would have changed: DAWASA had no obligation to agree to amend the Lease Contract.
576. Further, the Republic submits that BGT's contentions about the appointment of the EWURA board are mistaken in principle and in fact. According to the Republic, BGT misstates the World Bank's views on the subject; fails to consider that even had EWURA

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<sup>231</sup> Exhibit R-202. Explanatory Notes on Key Topics in the Regulation of Water and Sanitation Services, p. 43.

been appointed, the Ministry would still have existed and had the capacity to act as it did in May and June 2005; and ignores the dispositive question whether the Lease Contract and the bidding process that preceded it entitled City Water to any of the things BGT now says it should have received.

577. Further, the Republic argues that BGT has failed to demonstrate any causal link between the acts / omissions complained of and any harm to BGT. For example, BGT does not (and according the Republic cannot) explain how City Water would have benefited from the time-consuming process of holding a public hearing on the bailout demanded by BGT during the renegotiation – in the Republic’s words:

“... the last thing a private operator would have wanted given customers’ natural aversion to any tariff increase and perennial complaints about poor service.”

**(c) “The Republic failed to manage the expectations of the public with regard to the speed of improvements to the network”**

578. The Republic submits that no Tribunal has ever held that a host State’s negative public statements about an investor constituted unfair and inequitable treatment. It further submits that the only specific events BGT cites occurred in May and June 2005 at a time where not only DAWASA had decided to terminate the Lease Contract, but City Water had already become insolvent and worthless. Even if the expectations of the public with regard to the speed of improvements had anything to do with City Water’s failures from February 2003-April 2005 (of which there is no evidence), the Republic contends that BGT has not pointed to anything the Republic could or should have done about it. BGT’s claim concerning the management of public expectations therefore makes no sense causally, particularly given that neither BGT nor City Water raised this supposed problem when it might have made a difference.

***(d) “The Republic failed to ensure that Government agencies paid their water bills promptly”***

579. According to the Republic, BGT is unable to show that it had any legitimate expectation that the Republic would “ensure” *prompt* payment of bills by government institutions. Indeed, during the bidding and negotiation process, the Republic clearly refused to guarantee that such institutions would pay their bills *at all*. To the extent service was provided and bills were legitimately due, the various institutions were obliged to pay – under their individual contracts with City Water, enforceable as a matter of Tanzanian law. In other words, these institutions were to be treated for most purposes like any other customer and, as with any other customer, delayed payment or non-payment of bills was a commercial risk accepted by City Water (and BGT) that could be combated with the tools at their disposal under the customer contracts and Tanzanian law. Indeed, increasing collection ratios was one of the principal reasons for bringing in a private operator in the first place.
580. Further, the Republic notes that the only provisions in the Lease Contract regarding bill payments by government’s institutions are in Articles 43.2 and 43.3. The fair and equitable treatment obligation is not a means for achieving through litigation what was not achieved through negotiation. During the bidding process, bidders sought a Government guarantee of payment by Government institutions. This was rejected explicitly. BGT cannot, therefore, have legitimately expected such a guarantee.
581. Bidders had been clearly informed that Government institutions should be treated as any other customer and that remedies for failure to pay should be found in the contractual relationship between City Water and the customer, notably disconnection of water services, as provided in the Lease Contract at Article 43.2.

582. Finally, apart from the fact that BGT cannot have expected different treatment in this respect, the Republic contends that the effect of delayed payment by Government institutions was minimal. Even if one accepts BGT’s allegation that Government institutions owed USD 1.5 million, it is clear that City Water more than made up for the deficiency by improperly withholding the Lessor Tariff, misappropriating the FTNDWSC Tariff, and failing to pay the Rental Fee – the sum of which was, by the end, more than Tsh 3.2 billion (USD 2.8 million).<sup>232</sup>

***(e) “The Republic failed to deal with requests to adjust the terms of the Lease Contract in respect of the Operator Tariff to reflect changing conditions”***

583. According to the Republic, BGT cannot have had any legitimate expectation that the terms of the Lease Contract would be thrown aside on the basis of allegedly “changing conditions”, except in conformity with the Lease Contract’s provisions regarding well-defined Material Changes of Circumstance. Moreover, what City Water and BGT requested in 2004-2005 was not merely to “*adjust the terms of the Lease Contract in respect of the operator tariff*”, but to make “radical” changes in the fundamental economics of the deal.

584. The Republic also maintains that the notion that “due diligence in the protection of BGT’s investment” required the Republic to guarantee BGT a 20-25% profit, no matter what changes that might require to the terms BGT had accepted in its bid, underlies BGT’s entire case. BGT’s representatives repeatedly stated that City Water was not viable with the Lease Contract as it was. It follows that the only way that BGT could possibly be entitled to any damages is if it had a *right* to have the Lease Contract changed – which was clearly not the case.

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<sup>232</sup> Castalia Report Appendix D.

585. The Republic further submits, in any event, that DAWASA, though it had no obligation to do so, did offer to make significant changes to the contract, but that City Water rejected them.

## C. THE ARBITRAL TRIBUNAL'S DECISION

### 1. The Standard

586. *The General Standard:* Under the heading “Promotion and Protection of Investment”, Article 2 of the BIT provides as follows:

“Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party”.

587. The parties disagree on the meaning of these terms, and in particular, whether the applicable standard is (as BGT contends) an autonomous one, or (as the Republic contends) is no more than the customary international law minimum standard.<sup>233</sup>

588. The Arbitral Tribunal notes that there have been marked differences on this issue between commentators. For example, Schreuer, “Fair and Equitable Treatment in Arbitral Practice”<sup>234</sup> and the 1999 UNCTAD Study,<sup>235</sup> both reject the idea that fair and equitable treatment is tied to the customary international law minimum standard. In contrast, Thomas, “Reflections on Article 1105 of NAFTA”,<sup>236</sup> and the 2005 OECD Study,<sup>237</sup> both argue for a linkage between the two.

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<sup>233</sup> Counter- Memorial, para. 7.51.

<sup>234</sup> Ch. Schreuer, “Fair and Equitable Treatment in Arbitral Practice,” 6 J. World Investment and Trade 357 (2005) [hereinafter Schreuer, *Fair and Equitable*].

<sup>235</sup> UNCTAD, *Fair and Equitable Treatment* (1999), pp. 12-13.

<sup>236</sup> Ch. Thomas, “Reflections on Article 1105 of NAFTA”, 17 ICSID Rev.—FILJ 21(2002).

589. Equally, the decisions of previous arbitral tribunals have differed on this point. For example, in *Saluka v. Czech Republic*,<sup>238</sup> and *Azurix v. Argentina*,<sup>239</sup> it was held that the fair and equitable standard was different from the international minimum standard, whereas in *Genin v. Estonia*,<sup>240</sup> and *Siemens v. Argentina*,<sup>241</sup> the two concepts were held to be the same.
590. In the Arbitral Tribunal's view, as noted by Schreuer and Dolzer<sup>242</sup>, caution must be exercised in any generalised statement about the nature of the "fair and equitable treatment" standard, since this standard finds different expression in different treaties. For example, some treaties (such as the BIT here) simply refer to "fair and equitable treatment". Others include express language treating this standard as an element of the general rules of international law (e.g. the French model treaty), or list this standard alongside the rules of international law.
591. Given the wording of Article 2(2) of the BIT here, the Arbitral Tribunal sees force in the argument that the Contracting States here ought to be taken to have intended the adoption of an autonomous standard, on the basis, as stated by Christoph Schreuer, that:
- "it is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote a well-known concept such as the "minimum standard of treatment in customary international law". If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression".<sup>243</sup>

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<sup>237</sup> OECD Study, *International Investment Law: A Changing Landscape* (2005), pp. 88-97.

<sup>238</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, paras. 286-295.

<sup>239</sup> *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/03/30), Award of 14 July 2006, para. 361 [hereinafter *Azurix v. Argentina*, Final Award].

<sup>240</sup> *Genin v. Estonia*, Award of 25 June 2001, para. 367.

<sup>241</sup> *Siemens v. Argentina*, Award of 6 February 2007, para. 291.

<sup>242</sup> Ch. Schreuer & R. Dolzer, *Principles of International Investment Law* (2008), p. 121.

<sup>243</sup> Schreuer, *Fair and Equitable*, p. 360.

592. Having said this, the Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.<sup>244</sup>

593. The concept of “*fair and equitable treatment*” is not precisely defined in the BIT, but appears to give each arbitral tribunal much latitude. As noted by one commentator:

“It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest. It is therefore a concept that depends on the interpretation of specific facts for its content”.<sup>245</sup>

594. Similarly, as put by the OECD, the general standard gives the arbitrators the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes.<sup>246</sup>

595. The BIT therefore leaves the precise scope of the “fair and equitable treatment” standard to the determination of the Arbitral Tribunal, which:

“will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable”.<sup>247</sup>

596. *Relevant Threshold*: Whilst the Tribunal in *Mondev v. United States*,<sup>248</sup> concluded that:

“a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case”

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<sup>244</sup> E.g. *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 291; *Azurix v. Argentina*, Final Award, para. 361; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, 44 ILM 1205 (2005), paras. 282-284 [hereinafter *CMS v. Argentina*, Award on Merits]; *Occidental v. Ecuador*, Award of 1 July 2004, para. 190.

<sup>245</sup> P. Muchlinski, *Multinational Enterprises and The Law* (1995), p. 625.

<sup>246</sup> OECD, “Fair and Equitable Treatment Standard in International Investment Law,” Working Papers on International Investment No. 2004/3 (September 2004) [hereinafter OECD, Working Papers].

<sup>247</sup> F. A. Mann, “British Treaties for the Promotion and Protection of Investments”, 52 *British Y.B. Int’l L.* 241, 244 (1981).

<sup>248</sup> *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, 42 ILM 85 (2003); 6 ICSID Rep. 192 (2004), para. 118 [hereinafter *Mondev v. United States*].

This is not to say that the general threshold for finding a violation of the standard cannot be articulated.

597. This threshold is a high one. As stated by the tribunal in *Waste Management v. Mexico* (No. 2):

“Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>249</sup>

598. Similarly, the arbitral tribunal in *Thunderbird v. Mexico* held that:

“Notwithstanding the evolution of customary law since decisions such as the *Neer* claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent jurisprudence ... [citing *Genin* and *Waste Management*] ... For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”<sup>250</sup>

599. These were, of course, statements made in the context of Article 1105(1) of NAFTA, which contains slightly different wording to the BIT here, and has also been the subject of a binding interpretation by the NAFTA Free Trade Commission (FTC). However, notwithstanding these factors, the Arbitral Tribunal considers that the description of the general threshold for violations of this standard is appropriate in the context of Article 2(2) of the BIT.

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<sup>249</sup> *Waste Management v. Mexico* (No. 2), Final Award, para. 98.

<sup>250</sup> *Thunderbird v. United Mexican States* (UNCITRAL arbitration), Award of 26 January 2006, para. 194.



600. The Arbitral Tribunal notes further that certain expressions of a lower threshold have been the subject of some criticism – even outside of NAFTA. In particular, the frequently cited test set out in *TECMED v. Mexico*,<sup>251</sup> which gave primacy to the expectations that were taken into account by the foreign investor in making the investment, was the subject of the following comment by the ICSID *ad hoc* annulment Committee in *MTD v. Chile*:

“...the *Tecmed* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.”<sup>252</sup>

601. In applying the general threshold as articulated (in particular) by the tribunal in *Waste Management v. Mexico (No. 2)*, the Arbitral Tribunal has also taken into account the submissions of the Petitioners, as summarised earlier, which emphasise countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct; the limit to legitimate expectations in circumstances where an investor itself takes on risks in entering a particular investment environment; and the relevance of the parties’ respective rights and obligations as set out in any relevant investment agreement (here the Lease Contract).

602. *Specific Components of the Standard:* The general standard of “fair and equitable treatment” as set out above comprises a number of different components, which have been elaborated and developed in previous arbitrations in response to specific fact situations. These have been the subject of detailed consideration in the parties’ submissions. In so far

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<sup>251</sup> *TECMED v. Mexico*, Award of 29 May 2003, para. 154.

<sup>252</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No ARB/01/7), Decision on the Application for Annulment of 21 March 2007, para. 67 (in fact upholding the original award).

as they are relevant to the dispute here, these separate components may be distilled as follows:<sup>253</sup>

- *Protection of legitimate expectations*: the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment,<sup>254</sup> as long as these expectations are reasonable and legitimate<sup>255</sup> and have been relied upon by the investor to make the investment”.<sup>256</sup>
- *Good faith*: the standard includes the general principle recognised in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation.<sup>257</sup>
- *Transparency, consistency, non-discrimination*: the standard also implies that the conduct of the State must be transparent,<sup>258</sup> consistent<sup>259</sup> and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.<sup>260</sup>

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<sup>253</sup> Certain other elements of the “fair and equitable treatment” standard, such as the protection from “denials of justice”, were not in issue in this case.

<sup>254</sup> *E.g.*, *CME Czech Republic BV v. Czech Republic* (UNCITRAL Arbitration), Final Award of 14 March 2003, para. 611 (holding that the Czech Republic had “breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest”) [hereinafter *CME v. Czech Republic*, Final Award]; *Waste Management v. Mexico (No. 2)*, Final Award, paras. 98, 305; *Saluka v. Czech Republic*, Partial Award of 17 March 2006, paras. 63, 164; *Occidental v. Ecuador (No. 1)*, 12 ICSID Rep. 54 (emphasising the importance of “the stability of the legal and business framework”).

<sup>255</sup> *E.g.* *Waste Management v. Mexico (No. 2)*, Final Award, para. 305.

<sup>256</sup> *E.g.* *Waste Management v. Mexico (No. 2)*, Final Award, para. 98.

<sup>257</sup> *Waste Management v. Mexico (No. 2)*, Final Award; *Middle East Cement v. Egypt*, Award of 12 April 2002, para. 143; *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 303.

<sup>258</sup> *E.g.*, *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 164; *Waste Management v. Mexico (No. 2)*, Final Award, para 98; *CME v. Czech Republic*, Final Award, para 611; *Maffezini v. Spain*, Award of 13 November 2000. para. 83; *Metalclad v. Mexico*, Award of 30 August 2000.

<sup>259</sup> *E.g.*, *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 164; *CME v. Czech Republic*, Final Award, para. 611.

<sup>260</sup> *E.g.*, *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 164, *Waste Management v. Mexico*, Final Award, para. 98; *CME v. Czech Republic*, Final Award, para. 611.

603. It is on the basis of these principles, and taking into consideration all the circumstances of the dispute, that the Arbitral Tribunal must determine whether the conduct of the Republic was consistent with its obligation to ensure fair and equitable treatment of BGT's investment.

## 2. The specific claims

### (a) *Conduct the Subject of Article 5 of the BIT*

604. As noted earlier, it is BGT's case that each of the acts and omissions complained of in the context of Article 5 of the BIT (expropriation) also constituted a breach of Article 2(2) of the BIT.

605. As to this, by reason of the analysis set out in **Chapter V(3)C** of this Award, the Arbitral Tribunal concludes that the following conduct on the part of the Republic was in violation of Article 2(2) of the BIT:

- (a) Minister Lowassa's press conference on 13 May 2005, and his address to the staff on 17 May 2005 (see paras. 497-500 of **Chapter V** above);
- (b) the withdrawal of the VAT exemption on 24 May 2005 (see paras. 501-502 of **Chapter V** above);
- (c) the seizing of control of City Water's offices; the immediate installation of DAWASCO; and the deportation of senior management on 1 June 2005 (see paras. 503-518 of **Chapter V** above).

606. As with the analysis of the Republic's breaches of Article 5 of the BIT, there is a separate question as to whether these breaches of Article 2(2) of the BIT caused any of the economic loss and damage for which BGT claims compensation.

607. As set out earlier, the Arbitral Tribunal agrees with the Republic's position that, by reason of City Water's performance, the termination of the Lease Contract at the time of these

events was inevitable, and was going to materialise within a matter of weeks. This is directly relevant to the issue of causation, which is addressed separately in **Chapter VI** of this Award.

***(b) The Republic Did Not Appoint an Independent Regulator and Failed to Ensure that the Minister, as Independent Regulator, Carried out the Duties He Had Assumed Under the EWURA Act***

608. According to Mr. Baker, one of the regulatory experts, it was critical to ensure that the Regulator was independent from the political process. This was essential to secure the credibility of the arrangements and their legitimacy in the eyes of the customers and the people of Tanzania.
609. Equally, Mr. Larry Magor testified at the hearing that the existence of an independent regulator was an important factor for BGT in deciding to do business in Tanzania.<sup>261</sup>
610. The reasons why the independent regulator was not put in place until 2006 were political. Tanzania needed financing to establish the independent regulator and other related institutions. To obtain the necessary financing from the World Bank, certain conditions had to be met and for political reasons, it took a long time before this was achieved.<sup>262</sup> It was the Tanzanian Parliament which enacted an amendment in the DAWASA Act to appoint the Minister as Interim Regulator.<sup>263</sup> The Board of EWURA was only put in place in 2005. It comprises seven people. EWURA is a substantial operation, employing 94 people<sup>264</sup> and regulating about 90 entities.<sup>265</sup>

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<sup>261</sup> Hearing Transcript, Day 1, p. 162, 18.

<sup>262</sup> Mr. Masebu Testimony, Hearing Transcript, Day 4, pp. 179, 7-25 and p. 181.

<sup>263</sup> *Ibid*, p. 182, 2-8.

<sup>264</sup> *Ibid*, p. 181, 2-12.

<sup>265</sup> *Ibid*, p. 167, 13-15.

611. In the present case, however, the role of the Regulator was to exercise the functions which were attributed to him in the Lease Contract.<sup>266</sup> In this respect, the powers of the Regulator were not unlimited. He had the duty to regulate DAWASA and the Operator in accordance with the provisions of the Lease.
612. As Mr. Magor stated in his evidence:
- “there were several questions asked by the bidders on the role of the Regulator and it was understood that the authority of the Regulator, be it EWURA or an Interim Regulator, would be narrowly defined and would be limited by the express terms of the Lease Contract”.<sup>267</sup>
613. This was recognised in terms by Mr. Magor during his cross examination, when he was asked to comment on an addendum that was given to bidders as part of the bidding process.<sup>268</sup> The document stated that:
- “... the EWURA is bound to regulate the DAWASA and the Operator in line with the provisions of the Lease, which are repeated in the licenses granted by the EWURA. The current approach aims at ensuring that there are clear regulatory provisions in the licenses which repeat what is in the Lease so that the hands of the Regulator are guided accordingly. With this approach, the Regulator will be working within the limits of the license and the Lease, in other words, two documents act as a “rope” and the Regulator is tied to graze within the limits of that rope”.
614. Mr. Shugart, the Republic’s regulatory expert, explained that in the circumstances of this case, and in particular the constraints imposed by the Lease Contract, the independence of the Regulator from political authority was not in fact as important as it might otherwise have been. This was so at least until the stage of a Major Review was reached (which it was not in this case).<sup>269</sup>

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<sup>266</sup> Hearing Transcript Day 4, pp. 239-240.

<sup>267</sup> Hearing Transcript Day 1, p. 164.

<sup>268</sup> Hearing Transcript Day 1, pp. 162, 23-25.

<sup>269</sup> Hearing Transcript, Day 4, p. 246, 17-21.

615. In the Arbitral Tribunal's view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from BGT's legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA.
616. This, however, was a breach of Article 2(2) that had no negative impact on BGT. There is no evidence to support BGT's allegation that the Republic failed to ensure that the Minister, as Interim Regulator, carried out the duties he had assumed under the EWURA Act. On the contrary, the evidence is that the Interim Regulator acted properly and in accordance with his duties. For example, in July 2004, when City Water requested a tariff increase in application of the Lease indexation formula, this was granted.<sup>270</sup> Again, in July 2004, when City Water asked for an Interim Review under Article 41.4 of the Lease Contract, the Interim Regulator directed the parties to undertake that review. The Interim Regulator convened two meetings in August 2004 to discuss the overall situation, including not only tariff levels but inter-shareholder matters, City Water's finances, and progress on the capital works. Minister Lowassa later met with Mr. White over two days in October 2004. At around the same time, DAWASA and City Water spent weeks attempting to agree on a financial model as a basis for further discussions of potential changes. After further communications with Mr. White (eg in December 2004),<sup>271</sup> the Interim Regulator concluded (in the Arbitral Tribunal's view correctly) that what BGT was seeking went beyond the scope of any review available under the Lease Contract, and he therefore proposed a much broader contractual renegotiation process (which he was not required to propose).

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<sup>270</sup> Larry Magor Testimony, Hearing Transcript, Day 1, p. 170.

<sup>271</sup> Exhibit R-89. Larry Magor Testimony, Hearing Transcript, Day 1, p. 172, 8-9.

617. Further, as explained below, the Arbitral Tribunal considers that the Minister as Interim Regulator addressed the Request for Interim Review, and conducted the Renegotiation Process, in good faith.
618. Indeed, most of the period from August 2004 to May 2005 was then spent on a broad review of the situation, in which Minister Lowassa and DAWASA fully engaged. Ultimately, however, no agreement was reached – but in the Arbitral Tribunal’s view, this was nothing that the EWURA could have changed.
619. Overall, in the Arbitral Tribunal’s view, City Water in fact obtained wide-ranging reconsideration of the Lease Contract over and above that to which it was strictly entitled.
620. So it is that no contemporaneous complaint was made by City Water (or BGT) about the absence of an independent regulator, or about the breach of any legitimate expectations in this regard.
621. The Arbitral Tribunal concludes that, in all the circumstances of this case, this complaint does not meet the general threshold as set out above, such as to constitute an actionable violation of Article 2(2) of the BIT.

***(c) The Republic Failed to Manage the Expectations of the Public with Regard to the Speed of Improvements to the Network***

622. The Arbitral Tribunal notes that at an early stage of the Project, the Republic did actively manage the expectations of the public with regard to the speed of improvements of the network. In his State of the Nation address to Parliament on 12 February 2004, the President of Tanzania stated as follows:

“The decision to privatize water and sewerage services in Dar es Salaam City was not an easy one to take. But we had to take a decision having analyzed the reality of our situation, and carefully weighing the pros and cons. Finally we took a decision and concessionary (sic) the infrastructure to City Water from 1 August 2003. Surprisingly, even when the concession has not run for six

months some people are becoming impatient wanting all problems to disappear immediately. That is not realistic. We have lived with these problems, and countenanced them for many years. How can one expect City Water to resolve all of them in six months?"<sup>272</sup>

623. The President's "*words of encouragement about City Water and the privatization process*" were acknowledged by City Water in a letter to the Presidency dated 16 February 2004.
624. In May 2005, the Republic's attitude dramatically changed. Far from seeking to manage the public's expectations, the Minister acted in such a way as to undermine the public's confidence in City Water, especially during the press conference of 13 May 2005 where the Minister referred to City Water's poor performance and informed the public that the Lease Contract had been terminated and that DAWASCO was taking over.
625. As explained in **Chapter V**, by the time of these announcements, City Water's performance was such that the termination of the Lease Contract was inevitable, and was going to materialise within a matter of weeks. There was also widespread criticism of City Water.
626. However, at this stage, according to DAWASA, the Lease Contract had not yet been terminated. Indeed, even by 15 June 2005, DAWASA continued to insist that the Lease Contract had not been terminated, that it remained in existence, and that the alleged breach by City Water remained capable of remedy.<sup>273</sup> DAWASA's counsel expressly stated that, on the expiry of the contractual notice period of 24 June 2005, DAWASA "*will be entitled to terminate the [Lease Contract]*" - the clear implication being that, prior to 24 June 2005, neither DAWASA nor the Republic had any entitlement to terminate the Lease Contract.
627. The position in May, therefore, was that despite its poor record, and despite all the public criticisms, City Water still had a right to the proper and unhindered performance of the

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<sup>272</sup> Exhibit C-110.

<sup>273</sup> Exhibit C-43. DAWASA letter of 15 June 2005.



contractual termination process. In the Arbitral Tribunal's view, the Republic's public statements at this time constituted an unwarranted interference in this. They inflamed the situation, and polarised public opinion still further, thereby ensuring that from May 2005 onwards, the process by which the Lease Contract was terminated and City Water was removed did not – and could not – follow a normal contractual course.

628. The Arbitral Tribunal concludes that in acting in such a way in May 2005, the Republic did not comply with the fair and equitable treatment principle.
629. Once again, however, the issue of causation arises, given the extreme difficulties in which City Water found itself by May 2005. This is addressed separately in **Chapter VI** of this Award.

***(d) The Republic Failed to Ensure that Government Agencies Paid Their Water Bills Promptly***

630. The timing of payment by Government institutions of their water and sewerage bills was an issue specifically addressed during the bidding process in 2002-3. BGT's own bid noted that:

“[t]he poorest collections performance comes from government institutions ...”<sup>274</sup>

631. During negotiations, the PSRC considered a bidder's proposal that the Republic guarantee payment from Government institutions. Bidders also asked for the right to set off unpaid Government institutions bills against the Rental Fee payable to DAWASA.<sup>275</sup> Importantly (in the Arbitral Tribunal's view), neither proposal was accepted.<sup>276</sup> It follows that the successful Operator would only have the same mechanisms available to it to enforce collections from Governmental institutions as with other customers (including disconnections pursuant to Article 43.2 of the Lease Contract).

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<sup>274</sup> Exhibit R-21. Due diligence report, Annex B to Technical Bid, para. 4.2.

<sup>275</sup> Exhibit R-6. Combined Bidders Comments, 25 April 2002, pp. 22, 34.

<sup>276</sup> Exhibit R-10. Combined Bidders Comments, 5 June 2002, p. 58.

632. Indeed, the Lease Contract confirmed this understanding by explicitly referring to the disconnection of Government institutions in accordance with the terms of their contracts with City Water (Article 43.2).
633. Article 43.2 of the Lease Contract, under the heading “Non Payment of Bills”, provides that:
- “[f]ailure by a Customer (including a Government Institution) to pay amounts due for either the water or Sewerage bill may result in a service suspension of the water supply or Sewerage Services to the Customer (including a Government Institution). The Service may be terminated and reconnected in accordance with the provisions of the Customer Contract (or the relevant agreement in respect of provisions of Services to the Government Institution), as the case may be.”<sup>277</sup>
634. Further, an entitlement to withhold DAWASA’s Lessor Tariff or other payments in order to make up for overdue bills from Government institutions was also requested during the bidding process – and rejected.<sup>278</sup>
635. It follows, in the Arbitral Tribunal’s view, that BGT cannot have legitimately expected any special arrangement with respect to Government institutions’ bills. As indicated in Article 43.2 of the Lease Contract, Government institutions were to be treated as any other customer. Action could be brought before local courts, but probably more efficiently, water services could have been temporarily disconnected. And it appears that when this was done with the army, they paid their bills at least for part.<sup>279</sup>

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<sup>277</sup> Article 43.3 of the Lease Contract, under the heading “Payment of Bills for Government Institutions”, also provides that:

“for each Government Institution provided with Services, the Operator shall provide annually to the Lessor the estimated or predicated consumption and charges at least three (3) months before the Government’s annual budget is finalized (the date of which will be provided by the Lessor in good time for the Operator to meet his obligations under this Article 43.3)”.

<sup>278</sup> Exhibits R-6 and R-10. Combined Bidders Comments of 25 April 2002, pp. 22, 54; Combined Bidders Comments of 5 June 2002, p. 58.

<sup>279</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 155, 19 to p. 159, 23.

636. The record does not provide evidence of a breach by the Republic of its international obligations in relation to the late payment of Government institutions: the sole fact that the latter were in arrears in their payments is not sufficient to establish a breach by the Republic of the fair and equitable treatment principle.

***(e) The Republic Failed to Deal with Requests to Adjust the Terms of the Lease Contract in Respect of the Operator Tariff to Reflect Changing Conditions***

637. BGT's case here is based on the premise that City Water was entitled to a review of the Lease Contract as a whole. It is to be noted that City Water's requests in 2004-5 amounted to a significant change in the economics of the Lease Contract. As TRC put it, City Water's position in the renegotiation was to "de-risk" the Lease Contract, or in other words to shift to DAWASA risks that BGT had itself taken on in its bid.<sup>280</sup>

638. The notion that BGT was entitled to such a review is, however, difficult to reconcile (a) with exchanges that took place in the course of the bidding process as well as (b) the terms of the Lease Contract itself.

639. *The Bidding Process*: As for the bidding process, the possibility of a wide-ranging and unstructured review to redress alleged financial imbalances was sought by bidders, but squarely rejected by the PSRC. The Arbitral Tribunal notes, for example, the following exchanges that took place in the contractual bidding period:

Bidder's Question / Comment:

"... We suggest to include a broader clause than the interim review allowing a review of the contract provisions, i.e. generally speaking an Adjustment to the Contract.

This clause, without any threshold, would allow both Parties to ask for a negotiation on the contract when a Party has serious reasons to consider that the economical situation of the Contract has

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<sup>280</sup> Exhibit R-163. TRC Phase II Final Report of 24 May 2005, p. 22.

changed compared to the situation taken into account in the Bidder Business Plan...<sup>281</sup>

PSRC's Response:

“This is not acceptable. The proposal would create too much uncertainty. The provisions for changes to the tariffs allow for changes in economic circumstances to be taken into account. See also Article 63 which allows for adjustment to the contract on terms which are standard for a contract of this nature.”<sup>282</sup>

...

Bidder's Question / Comment:

“... At the end of [theEMP], the Parties can agree an adjustment of the Contract where there are any deviations between the assumptions taken into account by the Bidder and the actual situation.”<sup>283</sup>

PSRC's Response:

“... it is up to bidders to carry out [their] own due diligence ...

The only adjustments that will be considered will be in accordance to: Article 41, Review of Operator Tariff and Article 42, Material Change of Circumstances.”

640. The PSRC maintained this position throughout.<sup>284</sup> The Arbitral Tribunal therefore concludes that by the time BGT made its bid, it could not have had a legitimate expectation that any review broader than that provided for in the Lease Contract would be available.
641. *The Lease Contract's Terms:* The Lease Contract fixed the Operator Tariff for the first five contract years. Apart from adjustment under the Indexation Formula to account for inflation and exchange rate fluctuations, the Lease Contract provided for only two possible reviews to take effect before the beginning of the sixth year: the Interim Review (which

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<sup>281</sup> Written Questions of 30 April 2002, p. 3.

<sup>282</sup> Written Questions of 30 April 2002, p. 3. Article 63 of the Lease Contract permits the parties *voluntarily* to agree to amend the Lease Contract, subject to certain conditions.

<sup>283</sup> Exhibit R-10. Combined Bidders' Comments of 5 June 2002, p. 49.

<sup>284</sup> Exhibits R-9 and R-10. There were many similar exchanges between bidders and the PSRC, *see e.g.*, Combined Bidders' Comments of 25 April 2002, pp. 18, 20; Response to Bidder's Questions of 13 May 2002, p. 1; Combined Bidders' Comments of 5 June 2002, pp. 53, 67.

City Water received, but could not demonstrate a Material Change of Circumstances) and the Annual Review (of which City Water could not take advantage because it failed to collect the necessary data).<sup>285</sup>

642. *The Interim Review:* Article 41.4 of the Lease Contract, under the heading “An Interim Review of the Operator Tariff”, provides as follows:

“a) Subject to Article 41.4 (e), an Interim Review may be undertaken at the request of either the Lessor or the Operator where either party can demonstrate that an event of Material Change of Circumstances has occurred. Any proposed changes as a result of such an Interim Review shall be subject to the approval of the regulator.

b) The Regulator may direct the parties to undertake an Interim Review where the Regulator has reasonable grounds to believe that the Operator Tariff needs revision or can demonstrate that a Material Change of Circumstances has occurred.

c) Within six (6) weeks of the receipt of a request for an Interim Review, the Lessor shall appoint a Technical Auditor to investigate and report to the Lessor, the Regulator and the Operator.

d) Upon receipt of the report from such Auditor, after applying to the Regulator for its approval, the Lessor shall make its determination with all reasonable expedition. If the Lessor, acting reasonably, concludes that there has been a Material Change of Circumstances, the Lessor shall authorize appropriate specific modifications or variations to the levels of the Operator Tariff or to the Indexation Formula, following approval by the Regulator.

e) There shall be no more than two (2) Interim Reviews in any continuous period of twelve (12) months”. (Emphasis added.)

643. The Arbitral Tribunal considers that a clear distinction should be made between Article 41.4(a) and Article 41.4(b). Article 41.4(a) permits the Operator to ask for an Interim Review, only when it can demonstrate that an event of Material Change of Circumstances has occurred. The fact that in the opinion of the Operator, the Operator Tariff needs a revision, is not sufficient to justify a request for revision. A Material Change of Circumstances has to be established.<sup>286</sup>

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<sup>285</sup> Witness Statement of Cliff Stone, para. 18(01).

<sup>286</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 168, 9.

644. Concurrently, it is clear that the sole opinion of the Operator that the Operator Tariff needs a review is not *per se* a compelling consideration for the Regulator to direct the parties to undertake an Interim Review.
645. Article 41.4(b) gives sole discretion to the Regulator to direct the parties to undertake an Interim Review where either (i) he has reasonable grounds to believe – that is, he has a personal and objectively justifiable conviction – that the Operator Tariff needs revision, or (ii) if he can demonstrate that a Material Change of Circumstances has occurred.
646. The Arbitral Tribunal agrees with Mr. Shugart that the contract did not call for, or entitle City Water to, a general “needs” review. It also agrees with his conclusion that “*good regulation does not consist of ad hoc decisions based on circumstances that just happen to come up*”.<sup>287</sup> In other words, the fact that the Operator Tariff needed revision because the Operator underbid or did not correctly perform its obligations under the contract would certainly not be a reason for the Interim Regulator to direct the parties to undertake an Interim Review. To borrow the words of Mr. Shugart:
- “not only would that be bad regulatory policy, ..., it would be terrible procurement policy. It would completely undermine, it would invalidate the whole bidding process of bidders. If, when they bid, they can count on a clause in the contract that if they get into bad times, they will have a needs review, ... this is terrible procurement policy. It just cannot be”.<sup>288</sup>
647. Here, the Interim Regulator did not take such an initiative. There is no evidence, however, that the Interim Regulator was unreasonable in concluding that the Operator Tariff did not need revision at that point in time, or that no Material Change of Circumstances had occurred.
648. What the Interim Regulator in fact did was to grant City Water’s request and to order DAWASA to appoint an auditor. In accordance with Article 41.4(a) of the Lease Contract,

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<sup>287</sup> Hearing Transcript, Day 5, p. 38.

<sup>288</sup> Hearing Transcript, Day 5, pp. 41-42.

the purpose of the audit was to determine “*whether there are reasonable grounds for interim review of tariff as provided for in the Lease Contract*”. The auditor would investigate “[p]arameters relevant to the *Material Changes of Circumstances as stipulated in 42.1 of the Lease Contract*”. The Interim Regulator also directed that the auditor review and verify the equity injections made by City Water’s shareholders.<sup>289</sup>

649. Neither City Water nor DAWASA objected to the Interim Regulator’s directions. PwC was appointed auditor, together with the engineering firm Howard Humphreys, again without any objection. City Water prepared a submission and PwC issued its report on 26 November 2004. It concluded that no tariff adjustment was warranted, mainly on the basis that City Water could not supply the data needed to determine whether there had or had not been a Material Change of Circumstances. For example, in relation to City Water’s claim that there had been a material change in the amount of water available for billing, PwC noted:

“it is our view that there has been insufficient representative flow data provided by the Operator over the 11 month period to enable a firm conclusion to be made. After the first 11 months of operations, there are no permanent working bulk flow meters at the treatment works, reservoirs or main distribution pipes...”<sup>290</sup>

650. Overall, the Arbitral Tribunal considers that the evidence does not support BGT’s allegation that the Interim Regulator and DAWASA failed to respond appropriately to City Water’s request for review of the Operator Tariff.

651. *Renegotiation of the Lease Contract*: The chronology of the renegotiation of the Lease Contract was set out earlier in this Award (see paras. 176-200 above). It is clear on the evidence that when the renegotiation process was commenced, City Water was in a very difficult financial position and BGT had acknowledged that City Water was not viable

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<sup>289</sup> Exhibit R-80. Regulator Directive of 31 August 2004.

<sup>290</sup> PwC Interim Review of 26 November 2004, p. 2.

without “radical” changes to the Lease Contract. DAWASA had no legal obligation to make such radical changes, but still accepted to enter into a process of renegotiation.

652. It is correct that initially, while Dr. Ballance (of TRC) had wanted three months for the renegotiation process,<sup>291</sup> the Permanent Secretary proposed a timetable of only one week.<sup>292</sup> This was finally extended to three weeks<sup>293</sup>, and the parties agreed to this timetable.<sup>294</sup> When Dr. Ballance subsequently requested a further three-week extension to the renegotiation, and DAWASA and City Water also wanted more time, the Permanent Secretary only granted one week.

653. Even if this time period was short, the Arbitral Tribunal concludes that it was not unreasonable. Given the critical financial situation of DAWASA and City Water, it can readily be appreciated that the Minister and DAWASA wanted to reach a solution as quickly as possible. As Stephan Richer himself wrote to Brian Winfield and Larry Magor on 9 April 2006:

“The Government is extremely frustrated with the lack of progress and wants to rapidly force an outcome, one way or the other”.

654. Discussions about restructuring the deal had been going on for the better part of the year and it was time for a resolution. Moreover, City Water’s performance continued to deteriorate as it ran low on funds and its shareholders refused to inject more capital, and the financial situation at both City Water and DAWASA demanded immediate action. At least in theory, and viewed at that time, this crisis could have threatened a vital public service and the situation therefore had to be resolved one way or the other in the near future. The Arbitral Tribunal therefore rejects BGT’s allegation that:

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<sup>291</sup> Tony Ballance Testimony, Hearing Transcript, Day 6, p. 13, 7-25; 14, 4.

<sup>292</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 13, 19-21.

<sup>293</sup> *Ibid.*, pp. 21-24.

<sup>294</sup> *Ibid.*, pp. 16-18.



“the curtailed timetable is entirely consistent with a political decision that the Republic would go through the motions of the renegotiations but had no real intention for them to succeed”.<sup>295</sup>

655. The substantive renegotiations started with a meeting on 8 April 2005 which was attended by all interested parties. At the meeting, City Water conceded it owed DAWASA Tsh 3.34 billion and that the Project Account balance, which DAWASA was required to maintain at Tsh 750 million, had dwindled to Tsh 66 million.<sup>296</sup>

656. At this 8 April meeting, a deadline of 28 April 2005 was discussed and set.<sup>297</sup> Mr. Stone acknowledged the deadline. In a letter to Mr. Mutalemwa dated 14 April 2005, he said that City Water welcomed DAWASA’s:

“commitment to concluding a quick renegotiation, i.e., within a period of one or two weeks ...”.<sup>298</sup>

657. The parties were well aware what the consequences would be if the deadline passed without an agreement: the Performance Bond would be called and the Lease Contract would be terminated. On 15 March 2005, Mr. Stone advised Mr. Richer, Mr. Winfield, and BGT’s Chairman Larry Magor that DAWASA planned to advise the World Bank that the situation was untenable and that the Performance Bond would soon be called in full.<sup>299</sup>

Mr. Stone also told his superiors that the Lease Contract would also be terminated:

“Cash flow is based on us paying DAWASA the lessor tariff, with two months credit ... the longer we delay in giving such an offer, the less chance of it being accepted. Relationships have already started to deteriorate ... DAWASA are currently developing a strategy for us to be replaced by DAWASA themselves. As time moves on and these plans are developed, it will become increasingly difficult to stop this ball from rolling into termination”.

658. Mr. Stone outlined the possibilities heading into the renegotiation:

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<sup>295</sup> BGT’s Summary of the oral evidence, p. 33, para. 94.

<sup>296</sup> Exhibit R-133. Minutes of Joint Meeting with Permanent Secretary of 8 April 2005, p. 2.

<sup>297</sup> *Ibid.*, p. 6.

<sup>298</sup> Exhibit R-136. Letter from City Water to DAWASA, p. 2.

<sup>299</sup> Exhibit R 122. Email from Cliff Stone of 15 March 2005.

“I see only three courses of action: A. Agree to pay Lessor Tariff and negotiate terms. Obtain a good renegotiation outcome. B. Allow DAWASA to call the bond, full or partial. Then either go legal (we do not have a strong case) or accept it and renegotiate, under difficult terms. C. Agree to walk and negotiate the best exit terms we can”.

659. As the 28 April 2005 deadline for agreement approached, TRC prepared an *Aide Mémoire* recording events to that point. It pointed out the following :

“This Aide Mémoire is written because the negotiations between CWS and DAWASA, which were expected to be completed by 29 April 2005, have not been finalized as of this date. This Aide Mémoire sets out what the current position is so all parties understand where the process is and how it will be completed. It is expected that an outline agreement be reached by 6 May 2005. Both parties, together with TRC, met with the Permanent Secretary (PS) Ministry of Water and Livestock Development on 27 April 2005 where an extension of three to four weeks to complete these negotiations was requested. The PS agreed to one-week extension (to reach an outline agreement) subject to the agreement of the Minister”.<sup>300</sup>

660. BGT and City Water were therefore well aware that if no agreement could be reached by 6 May 2005, DAWASA would call the Performance Bond and terminate the Lease Contract.

661. During the negotiations, DAWASA offered a.o. a 40% increase in the Operator Tariff in January 2006,<sup>301</sup> a two-year interest free grace period before beginning repayment of City Water’s arrears to DAWASA<sup>302</sup> and a USD 6 million increase in the amount available under the Sub-Loan.<sup>303</sup> In return, DAWASA requested a number of things, amongst which two were deal breakers. As TRC put it:

“there are two overriding issues that need to be considered by both parties before an agreement is likely to be reached: the future level of collections [and] the extension of the Lease Contract – and what if anything might trigger this ...”<sup>304</sup>

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<sup>300</sup> Exhibit R-142. TRC Renegotiations *Aide Mémoire* of 28 April 2005, p. 1.

<sup>301</sup> Exhibit R-148. TRC’s Outline Agreement of 5 May 2005.

<sup>302</sup> Exhibit R-152. Letter from City Water to DAWASA of 9 May 2005, para. 17.

<sup>303</sup> Exhibit R-149. TRC’s Issues for Renegotiation of 5 May 2005, p.16.

<sup>304</sup> Exhibit R-148. TRC’s Outline Agreement of 5 May 2005.

662. Notwithstanding a degree of ambiguity in its proposal, the Arbitral Tribunal concludes that the two issues were linked (and understood to be so). DAWASA agreed in principle to a five-year extension, but also took the position that this could come into effect only when two things happened: (i) BGT injected the equity it was promising (an additional USD 1.5 million); and (ii) City Water achieved certain performance targets (including collections levels).<sup>305</sup>
663. As TRC noted after the renegotiation was over: “the level of cash collections that CWS could achieve... was the most significant issue throughout the whole renegotiation process”<sup>306</sup> and indeed the reason for its failure.
664. The level of cash collections was important for City Water but also for DAWASA which depended on the Lessor Tariff to fund its operations and meet its financial obligations to the DWSSPP. Moreover, the more City Water collected and retained as Operator Tariff, the less additional capital City Water would need. Therefore, if City Water could not commit to an adequate level of collections, DAWASA would have to lend City Water more cash via the Sub-Loan.
665. The parties met with Dr. Ballance for the final time on 5 May 2005, the day before the extended deadline. Dr. Ballance gave a PowerPoint presentation on the course of the renegotiation and delivered a draft proposed framework for an agreement.<sup>307</sup> He understood this proposed framework agreement as the final offer.<sup>308</sup> It was also so understood by Mr. Mutalemwa,<sup>309</sup> who described it as a take it or leave it proposal or at

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<sup>305</sup> Witness Statement of Tony Ballance, p. 40.

<sup>306</sup> Exhibit R-163. TRC Phase II Final Report of 24 May 2005.

<sup>307</sup> Exhibits R-149 and R-150. TRC’s presentation Issues for Renegotiation of 5 May 2005; TRC’s Outline Agreement between the parties of 5 May 2005.

<sup>308</sup> Witness Statement of Tony Ballance, para. 23.

<sup>309</sup> Hearing Transcript, Day 3, p. 32, 3-8.

least, either you take it, or you offer something better.<sup>310</sup> But in this respect, Dr. Ballance testified that it was not expected that:

“City Water was going to come back with something more favourable to DAWASA than the terms of the 5th of May agreement”.<sup>311</sup>

666. Dr. Ballance’s 28 April 2005 *Aide Mémoire* summarising the status of the renegotiation had also advised all parties that 6 May 2005 was the deadline for mutual acceptance of a framework agreement and went on to list the actions necessary “*in order for the renegotiation to reach a conclusion by 6 May 2005*”.<sup>312</sup> It pointed out in particular that:

“the key issue identified that would be central to an agreement is the level of cash collections (and the key drivers of this figure) CWS are able to achieve and are prepared to agree to going forward. While there are a number of other issues that will need to be resolved, failure to reach some agreement on cash collection levels is unlikely to result in a successful renegotiation of the contract”.

667. Finally, the *Aide Mémoire* noted that:

“Dr. Tony Ballance of TRC will return to Tanzania on 4 May 2005 to oversee further formal negotiations. He will depart on 5 May, by which time an agreed position should be reached”.

668. When the parties met with Dr. Ballance on 5 May 2005, he proposed a compromise setting out a level of future collections lower than that which DAWASA had proposed, but higher than City Water’s proposal. Since he considered that the proposal was as low as DAWASA was willing to go on collections, Dr. Ballance believed that it was time for City Water either to accept the compromise proposal or concede that the renegotiation had failed.<sup>313</sup> On the extension issue, Dr. Ballance’s compromise provided for the five year

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<sup>310</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 36, 5-9.

<sup>311</sup> Tony Ballance Testimony, Hearing Transcript, Day 6, p. 21, 1-15.

<sup>312</sup> Exhibit R-142. TRC’s Renegotiations *Aide Mémoire* of 28 April 2005, p. 2.

<sup>313</sup> Witness Statement of Tony Ballance, para. 24.

extension to be conditioned on equity injections alone and not on City Water achieving performance targets as DAWASA had requested.<sup>314</sup>

669. When Dr. Ballance left Dar es Salaam on 5 May 2005, his view was that the renegotiation had failed or was about to fail.<sup>315</sup> This was confirmed by Mr. Stone's letter to Mr. Mutalemwa of 9 May 2005.<sup>316</sup> Although the Arbitral Tribunal agrees that the terms of the letter are somewhat confusing, it was not unreasonable to deduce from it that City Water indeed failed to accept the compromise on the two overriding issues. City Water apparently continued to insist on a five-year extension without any conditions, including the compromise condition (equity injection first, as Dr. Ballance had proposed<sup>317</sup>). But the real problem was City Water's rejection of the final compromise concerning future collections. Dr. Ballance's proposal had listed levels for the fiscal year that was about to end and for the five succeeding fiscal years. Mr. Stone's letter substituted lower levels for each of the succeeding years and made it clear that City Water would not go any higher:

“these collections [i.e., the lower levels proposed by City Water] are considered by City Water as already being very aggressive but achievable. We believe that any cash collection forecasts in excess of these levels are unrealistic”.<sup>318</sup>

“It was the best City Water could do”.<sup>319</sup>

670. And indeed, the first paragraph of the letter indicated that:

“in principle we accept the proposal except for the proposed collections and with the following modifications and clarifications”.

671. This amounted to a counterproposal on the most substantial issues, and therefore to a rejection of the proposal.

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<sup>314</sup> Exhibit R-148. Agreement between the parties of 5 May 2005, p. 3.

<sup>315</sup> Witness Statement of Tony Ballance, paras. 24-25.

<sup>316</sup> Exhibit C-100.

<sup>317</sup> Exhibit R-152. Letter from City Water to DAWASA of May 2005, para. 3.

<sup>318</sup> *Ibid.*, para. 1.

<sup>319</sup> Cliff Stone Testimony, Hearing Transcript, Day 2, p. 227, 1- 5.

672. Mr. Mutalemwa's evidence was that the real issue arising from Mr. Stone's collections proposals in the 9 May 2005 letter was that they created a "cash gap" of Tsh 6 billion as opposed to the Tsh 2 billion cash gap (or cash shortage) that resulted from TRC's 5 May 2005 proposal,<sup>320</sup> and that these were costs that DAWASA could not absorb.<sup>321</sup> The amount of the cash gap was disputed by BGT, but even if it was not as high as Tsh 6 billion, it was in any case very substantial and well over the cash deficit of Tsh 2 billion suggested by Dr. Ballance in his proposed framework agreement, which would in principle have been acceptable to DAWASA.<sup>322</sup>
673. It is clear therefore that the renegotiation had failed. As noted earlier, City Water had no right to such a renegotiation<sup>323</sup> of the Lease Contract, DAWASA had simply accepted to engage in the same. The parties were aware – and agreed - that the last deadline for conclusion of the discussions was 6 May 2005. In the Arbitral Tribunal's view, the last proposal by DAWASA could not be criticised as unreasonable. It was just not accepted by City Water. City Water's further allegations that its last proposal should have been further considered and that the issue of the cash gap could have found a solution are unjustified, since the deadline agreed upon by all parties had already been reached.
674. On the basis of the above, and all the circumstances, the Arbitral Tribunal concludes that the renegotiation was performed in good faith by DAWASA. It was the last chance for City Water. No agreement could be reached. According to Dr. Ballance himself, the termination of the renegotiation process by the Republic at this point was not

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<sup>320</sup> Hearing Transcript, Day 3, p. 53, 22-25; p. 54, 14-17.

<sup>321</sup> Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 54, 18-25 and p. 84, 17-20.

<sup>322</sup> Exhibit R-173. Memo by Archard Mutalemwa of 9 June 2005, p. 29; Archard Mutalemwa Testimony, Hearing Transcript, Day 3, p. 70, 22- 24.

<sup>323</sup> *See also* the testimony of Cliff Stone, Day 2, p. 87, 14-25; p. 88, 2-22 (that DAWASA was under no compulsion to agree to amend the contract, that City Water was similarly free to reject any proposals that might have come from DAWASA and that DAWASA was also free to reject any proposal coming from City Water).

unreasonable<sup>324</sup>: there was a draft agreement “*that was designed to meet the requirement of both parties and there was a compromise*”. Therefore, from the moment one of the parties tried to move “*away from the biggest and most important assumption*”, he called the deal off, especially since Mr. Mutalemwa, who was a critical person on the DAWASA side in the negotiations, was already unpersuaded by the numbers proposed by Dr. Ballance and would have preferred higher figures.<sup>325</sup>

675. Overall, the Arbitral Tribunal concludes that there was no breach by the Republic of the fair and equitable treatment standard in this regard.

676. *Subsequent Treatment of DAWASCO*: The Arbitral Tribunal considers that there is no evidence in the record that DAWASCO has received preferential treatment as compared to City Water and that therefore, Respondent has acted in a discriminatory manner. This is addressed further below.

## **(5) UNREASONABLE OR DISCRIMINATORY MEASURES**

### **A. BGT’S POSITION**

677. According to BGT, the Republic has also breached Article 2(2) of the BIT, which provides in part that the Republic shall not impair the investments of foreign investors such as BGT.

Article 2(2) states that:

“[n]either contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party”.

678. BGT relies on *Saluka v. Czech Republic*, where the tribunal explained that “impair” means “according to its ordinary meaning (Article 31 of the Vienna Convention on the Law of

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<sup>324</sup> Tony Ballance Testimony, Hearing Transcript, Day 5, p. 67, 23.

<sup>325</sup> *Ibid.*, p. 67, 10-22.

Treaties), any negative impact or effect caused by “measures taken by the host State”.<sup>326</sup>

BGT also argues that the Republic impaired BGT’s purported investment by “unreasonable or discriminatory measures”.

679. BGT submits that beyond the measures constituting expropriation or amounting to a breach of the fair and equitable treatment principle, the Republic has impaired BGT’s management, maintenance, use, enjoyment or disposal of its investment, in breach of Article 2(2) of the BIT, by taking the following measures:

- (a) Holding the Minister’s press conference on 13 May 2005 during which the Minister announced the termination of the Lease Contract, having the consequence that the customers, suppliers and employees of City Water were confused, with a resultant effect on their willingness to, respectively, pay bills, deliver supplies, or work effectively.
- (b) Issuing the Cure Notice requiring re-instatement of the Performance Bond on 17 May 2006, despite the fact that DAWASA had called it in full the day before, together with the subsequent reliance on City Water’s refusal to terminate the Lease Contract.
- (c) Statement of the Cabinet’s express intention, set forth in the minutes of the meeting of the Cabinet on 13 May 2005, to give the excess funds generated from the call on the Performance Bond as “seed capital” to DAWASCO, constituting a blatant misappropriation of the funds released by the call on the Performance Bond, sanctioned at the highest level of Government.
- (d) Making the Minister’s address to the staff on 17 May 2005, constituting a clear abuse of his position as a Minister, and a complete abandonment of his position as Interim Regulator, in which he drew a deliberate distinction between STM, as a

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<sup>326</sup> *Ibid.*, para. 458.



“Tanzanian” investor and BGT as a “foreign” investor, with the effect of undermining still further City Water’s ability to manage its staff.

- (e) Notifying the TRA’s withdrawal of City Water’s VAT exemption.
- (f) Deporting City Water’s senior management, constituting one of the clearest examples of the abuse of sovereign power in this case, which was without justification, unlawful, extreme, unnecessary and a calculated gesture to the electorate.
- (g) Effecting the immediate installation of DAWASCO, which defeated the requirement of the Lease Contract that the handover of operations on a termination be orderly and co-operative, and which demonstrates how little the Republic was actually concerned with the smooth operation of the water and sewerage network, and which was calculated to cause disruption rather than the reverse.
- (h) Engaging in the Republic’s subsequent treatment of DAWASCO, which was treated in a manner which was clearly preferential, including by the establishment of EWURA; the approval of a significant increase in the Customer Tariff; and the commissioning of a public inquiry, all of which demonstrate a presence of political support and effort to make the new operator a success, which was entirely absent in respect of City Water.

## **B. THE REPUBLIC’S POSITION**

680. According to the Republic, the language relied on by BGT from the *Saluka* decision is not the standard. Something more than a *de minimis* effect is required, given that BGT must establish causation of the economic loss claimed as damages.
681. Even if the threshold for “impairment” were as low as BGT suggests, one would still have to inquire which measures taken by a State are wrongful. Obviously, not everything a State does that happens to have a negative effect on an investment violates the BIT: the

measures must be unreasonable or discriminatory. In this respect, the Republic argues that *Saluka* suggests that:

“the standard of reasonableness ... requires ... a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of non-discrimination requires a rational justification of any differential treatment of a foreign investor”.<sup>327</sup>

682. Under this standard, the Republic denies that its actions violated Article 2(2) of the BIT.
683. According to the Republic, Minister Lowassa’s 13 May 2005 press conference on the subject of a significant impending event, concerning a critical public service, obviously bears a reasonable relationship to the rational policy of keeping citizens apprised of matters that affect their lives. There was also nothing, in the Republic’s view, that was discriminatory about the press conference. It notes in this respect that City Water was 49% Tanzanian-owned.
684. DAWASA’s issuance of the Cure Notice to reinstate the Performance Bond in accordance with the agreed terms of the Lease Contract was also, according to the Republic, a reasonable step in pursuit of the rational policy of terminating a contract with which City Water had rarely even tried to comply. Moreover, the Cure Notice was reasonably related to the rational policy of protecting DAWASA’s financial position, and the DWSSP as a whole, from City Water’s potential future breaches of the financial provisions of the Lease Contract. The Republic contends that the Cure Notice was therefore not unreasonable and there is no suggestion that it was discriminatory in that there has been no showing that any similarly situated majority Tanzanian-owned company has been treated differently.
685. As to the third event, the alleged instruction to use proceeds of the Performance Bond as “seed capital” for DAWASCO, the factual predicate is said to be incorrect. DAWASCO was financed by a new sub-loan from DAWASA using funds lent by the World Bank. The

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<sup>327</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 460.

proceeds of the Performance Bond were virtually entirely offset by what was owed by City Water to DAWASA, even before the millions of dollars borrowed under the sub-loan are taken into account. Therefore, the alleged use of Performance Bond proceeds as “seed capital” for DAWASCO simply did not happen. To the extent BGT complains solely about the Republic’s supposed instruction to make such use of the Performance Bond proceeds, the fact that the instruction was never implemented defeats the claim.

686. The fourth event cited by BGT is Minister Lowassa’s address to City Water’s employees on 17 May 2005. The address was not, in the Republic’s submission, unreasonable: it accorded with the rational policy that Government officials in Tanzania typically addressed groups affected by events within sectors under their jurisdiction to offer reassurance and clarification. Nor was the address discriminatory: Minister Lowassa’s statement that BGT had received payment under the SIPE, POG, and Delegated Capital Works, while STM had not, was true and well known, and was one of the principal causes of the falling-out among City Water’s shareholders that had contributed to City Water’s dysfunction by May 2005.
687. The Republic also replies that the VAT withdrawal on 24 May 2005 had no effect whatsoever on BGT’s purported investment. The decision was not unreasonable, since City Water was going out of business and had not complied with the undertakings that had been made in order to obtain a TIC certificate. Moreover, BGT does not establish to what extent it would have been discriminatory.
688. Concerning the deportation of Mr. Stone and two colleagues, it was said to be within the Republic’s discretion to take such action in support of the rational policy of protecting the water and sewerage network and minimising disruptions of service in the context of a crisis fomented by City Water at BGT’s behest.
689. The immediate installation of DAWASCO was said to be in conformity with the requirement of the Lease Contract that the handover of operations upon termination be

orderly and cooperative. But it was City Water's deliberate and repeated violation of precisely that requirement that made it necessary to consider how best to prevent a needlessly disruptive and potentially destructive dysfunction in management. The decisions taken at the time were reasonably related to rational objectives. They cannot be considered discriminatory: there is no majority Tanzanian-owned company which received different treatment.

690. Finally, the Republic submits that it is not true that DAWASCO has been treated more favourably than City Water. In any case, there are rational justifications for treating a State-owned company differently from a private company in some respects. DAWASCO's Lease Contract is essentially identical to City Water's, though it is more onerous in some ways, particularly in containing cash management mechanisms to prevent DAWASCO from misappropriating DAWASA's money and the FTNDWSC Tariff in order to finance its own operations. The Operator Tariff increase granted to DAWASCO effective 1 August 2006 was 60% less in real terms than the increase offered to City Water in May 2005. Finally, the establishment of EWURA proved to be a burden for DAWASCO. There is therefore no factual basis for a claim that DAWASCO has received preferential treatment as compared to City Water.

## **C. DECISION OF THE ARBITRAL TRIBUNAL**

### **1. The Standard**

691. Article 2 of the BIT provides that:

“neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in the territory of nationals or companies of the other Contracting Party”.

692. As the Arbitral Tribunal determined in *Saluka*, the standard of “reasonableness” has no different meaning than the “fair and equitable treatment” standard “*with which it is*

*associate*”.<sup>328</sup> The Arbitral Tribunal therefore adopts its analysis of this standard as set out earlier.

693. Reasonableness requires that the State’s conduct:

“bears a reasonable relationship to some rational policy, whereas the standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor”.<sup>329</sup>

694. Similarly, as the Arbitral Tribunal in *CMS* stated, the standard of protection against discrimination:

“is related to that of fair and equitable treatment. Any measure that might involve ... discrimination is in itself contrary to fair and equitable treatment.”<sup>330</sup> The standard is next related to impairment”.<sup>331</sup>

695. A measure is discriminatory when it provides:

“the foreign investment with a treatment less favorable than domestic investment”.<sup>332</sup>

## 2. The claims

### (a) *The Minister’s Press Conference of 13 May 2005*

696. With respect to the Minister’s press conference of 13 May 2005, for the reasons already set out earlier, the Arbitral Tribunal considers that it was unreasonable. It cannot be justified *ex post facto* by the need to inform the public of an important decision, particularly in light of the fact that DAWASA at the same time was maintaining that the Lease Contract had not been terminated (at least yet). The press conference exceeded the bounds of normal information, included severe criticisms of BGT which were at least in part clearly

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<sup>328</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 460.

<sup>329</sup> *Ibid.*

<sup>330</sup> *CMS v. Argentina*, Award on Merits, para. 290. *See also Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 460.

<sup>331</sup> *CMS v. Argentina*, Award on Merits, para. 290.

<sup>332</sup> *U.S. v. Italy (Elettronica Sicula Spa [ELSI] case)*, 1989 ICJ Reports 15 (July 20, 1989), para. 128 [hereinafter *ELSI*].

motivated by political considerations. Moreover, the statements at the press conference obviously impaired the management of BGT's investment (or at least, the performance of the contractual termination phase). On the other hand, the Arbitral Tribunal concludes that there is no clear evidence of a resultant effect on the customers', suppliers' and employees' of City Water's willingness to, respectively, pay bills, deliver supplies or work effectively. Although it is not unimaginable that such effects could have occurred, there is nothing to indicate that they in fact did.

**(b) *The Cure Notice***

697. The Cure Notice to reinstate the Performance Bond was issued by DAWASA in accordance with the Lease Contract. The Arbitral Tribunal considers that the fact that the Cure Notice was issued immediately following calling of the full Performance Bond involves issues that are primarily contractual. In any event, the Arbitral Tribunal is unable to identify any particular injury flowing from the issuance of the Cure Notice (with which BGT and City Water did not comply). Nor is the Arbitral Tribunal able to identify the exercise of any *puissance publique* in this conduct. Rather, it was simply the act of DAWASA pursuant to its understanding of the Lease Contract. In the circumstances, the issuance of the Cure Notice cannot be seen as a breach of Article 2(2) of the Treaty.

**(c) *The Minister's Address to the Staff***

698. As far as the Minister's address to the staff on 17 May 2005 is concerned, the Arbitral Tribunal considers that, as with the press conference, this was not reasonable; that it exceeded the bounds of normal public information; and that it was primarily motivated by political considerations. It is properly to be characterised as an abuse of Governmental authority (and the exercise of *puissance publique*). The Arbitral Tribunal also notes that

there is evidence that what was said at that meeting undermined the management authority of City Water<sup>333</sup> - or at least, the performance of the normal contractual termination phase.

699. Having said this, the Arbitral Tribunal again concludes that there is no clear evidence of a resultant effect on the customers', suppliers' and employees' of City Water's willingness to, respectively, pay bills, deliver supplies or work effectively. Once again, although it is not unimaginable that such effects could have occurred, there is nothing to indicate that they in fact did.

**(d) *The Misappropriation of the Funds Released by the Call on the Performance Bonds***

700. As noted earlier, by the terms of the Lease Contract, the Performance Bond could only be called in its entirety – there was no mechanism for a partial call. The Arbitral Tribunal is satisfied, on all the evidence, that the decision to call the Performance Bond was a decision taken in light of City Water's contractual performance, which had long been foreshadowed. It was an ordinary step of a contracting counterparty, and not the exercise of any *puissance publique*.

701. Whether or not the Performance Bond was in fact (or law) properly called is obviously a contractual matter as between City Water and DAWASA.

702. According to Article 47.2 of the Lease Contract:

“[a]fter the payment to the Lessor where the Operator is of the opinion that the demand and the entire payment or any part thereof was not due and payable it may invoke the dispute resolution process under Article 66 to seek for refund as appropriate”.

703. Article 66 provides for arbitration between DAWASA and City Water under the UNCITRAL Arbitration Rules. Again as noted earlier, this issue has already given rise to UNCITRAL arbitration proceedings pursuant to the Lease Contract, as well as litigation.

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<sup>333</sup> Hearing Transcript, Day 3, p. 111, 3-8.

704. It was suggested in the course of the proceedings that once the relevant debts had been satisfied, there may have been a surplus of funds that was not returned by DAWASA, but in fact was incorrectly applied for other uses (DAWASCO) at the Republic's direction. Indeed, during the hearing, Mr. Mutalemwa testified that the balance remaining on the call of the Performance Bond had been transferred to the account of DAWASCO.<sup>334</sup>
705. Again as noted earlier (paras. 493-4 above), in the Arbitral Tribunal's view, whether or not there were any surplus monies, and whether or not they were misapplied and must therefore be repaid (on which the evidence was ultimately inconclusive), is a contractual matter.
706. If in fact there was a surplus from the call on the Performance Bond, and if in fact this surplus was misapplied by separate dictat from the Cabinet, this could give rise to a claim of unjustified or unreasonable conduct pursuant to Article 2(2) of the BIT. The evidence on each issue, however, was ultimately insufficient to found such a claim.

***(e) The Withdrawal of the VAT Exemption***

707. The Arbitral Tribunal concludes that the VAT withdrawal on 24 May 2005 was also abusive and unreasonable. The evidential record does not support the Republic's allegation that City Water had not complied with the undertakings that had been made in order to obtain a TIC certificate, and instead indicates that the withdrawal was connected to the other steps taken by the Republic against BGT and City Water at the time. This was also a clear exercise of *puissance publique*.
708. Withdrawal of the VAT exemption could have impaired City Water's business if City Water had continued its operations, but as discussed above, this was not the case and it is impossible to identify specific injury that resulted to BGT from the Republic's action. The

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<sup>334</sup> Hearing Transcript, Day 3.



issue is best dealt with as a violation of the fair and equitable treatment standard and as one of the events which converted the contract termination process into an expropriation.

***(f) The Seizure of City Water's Assets and the Deportation of City Water's Senior Management***

709. The same conclusion as that reached with regard to withdrawal of City Water's VAT exemption applies to the deportation of City Water's senior management, the seizure of City Water's assets and the immediate installation of DAWASCO. In each case, the Republic's actions were abusive and unreasonable. There is no evidence supporting the Republic's asserted justifications for the seizure and deportation, which were instead parts of a concerted campaign against BGT and City Water. At the same time, for the reasons also discussed above, these actions ultimately resulted in no quantifiable financial loss to BGT.

***(g) The Subsequent Treatment of DAWASCO***

710. As far as the Republic's subsequent treatment of DAWASCO is concerned, the Arbitral Tribunal considers that there is no evidence that DAWASCO has received preferential treatment as compared to City Water. The evidence indicates that DAWASCO's treatment differed in various respects, some more positive and others more negative, but that cumulatively there is insufficient evidence of discriminatory preferential treatment of DAWASCO compared to City Water.

**(6) FULL PROTECTION AND SECURITY**

**A. BGT'S POSITION**

711. According to BGT, the Republic failed to ensure that its investments received full protection and security as required by Article 2(2) of the BIT, which provides that:

“investments of nationals or companies of each Contracting Party shall at all times ... enjoy full protection and security in the territory of the other contracting Party”.

712. BGT argues that this provision of Article 2(2) imposes an obligation of due diligence on the part of the Republic to protect BGT's investments from physical assault, such as civil strife and physical violence. BGT cites *AMT v. Congo*, where an ICSID tribunal held that the obligation to ensure investors full protection and security is:

“an obligation of vigilance, in the sense that [the host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its [the Claimant's] investments and should not be permitted to invoke its own legislation to detract from any such obligation. [The host State] must show that it has taken all measures of precaution to protect the investment of [the Claimant] in its territory”.<sup>335</sup>

713. BGT also relies on *Wena Hotels*, already cited, where the tribunal held that “Egypt violated its obligation by failing to accord Wena's investment fair and equitable treatment and full protection and security” by failing to take preventive action while Egypt was aware of the State entity's intention to seize the hotels.<sup>336</sup> More recently, the tribunal in *Saluka* commented that:

“the “full security and protection” clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force”.<sup>337</sup>

714. BGT submits that by its conduct, the Republic has not only failed to safeguard the physical integrity of BGT's investment “against interference by use of force”, but has perpetrated its own breach of the full protection and security standard. The facts complained of include, in addition to those amounting to expropriation, and outlined above; those amounting to a breach of fair and equitable treatment; and the taking of unreasonable or discriminatory measures:

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<sup>335</sup> *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo* (ICSID Case No. ARB/93/1), Award of 21 February 1997, 5 ICSID Rep.14, 28 (2002) [hereinafter *AMT v. Congo*]

<sup>336</sup> *Wena Hotels v. Egypt*, Final Award para. 131.

<sup>337</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 483.

- (a) the Republic's usurpation of BGT and City Water's management and control in respect of City Water's facilities and the Project, by calling a meeting on 17 May 2005 of City Water's staff to announce the termination of the Lease Contract and the replacement of City Water's managers, and by subsequently installing in DAWASCO in City Water's place;
- (b) the removal of City Water's managers from their place of work for so-called inquiries, under threat of sanction, and procurement of their immediate deportation from the country; and
- (c) the Republic's seizure of City Water's premises on 1<sup>st</sup> June 2005 and their subsequent occupation.

715. BGT further submits that the obligation to ensure "*full protection and security*" also extends to legal protection and security,<sup>338</sup> including protection from interference with the basic legal framework upon which an investor has relied in making its investment. In the present case, BGT's basic expectation was, at least, that the Lease Contract would be performed in good faith and in accordance with due process and the rule of law. According to BGT, when Minister Lowassa announced that the Lease Contract was terminated by executive fiat, quite independently of any legitimate contractual process, the Republic violated BGT's right to full protection and security for its investment.

## **B. THE REPUBLIC'S POSITION**

716. The Republic submits that BGT does not define the standard of "*full protection and security*" in any fashion that might distinguish it from the obligation to provide fair and equitable treatment. Furthermore, the only event that BGT cites as violating the supposed requirement to provide legal protection and security is Minister Lowassa's statement on 13

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<sup>338</sup> Dolzer & Stevens, p. 61; A. Redfern and M. Hunter with M. Blackaby and C. Partasides; *Law And Practice of International Commercial Arbitration* (4<sup>th</sup> Ed., 2004), p. 492, paras. 11-29.

May 2005, which it contends purported to terminate the Lease Contract. This characterisation of Minister Lowassa’s statement is incorrect.

717. Regarding physical protection and security, tribunals, since *CME v. Czech Republic*,<sup>339</sup> have focused on the need to give full protection and security an independent meaning and significance. They have tended to limit the standard to physical protection from third party violence. The *Saluka* tribunal, for example, held that the:

“full protection and security standard applies essentially when the foreign investment has been affected by civil strife and physical violence: [t]he full security and protection clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force”.<sup>340</sup>

718. The OECD has also said that the full protection and security standard:

“applies essentially when the foreign investment has been affected by civil strife and physical violence. The obligation of vigilance has been considered a standard deriving from customary international law”.<sup>341</sup>

719. According to the Republic, the standard of diligence required has therefore to do with anticipating or responding to harm to the investment caused by outside agencies, such as civil war, riots, or natural disasters. *Saluka* is the only case which BGT cites in which the conduct of the State itself was considered under the full protection and security standard. But even if the standard could properly be applied to physical force employed by the State itself, BGT could not establish a violation.

720. As to the “*usurpation of BGT and City Water’s management and control of City Water’s facilities*”, the Republic submits that it is unclear whether convening a meeting to which neither BGT nor City Water objected could be considered as the use of physical force or what effect it could have had on the physical integrity of BGT’s purported investment. No

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<sup>339</sup> See *CME v. Czech Republic*, Final Award.

<sup>340</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 483, 484..

<sup>341</sup> OECD, Working Papers, p. 26.

damage is alleged to have been done to “*City Water’s facilities*”, nor was any force used or threatened.

721. The same is true for the “removal of City Water’s managers from their place of work for so-called inquiries, under threat of sanction, and procurement of their immediate deportation from the country”. No force was used in removing Mr. Stone and two others from their offices and while BGT asserts that there was a “threat of sanction” made, it does not substantiate that assertion. As for the deportations, no more force was used or threatened than was lawful and appropriate for carrying out an order of deportation and the latter was motivated by reasons that have already been mentioned, including the need to protect the water and sewerage system from physical harm.

722. Finally, concerning “*the Republic’s seizure of City Water’s premises on 1 June 2005 and their subsequent occupation*”, BGT overlooks the fact that City Water did not own the premises which belonged to DAWASA. No physical force was used. The repossession of DAWASA’s property was not in any way extraordinary in the context of a tenant that was wrongfully refusing to give up possession of leased premises.

723. The Republic concludes that the full protection and security standard is not strict liability. Whatever its scope, it remains a duty of due diligence. The Republic did not have to protect BGT’s purported investment at all costs, but only to exercise the diligence that “*one can expect from a civilized nation*”. Faced with a crisis of City Water’s own manufacture, the Republic acted, within its discretion as a civilized nation, to protect the basic needs of its citizens.

## C. DECISION OF THE ARBITRAL TRIBUNAL

### 1. The Standard

724. The content of the full protection and security standard has been examined in various ICSID cases. For example, in *AMT v. Congo*, the arbitral tribunal held that:

“the obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment ... Zaire must show that it has taken all measures of precaution to protect the investment of AMT on its territory. ... It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and care required by international law”.<sup>342</sup>

725. In the *AMT* case, as well as in the *Wena* case, the ICSID tribunals recognised that in international law, the duty of protection implies a duty of “*due diligence*”. The scope of this duty was clearly explained by the arbitral tribunal in *AAPL v. Sri Lanka*,<sup>343</sup> in which the tribunal referred to the definition of Ian Brownlie<sup>344</sup> according to whom a substantive failure to take reasonable, precautionary and preventive action is sufficient to engage the international responsibility of a State for damage to public and private property in that area.

726. Reference may also be made to a recent study of UNCTAD<sup>345</sup> which, commenting on the *AMT*, *AAPL* and *Wena* cases, states that:

“while not an obligation of result, an obligation of good faith efforts to protect the foreign-owned property has been established by these recent cases, without special regard for the resources available to do so. This has been referred to as a standard of ‘due diligence’ on the part of the host country. As a result, this standard should be understood as being very much a ‘living’ one. It places a clear premium on political stability, and the obligation of host countries to ensure that any instability does not have negative effects on foreign investors, even above the ability to protect domestic investors”.

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<sup>342</sup> *AMT v. Congo*, Award of 21 February 1997, paras. 6.05, 6.06.

<sup>343</sup> *Asian Agricultural Products Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990.

<sup>344</sup> *Brownlie*, *Principles of International Law*, p. 453.

<sup>345</sup> UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005), pp. 40-41.

727. More recently, in *Saluka*, the tribunal decided that:

“the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force”.<sup>346</sup>

728. In *Azurix v. Argentina*, the tribunal went further by deciding that:

“it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor’s point of view”.<sup>347</sup>

with the consequence that:

“when the terms ‘protection’ and ‘security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security”.

## 2. The Claims

729. The Arbitral Tribunal adheres to the *Azurix* holding that when the terms “protection” and “security” are qualified by “full”, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of “full security” only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.

730. The Arbitral Tribunal also does not consider that the “full security” standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself. That is also implied by the term “full,” as well as the purposes of the BIT and the *Wena* and *AMT* awards (discussed above).

731. In that perspective, even if no force was used in removing the management from the offices or in the seizure of City Water’s premises, these acts were unnecessary and abusive and

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<sup>346</sup> *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 483.

<sup>347</sup> *Azurix v. Argentina*, Final Award, para. 408.

amount to a violation by the Republic of its obligation to ensure full protection and security to its investors. As already discussed (and addressed further below), however, these acts have not been shown to have caused any quantifiable financial or commercial loss to BGT.

**(7) UNRESTRICTED TRANSFER OF INVESTMENT AND RETURN**

**A. BGT'S POSITION**

732. BGT contends that the Republic has breached its obligation under Article 6 of the BIT by effectively preventing the “*unrestricted transfer*” of BGT’s investment and returns in the following respects:

- (a) BGT is unable to “*transfer*” its investment, by means of the sale of its shareholding in City Water or otherwise, in that the value of that shareholding has been nullified by the events of 1<sup>st</sup> June 2005;
- (b) BGT is unable to “*transfer*” returns from the investment because no dividends will be forthcoming, and it is unable to liquidate any remaining assets until City Water is placed into insolvency proceedings;
- (c) City Water and BGT have been denied access to accounts held at CDRB.

**B. THE REPUBLIC'S POSITION**

733. The Republic submits that after 1 June 2005, City Water and BGT did not have any funds to transfer since City Water was without value and would never pay dividends. Article 6 does not guarantee that investors will have funds to transfer. It guarantees that if investors have such funds, they will be allowed to transfer them, subject to the conditions stated in Article 6. Free-transfer provisions are aimed at measures that would restrict the act of transferral, such as currency control restrictions or other host State acts which effectively imprison the investor’s money in the host State of the investment.



734. As to BGT's two other complaints, that it cannot liquidate City Water's assets until City Water is placed into insolvency proceedings, and that CDRB, City Water's bank, is allegedly continuing to deny City Water access to its bank account, the Republic contends that they are totally unfounded. On the one hand, BGT does not explain why City Water has not been placed into insolvency proceedings or why the Republic could be responsible for that fact. In any case, if City Water were liquidated, its other creditors would have to be paid in full before BGT collected anything and City Water assets are not nearly sufficient to pay creditors' claims. As for the alleged difficulties with CDRB, this is a private law matter between City Water and CDRB.

### **C. DECISION OF THE ARBITRAL TRIBUNAL**

735. The Arbitral Tribunal agrees with the Republic that Article 6 of the BIT is not a guarantee that investors will have funds to transfer. It rather guarantees that if investors have funds, they will be able to transfer them, subject to the conditions stated in Article 6. The free transfer principle is aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host State which effectively imprison the investors' funds, typically in the host State of the investment. No such measures have been taken in the present case. BGT's claims are therefore unfounded. As for the difficulties encountered by BGT and City Water with CDRB, the Tribunal also agrees that this is a private law matter to be solved with CDRB.

## **CHAPTER VI. REMEDIES**

### **A. BGT'S POSITION**

#### **1. General Principles**

736. There was substantial agreement as between the parties on the principles governing the amount of compensation to be awarded for violations of international law. The relevant

principles were set out by BGT in its first memorial, based largely on the ILC Articles which codify the rules of customary international law on the responsibility of States for their internationally wrongful acts.

737. By Article 1 of the ILC Articles, every “*internationally wrongful act*” of a State entails the “*international responsibility*” of that State. An “*internationally wrongful act*” is defined in Article 2 as an act or omission which is (i) attributable to the State under international law; and (ii) a breach of an international obligation of the State.
738. Under Article 28, the international responsibility of a State which arises by virtue of an internationally wrongful act gives rise to the legal consequences set out in part 2 of the ILC Articles. These include, under Article 31 (Reparation), an obligation to make “*full reparation for the injury caused by the internationally wrongful act*”. Injury is defined as including “*any damage, whether material or moral, caused by the internationally wrongful act*”. Article 34 sets out the three forms of reparation which may be claimed individually or in combination: (i) restitution; (ii) compensation; (iii) satisfaction.
739. Under Article 36, the State responsible for the internationally wrongful act is under an obligation to make restitution, that is “*to re-establish the situation which existed before the wrongful act was committed*” to the extent that this is possible or proportionate. When restitution cannot be made (as in the present case), the State is under an obligation to compensate for the damage caused. Such compensation is to cover “*any financially assessable damage including loss of profits insofar as it is established*”.
740. As far as expropriation is concerned, BGT notes that there are two standards of compensation, depending on whether the investment is expropriated lawfully or unlawfully.

741. Where expropriation is characterised as lawful, the standard of compensation is determined by reference to the relevant terms of the investment treaty itself, provided they exist. In the present case, Article 5(1) of the BIT provides that in the event of an expropriation, the State shall be obliged to pay compensation amounting to:
- “... the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, [and] shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable”.
742. The “*genuine value of the investment*” under Article 5(1) means the fair market value of the lawfully expropriated investment as determined by the application of an appropriate valuation methodology. BGT submits that as the expropriation in this case took place and became public knowledge on the same day, fair market value under the standard for lawful compensation is to be determined as at 1 June 2005.
743. Where the expropriation is unlawful, it amounts to a breach of the State’s obligations under the BIT (as well as customary international law), and is subject to the rules of customary international law relating to State responsibility. With one exception, the measure of compensation applicable to unlawful expropriations, at least in theory, may be different than that for a lawful expropriation. It reflects the position under the ILC Articles, and includes full reparation for, and consequential losses suffered as a result of, the unlawful expropriation.
744. The exception relates to any expropriation that would have been lawful but for the fact that the expropriating State has not yet provided “*prompt, adequate and effective compensation*”. An unlawful expropriation of that character will be compensated for by applying the same standard of compensation as applied to a lawful expropriation.
745. On BGT’s case, full reparation entitles the unlawfully expropriated investor to reparation that:

“wipe[s] out all the consequences of the illegal act and re-establishes the situation which would in all probability have existed if that act had not been committed”.

746. BGT argues that full reparation thus entitles the unlawfully expropriated investor to *restitutio in integrum* or to actual restoration of the expropriated investment. If *restitutio in integrum* is not available, the expropriating State must pay restitutionary damages in lieu of actual restitution. Restitutionary damages include, but are not limited to, fair market value of the unlawfully expropriated investment as determined by the application of an appropriate valuation methodology.
747. In addition to restitution or restitutionary damages, and subject to the obvious prohibition against double compensation, BGT also argues that the unlawfully expropriated investor is entitled to damages for the consequential losses suffered as a result of the unlawful expropriation. The nature of consequential losses claimable as a result of an unlawful expropriation is an open category but includes an entitlement to loss of profits suffered by the investor between the date of the expropriation and the award.
748. BGT submits that restitution is seldom possible where an investment has been expropriated and that it is not possible on the particular facts of this case. City Water ceased to function after the expropriation. Accordingly, it is impossible to provide full reparation of BGT’s investment in City Water and BGT therefore contends that it is entitled to restitutionary damages and damages for consequential losses.

## **2. Quantification**

749. According to BGT, the question as to what valuation methodology is appropriate for calculating “fair market value” depends on the nature of the investment and the timing of the expropriation. In this respect, BGT submits that the Discounted Cash Flow (“DCF”) method, involving the analysis of future profits and the discounting of these to calculate a net present value – being the approach advanced by the Republic – is only appropriate

where the future profits of the investment can be determined with a degree of certainty, or in other words, when the expropriated entity has had a history of profitable operations.<sup>348</sup> According to BGT, on the facts of this case, the application of the DCF method is inappropriate because City Water had not made any profits at the date of the expropriation and its forecast of profits for the future had not been determined on the basis of reliable information. Rather, the forecast of profits was based upon data provided during the Bid Process which was subsequently discovered to be substantially incorrect. The DCF approach was therefore said to be too speculative on the facts here.

750. Consequently, BGT submits that fair market value in this case can only be calculated on the basis of the actual investment in the project (a so-called Cost, or Net Investment method). This method derives a valuation by reference to the costs associated with that investment such as the purchase price (including all associated costs) and opportunity cost of the investment. It draws primarily on historical data which is generally considered to be reliable and substantially more certain than forecasted data.

751. According to the Grant Thornton report filed by BGT, which adopts a Net Investment approach and assumes a lost return on funds at either 20% or 25%, BGT's recoverable losses amount to USD 19,059,205 (at 20%) or US\$ 20,158,775 (at 25%), as at the date of expropriation (1 June 2005).

## **B. THE REPUBLIC'S POSITION**

### **1. General Principles**

752. In its Counter-Memorial,<sup>349</sup> the Republic agrees that if an expropriation had occurred on 1 June 2005, the market value of the expropriated property would be the correct measure of damages. The Republic, however, submits that a different measure of damages is

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<sup>348</sup> *Metalclad. v. Mexico*, Award of 30 August 2000; *SPP v. Egypt*, Award on Merits, paras. 188-189.

<sup>349</sup> Counter-Memorial, p. 191, para. 8.2.

applicable to BGT's other claims. As a matter of customary international law, States are only obliged to rectify the "*consequences of... illegal act[s]*". With respect to any breach of an obligation other than the prohibition on improper expropriation, BGT would thus be entitled to compensation only for such loss as was caused by the act constituting the violation.

753. The Republic relies in this regard on *Feldman v. Mexico* where the claimant sought compensation for breach of Article 1102 of the NAFTA (which guarantees national treatment), as well as Article 1110 (the expropriation provision). The tribunal in that case noted that:

"the only detailed measure of damages specifically provided in Chapter 11 is in Article 1110 (2-3) [covering expropriation], "fair market value", which necessarily applies only to situations that fall within that Article 1110. It follows that, in case of discrimination that constitutes a breach of Article 1102, what is owed by the responding Party is the amount of loss or damage that is adequately connected to the breach".<sup>350</sup>

754. The Republic points out that BGT has not put forward a damages case with respect to any of its claims other than expropriation. Thus, the Arbitral Tribunal has no way to determine, as one example, how much monetary loss BGT suffered as a result of the Republic's alleged failure to manage public expectations.

755. The Republic also submits that in order to succeed in any of its claims, BGT has to prove that:

- the value of BGT's investment was diminished or eliminated; and
- the actions BGT complained of were the actual and proximate cause of that diminution in, or elimination of, value.

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<sup>350</sup> *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002, 18 ICSID Rev. – FILJ 488 (2003), para. 194.

756. In other words, the investor's claims must be dismissed if the State's violation was not the proximate and direct cause of compensable harm to the investor.
757. For example, in the *Lauder* case, the tribunal found that the Czech Republic had violated the relevant investment treaty in 1993.<sup>351</sup> It also found, however, that the direct cause of the loss suffered by the investor was the action of a private party, a Mr. Zelezny, in 1999, and that the 1993 breach was therefore not the proximate and direct cause of the loss; on this basis, it dismissed the investor's claims.
758. It is the Republic's position that BGT has failed in this case to prove that the alleged wrongs of the Republic have in fact caused a compensable loss to BGT. In particular, the Republic submits that no post-12 May 2005 event can have caused compensable harm to BGT for three reasons, as summarised below.
759. Firstly, as of 12 May 2005, City Water had no value. According to the Castalia Report,<sup>352</sup> as of that date, City Water had shareholders' equity of less than negative USD 8,000,000. It was not paying its bills and was subject to winding up at the instance of any of its creditors; BGT had repeatedly said City Water was not financially viable under the *status quo*; and financial projections produced jointly by Biwater, City Water and DAWASA showed that City Water would suffer significant operating losses in every remaining year of the Lease Contract. No rational buyer would have paid anything for BGT's 51% share of City Water's equity, nor was there any prospect that BGT would recover anything from the shareholder loan it had made to City Water in October 2004. Whatever the reason, BGT's investment was worthless long before the events giving rise to BGT's claims began.
760. Second, by the time BGT's narrative in this case begins (i.e. with Minister Lowassa's press conference on the evening of 13 May 2005), DAWASA had already begun carrying out its

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<sup>351</sup> *Lauder v. Czech Republic*, Final Award of 3 September 2001, paras. 233-234.

<sup>352</sup> Castalia Report, p. 67.

decision to terminate the Lease Contract. This was DAWASA's right under the terms of the Lease Contract itself and Tanzanian law. Without the Lease Contract, City Water could not operate and could never produce any returns for its shareholders. The termination could and would have occurred irrespective of any of the post-12 May events of which BGT complains.

761. Third, City Water not only had no value, but it could not have continued operating for more than a short period after 1 June 2005, even if DAWASA had not terminated the Lease Contract and even if none of the post-12 May 2005 events had occurred. Mr. White had himself observed that City Water "cannot survive" beyond the end of June 2005.<sup>353</sup> City Water had overdue bills to its trade creditors of approximately USD 2.4 million. Since it was losing money every month, it could not hope to repay those bills. Its creditors therefore could have shut City Water down at any time. Even if they had not done so, City Water was barely making payroll as of May 2005 and would have collapsed soon thereafter when it was no longer able to pay its employees.

762. On the basis of a detailed analysis of each, the Republic submits that none of the individual acts or omissions of which BGT complains as being attributable to the Republic and allegedly in violation of the BIT, can support BGT claims, since none of them caused any compensable harm.

## 2. Quantification

763. According to the Republic, fair market value is that which would be paid by a hypothetical willing buyer who has reasonable "*knowledge of the relevant facts*".<sup>354</sup> The Castalia Report – filed by the Republic – establishes that City Water had no economic value on 1 June 2005. Indeed, as of that date, BGT itself was not willing to spend another shilling to

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<sup>353</sup> Exhibit R-89. Letter from Biwater Plc. to Minister Lowassa of 3 December 2004.

<sup>354</sup> *CMS v. Argentina*, Award on Merits, para. 402.



keep City Water from collapsing, and no rational buyer with reasonable knowledge of the relevant facts would have spent a shilling to buy it.

764. The same was true as of 12 May 2005. At that date, City Water had:

- current liabilities of Tsh 7.6 billion more than its current assets;
- total liabilities of Tsh 9.6 billion more than its total assets;
- operating losses of Tsh 15.6 billion in two years of operation;
- projected operating losses averaging Tsh 400 million per month for the next 4 years, pushing it further and further into the red;
- a single potential source of operating profits, namely the Lease Contract, of which it was admittedly in breach and which was therefore terminable whenever DAWASA chose;
- no projected profits for at least four years, and then only if City Water's shareholders contributed sufficient equity to finance City Water's cash shortfall every year (a total of more than Tsh 35 billion); and
- the prospect of continuing to operate for only another 8 years, even if one ignores DAWASA's right to terminate the Lease Contract.

765. Further, BGT would have had to disclose to any prospective purchasers that:

- prospects for the projects were "*very bleak*";<sup>355</sup>
- "*City Water cannot continue to trade without a significant change to the economic balance of the contract*";<sup>356</sup>
- BGT "*knew*" that City Water would be defunct in less than two months at the outside;<sup>357</sup>

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<sup>355</sup> Exhibit R 133. Minutes of Joint Meeting with Permanent Secretary of 8 April 2005, p. 5.

<sup>356</sup> Exhibit R-92. Email from Brian Winfield of 10 December 2004, Attachment, p. 2.

<sup>357</sup> Exhibit R-89. Letter from Biwater Plc. to Minister Lowassa of 3 December 2004, p. 2.

- The situation “cannot continue” because City Water could not pay its liabilities and cash from both equity injections and the Sub-Loan was “running out”;<sup>358</sup>
- “we have run out of cash again” as of 7 May 2005.<sup>359</sup>

766. According to the Republic, the value of BGT’s shares in City Water equates to the net present value of future dividends to be paid on the shares, plus 51% of the net assets that City Water would have held at the end of the ten-year term of the Lease Contract. As of 12 May 2005, as confirmed by the Castalia Report, the net present value of future cash flows that BGT could expect was negative. To keep City Water out of liquidation, BGT would had to have put more money in than it could possibly get out. No prospective purchaser would have been credulous enough to pay anything for BGT’s investment as of 12 May 2005.

767. BGT’s own financial experts had no doubt as to City Water’s prospects. Together with John Sitton, DAWASA’s financial adviser, City Water and Biwater analysts developed a base case in early 2005 which showed that City Water would never have a profitable year. It would lose between Tsh 9.8 billion and Tsh 20.2 billion per year, every year for the duration of the Lease Contract.

768. Finally, for the Republic, the Grant Thornton report filed by BGT is riddled with errors and inconsistent with all of the relevant evidence, beyond the fact that the report fails to take account of City Water’s actual performance.

769. The Grant Thornton report takes every single cost incurred by BGT, every invoice having any arguable connection with City Water, and lumps these costs altogether to determine City Water’s supposed value. In effect, BGT is claiming a guaranteed return of 20% or 25% on every conceivable City Water-related expenditure. On the Republic’s case, it

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<sup>358</sup> Exhibit R-129. City Water Proposed Project Plan of April 2005, p. 4.

<sup>359</sup> Exhibit R-150. Email from Cliff Stone of 7 May 2005.

cannot be entitled to this. It is well settled that international investment law is not an insurance policy against losing money, let alone a guarantee of profit.

770. The implicit assumption of Grant Thornton's method is that whatever money BGT spent in connection with City Water was spent wisely and that everything went as expected. This is not correct. BGT's own projections showed that it could not have expected anything close to a 20% or to 25% return, and that is counting only equity injections; if all of the ancillary costs are added in, the expected rate of return plummets further. In practice, City Water did not do nearly as well as BGT's projections had predicted. Grant Thornton's methodology does not account for the possibility that BGT's original investment was a poor one, nor for the possibility that underperformance decreased the value of that investment overtime.

771. Finally, the Grant Thornton report credits BGT with costs that cannot be justified as reflecting City Water's value. In some cases, those costs were incurred after 1 June 2005, and there is no attempt to explain how such post-1 June 2005 costs could be appropriately included in a valuation of City Water as of that date.

772. The Republic therefore submits that the valuation proposed by BGT is unrealistic; that any realistic approach to valuation confirms what BGT's own representatives, including Mr. White, said over and over again: that City Water could not survive, let alone generate returns for its shareholders.

## **C. DECISION OF THE ARBITRAL TRIBUNAL**

### **1. General Principles**

773. As was common ground between the parties, and as set out in the ILC Articles as a codification of the rules of customary international law on the responsibility of States for their internationally wrongful acts, every internationally wrongful act of a State entails the

international responsibility of that State.<sup>360</sup> An internationally wrongful act is an act or omission which is attributable to the State under international law and a breach of an international obligation of the State.<sup>361</sup> Under Article 28 of the ILC Articles, the international responsibility of a State entails an obligation on that State to make full reparation for the injury caused thereby.<sup>362</sup> Injury is defined as including “*any damage, whether material or moral, caused by the internationally wrongful act*”.

774. The State responsible for the internationally wrongful act is under an obligation to make restitution, that is to re-establish the situation which existed before the wrongful act was committed, to the extent that it is possible or proportionate to do so.<sup>363</sup> When restitution cannot be made, the State is under an obligation to compensate for the damage caused. Such compensation is to cover “*any financially assessable damage including loss of profits insofar as it is established*”.<sup>364</sup>

775. *Expropriation*: The standard of compensation for unlawful expropriation (being the relevant claim here), includes full reparation for, and consequential losses suffered as a result of, the unlawful expropriation. Full reparation entitles the unlawfully expropriated investor to restitutionary damages which include, but are not limited to, the fair market value of the unlawfully expropriated investment as determined by the application of an appropriate valuation methodology. In addition, the unlawfully expropriated investor is entitled to damages for the consequential losses suffered as a result of the unlawful expropriation. Such losses ordinarily include an entitlement to loss of profits suffered by the investor between the date of the expropriation and the award.

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<sup>360</sup> ILC Article 1.

<sup>361</sup> ILC Article 2.

<sup>362</sup> ILC Article 31.

<sup>363</sup> ILC Article 36.

<sup>364</sup> *Idem*.

776. *Other Claims:* For claims other than expropriation (breach of fair and equitable treatment, unreasonable and discriminatory measures, violation of full protection and security, and of the principle of unrestricted transfer of funds), the BIT does not offer any guidance for evaluating the damages arising from such breaches. On the basis that this does not mean that compensation is excluded, the common starting point is the broad principle articulated in the well known *Factory at Chorzow* case, according to which any award should:

“as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”<sup>365</sup>.

777. The application of this broad principle has been the subject of detailed analysis in many commentaries and decisions, albeit that in many BIT cases, arbitral tribunals appear to have simply deployed the fair market value of the investment in question as the measure of damages both for claims of expropriation and breaches of other treaty standards.

778. However the *Factory at Chorzow* test is analysed, it is well settled that one key requirement of any claim for compensation (whether for unlawful expropriation or any other breach of Treaty) is the element of causation. This requirement is elaborated below. As explained later in this Section, in the Arbitral Tribunal’s view, this key element is absent in this case. The fact that this alone is determinative of all BGT’s claims for compensation in this case, renders unnecessary any further analysis of the precise measure of compensation for non-expropriation claims.

779. *Causation:* Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by BGT.

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<sup>365</sup> *Case concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 1928, PCIJ, Series A No. 17, p. 47.

780. The requirement of causation is commonly considered in the context of compensation for non-expropriatory breaches of treaty, on the basis (i) that the measure of damages for expropriation is usually the subject of detailed regulation in the treaty itself, such that the application of any wider principles of international law is not needed or (ii) that the element of causation is implicit in the initial determination that an expropriation has taken place.
781. As explained in paragraphs 462-465 above, the Arbitral Tribunal considers that an expropriation may take place by reason of a substantial interference with rights, even if no economic loss is caused thereby, or can be quantified. In such cases, non-pecuniary remedies (e.g. injunctive, declaratory or restitutionary relief) may still be appropriate. Whether any economic loss has in fact been caused by the “taking” in question is a matter to be considered in the context of a claim for compensation, rather than being a necessary ingredient in the cause of action of unlawful expropriation itself.
782. It follows that the requirement of causation needs to be considered here with respect to each of BGT’s claims for compensation, both for expropriation and non-expropriatory breaches of the treaty.
783. Article 31(2) of the ILC Articles defines “injury” (for which a State is obliged to make reparation) as including:
- “... any damage, whether material or moral, caused by the internationally wrongful act of a State.”
784. There is little guidance as a matter of international law on the precise test of causation to be applied (there being a number of different possible formulations). Accordingly, many

international tribunals have had recourse to private law analyses in their application of this requirement, and a number of commentators have recommended this approach.<sup>366</sup>

785. The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote. In his commentary on Article 31 of the ILC Articles, and drawing from a wide range of international decisions, Professor Crawford describes these elements as follows (with citations omitted):

“... Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses ‘attributable [to the wrongful act] as a proximate cause’, or to damage which is ‘too indirect, remote, and uncertain to be appraised’, or to ‘any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of’ the wrongful act. This causality in fact is a necessary but not a sufficient condition of reparation. There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage ‘is not a part of the law which can be satisfactorily solved by search for a single verbal formula’. The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.”<sup>367</sup>

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<sup>366</sup> See e.g., *Brownlie*, *Principles of International Law*, p. 446; Mclachlan, Shore & Weiniger, *International Investment Arbitration, Substantive Principles* (OUP 2007), p. 336, (citing, in addition to the other sources mentioned here, Article 38 of the Statute of the International Court of Justice, which directs the ICJ to have regard to “the general principles of law recognized by civilised nations”).

<sup>367</sup> J. Crawford, *The International Law Commission’s Articles On State Responsibility, Introduction, Text And Commentaries* (2002), pp. 204-205.

786. The key issue in this case is the factual link between the wrongful acts and the damage in question, as opposed to any issue as to remoteness or indirect loss. The Arbitral Tribunal notes in this regard the approach of the ICJ in the *ELSI* case. In that case, the ICJ held that the primary cause of the claimant's difficulties lay in its own mismanagement over a period of years, and not the act of requisition imposed by the governmental authorities. In reaching this conclusion, the Court applied an "underlying" or "dominant" cause analysis.

E.g:

"100. It is important in the consideration of so much detail, not to get the matter out of perspective: given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted that the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purpose of Italian bankruptcy law.

101. ... There were several causes acting together that led to the disaster to *ELSI*. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was *ELSI*'s headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition."<sup>368</sup>

787. The Arbitral Tribunal considers that in order to succeed in its claims for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value.

## 2. Analysis

788. In applying these principles to this case, it is convenient to summarise the position with respect to BGT's investment (a) as at 12 May 2005, being the date immediately prior to the first act of the Republic which the Arbitral Tribunal has found to be in breach of the BIT,

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<sup>368</sup> *ELSI* case, paras. 100-101.



and (b) as at 1 June 2005, being the date on which BGT states its investment was expropriated, and the relevant date for the valuation of its damages claim.

789. *Position as at 12 May 2005:* As set out earlier in this Award, serious problems were encountered in the performance of the Lease Contract from the very start. In particular (and in summary):

- (a) BGT's bid was poorly prepared.
- (b) BGT (and City Water) did not take the benefit of the EMP – notwithstanding the fact that this was an available method for re-calibrating base figures, and thereby addressing many of the data inconsistencies for which complaint was made.
- (c) As a result of the poor bid, coupled with numerous management and implementation difficulties, BGT (and City Water) did not generate the income which had been foreseen, and accordingly the project quickly encountered substantial difficulties.
- (d) The position was soon reached where it was clear that City Water simply could not continue without a fundamental renegotiation of the contract.
- (e) This renegotiation took place, but failed. As had been announced by DAWASA at the beginning of the renegotiation process, this failure, in turn, necessarily implied the termination of the Lease Contract.

790. As noted in the Castalia Report, and as emphasised by the Republic, by 12 May 2005, City Water had shareholders' equity of less than negative USD 8,000,000. It was not paying its bills and was subject to winding up at the instance of any of its creditors. In particular, it was withholding the Lessor Tariff, the FTNDWSC Tariff, and the Rental Fee. As set out earlier, BGT had repeatedly said City Water was not financially viable under the *status quo*; and joint financial projections showed that City Water would suffer significant operating losses going forward.

791. By the beginning of May 2005, and before the events that began on 13 May 2005, the normal contractual termination process was underway, and in the Arbitral Tribunal's view, in all the circumstances, termination of the Lease Contract was inevitable and was going to materialise within a matter of weeks – quite apart from the events that then occurred as of 13 May 2005.
792. *Position as at 1 June 2005:* In the Arbitral Tribunal's view, by 1 June 2005, being the date BGT states its investment was expropriated by the Republic, the said investment was of no economic value. This, indeed, had been the position since well before this date, and well before 13 May 2005.
793. In assessing value for the purposes of a damages claim, the Arbitral Tribunal considers that the appropriate method in the present case is the Discounted Cash Flow method (which is the method used in most BIT cases). Contrary to BGT's case, the Arbitral Tribunal does not consider that the Costs - or Net Investment – method is appropriate.
794. Indeed, the application of the Costs / Net Investment method by Grant Thornton consists of claiming a guaranteed return of 20% or 25% on every conceivable City Water-related expenditure, which has no justification. Further, as a testament to the inappropriateness of the method, the Grant Thornton calculations lead to a conclusion that 51% of City Water was worth US\$ 20 million as of 1 June 2005, the date the expropriation took place. On any view, this is completely inconsistent not only with the relevant evidence, but also with BGT's repeated statements at the time, and City Water's own accounts.
795. In the Arbitral Tribunal's view, the correct approach to valuation here is that set out in the Castalia Report. The resounding conclusion (as summarised by the Respondent) is that City Water had no economic value on 1 June 2005; that as of that date, BGT was not willing to spend another shilling to keep City Water from collapsing and no rational buyer with reasonable knowledge of the relevant facts would have spent a shilling to buy it; that

City Water had total liabilities in the amount of Tsh 9.6 billion more than its total assets, operating losses of Tsh 15.6 billion in two years of operations and projected operating losses averaging Tsh 400 million per month for the next four years.

796. Moreover, City Water's single source of operating profits, the Lease Contract, was about to be terminated.

797. Consequently, the "fair market value" of City Water at the date of the expropriation, 1 June 2005, was nil.

798. *Causation:* Applying the principles elaborated earlier, the Arbitral Tribunal concludes in all the circumstances that the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005. In other words, none of the Republic's violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place.

799. As at the 1 June 2005, the only "investment" which was the subject of the Republic's expropriation comprised contractual termination rights, which themselves were of no value. The Republic, in effect, interfered with and accelerated the contractual termination process, but by that stage termination was inevitable in any event, and BGT has not established that, had these acts not taken place, the fair market value of City Water as of 1 June 2005 would have raised above zero.

800. As for the specific violations of the BIT:

(a) *Public announcement on behalf of the Republic of the termination of the Lease Contract on 13 May 2005:* Minister Lowassa's announcement on 13 May 2005 interfered with the contractual termination process, but that process was already underway, and the harm which resulted and for which BGT now seeks

compensation was caused by the termination itself, and not by the announcement. The acceleration of the termination did not cause any separate compensable loss, given the absence of any value in the project by that time. Further, as noted earlier, there is no clear evidence of a resultant effect on the customers', suppliers' and employees' of City Water's willingness to, respectively, pay bills, deliver supplies or work effectively. Although it is not unimaginable that such effects could have occurred, there is nothing to indicate that they in fact did.

- (b) *The subsequent address to City Water staff on 17 May:* The same points arise with respect to this event. BGT has not shown that any separate economic harm was caused by this event. There is no evidence, for example, that the address had any material effect on City Water's cash receipts or the scale of City Water's operating losses, or produced adverse economic effects that were not already existent or inevitable at that stage.
- (c) *The withdrawal of the VAT certificate by the TRA on 24 May:* There is no evidence that the withdrawal of the VAT certificate on 24 May 2005 had any material effect on the value of BGT's 51% shareholding, in particular given that City Water was already incapable of paying its creditors by that stage and was about to go out of business. No other adverse effects (which were not already existent or inevitable) have been shown.
- (d) *The seizing of the assets of City Water, the immediate installation of DAWASCO, and the deportation of City Water's management on 1 June 2005:* Had the normal contractual termination mechanism been allowed to take its course, City Water would have been replaced by DAWASCO on about 24 June 2005. By reason of the Republic's actions, this occurred instead on 1 June 2005. However, the investment that was seized early was of no economic value. Indeed, as the Republic pointed out, the economic effect of the Republic's actions was to save

City Water from losing approximately Tsh 175 million per week or Tsh 525 million over the three week period in question.

801. *The Distinction Between Causation and Quantum*: It has been suggested that the above analysis wrongly elides the issues of “causation” and “damages”, and that the proper analysis should be as follows:

- (a) that the Republic’s wrongful acts (e.g. seizure of City Water’s business and premises) caused injury to City Water (by depriving it prematurely of the use and enjoyment of its property); but that
- (b) as a matter of evidence, BGT failed to prove that there was any monetary value associated with the injury that it suffered, or in other words, the monetary value of the injury was zero.

802. On this basis, it is said that BGT’s claim fails as a matter of quantum, but not causation.

803. The majority of the Tribunal considers both approaches tenable. One reason for preferring an analysis based on “causation”, however, is the difficulty in concluding that the Republic’s wrongful acts in fact “*caused injury*” to City Water, as set out in paragraph 798(a) above. In this regard, some meaning must be given to the concept of “*injury*”. In particular, “*causing injury*” must mean more than simply the wrongful act itself (e.g. an expropriation, or unfair or inequitable treatment), otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry.

804. It is therefore insufficient to assert that simply because there has been a “taking”, or unfair or inequitable conduct, there must necessarily have been an “*injury*” caused such as to ground a claim for compensation.<sup>369</sup> Whether or not each wrongful act by the Republic

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<sup>369</sup> It may be noted in this regard that Article 31(2) of the ILC Articles defines “injury” (for which a State is obliged to make reparation) as including: “... any damage, whether material or moral, caused by the internationally wrongful act of a State.”

“caused injury” such as to ground a claim for compensation must be analysed in terms of each specific “injury” for which BGT has in fact claimed damages.

805. As set out earlier, the conclusions on causation reached by the majority of the Tribunal are based on the lack of linkage between each of the wrongful acts of the Republic, and each of the actual, specific heads of loss and damage for which BGT has articulated a claim for compensation. In other words, the actual loss and damage for which BGT has claimed – however it is quantified – is attributable to other factors.
806. Ultimately, however, this is a difference in analysis, not result. Whichever approach is adopted, the conclusion is the same, namely, that BGT has failed to demonstrate compensable monetary damages or loss in this case.

### **3. Conclusions**

807. Given that none of the Republic’s violations of the BIT caused the loss and damage for which BGT now claims compensation, it follows that each of BGT’s claims for damages must be dismissed, and that the only appropriate remedies for the Republic’s conduct can be declaratory in nature.
808. The Tribunal notes that no claim has ever been made (or quantified) for so-called “moral” damages, and no argument was advanced on this issue by any party at any stage. Even if any such claim had been advanced, the circumstances of this case, and in particular BGT’s own conduct, would render any such award inappropriate.

## CHAPTER VII. COSTS

809. Article 61 of the ICSID Convention addresses three types of costs which are to be assessed and allocated by the Arbitral Tribunal, namely (a) the expenses incurred by the parties in connection with the proceedings; (b) the fees and expenses of the members of the Tribunal, and (c) the fees and expenses of ICSID itself.
810. Items (b) and (c) above are referred to collectively below as the “costs of the arbitration”.
811. Each party in this case has claimed in respect of the costs incurred in relation to these proceedings, and detailed submissions have been made in this regard. These have included a range of issues said to be relevant to the exercise of the Arbitral Tribunal’s discretion on the allocation of costs, including the respective conduct of each party of the arbitral proceedings themselves, and alleged losses suffered by the Republic by reason of BGT’s performance of the Lease Contract.
812. In the Arbitral Tribunal’s view, the following matters are of key significance in relation to the allocation of costs in this case:
- (a) BGT has demonstrated that the Republic acted in violation of the BIT, and to this extent it has been successful.
  - (b) On the other hand, BGT has failed to sustain any of its claim for damages, which on any view was substantial, and may well have been an important motivation for this arbitration. To this extent, the Republic has been successful. Indeed, if no claim, for damages had been brought, it is possible that the arbitration might not have been required.
813. In all the circumstances of this case, the Arbitral Tribunal concludes that there is no justification to order either party to pay the costs incurred by its opponent. Each party

should bear its own costs, and the costs of the arbitration (covered by advances paid to ICSID) should be borne by each party in equal shares.

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## CHAPTER VIII. OPERATIVE AWARD

814. For the foregoing reasons, the Arbitral Tribunal decides and declares as follows:

- (a) That the Arbitral Tribunal has jurisdiction over this dispute, in so far as it concerns alleged violations of the BIT, but does not have jurisdiction over this dispute in so far as it concerns claims under the TIA.
- (b) That the following conduct attributable to the Republic constituted violations of the fair and equitable treatment standard in Article 2(2) of the BIT; unreasonable and discriminatory conduct in violation of Article 2(2) of the BIT; and, cumulatively, an expropriation in violation of Article 5 of the BIT:
  - (i) the public announcement on behalf of the Republic of the termination of the Lease Contract on 13 May 2005;
  - (ii) the subsequent address to City Water staff on 17 May;
  - (iii) the withdrawal of the VAT certificate by the TRA on 24 May; and
  - (iv) the seizing of the assets of City Water, the immediate installation of DAWASCO, and the deportation of City Water's management on 1 June 2005.
- (c) That item (b)(iv) above also constituted a violation of the Republic's obligation in Article 2(2) of the BIT to provide full protection and security.
- (d) All other allegations made by BGT that the Republic has acted in violation of the BIT are dismissed.
- (e) BGT's claims for damages are dismissed.
- (f) Each party shall bear their own legal costs, and the costs of the arbitration shall be shared between the parties equally.

THE ARBITRAL TRIBUNAL

[signed]  
**Gary BORN**

Date:

[signed]  
**Toby LANDAU QC**

Date:

[signed]  
**Bernard HANOTIAU**

Date:

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

**ICSID CASE NO. ARB/05/22**

***BIWATER GAUFF (Tanzania) LIMITED***

**v.**

***UNITED REPUBLIC OF TANZANIA***

**CONCURRING AND DISSENTING OPINION**

1. While agreeing with many of the conclusions and much of the analysis of the Tribunal's Award, I write separately with regard to several aspects of the Tribunal's analysis, and also with regard to the Tribunal's ultimate decision.

2. Preliminarily, I emphasize both my high regard for my colleagues and the narrow scope of my concurring and dissenting opinion. I agree in most respects with the Tribunal's factual and legal analysis, which is careful and thorough. I differ only on limited grounds, and do so with reluctance, mindful of the desirability of unanimity in arbitral decision-making. Nonetheless, on these issues, which are of importance in both this and other cases, I am unable to join in the Tribunal's analysis.<sup>1</sup>

## **I. EXPROPRIATION AND OTHER VIOLATIONS OF THE BIT**

3. First, I join in the Tribunal's conclusion (Award, paras. 451-519) that the Republic's treatment of BGT constituted an expropriation in violation of Article 5(1) of the BIT and the Tribunal's declaration that the Republic's conduct violated the protections of the BIT (Award, para. 814). In this regard, it is clear that the Republic engaged in a series of actions which had the effect of prematurely terminating the Lease Contract, without regard to the contractual termination and other provisions of that agreement, and denying BGT any meaningful possibility to use either its leased premises or other assets, without any consideration being given by the Republic to the possibility of compensation for the seizures. This amounts to a classic instance of expropriation in violation of both Article 5(1) and settled principles of customary international law.

## **II. THE REPUBLIC'S RETENTION OF THE ENTIRE PROCEEDS OF THE PERFORMANCE BOND**

4. Second, and despite the foregoing, the Tribunal minimizes one aspect of the Republic's conduct which had particular importance, both independently and as informing the characterization of the Republic's other actions. The Tribunal also characterizes this aspect of the Republic's conduct as a purely "contractual matter," falling outside its mandate -- analysis and conclusions which I am unable to join.

5. As mentioned in the Award (Award, paras. 494-495, 679(c), 697-706), the Republic's Cabinet adopted a formal decision on 13 May 2005 which decreed, among other things, that City Water's Performance Bond should be called in its entirety and that the proceeds of the bond should be used in part to satisfy City Water's obligations to DAWASA and in part, after DAWASA's claims had been fully satisfied, as so-called "seed money" for a newly-created government entity (DAWASCO). It is relevant in this regard to quote the Cabinet Minute verbatim:

"money received after DAWASA takes of the Bond [i.e., City Water's Performance Bond] should be used to pay the debt of [City Water] to

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<sup>1</sup> Terms defined in the Award have the same meaning in this concurring and dissenting opinion.

DAWASA and *some to be used as seed capital to enable DAWASCO to carry out its responsibilities.*"<sup>2</sup>

6. Pursuant to the Cabinet Minute, DAWASA subsequently called City Water's Performance Bond and retained the entire amount obtained thereby. It was considered to be clear at the time (and remains relatively clear now) that the amounts obtained by DAWASA under the Performance Bond were in excess of amounts it was then entitled to from City Water pursuant to the Lease Contract and the parties' other contractual relations. DAWASA had previously sought to draw the Performance Bond in part, for a sum of Tsh 3,446,459,746, but was unable to do so because the bond was by its terms capable of being drawn only in full; little had changed between the time of DAWASA's first partial draw and its subsequent complete draw (in the sum of Tsh 5,490,845,296), making it clear that a material excess was considered to be due for reimbursement to City Water.

7. Nonetheless, complying with the directions in the Cabinet Minute, DAWASA did not return the excess funds obtained by its draw of the Performance Bond (which excess funds were City Water's property) and instead transferred all of those funds to DAWASCO for its use in taking over City Water's business. This misappropriation of City Water's property for use by DAWASCO cannot be characterized as anything other than both expropriatory and a denial of fair and equitable treatment. Indeed, it was recognized as such, in very frank testimony, by one of the Republic's responsible officer in the course of these proceedings:

“QUESTION: [T]he Cabinet seems to have thought that there would be money left over [from the proceeds of the Performance Bond after satisfying DAWASA's claims against City Water]. They didn't say how much, they said some amount, but they thought there would be money left over, once the Performance Bond was pulled, beyond what DAWASA was entitled to that could be given to DAWASCO. Is that right?

MR. MUTALEMWA: Yes. Actually, that is what it implies, yes.

QUESTION: Did you agree with that? Is that -- did you think the Cabinet was wrong ...?

MR. MUTALEMWA: Well, it wasn't correct for us to give money to DAWASCO, because DAWASCO is a new public corporation so the government should have given money to DAWASCO, rather than take money from us, but that is what happened, actually. The government gave money eventually to DAWASCO. ...

QUESTION: What was left over, even if it was not very much, in your opinion... Was it repaid to City Water?

MR. MUTALEMWA: No. It was not repaid to City Water.”<sup>3</sup>

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<sup>2</sup> Exhibit C-26.

<sup>3</sup> Hearing Transcript, Day 3, p. 108, 17 to p. 110, 6.

8. This acknowledgement was right to make: the Republic deliberately directed, via the Cabinet Minute, the seizure of property (money) belonging to an investor and, recognizing that it had no legal entitlement to that property, and ignoring entirely the parties' contractual mechanisms, directed that the property be turned over to a local governmental entity. That action was all the more troubling because the local entity (DAWASCO) was founded specifically by the Republic to consummate the expropriation of the foreign investor's other property -- with the Republic thus directing the misappropriation and misuse of a private party's assets in order to finance that party's own expropriation. That action, in my judgment, constitutes both a separate expropriatory act, in violation of Article 5 of the BIT, and a further act in aid of the Republic's overall course of expropriatory conduct. To the extent that the Tribunal does not characterize the Republic's action as such, I am unable to join its reasoning.

9. The Tribunal appears instead to conclude that any characterization of the Republic's actions and any calculation of the amounts wrongfully seized by the Republic is solely a contractual matter that depends exclusively on an application of the Lease Contract (Award, paras. 494-495). According to the Tribunal, the Republic's appropriation of the Performance Bond "is a contractual matter," a seizure of surplus funds under the Performance Bond "cannot elevate the prior call on the Performance Bond into an expropriatory act," and "the computation of any such surplus (if there was one) is clearly a matter for the UNCITRAL arbitration pursuant to the Lease Contract to resolve" (Award, para. 495). In my view, the Tribunal's analysis fails properly to distinguish between City Water's contractual rights vis-à-vis DAWASA under the Lease Contract and BGT's rights vis-à-vis the Republic under the BIT and customary international law.

10. It is, of course, well-settled that an investor's BIT rights vis-à-vis a state arise from separate and independent sources -- namely, the BIT and customary international law -- than either the law of the host state or the parties' (or their affiliates') contractual relations. That is clearly recognized in prior authority in this context,<sup>4</sup> as well as under more general international instruments.<sup>5</sup> The same analysis applies to the respective mandates of a BIT tribunal, on the one hand, and a national court or commercial arbitral tribunal, on the other hand: a BIT tribunal has the mandate of deciding claims under the BIT and international law, while the national court or commercial arbitral tribunal has the mandate of deciding claims under applicable national law and the parties' contractual agreement(s). As one

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<sup>4</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, 8 ICSID Rep. 518 (2005); *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, 18 ICSID Rev.—FILJ 301 (2003), 8 ICSID Rep. 383 (2004); *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL Arbitration), Award of 15 November 2004, available at: [www.state.gov/documents/organization/38789.pdf](http://www.state.gov/documents/organization/38789.pdf) [hereinafter *GAMI v. Mexico*]

<sup>5</sup> See International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Article 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law") [hereinafter ILC Articles]; J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, 2002), pp. 36-38 ("Article 3 makes explicit a principle already implicit in article 2, namely, that the characterization of a given act as internationally wrongful is independent of its characterization under the internal law of the State concerned").

tribunal put it well in analogous circumstances, “ultimately, each jurisdiction is responsible for the application of the law under which it exercises its mandate.”<sup>6</sup>

11. Analytically, therefore, it is wrong to conclude that characterization of the Republic’s actions with regard to the Performance Bond is solely a “contractual matter” or entirely for the UNCITRAL tribunal (or a national court) to decide; insofar as BGT’s claims in this arbitration are concerned, the characterization of the Republic’s actions is a question of international law under the BIT and is an issue for this Tribunal to resolve, applying the BIT. Equally, it is wrong to conclude that any quantification of the injury resulting from a wrongful expropriation is simply a “contractual matter,” for the UNCITRAL tribunal or a national court to decide; again, that is an element of this tribunal’s mandate under the BIT.

12. This is true notwithstanding the fact that BGT’s rights under the BIT arise, in part, from City Water’s contractual rights under the Lease Contract. In my view, the essential point is that City Water’s rights under the Lease Contract provide the original foundation for BGT’s investment and property rights, but once they have arisen, those property rights have their own separate international legal status, safeguarded by the terms of the BIT and by customary international law. Put differently, BGT’s rights under the BIT are not exclusively defined by the terms of the Lease Contract and Tanzanian law: they are instead rights protected by international law, which are for this Tribunal to assess, both as to whether the rights have been violated and what the monetary consequences of any such violation are. Thus, contrary to the Tribunal’s apparent suggestion, the UNCITRAL tribunal’s mandate with regard to contractual disputes under the Lease Contract and the Performance Bond does not supersede this Tribunal’s mandate under the BIT.

13. That conclusion applies with particular force here, where the Republic’s expropriatory actions entailed a deliberate departure from and destruction of the contractual relationship between City Water and DAWASA. In those circumstances, it is particularly anomalous to conclude that the Republic’s actions are only a “contractual matter” and subject entirely to the UNCITRAL tribunal’s jurisdiction. Rather, it was the Republic which chose, through its expropriatory conduct, to depart from and render nugatory, the contractual mechanisms of the Lease Contract. In those circumstances, treating the Lease Contract as the sole basis for, and necessary limit to, BGT’s rights is in my view inconsistent with the protections of the BIT and international law.

14. Despite these disagreements with the Tribunal’s characterization under the BIT of the Republic’s Cabinet Minute and DAWASCO’s retention of funds under the Performance Bond, I do not disagree with the ultimate conclusion that, on the record before the Tribunal, there are no quantifiable monetary damages attributable to the Republic’s actions in this regard. As the Tribunal correctly notes, “neither Party ... tendered evidence to prove any specific surplus amount” (Award, para. 495). In the absence of such evidence, there is no basis for concluding that a specific, quantifiable amount of damages was caused or for making an award to that effect. Importantly,

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<sup>6</sup> *GAMI v. Mexico*, Award of 15 November 2004, para. 41. See also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 21 November 2000, 5 ICSID Rep. 296 (2000), p. 315.

however, it is for this Tribunal, applying the BIT and international legal principles -- and not for the UNCITRAL tribunal or another body applying other legal instruments -- to characterize the lawfulness of the Republic's actions and to evaluate the evidence in order to determine the consequences of any such action.

### III. CAUSATION AND VALUATION

15. Third, I am also unable to join in the Tribunal's apparent conclusion that BGT is entitled to no financial compensation on grounds of "causation" (Award, paras. 736-808 and particularly 797-808). The Tribunal concludes that "the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005" (Award, para. 798). The Tribunal also reasons that "the Republic, in effect, interfered with and accelerated the contractual termination process, but by that stage [i.e., 1 June 2005] termination was inevitable in any event" (Award, para. 799). Furthermore, the Tribunal concludes that there is a "lack of linkage between each of the wrongful acts of the Republic and each of the actual, specific heads of loss and damage for which BGT has articulated a claim for compensation" (Award, para. 805).

16. In my view, this analysis confuses issues of causation, on the one hand, and quantification or quantum of damages, on the other; this analytical confusion is ultimately not decisive to the specific outcome in the present case, but it could well be in future cases and I am therefore unable to join it.

17. Preliminarily, it should be clear that the Republic's expropriatory, unfair and inequitable and other wrongful acts caused injury to BGT. Specifically, it is beyond debate that the Republic wrongfully seized City Water's business, premises and assets at a point in time (1 June 2005) at which the Republic had no right – under either international law or the Lease Contract – to do so. That wrongful seizure clearly caused injury to City Water by depriving it prematurely of the use and enjoyment of its property: whether measured in weeks (to 24 June 2005, as the Tribunal concludes) or months (some longer period which would have obtained in reasonable dealings between contracting parties conducting themselves in good faith) or years (the remaining lease term under the Lease Contract), City Water was wrongfully evicted from its leased premises, and wrongfully denied the use of its assets, its management and its staff, for some ascertainable period of time.

18. In this respect alone, in my view, the Republic's actions clearly caused injury to BGT, by prematurely taking City Water's property and resources from it, and it is mistaken therefore to conclude, as the Tribunal does, that BGT's claims fail on the grounds of causation. Rather, the proper question is what quantum of loss or monetary value to attribute to the injury that the Republic caused to BGT.

19. Despite my disagreement with its analysis, I concur in the Tribunal's conclusions that BGT has failed to demonstrate, on the current record, compensable and quantifiable monetary damages or loss. That is because the evidence fails to show that there was any monetary value associated with the injury that BGT suffered.



20. BGT's request for relief broadly sought all damages caused by the Republic's wrongful actions: "the financial equivalent of full reparation for the unlawful expropriation of BGT's investment" or "compensation for the expropriation of BGT's investment in accordance with Article 5 of the Treaty" (Claimant's Memorial, para. 275). That request is not limited to specific sums or items of damages, but instead seeks recovery for all injury flowing from the Republic's wrongful actions. In turn, this requires determining the value of City Water's expropriated property (and, in particular, the value of City Water's remaining leasehold under the Lease Contract and other properties associated with its business).

21. The answer to this question appears, on the record in these proceedings, to be that no monetary value can be associated with City Water's remaining leasehold and other properties (Award, para. 787). Put differently, although the Republic caused BGT injury, including by expropriating its property and prematurely terminating the contractual relations between City Water and DAWASA, the property that the Republic wrongfully seized had no quantifiable monetary value.

22. Specifically, the evidence showed that City Water was persistently losing money under the Lease Contract and that, even with significant contractually-permitted modifications (pursuant to the Lease Contract's provisions) to the terms on which City Water did business, City Water would continue to lose money both in the short term and over the life of the Lease Contract. Only with a fundamental renegotiation of the Lease Contract, and its economic terms, would it have been possible for City Water to have become a sustainable and profitable enterprise; nothing entitled City Water to such a fundamental renegotiation and DAWASA had refused to consent to such revised terms of the Lease Contract prior to the events of 1 June 2005. Accordingly, whatever the remaining term of the Lease Contract (i.e., three weeks or a number of years) the evidence showed that City Water's business simply did not have a quantifiable positive monetary value. Thus, although the Republic wrongfully took City Water's remaining leasehold and the associated assets, thereby causing BGT injury, the monetary value of the commercial injury to BGT was zero.

23. The distinction between causation and quantification of injury is not, as the Tribunal appears to suggest, an academic one. Importantly, had City Water been earning a profit, or had the Lease Contract had a positive value, then BGT would have been entitled to a monetary award of damages. In that case, the fact that the "termination of the Lease Contract was inevitable and was going to materialise within a matter of weeks" (Award, para. 791) would be irrelevant. Even if one assumed that the Lease Contract would be terminated (and putting aside questions of the lawfulness of termination (see below)), the premature termination of a profitable lease or premature cessation of a profitable business would cause quantifiable monetary damage. Issues would arise in valuing that damage, but these would concern the matter of attributing a value to a prescribed period of time. It is for this reason that it is inaccurate to characterize BGT's claims for monetary damages as failing for lack of causation; rather, BGT's monetary damages claims fail because the injury that was caused to it had no quantifiable monetary value.

24. This analysis is important as a conceptual matter, and also consistent with more general principles of international law. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) make clear that a state which commits an internationally wrongful act, such as an expropriation, is under a number of obligations.<sup>7</sup> These include the obligation to cease the wrongful act and the "obligation to *make full reparation for the injury caused by the internationally wrongful act.*"<sup>8</sup> In turn, and importantly, Article 31(2) provides that "injury *includes any damage, whether material or moral,* caused by the internationally wrongful act of a State,"<sup>9</sup> while Article 36(1) provides that a State that commits an internationally wrongful act "is under an obligation to *compensate for the damage* caused thereby, insofar as such damage is not made good by restitution."<sup>10</sup>

25. Commentary to the ILC Articles explains that "'injury' includes any material or moral damage" and that the formulation is intended as "inclusive, covering both material and moral damage broadly understood."<sup>11</sup> In particular:

"there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to some form of reparation."<sup>12</sup>

26. The structure of these provisions makes clear that an internationally wrongful act results in an obligation to make reparation for "*injury,*" which includes, but is not limited to, an obligation to "compensate for *damage.*" An injury can very readily include matters not entailing monetary damage, and require relief not limited to monetary compensation for damage. Specifically, a state's expropriation or denial of fair and equitable treatment causes injury to the investor by depriving it of property or procedural or legal rights. The fact that this injury does not entail monetary damage in no way implies that there was no injury; on the contrary, an injury can very readily exist even without monetary damage.

27. Thus, and importantly, the fact that BGT suffered injury that entailed no quantifiable monetary value does not in any way contradict the fact that the Republic's wrongful expropriation caused BGT injury. Rather, as the ILC's Articles and accompanying commentary make clear, injury is distinguishable from the form and quantum of damage. Here, the Republic caused BGT injury through the premature and wrongful expropriation of its property -- regardless whether that injury had a quantifiable monetary value. Specifically, as noted above, the Republic's action deprived BGT of the

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<sup>7</sup> ILC Articles, Articles 28-39.

<sup>8</sup> ILC Articles, Article 31(1).

<sup>9</sup> ILC Articles, Article 31(2) (emphasis added). In turn, Article 36 provides that the state "is under an obligation to compensate for the damage caused [by its internationally wrongful act]," and that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 36.

<sup>10</sup> ILC Articles, Article 36(2).

<sup>11</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, 2002), pp. 91-92.

<sup>12</sup> *Idem*, p. 92.

use of its property and leasehold rights for at least some specified period of time, and of its rights to be treated fairly and equitably, regardless of the monetary value of those rights.

28. The Tribunal reasons that “‘causing injury’ must mean more than simply the wrongful act itself” (Award, para. 803). That is correct, but the essential point is that injury need not have a quantifiable monetary value: here, as stated, the injury is the premature taking of BGT’s property and the attendant deprivation of the use of that property.

29. The Tribunal also suggests that there is a “lack of linkage between each of the wrongful acts of the Republic and each of the actual, specific heads of loss and damage for which BGT has articulate a claim for compensation.” (Award, para. 805) That implies that BGT’s claim was limited to only specific, precisely-quantified amounts of loss, which is incorrect. Although BGT requested precisely quantified amounts (i.e., “damages in the range of US\$19,059,205 to US\$20,158,775” Claimant’s Memorial, para. 275(6)(b)) it separately, and naturally, more generally requested compensation for all damages caused by the Republic’s actions: again, “the financial equivalent of *full reparation for the unlawful expropriation of BGT’s investment*” and “*compensation for the expropriation of BGT’s investment* in accordance with Article 5 of the Treaty.” (Claimant’s Memorial, para. 275(6)(a)). Importantly, the reason that BGT’s general request for reparations is to be denied is that the evidence showed that the value of City Water’s business and remaining leasehold, however calculated, was zero. That is not an absence of causation of injury but a matter of valuation and quantum of damage.

30. Finally, although the negative long-term value of City Water’s business makes it unnecessary to decide the issue in this case, if City Water’s business would have been profitable over the life of the Lease Contract, even if unprofitable in the short-term, then the Tribunal would have been required to consider, for the purposes of this arbitration, the contractual entitlement of City Water to continuation of the Lease Contract on either new or different terms. In turn, that would have raised questions regarding the scope of the Tribunal’s jurisdiction to consider and decide contractual issues and the relevance (if any) of the UNCITRAL Award made pursuant to the Lease Contract. In this regard, it would not be sufficient to conclude, as the Tribunal does, that “termination of the Lease Contract was inevitable” (Award, para. 791); rather, the decisive consideration would have been whether “*lawful* termination of the Lease Contract” would have occurred.

31. Indeed, the conclusion that the Lease Contract would inevitably have been terminated is, taken alone, neither relevant to the proper outcome in this case nor a conclusion, given the issues presented to this Tribunal, that can properly be reached. Rather, the decisive point is that, whether or not it was terminated, the Lease Contract did not provide City Water and its business with a positive financial value.

#### **IV. COSTS AND RELATED ISSUES**

32. Fourth, I am unable to join in the Tribunal’s decision only to grant declaratory relief. In circumstances where a State deliberately conducts itself in a manner it knows at the time to be wrongful, disregarding the basic legal rights and protections of private

parties, it is at best anomalous for a tribunal to grant no affirmative relief. It is ancient law that there is no right without a remedy (*Ubi jus ibi remedium*) and that adage applies here no less than elsewhere. Whether denominated as moral damages (as some tribunals have done, but which has not been specifically requested here), recognized by way of a costs award (as other tribunals have done), or otherwise, it better advances the objectives of bilateral investment treaties and the ICSID Convention to require a measure of tangible reparations for violation of internationally-protected rights.

33. Here, while BGT did not demonstrate a quantifiable monetary loss, it did demonstrate an unacceptable breach of fundamental international rights and protections. In my view, that breach demands a remedy beyond merely declaring it a violation of the relevant BIT. The Republic's conduct caused moral damages to BGT, as well as the legal costs inevitable, given the Republic's refusal to acknowledge in any fashion the effects and nature of its conduct, in BGT obtaining international recognition of the violation of its rights. In these circumstances, I am unable to join in a decision granting only declaratory relief and would instead make an award of costs in favor of BGT.

## V. CONCLUSION

34. For these reasons, I am unable to join the Award and must with all due respect issue this concurring and dissenting opinion.

[*signed*]

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Gary Born

18 July 2008