

**International Centre for Settlement
of Investment Disputes**

ICSID Case No. ARB/05/22

**BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT**

v.

**UNITED REPUBLIC OF TANZANIA,
RESPONDENT**

PROCEDURAL ORDER N° 1

Rendered by an Arbitral Tribunal composed of

**Gary BORN, Arbitrator
Toby LANDAU, Arbitrator,
Bernard HANOTIAU, President**

I. CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES

1. On 2 August 2005, the Claimant, Biwater Gauff (Tanzania) Ltd. ("BGT") filed a request for arbitration with respect to a dispute with the Respondent, the United Republic of Tanzania ("the UROT") arising out of a series of alleged breaches by the UROT of its obligations under both international and domestic law concerning foreign investment which, according to BGT, are said to have caused loss to BGT in the region of US\$ 20 to 25 million.
2. In its request for arbitration (as subsequently amended, the latest version bearing the date of 21 February 2006), BGT formulated a request for provisional measures. This is further detailed below, following a summary of the underlying facts, as alleged by BGT.
3. For the avoidance of any doubt, the Arbitral Tribunal emphasises that the outline of facts set out below is nothing more than a summary drawn from BGT's Request for Arbitration (the UROT having yet to state its case), and entails no prejudgment whatsoever by the Arbitral Tribunal on any issues of fact or law.

(a) Outline of Facts as Alleged by BGT

4. In 2003, the UROT was awarded World Bank funding in the amount of US\$ 140,000,000 (the "Overall Project Funding") for the purpose of 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 "Overall Project"). As a condition of the Overall Project funding, the UROT was obliged to appoint a private operator to manage and operate the water and sewerage system, and to carry out some of the works associated with the Overall Project (the "Project").
5. Biwater International Limited ("Biwater"), a company incorporated under the laws of England and Wales, and HP Gauff Ingenieure GmbH & Co. KG-JBG ("Gauff"), a German corporation, submitted a joint tender for the Project and were awarded preferred bidder status by the UROT in December 2002. BGT was the investment

vehicle incorporated by Biwater and Gauff for the purpose of their investment. Biwater holds 80% of BGT's shares and Gauff holds the remaining 20%.

6. 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 contract 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 agreed to cooperate in respect of the Project 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, and STM subsequently agreed to acquire a minority shareholding in City Water. BGT currently holds 51% of the shares in City Water and STM holds the remaining 49%.
7. On 19 February 2003, 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 ("DAWASA"), as follows:
 - (i) the Water and Sewerage Lease Contract (the "Lease Contract");
 - (ii) the Supply and Installation of Plant and Equipment Contract ("SIPE"); and
 - (iii) the Contract for the Procurement of Goods ("POG") (together the "Project Contracts").
8. With regard to the Lease Contract, the parties were described as City Water, and the UROT as "represented by DAWASA". With regard to SIPE and POG, the parties were described as City Water and DAWASA, with no express reference to the UROT.
9. DAWASA is a Tanzanian public corporation. Prior to the handover of operations to City Water on 1 August 2003, DAWASA was responsible for the provision of water and sewerage services to the residents of Dar es Salaam and the surrounding area. Following 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 then collect revenue from the customer receiving these services.

10. 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 period of ten years. City Water also agreed to implement and manage the implementation of certain capital works associated with the Overall Project. Moreover, it assumed certain tariff and rental fee payment obligations to DAWASA, and DAWASA in turn agreed to facilitate City Water's operations, including allowing City Water exclusive access to and use of the Assets (as defined in the Lease Contract) which City Water leased from DAWASA; not retaining any other operator to operate the designated water services; and not operating in any way so as to hinder or conflict with City Water's operations.
11. CRDB Bank Limited ("CRDB"), a bank operating under the laws of the UROT, 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 SIPE and POG.
12. According to BGT, a series of events took place in 2005, culminating in the seizure of City Water on 1 June 2005, which constituted breaches by the UROT of its obligations under international and domestic law. In particular, it is said that:
 - on 13 May 2005, the Minister of Water and Livestock Development announced at a televised press conference that the UROT, on advice from DAWASA, had terminated the Lease Contract;
 - under cover of a letter from CRDB dated 16 May 2005, City Water was notified that the entire amount of the Lease Contract Performance Bonds had been called;
 - on 25 May 2005, DAWASA issued a Notice to Terminate under Article 51.3 of the Lease Contract, on the grounds of failure to remedy an alleged breach notified in a Cure Notice of 17 May 2005, the latter being a notice under

Article 50.1 of the Lease Contract, stating that City Water was in breach of its obligations under Article 47.1 of the Lease Contract to procure the maintenance of the performance guarantee for the duration of the Lease Contract;

- on 1 June 2005, representatives of the UROT effectuated the deportation of City Water's senior management. At the same time, representatives of the UROT and DAWASA entered City Water's offices with the express purpose of seizing control of the company's assets and installing new management (representatives of "DAWASCO", an allegedly newly formed government entity).

13. According to BGT, from 1 June 2005, DAWASCO, for all practical purposes, replaced City Water in the supply of water and sewerage services in Dar es Salaam and has announced this to the general public in Tanzania.
14. BGT concludes that the actions of the UROT and DAWASA on 1 June 2005 constituted a repudiatory breach of the Lease Contract. It alleges that the unlawful deportation of City Water's senior management, the seizure of City Water's assets, the occupation of City Water's offices and the takeover of City Water's business constitute the expropriation of BGT's investment and amount to a breach of the UROT's international and domestic obligations.

(b) BGT's Original Request for Provisional Measures

15. In its Request for Arbitration (paragraph 138 in the initial Request, paragraph 137 in the Amended Request), BGT formulated a request for provisional measures pursuant to ICSID Arbitration Rule 39 (1). It requested the Arbitral Tribunal to recommend binding provisional measures with respect to its rights to the following:
 - (i) monies standing to 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. BGT further 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 (initial paragraph 139, as amended - paragraph 138).

16. In particular, BGT requested the recommendation of provisional measures to preserve its rights in respect of (i), (ii) and (iii) until the determination of the Arbitral Tribunal in this arbitration (initial paragraph 140, as amended - paragraph 139). In addition, it requested the recommendation of provisional measures to preserve its rights in respect of City Water’s records, papers, documents and mail pending the determination of the Arbitral Tribunal (initial paragraph 141, as amended – paragraph 140).

(c) BGT’s Re-Formulated Request for Provisional Measures

17. On 10 February 2006, the parties were notified by the ICSID Secretariat that the Arbitral Tribunal invited BGT to submit a development of, or any further observations concerning, its request for provisional measures by 17 February 2006, and that the UROT was invited to submit its reply observations regarding BGT’s request for provisional measures by 27 February 2006. This latter date was subsequently extended to 1 March 2006.

18. Each party duly made written submissions pursuant to these directions.

19. On 7 March 2006, the parties were notified by the ICSID Secretariat that the Arbitral Tribunal invited BGT to submit a reply to the UROT’s answer of 1 March 2006 by 13 March 2006 and that the UROT was invited to submit a rejoinder by 20 March 2006. The Secretariat pointed out that the reply and rejoinder should address issues that had not been addressed previously, in particular the legal basis for BGT’s request and the legal defences to such requests. It also asked the parties to make concise and focused submissions. The Arbitral Tribunal also proposed that there be

oral submissions limited to 30 minutes per party on BGT's request for provisional measures at the Arbitral Tribunal's first session.

20. In its submission dated 17 February 2006, BGT re-formulated its request for provisional measures 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”

21. The first session of the Arbitral Tribunal took place in Paris on 23 March 2006 at the offices of the World Bank at 66 avenue d'Iéna. The parties agreed on procedural rules and on the agenda of the arbitration (as recorded in separate Minutes) and made submissions on the request for provisional measures.

II. BGT'S JUSTIFICATION FOR ITS REQUEST FOR PROVISIONAL MEASURES.

22. In its submission dated 17 February 2006, Claimant based its request for provisional measures on Article 47 of the ICSID Convention and Rule 39 (1) of the ICSID Arbitration Rules.
23. Article 47 of the ICSID Convention states that: “*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party*”.
24. Rule 39 (1) of the Arbitration Rules provides that: “*At any time during the proceeding a party may request that provisional measures for the preservation of its*

rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures”.

25. The justification for the request was further clarified as follows.
26. *City Water Bank Statements and Assets:* In respect of items 1(i) and (ii) of its re-formulated request of 17 February 2006 (the “Re-formulated Request”), BGT alleged that the purpose of the provisional measures was to preserve, and to provide BGT with access to, documentation relating to the bank accounts and assets of its investment vehicle, City Water. In particular, BGT stated that it sought (i) the preservation and provision of bank statements in respect of bank accounts held by City Water with its Tanzanian bank; and (ii) a written statement of account in respect of dealings with City Water’s assets by the UROT or by the UROT’s entities, as well as the preservation and provision of copies of all supporting documentation. The preservation and provision of such documentation was said to be necessary in order for BGT to be able to assess, or better assess, the extent of its loss since 1 June 2005.
27. With respect to the documentation relating to City Water’s bank accounts, BGT alleges that since 1 June 2005, it has been denied access to the monthly bank statements due to City Water from CRDB in respect of the company’s accounts (including its Contracting Works Accounts, Operational Accounts, Collection Account and Deposit Account). BGT alleges that following the seizure of its premises and business operations on 1 June 2005, it wrote several times to CRDB to obtain the requested copies of its bank accounts but never received them. It therefore requests the Arbitral Tribunal to order their production in order to identify any withdrawals or other unauthorised dealings with these accounts, to better assess its loss in this respect. To this end, BGT requests the Arbitral Tribunal to recommend that the UROT procure the collection, inventory and forwarding of all such statements delivered to City Water’s former Dar es Salaam premises. BGT considers these documents to be at risk of loss or destruction if left in the UROT’s possession, or that of the UROT’s entities.

28. With respect to the documentation relating to dealings with City Water's assets, BGT alleges that following the seizure of City Water's premises and business operations on 1 June 2005, DAWASCO was appointed to replace City Water as Operator and immediately assumed the control and use of all of City Water's assets, including corporeal assets such as vehicles and equipment. In addition, in early August 2005, BGT received reports that DAWASCO was collecting monies invoiced by and owing to City Water, and using such monies to pay various suppliers' bills. Consequently, BGT seeks the preservation and provision of all documentation relating to dealings with City Water's assets, including copies of all invoices, receipts and related correspondence in order to better assess its loss. BGT considers these documents to be at risk of loss or destruction if left in the UROT's possession or that of the UROT's entities. In addition, BGT seeks a written statement of account from the UROT detailing all dealings (including those of DAWASCO) with City Water's assets whether corporeal (e.g. vehicles) or incorporeal (e.g. debts owed to City Water) since 1 June 2005. BGT considers such written statement of account to be essential to understanding the UROT's (or the UROT's entities') dealings with City Water's assets.
29. *Preservation and Provision of City Water's Papers:* In respect of item 2 of the Re-formulated Request, BGT requests the Arbitral Tribunal to recommend the collection, inventory and provision of copies of the papers, records and correspondence of City Water held by DAWASCO since 1 June 2005 (and all correspondence of City Water held by DAWASCO subsequently) in order to preserve potential evidence relevant to its claim against the UROT, and in particular relevant to the better assessment of its loss. BGT considers these documents to be at risk of loss or destruction if left in the UROT's possession or that of the UROT's entities.
30. *Necessity and Urgency:* BGT further pointed out that it requests the above provisional measures as a matter of urgency. It considers, in accordance with ICSID jurisprudence, that necessity and urgency are present where a Respondent fails to take steps to preserve or to provide documentation relevant to a Claimant's case, or in circumstances where there is a risk of loss or destruction of such documentation.

III. THE UROT'S ANSWER

31. The UROT replied to BGT's Re-Formulated Request on 1 March 2006.
32. *Jurisdiction Objections:* The UROT has foreshadowed a number of objections to jurisdiction and other preliminary issues that may be presented to the Arbitral Tribunal in the early stages of the arbitration, taking the position that these are relevant factors which ought to caution the Arbitral Tribunal's exercise of its discretion under Article 47 of the ICSID Convention, particularly given, on its case, the absence of necessity or urgency in BGT's request.
33. *Necessity and Urgency:* The UROT recorded BGT's statement in its request that "*necessity and urgency are recognized in ICSID jurisprudence as being present where Respondent fails to take steps to preserve or to provide documentation relating to the Claimant's case, or in circumstances where there is a risk of the loss or destruction of such documentation*". On the UROT's case, even if this is a correct statement of the law, BGT has presented no evidence that the UROT has failed to take steps to preserve or to provide documentation or that there is a risk of the loss or destruction of such documentation, much less risk requiring the urgent imposition of interim measures. According to the UROT, BGT offers only the repeated, unsupported speculation that BGT considers these documents to be at risk of loss or destruction if left in the UROT's possession, which is not a substitute for evidence. Nor, according to the UROT, has BGT shown that the entities of whose actions it complains can rightly be called or equated with the UROT: With respect to the first requested measure, for example, the culprit, on BGT's own account of the facts, appears to be BGT's own bank (CRDB), an entity wholly unrelated to the Republic. For the avoidance of any possible doubt, the UROT stated that it has not lost or destroyed any relevant documentation, nor does it have any intention of doing so.
34. *Pre-Judging Merits:* On the other hand, the UROT alleged that BGT's request was an invitation to the Arbitral Tribunal to prejudge the merits of the case. The UROT takes issue with BGT's theory of the facts and it is therefore not appropriate for the

Arbitral Tribunal to resolve matters going to the merits on a provisional measures application. According to the UROT, the best example related to the request for an accounting in respect of all dealings with City Water's assets and copies of all of City Water's ledgers, papers, records, documents and correspondence. Identifying "City Water's assets" or "City Water's documents" is impossible without first resolving basic issues underlying the case. It is BGT's view that virtually everything City Water used is City Water's property. On the UROT's case, this is not so. UROT claims that City Water leased assets from DAWASA and that the physical and other assets that were necessary to operating the Dar Es Salaam water and sewerage system are mostly, if not entirely, the property of entities other than City Water. Indeed, according to the UROT, the Lease Agreement in its Article 56 required City Water to turn those assets over to DAWASA upon the termination of the Lease Contract for any reason, including breach by either party. Therefore, UROT concludes, before the extremely broad and generally defined measures sought in the request could be granted, the Arbitral Tribunal would have to explore the facts of the case and the operation of Article 56 in the context of the entire contractual agreement between City Water and DAWASA.

35. *The Nature of the Requests:* With respect to what the UROT refers to as the "Document Requests" (items 1 (i) and 2 of the Re-formulated Request), the UROT alleged that these are in fact document disclosure requests which are not an appropriate subject for a provisional measures application. Moreover, as was already explained by the UROT in previous correspondence with BGT, Article 56.3 of the Lease Contract provides that "*The Operator shall, on the termination of this Contract for whatever cause, deliver up to the Lessor all appropriate and necessary materials, documents, records ... data, intellectual property and other information of whatever nature (with the exception of those dealings solely with the Operator's Foreign Personal) in the possession, custody or power of the Operator relating to the operations of the Operator or to the Assets and necessary for the performance of the Services ...*". According to the UROT, it had proposed to BGT back in June 2005 that if City Water identified particular documents not covered by Article 56.3, those documents would be delivered to City Water. And if City Water might not be able to identify all such documents, DAWASA would create an inventory of the papers in its possession following termination of the Lease Contract and supply the

inventory to City Water, such inventory to be paid for by City Water given the apparent fact that the vast majority of the papers did not even arguably belong to City Water under Article 56.3. City Water did not accept this offer.

36. Furthermore, the UROT contends that the only category of documents that the request attempts to identify with any specificity is that described in item, 1(i) of the Re-formulated Request, relating to bank statements. The UROT reasons that it would appear here that if BGT's bank (an entity unrelated to the UROT) has continued sending statements to the same address as it did before the Lease Contract was terminated, these should be obtainable by City Water itself.
37. As far as the second document request is concerned (item 2 of the Re-formulated Request), the UROT observed that this is extremely large and tendentious and would require the Arbitral Tribunal to adopt BGT's views on some of the ultimate questions in dispute. The UROT denied that there was an occupation "of City Water's offices" on 1 June 2005 or at any other time. It denied that City Water's documents or other assets were seized at that or any other time and therefore denied that the class of ledgers, papers, etc. as described in item 2 of the Re-formulated Request exists at all.
38. Consequently, in the UROT's submission, BGT's request for document discovery in items 1(i) and 2 of the Re-Formulated Request should be rejected.
39. As far as what the UROT referred to as the "Accounting Request" is concerned (item 1(ii) of the Re-formulated Request), the UROT described BGT's insistence that the UROT create evidence as "audacious". The request assumes the correctness of BGT's theory of the case, and on the UROT's analysis invited the Arbitral Tribunal not only to prejudge the merits, but also to compel BGT to create a document bolstering BGT's theory. This request, it was said, is conceptually misguided and lacks evidentiary support.

IV. BGT'S REPLY TO THE UROT'S ANSWER

40. In its reply dated 16 March 2006, BGT asserted that in accordance with Article 47 of the ICSID Convention and Rule 39 (1) of the Arbitration Rules, the Arbitral Tribunal must consider the following issues in considering the recommendation of provisional measures :
- (i) Has BGT identified the right(s) that it seeks to preserve by means of the requested provisional measures?
 - (ii) Has BGT identified the measures the recommendation of which is requested?
 - (iii) Has BGT identified the circumstances that require such measures?
 - (iv) In addition, it was said, the Arbitral Tribunal must consider whether the requested provisional measures will impinge on the determination of the merits of the dispute.
41. *Identification of Rights:* With respect to (i), BGT seeks to preserve its procedural right to the preservation and production of evidence. According to BGT, this right is one of a number of procedural rights the protection of which goes to the integrity of the arbitration process. This right which is referred to in Article 1134 of NAFTA and in the UNCITRAL working group's draft amendment to Article 17 of the Model Law, has also been the subject of recommendations under Article 47 of the Convention by ICSID Tribunals. In addition, it falls directly with the definition of the type of rights capable of protection by means of provisional measures given in *Plama Consortium Limited v. Republic of Bulgaria* (2005). The Tribunal in *Plama* considered the scope of the rights to which Rule 39 (1) relates. It held that it is not limited to the preservation of the rights in dispute between the parties but extends to rights relating to the dispute. The Tribunal specifically stated that "*the rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the Arbitral Tribunal and for any arbitral decision which grants to the Claimant the relief it*

seeks to be effective and able to be carried out” (para. 40). The *Plama* Tribunal went on expressly to include procedural rights within the category of protected rights: “*thus the rights to be preserved by provisional measures ... may be general rights, such as the rights to due process ...*” (para. 40). Applying the test in *Plama* to the present case, it is BGT’s case that the right to the preservation and production of evidence relates directly to BGT’s ability to have its claim and request for relief in the arbitration “*fairly considered and decided by the Arbitral Tribunal*”.

42. BGT also referred to other ICSID decisions, and in particular *Agip v. Congo* (Award, 30 November 1979, (1993) 1 ICSID Reports 311) and *Vacuum Salt v. Ghana* (Award, 16 February 1994, (1997) 4 ICSID Reports 331-332). BGT noted that the facts of the present case are directly analogous with those of *Agip v. Congo* where the Tribunal made the requested recommendation for provisional measures. In that case, the Claimant’s locally incorporated subsidiary (an oil distribution company) had been nationalized, and its assets had been transferred to the state owned oil corporation. The subsidiary’s local offices had been occupied by the government and its company records has been seized. At the request of the Claimant, the Tribunal recommended that the Government of the Congo collect, create a complete list of, and keep available for presentation to the Tribunal at the Claimant’s request, the documents which had been in the subsidiary’s local office at the date of the occupation.
43. *Identification of Measures:* With respect to (ii), BGT pointed out that it had already specified the provisional measures the recommendation of which it requested and that these measures relate directly to the preservation and production of evidence.
44. *Identification of Circumstances:* Finally, in relation to (iii), BGT alleged that circumstances of necessity and urgency are clear in the present case.
45. With respect to necessity, BGT noted that since 1 June 2005, it has been denied access to key evidence relevant to its claims for damages: the administrative, financial, legal, commercial and engineering records contained in the offices of its investment’s vehicle, City Water. If BGT’s right to the preservation and production

of evidence is not protected, so it is argued, this will have a direct impact on BGT's ability to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide such claims fairly. This is not harm of a type which can be compensated by damages, for the very reason that it goes to BGT's ability to effectively present its claim for damages.

46. With respect to urgency, BGT alleged that the urgency is obvious given that the evidence at issue will have a direct bearing on the award made by the Arbitral Tribunal and that BGT requires the measures sought in order to present a comprehensive memorial to the Arbitral Tribunal. It is imperative that BGT's right to the preservation and production of evidence is protected at as early a stage as possible, in order to facilitate the efficient conduct of the proceedings.
47. With respect to the UROT's specific objections, BGT disputes the UROT's jurisdictional objections, and further points to SCHREUER who specifically recognises that a request for provisional measures may have to be decided by a Tribunal before it has ruled on its own jurisdiction and that as a consequence, a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction.
48. BGT further disputes the UROT's objections as to the lack of necessity and urgency, and with respect to the risk of prejudging the merits. BGT points out that an application for provisional measures will, of its nature, require the Arbitral Tribunal to balance the need for the protection of the applicant's legitimate rights with the requirement not to prejudge the merits of the case. In this case, the request does not impinge upon the merits of the dispute in any way. The preservation and production of documentation does not involve an acceptance by the Arbitral Tribunal of BGT's theory of the case. It simply involves the acceptance by the Arbitral Tribunal that BGT has a right to the preservation and production of evidence relevant to that case.
49. Moreover, with respect to the determination of the City Water's assets and Article 56 of the Lease Contract, BGT points out that it was not a party to the Lease Contract and does not seek to found its claim for provisional measures on the basis

of Article 56 or any other provision in that contract; that on the other hand, it does not assert a right to the preservation and production of evidence on the basis that all or any of the documents referred to belonged to City Water. On its case, BGT does not need to prove that it, or its subsidiary, has any rights of property in the requested documentation. Rather, BGT asserts a right to the preservation and production of the requested documentation on the basis that such documentation constitutes evidence directly relevant to its case. But even if the UROT's construction of Article 56 is accepted at its highest, and all of the materials, documents, records, data, intellectual property and other information of whatever nature as passed into the ownership of the UROT, Article 56 neither expressly nor impliedly excludes City Water from access to such material.

50. With respect to the "Accounting Request" (item 1(ii) of the Re-formulated Request), BGT notes that the UROT's argument in respect of Article 56 and the inability to identify "City Water's assets" cannot apply to this request and is not raised by the UROT, for the simple reason that there can be no doubt that the debts owed to City Water constitute "assets" of City Water and no other entity.
51. According to BGT, the request is both urgent and justified. BGT has been informed of reports that DAWASCO has been collecting monies owed to City Water. These reports appear to align with the statement in DAWASCO's "Notice to the Public" dated 8 June 2005 that "*all cheques should be addressed and paid to DAWASCO*". BGT has no information as to DAWASCO's dealings with such monies. In addition, BGT has been informed of reports that DAWASCO has paid out monies to certain alleged creditors of City Water.
52. Information pertaining to monies owing to City Water and monies owed by City Water is clearly evidence relevant to BGT's case. The UROT's objection that the request is audacious and inappropriate is unjustified. The creation of a Statement of Account is directly analogous to the creation of a list of documents, a provisional measure recommended in *Agip v. Congo*. The invoices, receipts and related correspondence are necessary in order to verify the information contained in the statement of documents.

53. With respect to the “document request” (items 1 (i) and 2 of the Re-formulated Request), BGT’s reply was that:
- The UROT’s allegation that the bank statements are probably in City Water’s post office box does not solve the issue since the key to such box is now also in DAWASCO’s possession or control;
 - The UROT’s allegation that the request for production of documents held at City Water’s offices on 1 June 2005 would require the Arbitral Tribunal to adopt BGT’s views on some of the ultimate questions in dispute, is also unfounded. The substance of BGT’s request relates to the ledgers, papers, records, documents and correspondence held at, or contained in, the City Water offices on 1 June 2005, and to correspondence addressed to City Water and delivered to those offices subsequently. It is clear that such a category of documents does exist.
54. BGT therefore concluded that its request is fully justified.

V. The UROT’s REJOINDER

55. In its rejoinder, the UROT reaffirmed its jurisdictional objections as well as the non compliance by BGT with the requirements for the recommendation of provisional measures contained in Article 47 of the ICSID Convention and Rule 39 (1) of the Arbitration Rules.
56. On the one hand, the UROT alleged that BGT has not attempted to demonstrate that its right to the preservation and production of evidence is threatened. What remains therefore is BGT’s asserted right to the production of evidence. But, it is said, parties to an ICSID arbitration have no such right: they have at most a right to ask the tribunal to call for production pursuant to Article 43 of the Convention. This right should not be circumvented by demanding immediate document production in the guise of an application for provisional measures under Article 47.

57. Moreover, the *Agip* and *Vacuum Salt* cases relied upon by BGT do not support its position. In *Agip*, the State did not oppose the claimant's provisional measures request. In *Vacuum Salt*, the claimant's provisional measure was rendered moot by the State's undertaking to preserve evidence. In both cases, the subject of the requested measures was property that the Respondent States admitted belonged to the claimants and also admitted having expropriated *de iure*. Such is not the case here.
58. The UROT also considered that BGT's reference to NAFTA and the UNCITRAL Working Group's draft revision to Article 17 of the Model Law are irrelevant since both texts contemplate the provisional measures to preserve evidence, not to require it to be produced.
59. In the second place, the UROT alleged that BGT has requested inappropriate (much too broad) measures, which could only be rejected on the basis of Articles 3 and 9.2 (c) of the IBA Rules of Evidence.
60. In the third place, the UROT reaffirmed its previous case that BGT has failed to prove the requirements of necessity and urgency. With respect to urgency, the UROT observed that City Water commenced a contractual arbitration against DAWASA more than ten months previously. At that time, it could easily have sought provisional measures from the UNCITRAL Tribunal or judicial intervention. In fact, according to the UROT, BGT broached the subject in connection with proceedings in both fora, but then abandoned each proceeding. Therefore, on the UROT's case, BGT should not now be permitted to come to this Arbitral Tribunal for the same purpose, especially since it has not shown any more urgency or diligence than City Water in seeking the documents at issue. If BGT needs the documents at issue to prepare its memorial, it should request them in the context of the discovery procedure which the Arbitral Tribunal has proposed to take place before the first round of pleadings.
61. Finally, the UROT reaffirmed its view that the requested measures would require the Arbitral Tribunal to prejudge the merits of the parties' dispute.

62. The UROT therefore concluded that BGT's request should be denied with costs.

VII. ORAL SUBMISSIONS

63. Each party further developed its case in the course of oral submissions at the first session.

64. An additional issue was also raised by the UROT at the hearing, namely whether BGT's Request for Arbitration was valid and properly registered pursuant to the ICSID Convention and Rules, given its subsequent amendment by BGT. Although this was raised primarily as a procedural issue, it was also advanced on behalf of the UROT as a relevant factor to be taken into account in assessing BGT's application for provisional measures.

VII. THE ARBITRAL TRIBUNAL'S DECISION

(a) General Observations and Powers

65. The starting point for the Arbitral Tribunal must be consideration of the nature and ambit of its powers with regard to provisional measures.

66. *Relevant Powers:* Article 47 of the ICSID Convention provides that:

“[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party”.

67. According to SCHREUER (The ICSID Convention: A Commentary, p. 744 and following, at 746):

“[t]he purpose of provisional measures is to induce behavior by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties’ rights, preventing self-help, safeguarding the awards’ eventual implementation and generally keeping the peace. They have to be taken at a time when the outcome of a dispute is still uncertain. Therefore, the Tribunal has to strike a careful balance between the urgency of a request for provisional measures and the need not to prejudge merits of the case”.

68. The author further points out that *“it is clear that provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits”* (p. 751). According to the author, one type of situation in which this is true is where *“it may be necessary to require the parties to cooperate in the proceedings and to furnish all relevant evidence”* (idem).
69. Under Arbitration Rule 39 (1), a party may request provisional measures at any time during the proceeding.
70. It is also clear, and apparently not in issue between the parties here, that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction (SCHREUER, p. 764). As noted on behalf of the UROT, there may be cases, however, where the likely objections to jurisdiction might be a relevant factor in a tribunal’s exercise of its discretion to recommend provisional measures (for example in a case where there is no urgency or questionable necessity).
71. *Ambit of the Power:* The ambit of this power is very broad. The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights. SCHREUER points out in this respect that *“the rights most frequently invoked in the requests for provisional measures concerned procedural questions”*, such as *“the right of access to evidence (disclosure)”* (p. 779). In the same vein, the ICSID Tribunal in the *Plama* case held that Rule 39 was not limited to the preservation of the rights in dispute between the parties but extended to rights relating to the dispute. As the Tribunal there put it: *“the rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the Arbitral Tribunal and for any arbitral decision which grants to the Claimant the relief it*

seeks to be effective and able to be carried out” (para. 40). It concluded that “*the rights to be preserved by provisional measures ... may be general rights, such as the rights to due process ...*” (idem).

72. Two examples of cases in which requests were filed with ICSID tribunals to preserve evidence are *Agip v. Congo* (Award, 30 November 1979, 1 ICSID Reports, 311) and *Vacuum Salt v. Ghana* (Award, 16 February 1994, 4 ICSID Reports, 331/2), both referred to by the parties.
73. In *Agip*, the claimant’s subsidiary in the Congo had been nationalized in 1975. In the course of the nationalization, the Government had occupied the local offices and seized the company’s records. ICSID proceedings were instituted in October 1977. On 21 November 1978, *Agip* lodged a request for measures of preservation in accordance with Article 47 to the effect that the Government should be directed to collect all the documents that had been kept at the local office, furnish the Tribunal with a complete list of these documents and keep these documents available for presentation to the Tribunal at *Agip*’s request. The Government did not avail itself of its right to make observations. The Tribunal made a decision as requested on 18 January 1979.
74. In *Vacuum Salt v. Ghana*, the claimant filed a request for arbitration on 28 May 1992 alleging breach of its lease agreement and the progressive expropriation of its business and property by *Ghana*. *Vacuum Salt* submitted a request for provisional measures on October 22, 1992, expressing concern, *inter alia*, over the preservation of its corporate records. The Government made a voluntary undertaking that it would not deny the claimant access to its records.
75. *Relevant Factors:* The requirements that must be satisfied for the recommendation of provisional measures under Article 47 of the ICSID Convention are now well-settled, and were not materially in dispute as between the parties (e.g. urgency, necessity, a right that requires protection; circumstances threatening the right; etc). They appear from the summary of each side’s case above, and need not be repeated.

76. As far as urgency is concerned, however, whilst it was common ground that this is a requirement, for its own part the Arbitral Tribunal considers that the requirement needs more elaboration. In the Arbitral Tribunal's view, the degree of "urgency" which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to "urgency" in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.
77. *Other Relevant Powers:* As recorded above, the UROT has made the point that some of BGT's requests are, in truth, applications for disclosure of documents, as opposed to proper requests for provisional measures. As set out below, to a certain degree the Arbitral Tribunal agrees with this. In this regard, it is relevant to note that quite apart from its powers under Article 47 of the ICSID Convention to recommend provisional measures, the Arbitral Tribunal also has a broad power under Article 43 of the ICSID Convention, as follows (in relevant part):
- "Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,*
(a) call upon the parties to produce documents or other evidence,"
78. Rule 34 of the ICSID Arbitration Rules is also in similar terms.
79. The Arbitral Tribunal notes that, absent contrary agreement, this is a power which it is entitled to exercise of its own motion, at any stage of the proceedings, and in relation to the production of documents or other evidence.
80. The precise dividing line between what is (i) properly a provisional measure under Article 47 and (ii) an order under Article 43 may not always be immediately obvious. This is all the more so given that (as set out above) Article 47 extends to the protection of procedural rights with respect to evidence, and given that tribunals

have in the past made recommendations for the marshalling and preservation of evidence under Article 47 that (arguably) might also have been made under Article 43.

81. In the Arbitral Tribunal's view, it is appropriate to analyse the precise nature of the relief that BGT seeks, in order to assess whether each element falls within the ambit of Article 47 – or, alternatively Article 43. In so far as it falls outwith Article 47, but within Article 43, the issue is then whether there are case management or other reasons to justify the issuance of an order under Article 43, ahead of the planned document disclosure exercise in this case.

(b) The Nature of BGT's Applications

82. BGT's (re-formulated) request for provisional measures comprises a range of different types of applications. Properly analysed, four different types of recommendation / order are sought:

- (i) for the preservation of evidence (documents listed in items 1(i), 1(ii) and 2 of BGT's Re-formulated Request);
- (ii) for the compilation of an inventory of documents (item 2 of BGT's Re-formulated Request);
- (iii) for the production of documents (items 1(i), 1(ii) and 2 of BGT's Re-formulated Request); and
- (iv) for the compilation of a statement of account (item 1(ii) of BGT's Re-formulated Request).

83. Each category is addressed in turn below.

(c) Preservation of Evidence

84. It is uncontroversial that the Arbitral Tribunal's powers under Article 47 include the power to recommend the preservation of evidence, including documents. This is one of the most common forms of interim relief.
85. As matters stand in this case, it is common ground that BGT's activity in Tanzania (by way of City Water) ceased as of 1 June 2005. It is also common ground that the operation previously run by City Water was (at least in some form) taken over by other entities thereafter. The precise nature of these events and their legal significance are obviously matters for later determination, but it is likely that the investigation of the merits will require consideration of evidence that is currently in Tanzania, and beyond BGT's possession, custody or control.
86. In the Arbitral Tribunal's view, BGT's request that this evidence be preserved is reasonable. Until a view can be taken as to the relevance and materiality of such evidence, the safest course at this early stage of the proceedings is to ensure that no adverse step is taken in relation to the same. To this extent, BGT has clearly identified the right which it seeks to preserve by means of the requested provisional measure. It has also identified the measures the recommendation of which is requested. The Arbitral Tribunal also considers that the requirements of necessity and urgency are met, the former because of the potential need for the evidence in question, and the latter because there is a need for such evidence to be preserved before the proceedings progress any further (e.g. to enable each party properly to plead their respective cases).
87. As to the requirement to demonstrate "circumstances that require such measures", the Arbitral Tribunal is motivated by the fact that the UROT has already volunteered an undertaking to preserve all such evidence (e.g. as set out in correspondence, in the UROT's Answer on provisional measures, and repeated since). The Arbitral Tribunal's recommendation is not based on any finding that the UROT has or may act adversely in respect of such documents, but rather a recognition of the need to preserve such evidence and the UROT's offer that already exists to do so.

88. The Arbitral Tribunal therefore recommends as follows, pursuant to Article 47 of the ICSID Convention:

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.

(d) Inventory

89. In the Arbitral Tribunal's view, the request for an inventory of documents in item 2 of BGT's Re-formulated Request is best analysed as ancillary to the preservation of the same documents. In order for all sides and the Arbitral Tribunal to better understand the range and nature of documents that might have existed or still exist at City Water's offices, and that might be relevant and material to the resolution of this dispute, it would obviously be extremely helpful for some form of inventory to be compiled. This is particularly so in a situation such as this when one party claims that it has been excluded from the relevant premises, and no longer has any means of reviewing the documentation itself.
90. For the same reasons as justify a recommendation to preserve documents, the Arbitral Tribunal considers it appropriate to recommend the provision of some form of inventory of documents within the category defined in item 2 of BGT's Re-formulated Request.
91. The Arbitral Tribunal notes that such an inventory was previously offered by DAWASA in June 2005 (albeit on certain terms, and at a time when such an inventory may have been easier to compile).
92. As a matter of powers, Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules clearly empower the Arbitral Tribunal to recommend all

necessary steps in order to preserve evidence, as demonstrated by the previous decisions noted earlier in which similar orders have been made.

93. In any event, as a matter of case management, the provision of an inventory is likely to facilitate and shorten the forthcoming document disclosure exercise, and as such the Arbitral Tribunal considers it within its general procedural powers to implement mechanisms such as this.
94. Having said this, the Arbitral Tribunal considers that the current formulation of item 2 of BGT's Re-formulated Request is overly broad and potentially burdensome. By "inventory", the Arbitral Tribunal does not have in mind the identification of individual items (such as papers, records, ledgers, correspondence etc), akin to an English litigation-style list of documents. Rather, the Arbitral Tribunal is of the view that the inventory should identify the categories of documents that exist, so as to enable further specific requests to be made in the course of the planned document disclosure exercise, without imposing an undue burden on the UROT or (if different) the entities which have possession, custody or control of the documents in question.
95. Further, given the difficulties that the UROT has articulated in relation to the ownership of the documents in question, and (for example) the possible operation of Art 56 of the Lease Contract, the Arbitral Tribunal considers that the inventory ought not to be tied to "City Water's" documents, thereby avoiding practical problems and any risk of prejudging issues. Rather, the documents in question should be defined by reference to those located at City Water's offices at the time of the alleged occupation on 1 June 2005.
96. The precise formulation of this inventory is a matter which the Arbitral Tribunal considers is best worked out between the parties in the first instance, since they are better placed to take account of the practical issues involved in compiling the same. In so far as agreement cannot be reached, the Arbitral Tribunal will make its own recommendation following submissions from the parties. The Arbitral Tribunal considers that this should be a matter in which the parties, and their counsel, should

be able to reach a satisfactory resolution without need for further submissions or expense.

97. For the avoidance of doubt, the Arbitral Tribunal's recommendation is not based on a final determination that any particular documents are subject to disclosure, are relevant to the dispute, are within the UROT's possession, custody or control, or that the UROT has or may act adversely in respect of the same, but rather a recognition of the need to preserve such evidence, and for reasons of case management.
98. The Arbitral Tribunal therefore recommends as follows:

That, 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 have been received subsequently.

That, the parties cooperate in establishing a workable and non-burdensome inventory within the parameters set out in paras 90-97 above.

(e) Production of Documents

99. Over and above the preservation of documents, BGT also seeks the actual production of various categories of documents (items 1(i), 1(ii) and 2 of BGT's Re-formulated Request).
100. This is a more controversial issue when framed as an application for provisional measures under Article 47 of the ICSID Convention. Actual production is not usually considered within the ambit of such interim relief, partly because

preservation is usually sufficient to protect the rights in question, and partly because actual production is catered for by other rules (in particular Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules). Indeed, the two procedures are aimed at different issues: Article 47 is designed to ensure that the Arbitral Tribunal can properly discharge its mandate, whilst Article 43 is one element in a range of provisions that structures how the mandate is to be discharged.

101. Further, as the UROT has observed, the danger of allowing Article 47 as a method of obtaining disclosure of documents is that this might be deployed to circumvent other procedures – in this case the detailed mechanism for two exchanges of document requests. Although there may be instances in which document production could be ordered pursuant to Article 47, this would in the Arbitral Tribunal’s view be exceptional.
102. Even assuming that the power is available to it, on balance the Arbitral Tribunal does not consider it appropriate in this case to address BGT’s applications for actual production of documents by way of Article 47. This is primarily because, the documents having already been secured by the recommendations above, the Arbitral Tribunal is not satisfied that the requirements of Article 47 are established (eg a right that is threatened).
103. However, the Arbitral Tribunal does consider it appropriate to consider the requests for production by way of Article 43, and in the light of case management issues.

(i) Application Concerning City Water’s Bank Accounts

104. Item 1(i) in BGT’s Re-formulated Request comprises a specifically identified, narrow category of documents that are of obvious potential relevance and materiality to the issues in dispute. As such, it is inevitable that they will be sought by BGT in the course of these proceedings in any event. Given its narrow ambit, this is a request that the Arbitral Tribunal considers appropriate to allow at this stage, since this may well have case management advantages.

105. In particular, insofar as there is any issue as to whether or not such documents exist and whether or not they are within the UROT's possession, custody or control, allowing the request at this stage of the proceedings could allow more time for these issues to be resolved.

106. The Arbitral Tribunal therefore orders as follows:

That, by 18 April 2006, the UROT take all necessary steps to procure that all of the bank statements (if any) which have 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 which are received thereafter are similarly delivered.

(ii) Application Concerning City Water's Assets

107. In so far as items 1(ii) and 2 in BGT's Re-formulated Request concern requests for production, however, the position is different. Unlike item 1(i) above, each of these requests comprise broad categories. The relevance and materiality of each category will be a matter for debate, as will the practicality and potential burden of each request. As one example, item 1(ii)(i)(a) could encompass all documents generated in respect of all customers in Dar es Salaam, which might total hundreds of thousands of individual accounts or subscriptions. In the event that the categories are found to be relevant and material, and the UROT is able to establish a disproportionate burden, other mechanisms may have to be considered for the handling of these documents (eg a summary statement with sample documents).

108. These are all issues which will require a more thorough consideration, which is more appropriately done with the benefit of the “Redfern Schedule” procedure that has now been put in place.
109. It follows that there are no case management advantages in accelerating these requests, and that BGT’s application for production under items 1(ii) and 2 of its Re-formulated Request are denied for the time being. BGT is, of course, free to make requests for production for such materials in the course of the arbitration.

(f) Statement of Account

110. In the Arbitral Tribunal’s view, BGT’s request for a “Statement of Account” in item 1(ii) of its Re-formulated Request is properly viewed as an aspect of the production of documents or other evidence. This is particularly so since the request is advanced as a collation or summary of the documents for which BGT also seeks production.
111. However, for the same reasons as set out above with respect to production of documents, the request concerns a broad category of underlying documents, and is therefore far from straightforward. As such, the Arbitral Tribunal considers that it ought to be addressed with the benefit of the agreed “Redfern Schedule” procedure, and the full elaboration of competing factors that this will entail. To this end, there are no case management advantages in accelerating the issue.
112. As far as Article 47 is concerned, the underlying documents have already been preserved (by the recommendation above), and therefore the Arbitral Tribunal considers that there are no grounds for the imposition of further provisional measures in this regard.
113. It follows that BGT’s request for a “Statement of Account” in item 1(ii) of its Re-formulated Request is denied for the time being.

(g) Concluding Note

114. 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 either party's case, and it has been careful not to prejudge any issues of fact or law in the formulation of this procedural order.

The Arbitral Tribunal

Gary BORN

Toby LANDAU

Bernard HANOTIAU

Dated: 31 March 2006