**Tanzania: corruption in the energy sector**

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**Acronyms:**

APPP Africa Power and Politics Programme

CCM Chama Cha Mapinduzi

DHSA Dowans Holdings SA

DTL Dowans Tanzania Limited

ICC International Chamber of Commerce

POA Power Off-Take Agreement

PPRA Public Procurement Regulatory Authority

RDEVCO Richmond Development Company

Tanesco Tanzanian Electric Supply Company Limited

1. ****Introduction****

This report focuses on alleged corruption that was involved in a short-term emergency energy contract signed in 2006 between Tanesco, the Tanzanian state utility responsible for the generation, transmission and distribution of electricity, and Richmond Development Company (who, towards the end of 2006, passed on the contract to Dowans Holdings). When Tanesco cancelled the contract with the company in 2008, as a result of the corruption allegations, the company took them to arbitration at the International Chamber of Commerce. In its November 2011 ruling, the ICC arbitration panel slapped Tanesco with a huge award that they are required to pay, which could severely undermine Tanesco’s ability to deliver electricity. Tanesco has launched a number of legal challenges to the award, with the Tanzanian High Court giving its ruling on the most recent challenge on February 20 2012.

The report consists of five sections.

The first section sets out the background to the contract.

The second section talks about the contract itself. It focuses on:

* the 2006 signing of the contract
* the allegations of corruption and the political fall-out from this
* ownership of the private company
* the cost of the contract
* the cancellation of the contract

The third section focuses on the ICC case. It sets out:

* the ruling made by the ICC
* reaction to this ruling
* and Tanesco’s attempts to challenge the ICC award

The fourth section focuses on the departure of Dowans from Tanzania. In particular it focuses on:

* the dispute between Richmond and Dowans over machinery
* the sale of Dowans assets in the country

The fifth section concludes by locating this case in a broader context of arbitration tribunal findings.

1. ****Background:****

Tanzania has experienced crippling power shortages since the early 1980s. As one way of dealing with these power shortages, the second phase government led by Ali Hassan Mwinyi, the president between 1985 and 1995 introduced EPPAs (Emergency Power Purchase Agreements)[[1]](#endnote-1). These allow Tanesco to establish agreements with private sector energy generators who sell the energy they produce to the government-owned corporation through Power Off-Take Agreements (POAs).

These EPPAs have caused myriad problems in the past and continue to do so today. The Controller and Auditor General’s annual report for the 2007/2008 financial year notes that “Tanesco is overburdened by the liabilities imposed by various power purchase agreements (PPA) mostly entered without compliance with the requirements of Public Procurement Act and its regulations”[[2]](#endnote-2).

More specifically, the payments Tanesco makes to two IPPs (Songas and IPTL) accounts for about 90% of Tanesco’s revenue[[3]](#endnote-3). There are also ongoing problems with the Independent Power Tanzania Limited (IPTL) IPP. While IPTL has installed capacity to generate 100MW, they have not been generating much electricity because of a dispute over the price of power that they would supply[[4]](#endnote-4). At times, when electricity shortage is severe, the government has been forced to buy fuel to move the turbines, so allowing IPTL to produce electricity.

1. ****Tanesco, Richmond emergency power contract****
   1. **The 2006 contract**

In 2006, Tanzania had been experiencing the consequences of a severe drought that undermined the country’s ability to generate electricity through its hydropower system. On June 23, due to the power shortages, Tanesco entered into a $179 million contract with Richmond Development Company Ltd . Richmond, supposedly an American company based in Houston, Texas, undertook to deliver 100MW of emergency power supply from a gas-turbine power plant in Dar es Salaam.

The process leading up to the signing of this POA is set out very clearly in the September 2011 judgement of the Tanzanian High Court[[5]](#endnote-5). The process involved the following:

* In March 2006 Tanesco put out a tender for the supply of emergency power from gas-based generating plants of 100 MW.
* Eight bids were received. One of these bids was from Richmond Development Company. In its proposal, Richmond claimed that the plant was readily available for supply, installation and commissioning.
* Tanesco’s Tender Board, responsible for evaluating the bids in terms of the Public Procurement Act of 2004, produced a report which found that none of the 8 bids were acceptable.
* In April, in an unprecedented move, the government instructed Tanesco to re-call the 8 bidders so that they could be re-evaluated. The Tanesco Tender Board objected, noting that this was unprocedural, but did recall the bidders. Again, they found that none of the 8 was acceptable.
* Tanesco Tender Board was then instructed by the government to suspend the tender process with immediate effect and the Ministry of Energy and Minerals took over the process.
* A report produced by the Ministry, evaluating the eight bidders, recommended that Richmond be awarded the contract.
* As a result, a power off-take agreement (POA) was signed between Richmond and Tanesco, with Tanesco being directed to sign it by the government.

In other words, the contract with Richmond was entered into without the approval of Tanesco’s Tender Board, as required by Section 31 (1)(b) of the Public Procurement Act No. 21 of 2004.

* 1. **RDC fails to deliver**

An initial probe into the contract by the Public Procurement Regulatory Authority (PPRA) established that Tanesco was ordered to enter into the contract even though Tanesco had established that Richmond was “non-responsive to the bid requirements and unable to deliver in the tendering process”[[6]](#endnote-6). Despite having continually asserted that it was ready to supply power, Richmond did not have a plant to generate the electricity, nor the money to buy a plant.

By October 2006 Tanesco was complaining to Richmond about its failure to deliver on the contract. Unable to buy a plant to generate electricity Richmond then assigned over the POA to Dowans Holdings SA, a Costa Rican company[[7]](#endnote-7), without initially informing Tanesco. Rostam Aziz, a Tanzanian parliamentarian since 1994, who was granted a power of attorney for Dowans in 2005 to conduct their business outside of Costa Rica, was instrumental in arranging for this assignment of the POA.

Tanesco was informed by Richmond and Dowans of the assignment on December 4 2006, and asked for retrospective consent. Tanesco finally agreed to the assignment on December 21 2006. Dowans had the finances to buy the turbines, and the generation of power was started in January 2007, with the plant fully commissioned by October 2007. In March 2007, the POA was assigned to Dowans Tanzania Limited, with Dowans Holdings SA remaining responsible for the obligations under the POA.

* 1. **Establishment of parliamentary select committee**

As a result of Richmond’s initial non-performance, and the length of time it took for the POA to deliver electricity, a parliamentary select committee - headed by Dr. Harrison Mwakyembe - was appointed in November 2007 to investigate. A report produced by the committee, known as the ‘Mwakyembe Report’, found that the company “lacked experience, expertise and was financially incapacitated”[[8]](#endnote-8). The report noted that the contract had overlooked key law provisions, showed evidence of influence peddling by senior government officials, and involved corruption[[9]](#endnote-9), with the Prime Minister - Edward Lowassa - having personally selected Richmond out of 8 other companies[[10]](#endnote-10). It was also found that at the time the contract was awarded to Richmond the company had no legal existence either in Houston, Texas, or in Tanzania. This effectively should have meant that the contract was void.The Energy and Minerals Minister, Karamagi, was found to be responsible for preventing Tanesco from withdrawing from the agreement with Richmond[[11]](#endnote-11).

Information made available during the ICC proceedings was that Richmond Development Company was the name that RDEVCO traded as, and that it was RDEVCO that was in fact registered in Texas.

The Mwakyembe report also found that the initial report by the Prevention and Combating of Corruption Bureau (PCCB), which had found no problems with the Richmond contract, had been a “whitewash”[[12]](#endnote-12).

As a result of the political fallout from this investigation, Edward Lowassa, the then Prime Minister of Tanzania, as well as Cabinet ministers Nazir Karamagi (Energy and Minerals Minister) and Dr Ibrahim Msabaha (East Africa Cooperation Minister, who was the Energy and Minerals Minister at the time of the signing of the contract), resigned from government. This forced the President -Jakaya Kikwete - to dissolve the cabinet and form a new government.

* 1. **Ownership of the company**

The ownership of both Richmond and Dowans is hazy with, at times, different information being given on who the owners are.

It is alleged that Rostam Aziz, a member of parliament for 17 years for the ruling Chama Cha Mapinduzi (CCM) party, and a close friend of the then-prime minister Edward Lowassa was responsible for bringing Richmond into the country[[13]](#endnote-13).The East African reports that according to documents that were tabled in the arbitration proceedings, a Mr Gire, who is a co-founder of RDEVCO told the ICC that Mr Aziz was the owner[[14]](#endnote-14). Aziz, however, denies any connection with Richmond.

An APPP research report notes that Richmond was a shell company used to promote an emergency procurement project supported by Aziz and the Prime Minister – Edward Lowassa[[15]](#endnote-15).

As noted earlier, Aziz has links with Dowans Holdings S.A.

There are two different versions of who owns Dowans Tanzania Limited (DTL). At the ICC hearings, the arbitration tribunal accepted that Dowans Tanzania Limited was a joint venture partner to DHSA, with the Portek group, a Singaporean firm, as the other joint venture partner.

However, in the court case between RDEVCO and Dowans in the Texas District Court, it is stated that Dowans Tanzania Limited is a wholly owned subsidiary of Dowans Holding SA.

Aziz resigned from parliament in July 2011, ostensibly in favour of concentrating on private business. His resignation came just before it was rumoured that CCM was about to cleanse itself of corrupt or untrustworthy leaders. Aziz’s name had come up as one of those to be targeted by the party[[16]](#endnote-16).

* 1. **Cost of contract**

One of the terms of the contract was that Tanesco would pay Richmond, now Dowans, a capacity charge. This basically meant that Tanesco would pay DowansTShs152 million ($ 140, 000) a day for two years for their capacity to provide electricity, even if some or all of the electricity was not used[[17]](#endnote-17). Tanesco has similar arrangements to pay capacity charges with five other private companies – payments which are seriously affecting Tanesco’s financial standing[[18]](#endnote-18). This huge capacity charge was a concern of the parliamentary select committee that probed the contract.

In terms of the contract, Richmond/Dowans, on the other hand, only has to pay Tanesco TShs 12.5 million ($11, 900) for each day it fails to supply electricity on demand[[19]](#endnote-19).

* 1. **Cancellation of contract**

Despite the findings of the Mwakyembe report, and the report’s recommendation that the contract be cancelled as it was improperly procured, Tanesco or the government did not immediately cancel it. Partly - it seems - because they still desperately needed the power that Dowans could generate. Nor did they collect the penalty (over TShs 4 bilion) owed to them because of Richmond/Dowans’ initial failure to deliver power as agreed. Tanesco was criticized for this in a March 2009 report by the Controller and Auditor-General[[20]](#endnote-20). This report noted that “Dowans Holdings failed to commission at full capacity of 100MW generation on the Commercial operation date contrary to the agreement”[[21]](#endnote-21).

Not only did Tanesco fail to cancel the contract at this stage, but the possibility of extending the contract was raised because of the power crisis the country was facing. However, on June 30 2008 the government eventually announced its intention to cancel the power production and purchase agreements beginning1 August 2008[[22]](#endnote-22). It seems that the government took this decision partly because of the considerable popular opposition to the contract which had been generated once the findings of the Mwakyembe report were presented in Parliament and broadcast to the public on television.

Tanesco sent a letter to Dowans declaring that the contract was void *ab initio* because it was contrary to Tanzanian law. They argued that the contract had violated the Public Procurement Act No 21 of 2004, was therefore not lawful and not legally enforceable[[23]](#endnote-23). In addition, while the original contract had been signed between Tanesco and Richmond Development Company, it was RDEVCO that had transferred the contract to Dowans. Tanesco argued that this made the reassignment illegal.

1. ****International Chamber of Commerce (ICC)****

As a result of the cancellation of the contract, Dowans Holdings SA and Dowans Tanzania Limited took Tanesco to the International Chamber of Commerce (ICC) for breach of contract. This was in accordance with the clauses relating to the settlement of disputes in the Power Off-Take Agreement between Dowans and Tanesco. Dowans was demanding that they be paid for the power that they had supplied that Tanesco had not paid them for, as well as for damages resulting from the cancellation of the contract.

* 1. **ICC ruling**

In its November 15 2010 ruling the ICCco-arbitrators Swithin Munyantwali and Sir Jonathan Parker, ruled in Dowans favour. The ruling states that “It is declared that Tanzania Electric Supply Company Limited was in repudiatory breach of the POA and that Dowans Tanzania Limited was entitled to and did validly terminate it”. The ICC arbitration tribunal ordered Tanesco to pay $123.6 million (about Sh185.5 billion) to Dowans in settlement of its claim.

Among the findings of the arbitration tribunal are the following:

* The tribunal found in favour of Dowans (as the claimants) in relation to Tanesco’s charge that Richmond had misdescribed itself when signing the original POA. Although RDEVCO rather than Richmond Development Company was registered in Texas, the arbitration tribunal found that it was sufficiently obvious that the “supplier” in the POA was RDEVCO.
* The arbitration tribunal found that, even though the POA with Richmond had been assigned without the approval of Tanesco’s Tender Board, this did not invalidate the contract itself. They found it was still a valid and enforceable contract.
* The arbitration tribunal also found that Dowans Holdings S.A. had not misrepresented itself when it took over the contract from Richmond. Tanesco had argued that while Dowans had originally indicated that it was registered in Costa Rica, subsequent documents had talked about it being incorporated in the United Arab Emirates. The tribunal accepted Dowans claim that it was incorporated in Costa Rica.
* The arbitration tribunal also noted that as far as they were concerned, Dowans had carried out the terms of the POA: “DHSA/DTL was an organization of standing and substance in that it had taken on a high-profile and large-scale project and progressed that project entirely satisfactorily, employing its own resources in terms of finance, equipment and manpower, until the Respondent, for its own reasons (which had nothing to do with DHSA/DTL’s performance), sought to bring the project to an end.” The tribunal also maintained that “for over a year [between March 2007 when Dowans officially took over and 1 August 2008 when Tanesco terminated the contract], DTL provided steady and uninterrupted power consistent with the POA to the Tanzanian grid. During this time, DTL as the legitimate supplier to the POA invoiced the Respondent and was paid for some of its services in providing power to Tanzania.”

The ICC filed the award with the High Court of Tanzania on January 10 2011. Dowans SA and Dowans Tanzania Ltd also went to the High Court in London to get recognition and enforcement of the award as the Tanzanian state has assets in the UK.

* 1. ****Reaction to ICC ruling****

The ICC award against Tanesco has deeply angered many Tanzanians – from the government to ordinary people in the street. Many have called on Tanesco not to pay the award. Towards the end of 2011 a number of organisations wanted to march to show support for a demand that Tanesco does not pay. However, the demonstration scheduled for October 27 2011 was called off at the last minute when police banned the demonstration because of security fears[[24]](#endnote-24).

Tanesco argued that the award was against public policy: "If execution is allowed, the applicant's ability to generate, transmit and distribute the much needed electricity will be adversely affected, causing a severe power crisis and damage the Tanzanian economy"[[25]](#endnote-25).

Four human rights activists went to the High Court in 2011 challenging the validity of the ICC award. Their argument was that the award was against public interest and they wanted to block the registration of the award in Tanzania. However, this High Court challenge by the Legal and Human Rights Centre (LHRC), Lawyers Environmental Action Team (LEAT), Sikika Company Limited and a journalist[[26]](#endnote-26),was lost, with the judge arguing that they had failed to show they had an interest in the matter.

Tanesco also challenged the ICC award in the Tanzanian High Court, lodging their petition on February 9 2011. Tanesco wanted the High Court to either remit the award to the ICC for reconsideration on the grounds that it lacked merit, or to set the award aside. Tanesco’s arguments in court included:

* that payment of the award would be against the public interest;
* that the ICC didn’t consider all the evidence, including the evidence that RDC lacked the capacity to honour the contract;
* that the ICC misinterpreted the Public Procurement Act and recognized the contract despite it being signed in breach of Tanzanian law.

At the same time, Tanesco also applied to the English High Court to have the enforcement order set aside or adjourned until the case in the Tanzanian High Court had been heard. The English High Court agreed to the adjournment providing that Tanesco pay $5 million as security.

Judgement in the Tanzanian High Court was given on September 28 2011. Tanesco lost the case, with the High Court arguing that where specific questions of fact or law are referred to an arbitration tribunal for consideration and decision, the supervising court can’t interfere with the decision of that arbitration tribunal[[27]](#endnote-27). The High Court also formally registered the award, and made it a decree of court.

Tanesco then petitioned the High Court asking for permission to take its appeal to the Appeal Court. On February 20 2012 the High Court rejected this petition on the basis that Tanesco did not use the right law in applying for permission to challenge the original order, but that Tanesco was free to use other sections of the law to challenge the order to pay[[28]](#endnote-28). This now opens the way for Tanesco to file an appeal against the order to pay Dowans. In the meantime, the High Court will hear an application on April 18 2012 for a stay of execution for the payment of the award.

If Tanesco is not successful in its court applications, the question arises as to who will be responsible for paying the award – the government or Tanesco? According to Mr Utouh, the Controller and Auditor General of Tanzania, the government should shoulder the burden. According to The Citizen, in a letter that Mr Utouh wrote to the Finance and Economic Affairs’ permanent secretary, he stated that:"I have been able to evaluate the sequence of events pertaining to the procurement process of the 100MW rental emergency generating plant in Dar es Salaam, which was awarded to Richmond Development Company USA, and the transfer of its rights and obligations to Dowans SA. I have noted with concern the ministry of Energy and Minerals' override on the procurement functions of the board of directors and management of Tanesco and on non-compliance with the Public Procurement Act, 2004 and its related regulations of 2005"[[29]](#endnote-29). As a result of this, he argues that the government should pay the amount. He also noted that Tanesco is in a bad financial situation, which was worsening every year, and was unable to pay the award[[30]](#endnote-30).

1. ****The departure of Dowans****
   1. ****Dispute between Richmond and Dowans****

While the ICC arbitration was playing itself out, Dowans was embroiled in another legal battle, this time in the Southern District of the Texas District court in the United States of America.

In October 2008, a few months after Tanesco cancelled the POA, Tanesco and Dowans began negotiating about the possible sale of the Dowans Ubungo plant to Tanesco. RDEVCO then intervened to alert Tanesco to their claim that one of the turbines was in fact the property of RDEVCO rather than Dowans. Dowans took RDEVCO to court in the USA to confirm their ownership.

When the recent sale of the Dowans power plant in Ubungo was announced (see below), Symbion indicated that as far as they were concerned there was no pending court case anymore and the plant was owned by Dowans.[[31]](#endnote-31)

* 1. ****Selling of Dowans assets in Tanzania****

Ultimately the negotiations between Dowans and Tanesco fell through, not least because of the procurement laws in Tanzania. As well, the World Bank procurement procedures prohibit the government from buying used equipment and machinery.

In May 2011, after protracted negotiations with Dowans, Symbion Power, a USA-registered company, bought the 120MW Dowans plant at the Ubungo site in Tanzania, and is supplying electricity to Tanesco from this plant. With this sale, Dowans no longer has a physical presence in Tanzania.

Even before this purchase, Symbion had a presence in Tanzania with a number of electrification contracts with the Tanzania Rural Electrification Agency and Tanesco. Interestingly, in buying up the Dowans plant, Symbion indicated that it had joined forces with ProEnergy Services – a multi-national based in the US who operate and maintain power plants globally. The ICC arbitration papers note that Dowans also had a relationship with ProEnergy Services, with ProEnergy Services proposing that it provide operation and maintenance services at the Ubungo plant.

The sale itself was shrouded in secrecy with Symbion announcing that they had signed a confidentiality clause which prevented them from revealing key details of the deal[[32]](#endnote-32).

1. ****Conclusion****

There are two important lessons that can be drawn from this case.

The first lesson to note is the dangers of using private companies to solve problems of electricity generating capacity. Tanesco has an ongoing problem of not being able to generate sufficient power to meet the needs of the country. This is partly because of the ongoing drought which limits the generation of electricity through hydropower. In response to this situation, Tanesco has, over the years, signed a number of emergency power off-take agreements with private companies. These agreements are at a huge financial cost for Tanesco, who pays large capacity fees to these electricity providers. On top of the cost, Tanzania has also had to deal with the fallout from the corruption involved in one of these POAs, as outlined in this report.

The second lesson concerns the failings of the international arbitration system. The first blow to the Tanzanian people was learning that the Richmond POA, which Richmond was unable to deliver on, involved corruption by top politicians. It is a testament to the strength of public outrage that Tanesco and the government eventually cancelled the POA. The second blow was the massive award granted against Tanesco after it attempted to cancel the POA that had been awarded through corruption.

Tanesco is now attempting to challenge the ICC award made against it through legal means. So far, it has been unsuccessful. Part of the reason lies in the terms of the POA itself. Clauses in this agreement state that parties agree that the decision of arbitrators will be final and binding and not subject to appeal. In addition, the parties waive their right to challenge or contest the validity or enforceability of any arbitration agreement.

Clauses such as these, in a context where international arbitration rulings tend to favour the interests of the private sector, undermine the ability of national governments to work in the public interest.

The bias of arbitration tribunals and there general willingness to enforce corrupt contracts has been noted in a number of cases. In August 2010, 48 academic lawyers issued a statement on the international investment regime, in which they criticised tribunals for having “prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples”[[33]](#endnote-33).

This is a criticism that could be applied in the Tanzanian case, with the ICC failing to take into account Tanesco’s argument that national legislation had been breached when the POA was signed in contravention of the Public Procurement Act No 21 of 2004. In other words, the ICC arbitration tribunal seemed willing to ignore the improper influence that was used to win the contract, the fact that Richmond did not have the capacity to implement the POA, and the fact that Richmond Development Company did not exist, in favour of securing Dowans’ commercial interests. As Tanesco stated in their petition to the Tanzanian High Court, the arbitrator totally failed “to address the overwhelming evidence attesting to the existence of improper procurement of the POA”[[34]](#endnote-34).

While there are many questions around the ownership of Richmond and Dowans, the arbitration tribunal glossed over these and accepted at face value the submissions of Dowans, despite the fact that some of these submissions are contradicted by what emerged in the court case between Richmond and Dowans in Texas.

With many in Tanzania calling on Tanesco and the government not to pay the award, it is interesting to note that some countries, such as Argentina, are refusing to pay the awards granted against them by international tribunals.

Corruption is endemic to contracts between governments and private sector companies. It is imperative, therefore, that governments, and the people that they represent, should have the right to tear up corrupt contracts as illegitimate, without international arbitration tribunals then having the power to protect the interests of the private company who has secured a contract in this way.

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30. The Citizen “Auditor General’s ruling on who should pay Dowans” 22 May 2011 [↑](#endnote-ref-30)
31. “US firm acquires Dowans turbines” 21 May 2011 <http://www.thecitizen.co.tz/news/51-other-news/11109-us-firm-acquires-dowans-turbines.html> [↑](#endnote-ref-31)
32. “US firm acquires Dowans turbines” 21 May 2011 <http://www.thecitizen.co.tz/news/51-other-news/11109-us-firm-acquires-dowans-turbines.html> [↑](#endnote-ref-32)
33. See “Issues in international arbitration and disputed contract terminations” Note by D. Hall, PSIRU, March 2011. See <http://www.osgoode.yorku.ca/public_statement/> for the original statement. [↑](#endnote-ref-33)
34. See the judgement dated 28 September 2011, between Tanesco and Dowans Holdings SA/Dowans Tanzania Limited at <http://plc.practicallaw.com/6-510-6588> [↑](#endnote-ref-34)