

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK)
and Nachingwea Nickel Limited (Tanzania)**
Claimants

v.

United Republic of Tanzania
Applicant

**(ICSID Case No. ARB/20/38)
Annulment Proceeding**

DECISION ON THE STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee
Professor Dr. Rolf Knieper, President
Ms. Bertha Cooper-Rousseau, Member
Professor Githu Muigai, Member

Secretary of the ad hoc Committee
Ms. Aurélia Antonietti

Date of dispatch to the Parties: 31 October 2023

TABLE OF CONTENTS

I. Introduction and Parties 2

II. Procedural History 3

III. Summary of the Parties’ Positions 7

 A. Applicant’s position 7

 B. Claimants’ position 11

IV. The Tribunal’s Analysis 14

 A. Applicable Legal Standard 14

 B. Analysis 15

V. Costs 21

VI. Decision and Orders 21

I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment (“**Annulment Application**”) of the award rendered on 14 July 2023 (“**Award**”) in the arbitration proceeding ICSID Case No. ARB/20/38 between Nachingwea U.K. Limited (UK) (**NUKL**), Ntaka Nickel Holdings Limited (UK) (**NNHL**), two companies incorporated in the United Kingdom, and Nachingwea Nickel Limited (Tanzania) (**NNL**), a company incorporated in the United Republic of Tanzania (together the “**Claimants**”), and the United Republic of Tanzania (“**Applicant**” or “**Respondent**” or “**Tanzania**”). They are collectively referred to as the “**Parties**”.
2. The dispute in the original proceeding was submitted by the Claimants to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on 25 September, 2020 on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, in force since 2 August 1996 (the “**BIT**” or the “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated 18 March 1965 (the “**ICSID Convention**”).
3. The tribunal in the original proceeding was composed of Mr. Cavinder Bull SC (president), Mr. Doak Bishop and Justice Sanij Mmasenono Monageng (arbitrators) (the “**Tribunal**”).
4. The dispute concerns the development by the Claimants of the Ntaka Hill Nickel Project, a mining operation for the exploitation of nickel located in south-eastern Tanzania. The dispute arose from certain changes to Tanzania’s regulatory framework for mining projects, as the State reformed its mining regulations and mining licenses regime in July 2017. More specifically, in January 2018, Tanzania modified the legal basis for granting retention licenses, and in 2019, the Claimants’ retention licenses were subsequently cancelled without compensation. The dispute was brought under the investor-State dispute settlement provisions (Article 8) of the United Kingdom-Tanzania BIT.
5. The Tribunal has decided unanimously:

That the Centre has jurisdiction and the Tribunal has competence over the dispute;

That the Respondent unlawfully expropriated the Claimants' investment in Tanzania;

That the Respondent shall pay the Claimants USD 76,704,461.76 in damages and additional losses;

The Respondent shall pay the Claimants compound interest at the rate of 2% above the USD Prime rate on the amount awarded in (3) above, such compound interest to run from 10 January 2018 until the date upon which payment is made;

The costs of the arbitration, including the fees and expenses of the Tribunal and ICSID, shall be borne by the Respondent. The Respondent shall accordingly pay the Claimants USD 254,420.07 as reimbursement for the Claimants' share of the costs of the arbitration;

The Respondent shall pay the Claimants USD 3,859,161 in respect of the Claimants' legal costs and expenses;

and dismissed all other claims.¹

6. As will be discussed at a later stage, the Applicant asserts three grounds for annulment in accordance with Article 52(1) (b), (d) and (e) of the ICSID Convention.

II. PROCEDURAL HISTORY

7. On 25 July 2023, Tanzania filed the Annulment Application with ICSID pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), and requested the stay of enforcement "*until the Application for Annulment is decided upon*".²
8. On 28 July 2023, the ICSID Secretary General registered the Annulment Application and notified the Parties that pursuant to Arbitration Rule 54(2) the enforcement of the Award was provisionally stayed. By letter of 31 July 2023, recalled in an e-mail of 1 September 2023, an advance payment of the sum of 125,000 USD was requested, pursuant to Articles 15(1)(c) and 15(5) of ICSID Administrative and Financial Regulations.
9. On 24 August 2023, the *ad hoc* Committee (the "**Committee**") was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Professor Dr.

¹ Award, ¶ 413.

² Annulment Application, ¶ 42.

Rolf Knieper (German), serving as President, Ms. Bertha Cooper-Rousseau (Bahamian), and Professor Githu Muigai, EGH, SC (Kenyan). All members were appointed by the Chairperson of the ICSID Administrative Council. On the same day, the Parties were informed that the annulment proceeding was deemed to have begun on that date, and that Ms. Aurélia Antonietti, ICSID Senior Legal Adviser, would serve as Secretary of the Committee.

10. On 29 August 2023, the ICSID Secretariat informed the Parties that the Committee would be available for a First Session on 28 or 29 September or 11 October 2023 and asked the Parties to confirm their availability on or before 5 September 2023. It circulated a draft Procedural Order No. 1 and invited the Parties to liaise and react to it.
11. Also on 29 August 2023, the Committee asked the Applicant to inform the Committee no later than 5 September 2023 whether it maintained its request for the stay of enforcement, and the Claimants to inform the Committee no later than 7 September 2023 whether it would oppose such request. The Committee proposed to extend the provisional stay of enforcement in such case, hear the Parties on this issue immediately after the First Session further having received the Parties' written submissions. It invited the Parties to try to agree on a calendar for such submissions.
12. On 2 September 2023, the Applicant sent an e-mail to the Centre, that was not received before 6 September 2023, in which (i) it agreed to 11 October 2023 as the date of the First Session, and (ii) it maintained its request for the stay of enforcement.
13. On 5 September 2023, the Claimants informed the Committee (i) that they would be available on 28 or 29 September 2023 for the First Session, and (ii) they would oppose the request for a maintenance of the stay of enforcement. They agreed to a reasonable extension of the 30-days limit under ICSID Arbitration Rule 54(2). Further, they informed the Committee of their intention to submit a preliminary objection to the Application for Annulment as being manifestly without legal merit, in accordance with ICSID Arbitration Rule 41(5). They proposed to brief and hear this objection immediately after the First Session, together with the Applicant's request for the continuation of the stay of enforcement. In that perspective, they submitted a proposal for a calendar.

14. The Applicant reiterated its agreement and the request for the maintenance of the stay request in a letter dated 6 September 2023, and received by e-mail on 8 September 2023. In the letter, it agreed to the extension of the 30 days limit under ICSID Arbitration Rule 54(2) but objected to the Claimants' proposal to hear the request for the stay of enforcement and the objection under ICSID Arbitration Rule 41(5) together after the First Session. It proposed a procedural calendar in accordance with these indications.
15. On 6 September 2023, the Secretariat sent a letter to the Parties, asking for their agreement to the appointment of Ms. Wambui G. Muigai as an assistant of Committee Member Professor Githu Muigai in the proceeding, without remuneration and costs to be incurred by the Parties. Attached to the letter was Ms. Muigai's CV and her Declaration.
16. In a letter of 8 September 2023, the Claimants extended their availability for a First Session and a hearing to 11 October 2023. They reiterated the content of their letter of 5 September 2023, warned against efforts of the Applicant to abuse delays, and proposed an adapted form of a procedural calendar according to which the request for the stay and the application for a decision under ICSID Arbitration rule 41(5) would be heard together.
17. The Claimants informed the Committee by e-mail, dated 7 September 2023, and the Applicant informed the Committee by e-mails, dated 18 and 21 September 2023, that they did not object to the appointment of Ms. Wambui G. Muigai.
18. On 7 September 2023, not having received the advance payment of 125,000 USD requested from Tanzania on 31 August 2023, the ICSID Secretariat notified the Parties that (i) the Applicant was in default of payment, (ii) either Party had the opportunity to pay the required sum within 15 days, and (iii) that the Secretary-General may suspend the proceeding if no payment was received before 22 September 2023. By letter sent by e-mail on 6 September and received on 8 September 2023, the Applicant requested to be allowed to make the *"payment at-least in the end of this month of September or earlier October 2023 as it has not finalized internal approval processes for payment."*
19. On 11 September 2023, the Committee confirmed 11 October 2023 as the date of the First Session, to be held remotely. It circulated the draft of Procedural Order No. 1, and

invited the Parties to confer on the issues and submit joint proposals to the extent possible or their respective positions by 9 October 2023.

20. At the same time, the Committee confirmed that it would hear the Parties on the continuance of the stay of enforcement immediately after the First Session, after having received the Parties' agreement on the extension of the 30-days limit provided by ICSID Arbitration Rule 54(2), and notified a schedule for written submissions on the subject. It also informed the Parties that the schedule for the hearing on Claimants' ICSID Arbitration Rule 41(5) objection would follow a different course.
21. On 15 September 2023, the Committee notified the Parties of its decision to separate the submissions and hearing on the Claimants' request to reject the Annulment Application in accordance with ICSID Arbitration Rule 41(5) from the First Session and the hearing on the stay of enforcement, to accord each Party two rounds of submissions, for which it proposed a timetable, and to hear the Parties on the request during the week of 18 December 2023 remotely, for instance on 20 December 2023. It invited the Parties to try to agree on the timetable and on that or another date for a hearing during that week. By separate e-mails dated 18 and 19 September 2023, both Parties agreed to the timetable and remote hearing on 20 December 2023.
22. As scheduled, the Claimants submitted their Opposition to the Respondent's Request to Continue the Stay of Enforcement of the Award on 19 September 2023 (the "**Opposition**"), the Applicant submitted its Reply to the Claimants' Opposition to the Request to Continue the Stay of Enforcement of the Award on 28 September 2023 (the "**Reply**"), and the Claimant submitted its Rejoinder on the Respondent's Request to Continue the Stay of the Enforcement of the Award on 6 October 2023 (the "**Rejoinder**").
23. On 26 September 2023, the Centre received the Applicant's advance payment in an amount of USD 125,000.00, as requested.³

³ As per the Applicant's request, the amount was transferred from the refunds to the Tanzania from the original arbitration proceedings.

24. On 6 October 2023, the Parties submitted their joint proposals concerning the draft Procedural Order No.1, as well as a hearing schedule for the issue of the stay of enforcement.
25. On 11 October 2023, the Committee held the First Session and Hearing on Stay of Enforcement.
26. On October 17, 2023, further to the Hearing, the Claimants provided a letter to assure reimbursement in the event that the Award is annulled. They attached the Claimants' undertaking, dated 16 October 2023 for the Committee's consideration indicating *inter alia*:

2. If the Award is annulled in full, the Claimants undertake to promptly return to Tanzania all amounts collected upon the Award.

3. If the Award is annulled in part, the Claimants undertake to promptly return to Tanzania the amounts collected upon the Award corresponding to the annulled portion of the Award. If the amounts collected upon the Award are less than the amount due to the Claimants under the unannulled portion of the Award (including damages, interest and costs), no refund shall be due to Tanzania under this letter.

III. SUMMARY OF THE PARTIES' POSITIONS

A. APPLICANT'S POSITION

27. Tanzania submits that "*it is aggrieved [and] dissatisfied with the Award*",⁴ which "*is tainted with material irregularities which warrant for the issuance of continuation of stay of enforcement pending determination of the Application for Annulment.*"⁵
28. While Tanzania accepts that the continuation of the stay is not automatic, that it bears the burden of demonstrating circumstances that warrant deviating from the default rule of immediate enforceability of the Award and imposing a stay of enforcement,⁶ it considers that the decision must be based "*on the circumstances prevailing from case to case*", that *ad hoc* committees have considerable discretion in how to approach the issue of stay", and that the circumstances of the case warrant such stay. There is no indication

⁴ Transcript Hearing page 33.

⁵ Reply, ¶ 10.

⁶ Reply, ¶¶ 17, 19.

in the ICSID Convention, nor in the Arbitration Rules of what circumstances do (or do not) warrant a stay of enforcement.⁷

29. Tanzania relies on seven grounds to continue the stay of enforcement, which it summarizes as follows:

a. That, the Respondent, a Sovereign State discharging functions for and on behalf of the peoples of United Republic of Tanzania;

b. That, the Respondent, pays all liabilities through the tax payers money authority by the National Assembly in every financial year;

c. That, the Respondent was aggrieved by the aforesaid Tribunal's Award, hence preferring the Application for Annulment of the said Award through Ad hoc Committee to be appointed in accordance with the ICSID Convention and the ICSID Regulations and Rules of Procedure for Arbitration Proceedings (Arbitration Rules);

d. That, the Application for annulment preferred by the Respondent is yet to be determined thus, if the enforcement of the award is not stayed it may render the application for annulment nugatory;

e. That, justice and equity demand that, the stay of enforcement order is inevitable as it put the Parties to equal status for the entire period of determination of the Application for annulment of the impugned Award, thence, be granted immediately as sought by the Respondent;

f. That, should, the stay of enforcement order be delayed or not granted the Respondent will suffer irreparable loss to the detriment of the people of the United Republic of Tanzania and that, the pending application for annulment of impugned Award will be rendered nugatory and of academic exercise, if enforcement will commence and effected; and

g. That, the Respondent, stands to suffer great loss and unbearable circumstances as opposed to the Respondent as, a legal person.⁸

30. The Applicant submits that the Committee will have to weigh the risks, balance the interests of the Parties, and consider the possible prejudice of the Claimants, due to a possibly delayed payment on the one hand side, and the prejudice of Tanzania as a sovereign State, on the other hand side, "*being a guardian and custodian of the public interest of more than 60 million Citizens*";⁹ where all liabilities are paid "*through the taxpayer money*", and where the "*State accounts for each cent that is spent*".¹⁰

⁷ Reply, ¶¶ 26, 35.

⁸ Application, ¶ 43; Reply, ¶ 36.

⁹ Reply, ¶¶ 28-33; Transcript Hearing pages 36-37.

¹⁰ Transcript Hearing page 39.

31. The Applicant alleges that if the enforcement of the Award is not stayed it may render the Annulment Application annulment nugatory.¹¹ In addition, a stay would put the parties on equal footing for the entire annulment proceeding, which would be distorted by the immediate enforcement of the Award, as Tanzania is a sovereign State with a permanent and known address, and a permanent existence not threatened by insolvency, contrary to the Claimants, “*whose properties are not even known and which may be difficult to trace in case the Award is enforced*”, as it may “*even go into liquidation*”.¹² It asks that “*if this Award is annulled, and then Tanzania goes back to the [Claimants] to claim the money back, and the [Claimants] are not there, so what will be the value of that annulment process?*”¹³
32. Tanzania will suffer irreparable loss to the detriment of its people and stands to suffer great loss and unbearable circumstances.¹⁴ If the stay was lifted, the Claimants would pursue the enforcement which would prejudice Tanzania’s right to annul the Award.¹⁵ The Claimants will not be prejudiced with the continuation of the stay as the delay in payment of the Award amounts would be compensated by the payment of compound interest if the Annulment Application is unsuccessful.¹⁶ Tanzania has property both inside and outside Tanzania sufficient to satisfy the Award.¹⁷
33. The Applicant denies any dilatory tactics or motive. It has the right under the ICSID Convention to apply for annulment and “*an obligation in securing interests of the people of Tanzania [...] by exhaustion of available remedies*”.¹⁸ Tanzania argues that the likelihood of success of the case on the merits is not for the Committee to assess at this stage.¹⁹
34. The Applicant objects to the posting of financial security as a condition of the continuation of the stay, as requested by the Claimants as an alternative to the lifting of the stay. It affirms that it is “*ready and is able to pay the liabilities against it (awards)*

¹¹ Reply, ¶¶ 20, 76.

¹² Transcript Hearing pages 37-40, 51, 53; Reply, ¶ 30.

¹³ Transcript Hearing page 52.

¹⁴ Reply, ¶ 20.

¹⁵ Reply, ¶ 45.

¹⁶ Reply, ¶ 73.

¹⁷ Reply, ¶ 33.

¹⁸ Transcript Hearing page 43; Reply, ¶ 49.

¹⁹ Reply, ¶ 55.

as it has been doing to others”,²⁰ and that it “will continue to honour the award issued locally and internationally”.²¹ This is demonstrated by the fact that “to date Tanzania has not any outstanding obligation towards implementing the Tribunals’ order [...]”,²² and that it has no track record of failing to comply with awards.²³

35. It asserts that the provision of a financial guarantee would be penalizing Tanzania while favouring the Claimants,²⁴ and put the Claimants in a more favourable situation than it would be in if no Annulment Application had been made.²⁵ According to Tanzania, “*the Respondent being the State it pays all liabilities through tax payers’ money in every year and thus the Claimant should not be worried of the Respondent failure to comply with the award in the event the annulment application fails.*”²⁶

36. The Applicant relies on paragraph 38 of the decision on stay in *CMS v. Argentina*, where the committee held (quoted in full):

“As a general matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with. It should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn to the irrecoverable from an insolvent claimant. At the same time a Respondent seeking a remedy under the Convention should demonstrate that for its part it will comply with the Convention, and if there is doubt in that regard the Committee may order the provision of a bank guarantee as a condition of a stay.”²⁷

37. Tanzania requests the following relief:

ISSUE and order unconditional stay of Enforcement of the Impugned Award until final determination of Application for Annulment;

DISMISS the Claimants’ prayers as shown in the Claimants’ Opposition to the Respondent’s request to continue the stay of enforcement of the award;

ORDER the Claimants to pay all fees and costs of this Request for Continuation of Stay of Enforcement of Award; and

²⁰ Reply, ¶ 74.

²¹ Transcript Hearing page 40.

²² Transcript Hearing page 42.

²³ Reply, ¶ 70.

²⁴ Reply, ¶¶ 57-58.

²⁵ Reply, ¶¶ 63-67.

²⁶ Reply, ¶ 69.

²⁷ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006 (RL-46), ¶ 38.

ORDER such other relief(s) as it deems just and appropriate.²⁸

B. CLAIMANTS' POSITION

38. For the Claimants, the default rule in ICSID arbitration is that awards are immediately enforceable, and that Tanzania must provide compelling reasons to overcome that presumption and to demonstrate that a stay of enforcement is warranted.²⁹ By no means a stay is automatic, and it is a form of extraordinary relief; it is the exception rather than the rule,³⁰ and past cases show that most of the requests for an unconditional continuation are rejected.³¹ The Claimants consider that the Parties agree on the applicable legal standard.³²

39. To decide, the Committee needs to take into account the following factors:

The prospect of the requesting party's compliance with the award, potential hardship to one of the parties, the risk of non-recovery to the award creditor, irreparable harm to either party, the dilatory character of the stay request (i.e., whether the request manifestly lacks merit and is being used for merely tactical purposes), the conformity of the award debtor's municipal law enforcement regime with the ICSID Convention, and the balance of interests between the parties.³³

40. Tanzania has not discharged its burden of establishing circumstances that merit continuation of the stay. Specifically, Tanzania has failed to establish any link as to why the continuation of the stay is warranted merely because it is a sovereign State.³⁴

41. The Claimants argue that the risk of Tanzania's non-compliance with its obligations under the Award, if the Application is rejected, is high and based on Tanzania's past track record.³⁵ The Claimants reject Tanzania's assertion of compliance with awards.³⁶ On the contrary, they argue that "*Tanzania has used its domestic legal system to thwart ICSID arbitrations*", referring to *EcoDevelopment* or *Sunlodges*, where Tanzania only complied with the awards after the award creditors had taken steps to seize assets,

²⁸ Reply, ¶ 79.

²⁹ Opposition, ¶ 1.2; Rejoinder, ¶ 2.2.

³⁰ Opposition, ¶¶ 2.4, 2.7.

³¹ Rejoinder, ¶ 2.3.

³² Rejoinder, ¶ 2.2.

³³ Opposition, ¶ 2.8.

³⁴ Opposition, ¶ 2.10.

³⁵ Opposition, ¶ 2.13.

³⁶ Rejoinder, ¶ 2.9.

thereby spending a considerable time and costs.³⁷ Tanzania's conduct in relation to paying the costs of the present proceeding is relevant to assessing the risk of non-compliance. The Claimants react to the Applicant's reference to *CMS v. Argentina* by insisting that:

what Tanzania leaves out is that there were official assurances, there was a comfort letter from the Argentine Attorney General, as well as legal submissions showing that under Argentine regulations that letter had a legally binding effect on the State, and that was pivotal to the CMS committee's decision on the stay in that case. In this case, we have no such assurance of that kind and we do not have any official assurance from Tanzania that it intends to pay the Award in full.³⁸

42. The Claimants consider that their prejudice outweighs any potential prejudice to Tanzania. Tanzania's ability to pay the Award is undisputed as evidenced by the recent settlement agreement reached in the case of *Winshear Gold Corp.*³⁹ While “[t]he key risk to the Claimants’ interests is not only the eventual delay in the payment of the Award, but also and more importantly, the risk of Tanzania not complying with its obligations under the Award at all.”⁴⁰ The Claimants add that “[w]hile interest may be able to account for delayed payment; it does not address the risk of Tanzania’s non-compliance with its Award obligations, which is the substantial risk the Claimants face here.”⁴¹ Tanzania’s alleged hardship is neither substantiated nor proven.⁴² In any event, continuing the stay would only be justified if lifting it would lead to “catastrophic, immediate and irreversible consequences”, as rightly held by the *ad hoc* committee in *Maritime v. Guinea*.⁴³
43. Finally, Tanzania’s stay request is part of a dilatory attempt to delay satisfaction of the Award and negotiate a partial settlement of its Award obligations, which is “manifestly” abusive.⁴⁴ The Annulment Application aimed, according to the Solicitor General Dr

³⁷ Rejoinder, ¶¶ 2.10-2.11.

³⁸ Transcript Hearing page 74.

³⁹ Opposition, ¶ 2.18.

⁴⁰ Opposition, ¶ 2.24.

⁴¹ Rejoinder, ¶ 2.27.

⁴² Rejoinder, ¶ 2.23.

⁴³ Opposition, ¶¶ 2.17-2.21; Rejoinder, ¶ 2.22; Claimants rely on *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Interim Order No.1: Guinea’s Application for Stay of Enforcement of the Award, 12 August 1988 (A/CL-1), ¶ 26.

⁴⁴ Opposition, ¶¶ 2.28-2.31; Rejoinder, ¶ 2.19; the quote is from *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004 (A/CL-5), ¶ 26.

Luhende, “to protect the government’s aircraft” from seizure.⁴⁵ The dilatory aspect is also evidenced by a *prima facie* analysis of the Applicant’s alleged grounds for annulment that shows that Tanzania’s complaints lie in disagreement with the Tribunal’s decision rather than defects in the law applied, the reasoning employed, or the procedures followed to reach the findings and holdings in the Award.⁴⁶ For the Claimants, Tanzania’s submission on the stay is a mere cut and paste of the submission filed in the case of *Ecodevelopment*.⁴⁷

44. Alternatively, any stay of enforcement granted should be conditioned on Tanzania providing adequate financial security in the form of (a) a standby letter of credit or independent bank guarantee; or (b) a payment into an escrow account,⁴⁸ pending the outcome of the annulment process. That would be a protection against the substantial risk that Tanzania will not comply with its obligations under the Award,⁴⁹ and would not give an unfair advantage to the Claimants,⁵⁰ nor prejudice or harm Tanzania.⁵¹ Such a financial security would also ensure the efficiency of the Claimants’ possible collection.⁵² Any delay in the enforcement would unduly prejudice the Claimants.⁵³ The Claimants would not be put in a better position; it would place them in a position nearly equivalent to that which would have existed if they had paid, which, indeed, is the correct comparator.⁵⁴

45. The Claimants request the following relief:

(a) **DISMISS** the Applicant’s request to continue the stay of enforcement of the Award pending the Committee’s decision on the Respondent’s Annulment Application; or

(b) In the alternative, **ORDER**: (i) that the stay of enforcement be continued pending the resolution of the Respondent’s Annulment Application, on condition that the Respondent post financial security sufficient to satisfy the Award in full on the terms and conditions stated in the Claimants’ Opposition, or as otherwise determined by the Committee; and (ii) the Respondent to

⁴⁵ Opposition, ¶ 2.27; Rejoinder, ¶ 2.31.

⁴⁶ Opposition, ¶ 2.30; Rejoinder, ¶ 2.30.

⁴⁷ Rejoinder, ¶ 2.32.

⁴⁸ Opposition, ¶ 3.7.

⁴⁹ Opposition, ¶ 3.5.

⁵⁰ Opposition, ¶ 3.9.

⁵¹ Rejoinder, ¶¶ 3.4 *et seq.*

⁵² Opposition, ¶ 3.14.

⁵³ Rejoinder, ¶ 3.14.

⁵⁴ Rejoinder, ¶¶ 3.7-3.10.

provide a letter confirming its intention to satisfy the Award as required under Article 53 of the ICSID Convention without further legal recourse, in each case, failing which the stay of enforcement shall be lifted immediately;

(c) **AWARD** the Claimants their full costs of this procedure; and

(d) **AWARD** such other and further relief to the Claimants as the Committee deems appropriate.⁵⁵

IV. THE TRIBUNAL'S ANALYSIS

A. APPLICABLE LEGAL STANDARD

46. Article 52(5) of the ICSID Convention states as follows:

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

47. Rule 54 of the ICSID Arbitration Rules states as follows:

Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay,

⁵⁵ Rejoinder, ¶ 4.1.

which shall become effective on the date on which he dispatches such notification.

B. ANALYSIS

48. The ICSID Convention, seconded by Arbitration Rule 54, establishes the legal standard for the enforcement of awards and its stay for the duration of annulment proceedings clearly and unequivocally. Articles 53 and 54 provide that awards shall be binding on the parties, and that the parties shall abide by them and comply with their terms, with the adhering States being obliged to enforce the pecuniary obligations as if they were final judgments of their national courts, except to the extent that their enforcement is stayed. In accordance with Article 52(5) of the ICSID Convention, such stay may be ordered by *ad hoc* committees in the context of an application for annulment, if they consider that the circumstances so require.
49. Neither Articles 52 to 54 nor Rule 54 contain an explicit authorization of an *ad hoc* committee to decide on a conditional stay, and that wording has led to some debate on the issue. However, a good faith interpretation in accordance with the ordinary meaning of the terms, as required by Article 31.1 of the Vienna Convention on the Law of Treaties, leaves no doubt that the authority of a committee to order a stay of enforcement or to deny it encompasses the decision of a stay under appropriate conditions as a minor or major but identical type of measure if it considers that the circumstances so require. As always, the committee must exercise its discretion reasonably.
50. The standard is self-explanatory and needs no support by case law nor literature.
51. The Parties accept this evident standard in principle. They agree (1) that the award is immediately enforceable without an explicit decision on a stay of enforcement; (2) that the stay is not automatic; (3) that the Committee has considerable discretion to continue or to lift the stay; (4) that the Applicant must establish the circumstances that require its request; (5) that the Committee must base its decision on circumstances prevailing in the specific case; and (6) that the Committee must weigh the risks, balance the interests of the parties and appraise their respective prejudice resulting from a continuation or the lifting of the stay.
52. The Applicant asserts two categories of circumstances which it considers relevant for the Committee's determination.

53. One category concerns the general characteristics of the Tanzanian State structure and policy, as presented in Section III. A. above, *i.e.*, its sovereignty, its duty to act in the interest of the people, and the right and obligation to defend the public interest. These characteristics, important as they are, weigh little as circumstances for determining a continuation of the stay of enforcement, as it was the sovereign United Republic of Tanzania, representing the people, that ratified the ICSID Convention providing for the enforceability of awards notwithstanding a pending application for their annulment.
54. The other category concerns alleged particular relevant circumstances in the present dispute. The Applicant asserts: (a) that it is aggrieved by and dissatisfied with the Award; (b) that it will suffer prejudice if the Claimants enforce the Award by attaching the State's property, which serves important public purposes, or if it has to pay important amounts of money, that at the end of the day may not be due as the Award will most probably be annulled, the sums paid cannot be used for public purposes in the meantime; (c) that the Claimants are companies which value is unknown and which may disappear, rendering the annulment proceeding nugatory as it is to be feared that Tanzania will not be able to recoup moneys paid in honoring the Award once the Award is annulled; (d) that the Claimants will not suffer prejudice from the continuation of the stay, because, first, Tanzania has property to pay the Award in the unlikely situation that the Award is not annulled and that it has a track record of honoring its obligations arising from arbitral proceedings, and, second, the Claimants are compensated for the delays of payment due to the annulment proceedings by post-award compound interest; and finally (e) that the alternative of posting a financial security would be extremely costly for the Applicant and favor the Claimants unduly.
55. The Claimants assert: (a) that Tanzania has a track record of refusing to comply with arbitral awards, and that they will suffer prejudice from such very probable conduct in the present case; (b) that the payment of interest may compensate for the delay in payment caused by the annulment proceeding but not for the risk of non-compliance with the pecuniary obligations at all; (c) that the hasty collection of more than 40 alleged flaws in an unanimous award demonstrates the dilatory character of the Annulment Application, which is no more than an instrument to force the Claimants into settlement negotiations; (d) that Tanzania has not identified any concrete harm it would suffer from enforcement, while the Claimants' hardship is evident more than six years after Tanzania's violation of its obligations; (e) that the alternative request for a

financial security if the stay is continued would be appropriate, as it would not cause prejudice to the Applicant but protect the Claimants in case of the very probable dismissal of the Annulment Application.

56. At the outset, the Committee decides to not take into consideration the Applicant's assertion that it is aggrieved and dissatisfied with the Award. While the Committee has not yet formed an opinion on the substance of the Annulment Application, it is confident in its view that an alleged grievance and dissatisfaction with the Award would not qualify as criterion for any of the grounds for annulment as specified in Article 52(1) of the ICSID Convention, and the isolated reliance on them would *a limine* not justify a stay of enforcement.

57. As to the other alleged circumstances that are presented by each of the Parties and refuted by the other one, they center around uncertainty, time and costs of compliance.

58. The Committee understands the Applicant as saying:

- that compliance with the pecuniary obligations of the Award before the decision on its Annulment Application would cause enormous prejudice to it because, first, it would have to collect and immobilize money prematurely as it is probable that the amounts paid are finally not owed when the Award is annulled, and, second, it is not certain that the Claimants would reimburse the money paid if it is obliged to after the annulment of the Award;
- that it is ready, willing and able to honor the Award if it is not annulled, first, as it has always done, and second, as it has sufficient means to pay;
- that a continuation of the stay conditioned by financial security would cause enormous prejudice because a bank guarantee over more than 100 million USD is extremely onerous, while a transfer of money into an escrow account would necessitate a premature collection and immobilization of money that could not be spent on public works.

59. The Committee understands the Claimants as saying:

- that the Applicant is unable and/or unwilling to comply voluntarily with the pecuniary obligations of the Award at any moment, irrespective of whether the

Award became enforceable now, because the stay is lifted, or later, because the Annulment Application is dismissed;

- that the risk of non-compliance is not compensated by the payment of interest;
- that the Annulment Application is dilatory and instrumentalized to gain time and to force the Claimants into negotiations;
- that financial security would alleviate the risk of non-compliance.

60. The Committee understands that all Parties have serious concerns arising out of mistrust between them, the risks linked to the passage of time which are increased by the annulment proceedings, and the costs generated by enforcement or securing the payment.

61. The Claimants have taken a step to reduce the risk of the Applicant by making an undertaking, dated 16 October 2023, in which they represented that “[i]f the Award is annulled in full, the Claimants undertake to promptly return to Tanzania all amounts collected upon the Award.”

62. This letter reduces the uncertainty apprehended by the Applicant to a great extent. However, as the Claimants assured during the hearing, the risk of non-reimbursement of sums received by the Claimants before a decision annulling the Award is non-existent because the Claimants “are controlled by a publicly listed company in Australia [...] and it would be unfathomable for their controlling shareholder to cause them not to comply with their ICSID Convention obligations and to somehow divert funds collected away from their own accounts in such a way as to resist repaying Tanzania”.⁵⁶

63. In line with this assurance, the Committee invites the Claimants to submit a letter by their controlling shareholder representing that it will enable the Claimants to make good on their undertaking should they have received money in payment of the Award before a decision on the Annulment Application and in case the Award would be annulled. Such representation would condition the lifting of the stay for the eventuality

⁵⁶ Transcript Hearing pages 72-73.

that the Applicant does not comply with the Committee's direction to submit a guarantee of compliance.

64. As to the Claimants' concerns that Tanzania is unwilling to comply with the pecuniary obligations of the Award, the Committee notes that Tanzania objected to the assumption and represented repeatedly that it will honor the Award if and when its Annulment Application is rejected. The Committee further notes, sadly, that the possibility of non-voluntary compliance does not weigh heavily in favor of the lifting of stays, as in any event the attitude of non-compliance, if it is – as alleged – permanent, does not depend on specific junctures of the proceedings, and will be present throughout.
65. This being said, the Committee is not able to take sides for one or the other party and predict with some sort of certainty whether the Applicant will or will not comply with the Award. However, it recognizes the risk of non-compliance, and also the efforts of the Applicant to dispel the Claimants' apprehension.
66. In their written submissions, the Claimants have asked to minimize the risk by lifting the stay of enforcement, which, as said, would not really have a bearing on the risk, or, in the alternative, by ordering the posting on financial security and by providing a letter confirming the intention to satisfy the Award. During the hearing, they have changed the request by stating "*that if we do have adequate financial security, then a letter of comfort would be unnecessary*".⁵⁷
67. As to the Applicant's reliance on *CMS v. Argentina*, where the the committee did not request a bank guarantee, as the '*Procurador del Tesoro*' had confirmed that Argentina would honour the award and would not submit it nor the annulment decision to national legal scrutiny,⁵⁸ the Claimants contend that the letter "*was pivotal to the CMS committee's decision*" and that in the present case "*we have no such assurance of that kind*."⁵⁹
68. In weighing the Claimants' risk, the Applicant's concern about costs of financial security, and balancing the Parties' interests, the Committee comes to the conclusion, similar to the ad hoc committee in *CMS*, that an undertaking by Tanzania, executed by

⁵⁷ Transcript Hearing page 78.

⁵⁸ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006 (**RL-46**), ¶¶ 49-50.

⁵⁹ Transcript Hearing, page 74.

a government official or officials of Tanzania with full power to bind the State, committing to comply with the Award voluntarily, unconditionally and in full, and without subjecting such payment to enforcement proceedings or to a scrutiny by national Tanzanian courts, would be an appropriate condition for the maintenance of the stay of enforcement. It would consolidate the Applicant's oral assurances that it will honor its obligations, and address the Claimants' concern about the Applicant's commitment to comply voluntarily with the Award without an attempt to negotiate a settlement. The Committee believes that such official undertaking would be proportionate to the risk of non-compliance asserted by the Claimants.

69. In its effort to balance the Parties' interests, the Committee took into account that, at the same time, such guarantee does not burden the Tanzanian budget with expenses for a bank guarantee, which are definitely sunk, or with an immobilization of money and opportunity costs which would occur with the deposit in an escrow account.
70. The Committee believes that such costs must be seen in relation with the duration of the annulment proceedings by which the enforcement of the Award will be delayed. First, such duration is, indeed, compensated by the compound interest granted in the Award. Second, the duration is relatively short, given that Tanzania introduced its Application shortly after the Award and that the calendar fixed in Procedural Order No. 1 is relatively tight. The period might even be shortened if the Claimants are successful with their objection under Rule 41(5).
71. If such an undertaking were not forthcoming within 45 days after the present Committee's Decision, the stay of enforcement would be lifted, provided that the Claimants' parent company submitted a letter affirming the Claimants' capacity to reimburse funds received before a possible annulment of the Award. Should the Applicant wish to avoid the lifting of the stay, it could furnish a financial security in form and amount satisfactory to the Claimants, namely (i) an unconditional and irrevocable bank guarantee issued by, or (ii) a funded escrow account with, a reputable international bank with no principal establishment in Tanzania.

V. COSTS

72. Article 61(2) and Article 52(4) of the ICSID Convention and Rule 47(1) and Rule 53 of the ICSID Arbitration Rules give the Committee discretion regarding the allocation of costs.
73. The Committee does not make a decision on costs at this stage of the proceeding. The Committee will consider the allocation of costs incurred in connection with the Application for continuation of the stay as part of its final decision on annulment, let it be on the Claimants' 41(5) objections or the merits of the annulment. The Committee asks the Parties to maintain a separate accounting of costs incurred in connection with the Application for continuation of the stay.

VI. DECISION AND ORDERS

74. For the reasons stated above, the Committee:
 - 1) DECIDES that the stay of enforcement of the Award continues on a provisional basis subject to the condition that the Applicant provides an undertaking in substance as follows:

In the event, or to the extent, that annulment is not granted, the United Republic of Tanzania agrees and undertakes that (1) it will in accordance with its obligations under the ICSID Convention recognize the Award rendered by the Tribunal as final and binding and will abide by and comply with the terms of the Award; (2) it will not subject payments to any enforcement proceedings or to the scrutiny of Tanzanian courts; and (3) it will unconditionally and irrevocably pay the pecuniary obligations imposed by the Award in full to the Claimants within forty-five (45) days following the notification by the ICSID Secretariat of the Committee's Decision on annulment such that the Claimants will be fully compensated, including interest, and will not need to engage in any action to recognize, enforce, or execute the Award under Article 54 of the ICSID Convention in any ICSID Contracting State.

- 2) ORDERS that the Applicant shall within forty-five (45) days following the notification by the ICSID Secretariat of this Decision provide the undertaking to the Committee and the Claimants, executed by a government official or officials of Tanzania with full power to bind the State, together with information sufficient to establish for the Committee and the Claimants the legal basis as a matter of Tanzanian law for the power to bind the State of the relevant official or officials;
- 3) ORDERS that should Applicant not furnish an undertaking in compliance with this Decision within the stated time (or the time extended by the Committee), the stay so ordered will be terminated, and the Claimants shall be at liberty to take such action to enforce the Award as they deem fit, (a) if by that time the Claimants' parent company has affirmed that it will enable the Claimants to make good on their undertaking to reimburse the Applicant if the Award were annulled, and (b) unless the Applicant has furnished financial security in form and amount satisfactory to the Claimants, whether (i) an unconditional and irrevocable bank guarantee issued by, or (ii) a funded escrow account with, a reputable international bank with no principal establishment in Tanzania;
- 4) RESERVES its right to revisit at any time its Decision and Orders, at the request of either party or by own its motion, to modify or terminate the stay, or vary or amend its Decision regarding the undertakings;
- 5) RESERVES its decision on costs for a subsequent stage of the proceeding; and
- 6) DISMISSES all other requests.

On behalf of the Committee,



Rolf Knieper
President of the Committee
Date: 31 October 2023