INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

NACHINGWEA U.K. LIMITED (UK), NTAKA NICKEL HOLDINGS LIMITED (UK) AND NACHINGWEA NICKEL LIMITED (TANZANIA)

V.

UNITED REPUBLIC OF TANZANIA

(ICSID CASE NO. ARB/20/38)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated July 14, 2023.

Martina Polasek
Acting Secretary-General

Washington, D.C., July 14, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

NACHINGWEA U.K. LIMITED (UK), NTAKA NICKEL HOLDINGS LIMITED (UK) AND NACHINGWEA NICKEL LIMITED (TANZANIA)

Claimants

and

UNITED REPUBLIC OF TANZANIA

Respondent

ICSID Case No. ARB/20/38

AWARD

Members of the Tribunal
Mr. Cavinder Bull SC, President
Mr. Doak Bishop
Justice Sanji Mmasenono Monageng

Secretary of the Tribunal
Ms Aurélia Antonietti

Date of dispatch to the Parties: 14 July 2023

REPRESENTATION OF THE PARTIES

Representing Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited:

Dr. Marc D. Veit
Mr. Robert Denison
Lalive (London) LLP
9 Cloak Lane
London EC4R 2RU
United Kingdom

and

Mr. Augustin Barrier
LALIVE SA
Rue de la Mairie 35
1207 Geneva
Switzerland

and

Mr. Timothy L. Foden
Boies Schiller Flexner LLP
5 New Street Square
London, EC4A 3BF
United Kingdom

Representing the United Republic of Tanzania:

Hon. Judge Dr. Eliezer Mbuki Feleshi
Dr. Boniphace Luhende
Ms. Sarah D. Mwaipopo
Mr. George N. Mandepo
Ms. Salome S. Magesa
Mr. Ipyana Mlilo
Ms. Consesa Kahendaguza
Ms. Lydia Thomas
Ms. Angelina Ruhumbika
Ms. Neisha Shao
Office of Solicitor General
10 Kivukoni Street
PO Box 71554
11405 Dar es Salaam
Tanzania

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TABLE OF ABBREVIATIONS

Amending Legislation	Three pieces of legislation passed by the Tanzanian Parliament on 3 and 4 July 2017
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT or the Treaty	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 which entered into force on 2 August 1996
BSF	Boies Schiller Flexner LLP
C-[#]	Claimants' Exhibit
Cl. Mem. or the Memorial	Claimants' Memorial dated 22 July 2021
Cl. PHB	Claimants' Post Hearing Brief dated 5 April 2023
Cl. Reply or Reply	Claimants' Reply dated 21 July 2022
Cl. Costs Schedule	Claimants' Schedule of Costs dated 19 April 2023
CL-[#]	Claimants' Legal Authority
Claimants	Nachingwea UK Limited, Nachingwea Nickel Limited and Ntaka Nickel Holdings Limited
Claimants' affiliates	Indiana and its subsidiaries and joint venture partners that owned the Project over the course of the Project's life
CNI	Continental Nickel Limited, a Canadian company and a subsidiary of Indiana
CIMVAL	Canadian Institute of Mining, Metallurgy, and Petroleum
Draft Bills	Government of Tanzania's three draft bills published om 28 June 2017

Draft Feasibility Study	Draft feasibility study for the Project
ER	Expert Report
First Exploration Phase	Exploration work carried out on the broader 200 square kilometre Nachingwea area by the Claimants' affiliates from July 2004 to March 2011
GST	Geological survey of Tanzania
Hearing	Hearing on jurisdiction and merits held in Washington, DC, from 30 January to 2 February 2023
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Indiana	Indiana Resources, Claimants' parent company, listed on the Australian Stock Exchange
Invitation to tender	Request for pre qualification for joint development of reverted areas under formerly retention licences in Kagera (Ngara), Shinyanga (Kahama), Mbeya (Chunya), Simiyu (Bariadi and Busega), Morogoro and Lindi (Nachingwea) dated 19 December 2019
IPO	Initial Public Offering
Mining Commission	Mining Commission of Tanzania constituted after the 2018 Regulations' enactment
MEE	Multiple of Exploration Expenditure
Ngwena	Ngwena Limited, a Tanzanian company and a subsidiary of Indiana
NH Prospecting Licence	Prospecting licence over the Ntaka Hill area, PL No. 4422/2007 issued on 7 April 2007

NH Retention License	Retention Licence No. RL 0017/2015, covering the same area as the NH Prospecting Licence and issued on 21 April 2015 for a period of five years
NI 43-101	Canadian National Instrument 43-101 standards for disclosure for mineral projects.
Notice of Dispute	Notice that a dispute had arisen under the BIT in relation to the Project served by the Claimants to the Respondent on 14 January 2020
NNHL	Ntaka Nickel Holdings Limited, a company incorporated in the United Kingdom
NNL	Nachingwea Nickel Limited a company incorporated in the United Republic of Tanzania
NPV	Net present value
NUKL	Nachingwea U.K. Limited, a company incorporated in the United Kingdom
Parties	The Claimants and the Respondent
PEA	Preliminary economic assessment
PEM	Prospectivity Enhancement Multiplier
2011 PEA	First preliminary economic assessment based on the April 2011 mineral resource estimate of the Project published on 28 October 2011
2012 PEA	Updated PEA based on the April 2012 mineral resource estimate
Photos	Photos of the Ntaka Hill site taken by the Claimants' representatives dated 11 May 2022
PO2	Procedural Order No. 2
Project	Ntaka Hill Nickel Project, comprising the exploration for and development of nickel sulphide deposits in a large tenement package called the Nachingwea property

R-[#]	Respondent's Exhibit
Request	Request for arbitration from the Claimants against Tanzania dated 25 September 2020
Resp. C-Mem. or Counter-Memorial	Respondent's Counter-Memorial dated 14 January 2022
Resp. PHB	Respondent's Post Hearing Brief dated 5 April 2023
Resp. Rej. or Rejoinder	Respondent's Rejoinder dated 6 December 2022
Respondent or Tanzania	The United Republic of Tanzania
Revised Invitation to Tender	Revised invitation to tender dated 20 December 2019
RL-[#]	Respondent's Legal Authority
Satellite Images	Satellite images of the Project site dated May 2020 and May 2022
Second Exploration Phase	Exploration efforts focussed on more narrowly defined 48 square kilometre Ntaka Hill area from March 2011 onwards
STAMICO	State Mining Corporation
Stamped Reports	Quarterly reports stamped by the Tanzanian government
TCME	Tanzanian Chamber for Minerals and Energy
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 23 February 2021
Warthog	Warthog Resources Limited, a subsidiary of Indiana
WS	Witness Statement
2017 Scoping Study	Desktop scoping study dated from July 2017 which estimated a Project NPV of USD 20 million assuming a nickel price of USD 10,000

	per tonne, while noting upside potential of an NPV of USD 217.7 million if the nickel price rose to USD 20,000 per tonne for the Project
2017 Act	Written Laws (Miscellaneous Amendments) Act 2017
2017 CRA	Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017
2017 PSA	Natural Wealth and Resources (Permanent Sovereignty) Act 2017
2018 Regulations	Mining (Mineral Rights) Regulations 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") 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 which entered into force on 2 August 1996 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The claimants are Nachingwea U.K. Limited ("**NUKL**"), a company incorporated in the United Kingdom, Ntaka Nickel Holdings Limited ("**NNHL**"), a company incorporated in the United Kingdom, and Nachingwea Nickel Limited ("**NNL**"), a company incorporated in the United Republic of Tanzania (together, the "**Claimants**").

3. The respondent is the United Republic of Tanzania ("**Tanzania**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 25 September 2020, ICSID received a request for arbitration from the Claimants against Tanzania (the "**Request**").

6. On 5 October 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

7. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

8. The Tribunal is composed of Mr. Cavinder Bull SC, a national of Singapore, President, appointed by his co-arbitrators; Mr. Doak Bishop, a national of the United States of America, appointed by the Claimants; and Justice Sanji Mmasenono Monageng, a national of the Republic of Botswana, appointed by the Respondent.

9. On 23 February 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aurélia Antonietti, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal. Ms. Patricia Rodríguez Martín, ICSID Legal Counsel, was further designated Secretary of the Tribunal on 28 February 2022, until 20 December 2022, when Ms. Antonietti resumed her functions.

10. On 24 February 2021, the Centre requested that each Party make an initial advance payment of USD 150,000. The Centre subsequently acknowledged receipt of the Claimants' payment on 25 March 2021.

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 22 April 2021, by video conference.

12. Following the first session, on 28 April 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, England.

13. On the same date, the Centre informed the Parties of the Respondent's default in paying the initial advance payment and invited either party to settle the outstanding amount by 13 May 2021.

14. In accordance with Procedural Order No. 1, on 22 July 2021, the Claimants submitted their Memorial (the "**Memorial**" or "**Cl. Mem.**") along with:

- Factual Exhibits C-1 through C-258;
- Legal Authorities CL-1 through CL-99;
- Export Report of Mr Travis Taylor dated 22 July 2021, along with Appendices A to E and exhibits VP-001 through VP-104;
- Witness Statement of Ms. Bronwyn Barnes dated 21 July 2021;
- Witness Statement of Mr. Mathew Perrot dated 21 July 2021; and
- Witness Statement of Mr. Robert Adam dated 21 July 2021.

15. On 20 and 22 October 2021, the Centre invited either party to settle the outstanding initial advance payment of USD 150,000. By letter of 23 October 2021, the Claimants requested in response that:

> *"a) the Tribunal order the Respondent to comply with any further calls for funds issued by the ICSID Secretariat pursuant to Regulation 14(3)(d) in a timely fashion; and*
>
> *b) take the Respondent's breach of its obligation to make its initial USD 150,000 advance payment into account when determining the final allocation of the costs and expenses of the proceedings in the Award, pursuant to Article 61(2) of the ICSID Convention"*

16. On 26 October 2021, the Centre informed the Parties that the Tribunal was directing their attention to Regulation 14(3)(d) and noted the Claimants' request presented in b) mentioned above.

17. On 8 November 2021, the Centre acknowledged receipt of the Claimants' payment corresponding to the Respondent's share of the initial advance requested in the Centre's letter of 24 February 2021.

18. On 21 December 2021, the Respondent informed the Tribunal that the Parties had agreed to extend the time limit for the Respondent's counter-memorial and agreed on a new calendar. The Tribunal agreed to such extension and new calendar on 22 December 2021.

19. On 14 January 2022, the Respondent submitted its counter-memorial (the "**Counter-Memorial**" or "**Resp**. **C-Mem**.") along with:

- Factual Exhibits R-001 through R-051;
- Legal Authorities RL-001 through RL-041;
- Witness Statement of Prof. Abdulkarim Hamisi Mruma dated 14 January 2022;
- Witness Statement of Mr. Edwin Simon Igenge dated 14 January 2022; and
- Witness Statement of Mr. Andrew Abraham Mwangakala dated 14 January 2022.

20. On 4 March 2022, the Parties submitted their respective requests (in the form of *Redfern Schedules*) for the Tribunal to decide on production of documents.

21. On 25 March 2022, the Tribunal issued Procedural Order No. 2 concerning the Parties' requests for production of documents.

22. On 20 April 2022, the Claimants informed the Tribunal that one of its legal counsel, Mr. Timothy L. Foden had joined Boies Schiller Flexner LLP as a partner and requested the Tribunal to confirm that this change did not create any conflicts or advice whether further disclosures from any of its members were required.

23. On 26 April 2022, the Secretary of the Tribunal wrote to the Parties confirming that neither Mr. Bull nor Judge Monageng had any conflicts or additional disclosures to make with respect to Mr. Timothy L. Foden's move to Boies Schiller Flexner LLP and sending them an additional disclosure made by Mr. Bishop.

24. On 12 May 2022, the Centre acknowledged receipt of the Respondent's share of the initial advance payment requested by letter of 24 February 2021.

25. On 17 May 2022, the Claimants informed the Tribunal that the Respondent had failed to comply with Procedural Order No. 2 ("**PO2**") and requested that the Tribunal order the Respondent to proceed with the production of the documents responsive to the Claimants' document production requests No. 2 -12, 15-16, by 20 May 2022.

26. On 25 May 2022, the Respondent informed the Tribunal that they had tried to search for the requested documents without success. At the request of the Claimants, they were granted leave to respond to the Respondent's communication, which they did by 31 May 2022.

27. On 2 June 2022, the Tribunal sent a letter to the Parties, rejecting the Claimants' request for an additional order for the production of documents.

28. On 1 July 2022, the Claimants submitted its reply memorial ("**Reply**" or "**Cl. Reply**"), together with:

- Factual Exhibits C-259 through C-335;
- Legal Authorities CL-100 through CL-124;
- Second Witness Statement of Ms. Bronwyn Barnes dated 20 July 2022;
- Second Witness Statement of Mr Mathew Perrot dated 20 July 2022;
- Second Expert Report of Mr Travis Taylor dated 21 July 2022;
- An updated list of defined terms and abbreviations used by the Claimants in their Memorial and their Reply;
- A list of Claimants' factual exhibits and legal authorities submitted to date.

29. On 26 September 2022, the Parties submitted a joint application to the Tribunal to move the venue of the Hearing from London to Washington, D.C.

30. On 6 October 2022, the Tribunal issued Procedural Order No. 3, deciding that the Hearing would be held at ICSID's hearing facility located at 1225 Connecticut Avenue NW, 20036 Washington, D.C. from 30 January to 5 February 2023.

31. On 3 November 2022, the Centre requested that each Party make an additional advance payment of USD 250,000. The Centre further informed the Parties that the Claimants' previous advance payment of the Respondent's share of the initial advance payment, paid on 8 November 2021, would be used by ICSID to offset part of this advance.

32. On 14 November 2022, the Parties informed the Tribunal of their agreement to amend the hearing dates to 30 January to 3 February 2023 (thus relinquishing 4-5 February 2023).

33. On 15 November 2022, the Tribunal informed the Parties that it was agreeable to the amendment to the procedural calendar agreed by the Parties and issued an updated procedural calendar reflecting this change.

34. On 22 November 2022, the Respondent requested an extension to file its Rejoinder until 6 December 2022. On 23 November 2022, the Claimants confirmed their agreement to the requested extension, on the condition that the Respondent informed the Claimant by 24 November 2022, if it would present new witnesses with its Rejoinder and uploaded the entire submission with supporting documents to the Box platform on the filing date.

35. On 28 November 2022, the Tribunal informed the Parties that it approved of their agreement to extend the deadline to file the Rejoinder (on the conditions set forth above) and issued an updated procedural calendar.

36. On 1 and 2 December 2022, the Parties informed the Tribunal of the witnesses and experts they wished to cross-examine at the Hearing.

37. On 3 December 2022, the Respondent informed the Tribunal that it would not be able to pay its portion of the advance requested in ICSID's letter of 3 November 2022, within the deadline and asked for a three-month extension to make the requested payment.

38. On 6 December 2022, the Respondent submitted its Rejoinder ("**Rejoinder**" or "**Resp**. **Rej**."), together with:

- Factual Exhibit R-052;
- Legal Authorities RL-42 through RL-44.

39. On 8 December 2022, ICSID sent a letter to the Parties acknowledging receipt of the Claimants' portion of the advance requested in ICSID's letter of 3 November 2022.

40. On 12 December 2022, ICSID sent a letter to the Parties inviting the Respondent to pay its portion of the advance requested by March 3, 2023, unless additional funds were necessary before that date, in which case ICSID would issue a default letter inviting either Party to pay pursuant to ICSID Administrative and Financial Regulation 16.

41. Further to the agreement of the Parties, the Pre-Hearing Organizational Meeting between the Parties and the President of the Committee took place on 13 December 2022, by videoconference.

42. On 19 December 2022, the Tribunal issued Procedural Order No. 4 on the Organization of the Hearing.

43. On 20 December 2022, Mr. Doak Bishop made an additional disclosure to the Parties.

44. A hearing on jurisdiction and merits was held in Washington, DC, from 30 January 2023 to 2 February 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Mr. Cavinder Bull, SC	President
Mr. Doak Bishop	Arbitrator
Justice Sanji Mmasenono Monageng	Arbitrator
ICSID Secretariat:	
Ms. Aurélia Antonietti	Secretary of the Tribunal
For the Claimants:	
Mr. Timothy L. Foden	Boies Schiller Flexner LLP
Dr. Marc Veit	Lalive
Mr. Augustin Barrier	Lalive

Mr. Robert Denison	Lalive
Ms. Eden Jardine	Lalive
Ms. Bronwyn Barnes	Party Representative
Mr. Robert Adam	Party Representative
Mr. Mathew Perrot	Exploration Geologist
Mr. Travis Taylor	Secretariat
Ms. Abigail Harris	Secretariat

For the Respondent:

Dr. Boniphace Luhende	Government of Tanzania, Solicitor General
Mr. George Mandepo	Government of Tanzania, Director of Arbitration, Office of the Solicitor General
Ms. Salome S. Magesa	Government of Tanzania, Office of the Solicitor General
Mr. Ipyana Alinuswe Mlilo	Government of Tanzania, Office of the Solicitor General
Mr. Andrew A. Rugarabamu	Government of Tanzania, Principal State Attorney, Office of the Solicitor General
Ms. Consesa Kahendaguza	Government of Tanzania, Office of the Solicitor General
Ms. Lydia Thomas	Government of Tanzania, Office of the Solicitor General
Ms. Neisha Shao	Government of Tanzania, Office of the Solicitor General
Ms. Hadija Hamisi Ramadhani	Government of Tanzania, Office of the Solicitor General
Mr. Damian Renatus Kaseko	Government of Tanzania, Office of the Solicitor General
Prof. Abdulkarim Hamisi Mruma	Party Representative
Mr. Andrew Abraham Mwangakala	Party Representative
Ms. Maria Leonard Mwakibete	Party Representative
Mr. Edwin Simon Igenge	Ministry of Minerals, Director of Legal Services

Court Reporter:

Ms. Dawn K. Larson	B&B Reporters

45. During the Hearing, the following persons were examined:

On behalf of the Claimants:

Ms. Bronwyn L. Barnes	Witness
Mr. Robert Adam	Witness
Mr. Mathew Perrot	Witness
Mr. Travis Taylor	Expert

On behalf of the Respondent:

Prof. Abdulkarim Hamisi Mruma	Witness
Mr. Andrew Abraham Mwangakala	Witness
Mr. Edwin Simon Igenge	Witness

46. Subsequent to the Hearing, on 7 February 2023, the Tribunal directed that the Parties address the following in their post-hearing briefs:

a. The case of *Standard Chartered Bank (Hong Kong) Limited v. Tanzania*, ICSID Case No. ARB/15/41, Award, presented as Exhibit RL-025 was cited as requiring an active investment. The Tribunal asked for a comprehensive list of cases and authorities that discuss that case and/or the issue of an active investment.

b. The Tribunal invited the parties to point out in their post-hearing briefs the specific evidence and references on record that the alleged investments in this case were active investments, showing investments made.

c. The Tribunal asked the Respondent to indicate in its post-hearing brief its final position on the Claimants' slides 162 and 163.

d. The Tribunal noted that Mr. Andrew Mwangakala was presented as a fact witness in this proceeding, but his evidence seemed to be mostly expert in nature. The Tribunal asked to hear from both parties as to the admissibility of his written and oral opinions and the weight to be given to such opinions and why.

e. If liability were to be found, which has not been decided, the Tribunal asked the parties to provide calculations for pre-award interest at US Prime +2% up to June 1, 2023. Those calculations were to take the following scenarios into account: (i) a PEM of 1.6 and (ii) a PEM of 1.8 applied to the "relevant costs" on two dates: 10 January 2018 and 18 December 2019.

The Tribunal also asked the Parties to inform the Tribunal what exactly the costs were as of each date. If need be, the Tribunal would decide after receiving the post-

hearing briefs whether any further response from the parties were needed in respect of these calculations.

47. The Parties filed simultaneous post-hearing briefs on 5 April 2023.

48. The Claimants filed their costs schedule on 19 April 2023. The Respondent included its cost schedule in its post-hearing brief submitted on 5 April 2023.

49. The Parties were invited to provide any comments they might have on their respective costs submissions and costs schedules by 1 May 2023. The Claimants provided their comments on 1 May 2023. The Respondent's comments were only received by the Tribunal Secretary on 6 May 2023 due to an alleged technical issue with the Respondent's counsel's emails.

50. The proceeding was closed on 21 June 2023.

III. FACTUAL BACKGROUND

51. This dispute arises in connection with the Ntaka Hill Nickel Project (the "**Project**"), comprising the exploration for and development of nickel sulphide deposits in a large tenement package called the Nachingwea property.

A. THE DEVELOPMENT OF THE PROJECT

52. The Claimants are three companies forming part of a larger group which invested in the Project over a period of about 20 years. The Claimants' parent company is Indiana Resources ("**Indiana**"), a company listed on the Australian Stock Exchange. From 2000 until the events which form the subject of the present dispute, the Project was developed under various corporate structures which were ultimately owned by Indiana. The Claimants refer to Indiana and its subsidiaries and joint venture partners that owned the Project over the course of the Project's life collectively as the "**Claimants' affiliates**".

53. Indiana (at the time operating under the name Goldstream Mining NL) first invested in the Project in 2000 through its Tanzanian subsidiary, Warthog Resources Limited

("**Warthog**"). Indiana applied, through Warthog, for prospecting licences for preliminary reconnaissance periods covering the Nachingwea property, in accordance with the then-applicable Mining Act 1998. In 2004, Tanzania granted four new prospecting licences for preliminary reconnaissance periods to Warthog covering the entire 7,269 square kilometre Nachingwea exploration area.[1] The Claimants say that this completed Indiana's acquisition of the Project.[2]

54. Under these licences, Indiana conducted further research and exploration work as well as its first drilling programme at the Project.[3] This drilling led to the discovery of considerable ultramafic-hosted nickel sulphide deposits at Ntaka Hill, which became the focal point of nickel sulphide exploration at the Project.[4]

55. From 2006 onwards, the Claimants' affiliates conducted exploration activities under prospecting licences. In this regard, the Project area had to be divided into smaller areas, as prospecting licences had a smaller maximum size than those under a preliminary reconnaissance period. The key prospecting licence that this dispute relates to is the prospecting licence over the Ntaka Hill area, PL No. 4422/2007 issued on 7 April 2007 (the "**NH Prospecting Licence**").[5] This was the Project's core licence area and eventually contained the whole mineral resource defined by the Claimants.

56. As expenditure for the Project grew, Indiana also decided to access more funding opportunities, including by incorporating a new Canadian subsidiary, Continental Nickel Limited ("**CNI**"), to hold the Project in joint venture with Indiana through a new Tanzania subsidiary, Ngwena Limited ("**Ngwena**"). Warthog transferred its beneficial interest in the Project prospecting licences, including the NH Prospecting Licence, to Ngwena.[6]

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1 Prospecting Licence Nos. PLR 2515/2004 (**Exhibit C-165**), PLR 2516/2004 (**Exhibit C-166**), PLR 2922/2004 (**Exhibit C-167**) and PLR 2962/2004 (**Exhibit C-168**).

2 Cl. Mem., paragraph 82.

3 Warthog Annual Report, FY06, 24 December 2006 (**Exhibit C-171**), page 4.

4 First WS Mathew Perrot, paragraph 28.

5 Prospecting Licence No. PL 4422/2007, 7 April 2007 (**Exhibit C-12**).

6 Registration of Transfer of Prospecting Licence No. PL. 4422/2007 from Warthog to Ngwena, 13 September 2007 (**Exhibit C-179**).

57. In August 2007, CNI was listed on the Toronto Stock Exchange via an initial public offering ("**IPO**"). As part of the listing process, CNI published a technical report on the Project, compliant with Canadian National Instrument 43-101 ("**NI 43-101**") standards for disclosure for mineral projects. The technical report concluded that the Project held significant potential to host nickel sulphide mineralization and should be subjected to continued and detailed exploration.[7]

58. Thereafter, the Claimants' affiliates continued exploration work at the Project, with a focus on Ntaka Hill.[8] The first NI 43-101 compliant mineral resource estimate for the Project was published in June 2009[9] and updated in April 2011.[10] The first preliminary economic assessment ("**PEA**"), based on the April 2011 mineral resource estimate, was published on 28 October 2011 (the "**2011 PEA**") and estimated the net present value ("**NPV**") of the Project to be USD 207 million.[11]

59. The Claimants continued with the exploration and development of Ntaka Hill as well as the wider Nachingwea area. Indiana also re-acquired CNI in September 2012 and thereafter became dual-listed on the Australian and Toronto Stock Exchanges.

60. On 5 November 2012, an updated PEA, based on the April 2012 mineral resource estimate, was published (the "**2012 PEA**"). The 2012 PEA estimated the Project's NPV to be USD212 million based on a mixed open pit and underground mine development scenario and using the 2011 PEA nickel pricing assumptions.[12] The 2012 PEA further recommended that steps be taken to start applying for a mining licence.[13]

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7 A Technical Review of the Nachingwea Nickel Property Lindi and Mtwara Regions Southeastern Tanzania, 9 May 2007 (**Exhibit C-27**), page 55.

8 First WS Mathew Perrot, paragraph 31.

9 Technical Report on the Nachingwea Project, Lindi and Mtwara Regions, Tanzania, East Africa, 30 June 2009 (**Exhibit C-35**).

10 Technical Report on the Nachingwea Project, Lindi and Mtwara Regions, Tanzania, East Africa, 8 April 2011 (**Exhibit C-28**).

11 Technical Report on the Nachingwea Project, Lindi and Mtwara Regions, Tanzania, 28 October 2011 (**Exhibit C-71**), page 1-3.

12 NI 43-101 Technical Report, The Ntaka Hill Nickel Sulphide Project Lindi and Mtwara Regions, Tanzania, Africa, 5 November 2012 (**Exhibit C-30**), pages 17 and 264.

13 NI 43-101 Technical Report, The Ntaka Hill Nickel Sulphide Project Lindi and Mtwara Regions, Tanzania, Africa, 5 November 2012 (**Exhibit C-30**), page 281.

61. By that stage, the Claimants' affiliates had already started work to prepare a feasibility study, which was one of the requirements to apply for a special mining licence under Tanzania's Mining Act 2010. The Claimants' affiliates also continued with exploration and development work, all the while renewing the Project's prospecting licences as and when necessary. In accordance with Tanzanian law, the Claimants' affiliates relinquished 50% of each prospecting licence area upon each renewal. The NH Prospecting Licence therefore reduced in size from an initial 200 square kilometre exploration area to a focused 48.81 square kilometre area covering the identified mineral resource at Ntaka Hill.

62. In 2013 and 2014, Indiana formed joint ventures with MMG, a Hong Kong-listed major mining company, and Fig Tree, an investment vehicle of a Mauritius-based private equity fund, to advance exploration and development of the Project. Through these joint venture arrangements, the Claimants became owners of the Project: NNL directly and NNHL and NUKL indirectly through their shareholding in NNL.

63. In January 2015, the Claimants' affiliates completed a draft feasibility study for the Project (the "**Draft Feasibility Study**").[14] As part of the Draft Feasibility Study, the Claimants' affiliates conducted an economic analysis for the Project's development, which indicated that based on the assumptions in the Claimants' affiliates' development plan, the low nickel price as of early 2015 did not justify the significant capital expenditure required to develop the Project.

64. As the NH Prospecting Licence was due to expire in April 2015, the Claimants' affiliates applied for a retention licence to replace the NH Prospecting Licence.[15] They did so pursuant to section 37(1) of Tanzania's Mining Act 2010, which provided that "[t]he holder of a prospecting licence other than a prospecting licence for building materials or gemstones may apply to the Minister for the grant of a retention licence on the grounds that – (a) he has identified a mineral deposit within the prospecting area which is potentially of commercial significance; and (b) the mineral deposit cannot be

14 Ntaka Hill Nickel Sulphide Project Feasibility Study, January 2015 (**Exhibit C-69**).

15 Form No. MRF 1, Application for Mineral Rights under Division A (**Exhibit C-58**).

developed immediately by reason of technical constraints, adverse market conditions or other economic factors which are, or may be, of a temporary character."[16]

65. As part their application, the Claimants' affiliates submitted an explanation of the reasons the retention licence was required and appended various documents, including the Draft Feasibility Study.

66. Tanzania granted the application on 9 April 2015 and the retention licence no. RL 0017/2015, covering the same area as the NH Prospecting Licence, was issued on 21 April 2015 for a period of five years (the "**NH Retention Licence**").[17] The NH Retention Licence was transferred to NNL on 25 June 2015.[18] From this point onwards, the Claimants all owned the Project and the mineral rights which they held through the NH Retention Licence.

67. Thereafter, the Claimants continued the development of the Project, including by completing a desktop scoping study in July 2017 (the "**2017 Scoping Study**") which estimated a Project NPV of USD 20 million assuming a nickel price of USD 10,000 per tonne, while noting upside potential of an NPV of USD 217.7 million if the nickel price rose to USD 20,000 per tonne.[19] The 2017 Scoping Study also indicated a schedule anticipating completion of a definitive feasibility study by the end of Q3 2018, at which point the Claimants could apply for a special mining licence.[20]

B. MEASURES ADOPTED BY TANZANIA FROM 2017

68. Tanzania's Mining Act 1998 introduced an investor-friendly licensing regime, which was modernized without any significant changes in the Mining Act 2010.

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16 Tanzania Mining Act 2010 (**Exhibit C-158**), page 35.

17 Retention Licence No. RL 0017/2015 (**Exhibit C-13**).

18 Commissioner for Minerals' Acknowledgement of Transfer of Retention Licence No. RL 0017/2015 from Ngwena to NNL, 25 June 2015 (**Exhibit C-14**).

19 Battery Limits, Ntaka Hill Nickel 500 kt/y: Scoping Study, 31 July 2017 (**Exhibit C-66**), page 42.

20 Battery Limits, Ntaka Hill Nickel 500 kt/y: Scoping Study, 31 July 2017 (**Exhibit C-66**), page 43.

69. From 2017, however, Tanzania overhauled its existing mining regime by, among other things, introducing new legislation.

70. In June 2017, news reports stated that Tanzania's then-president, Dr John Pombe Magufuli, had commissioned an "investigating committee" in relation to the mining sector, which concluded that several mining companies had evaded tax payments. The investigating committee also recommended that Tanzania's mining legislation be revised.[21]

71. On 28 June 2017, the Government of Tanzania published three draft bills (the "**Draft Bills**"). On 29 June 2017, the Tanzanian Parliament invited stakeholders to provide their opinion on the Draft Bills by 1 July 2017, a Saturday.

72. On 1 July 2017, the Tanzanian Chamber for Minerals and Energy (the "**TCME**") submitted a letter stating that the process was done "hurriedly and without due consultation", unlike the extensive consultation which preceded the enactment of the Mining Act 2010.[22]

73. Shortly thereafter, on 3 and 4 July 2017, the parliament passed three additional pieces of legislation (the "**Amending Legislation**") under an emergency procedure, which received presidential assent and entered into force on 10 July 2017.

74. The Amending Legislation included:

a. The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (the "**2017 PSA**");[23]

b. The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017 (the "**2017 CRA**");[24] and

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21 The Economist Intelligence Unit, Government under fire over mineral export ban, 10 April 2017 (**Exhibit C- 225**).

22 Letter from TCME to the Parliamentary Committee on Energy and Minerals, 1 July 2017 (**Exhibit C-82**).

23 The Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (**Exhibit C-78**).

24 The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (**Exhibit C-80**).

c. The Written Laws (Miscellaneous Amendments) Act, 2017 (the "**2017 Act**").[25]

75. First, the 2017 PSA, among other things:

a. prohibited the export of raw resources, including mineral resources; and

b. provided that "permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal" and that "disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania."

76. Secondly, as for the 2017 CRA, this mandated the National Assembly of Tanzania to initiate a review and renegotiation of any resources contract deemed prejudicial to the interests of Tanzania or containing unconscionable terms.

77. Thirdly, the 2017 Act amended the Mining Act 2010 by, among other things, repealing the retention licence classification. Specifically, section 16 of the 2017 Act provided as follows:

"The [Mining Act 2010] is amended by repealing sections 37 and 38."

78. Sections 37 and 38 of the Mining Act 2010 were the relevant legislative provisions governing retention licences. Accordingly, by repealing these sections, section 16 of the 2017 Act removed the retention licence classification under Tanzanian law. However, the 2017 Act did not specify the impact of the removal of sections 37 and 38 of the Mining Act 2010 for existing retention licence holders.

79. Section 16 of the 2017 Act did not appear in the Draft Bills. As at 28 June 2017, the Draft Bills included only minor amendments to sections 37 and 38 of the Mining Act 2010. It was only on 4 July 2017 that the repeal of sections 37 and 38 of the Mining Act 2010 was introduced by way of an amendment to the Draft Bills.

[25] The Written Laws (Miscellaneous Amendments) Act 2017 (**Exhibit C-79)**.

80. Further, section 27F(3) of the 2017 Act provided that mineral right holders shall submit to the Geological Survey of Tanzania ("**GST**"), an agency of the Ministry of Minerals, various "accurate mineral data".[26]

81. After the Amending Legislation was enacted, President Magufuli held a rally on 24 July 2017 where he reportedly stated, among other things, that his government had "launched an economic war" against mining companies.

82. The immediate impact of the Amending Legislation on the Claimants' mineral rights under the NH Retention Licence was unclear to the Claimants. The Claimants therefore sought to obtain clarification concerning the impact of the Amending Legislation. Meanwhile, the Claimants decided to suspend all operations in Tanzania.[27]

83. On 10 January 2018, Tanzania passed the Mining (Mineral Rights) Regulations 2018 (the "**2018 Regulations**"), which sought to implement the 2017 Act.[28] Regulation 21 of the 2018 Regulations states:[29]

> "(1) All retention licences issued prior to the date of publication of these Regulations are hereby cancelled and shall cease to have legal effect.
>
> (2) Consequent upon cancellation of retention licence under sub-regulations (1), rights over all areas which were subject of retention licences are hereby and without further assurances reverted to the Government."

84. The publication of the 2018 Regulations made it clear to the Claimants that Tanzania had cancelled all existing retention licences altogether.[30]

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26 The Written Laws (Miscellaneous Amendments) Act 2017(**Exhibit C-79**), page 28, ¶27F(3).

27 First WS Bronwyn Barnes, paragraph 31.

28 2018 Regulations (**Exhibit C-90**).

29 2018 Regulations (**Exhibit C-90**), page 14.

30 First WS Bronwyn Barnes, paragraph37.

85. Shortly thereafter, Indiana requested the Australian Stock Exchange to suspend the trading of its shares until it could understand the impact of the situation.[31] Indiana also stated in a press release dated 19 January 2018 that "[g]iven that there has been no breach of the conditions of the Ntaka Hill Retention Licence or failure to comply with the Mining Act or the applicable regulations, Indiana would be surprised if it was not offered an alternative class of licence."[32] Indiana also stated that none of the Claimants had "received any formal notification from the Government of Tanzania on the cancellation of the Ntaka Hill Retention Licence" and that "a process of engagement with the Ministry of Minerals has commenced".[33]

86. Following the 2018 Regulations, the Claimants sought to engage with the Tanzanian authorities on a substitute licence for the NH Retention Licence.[34]

87. On 28 February 2018, NNL made a submission to the Ministry of Minerals seeking authorization to apply for a special mining licence.[35] NNL also sought confirmation from the Government that its title over the NH Retention Licence area would be maintained.[36] However, Tanzania initially responded that NNL should wait for the Minister of Minerals to return from maternity leave, and later stated that NNL's submission had not been considered pending the constitution of a new mining commission, which was supposed to be constituted following the 2018 Regulations (the "**Mining Commission**").[37]

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31 First WS Bronwyn Barnes, paragraph 37. See also ASX Market Release, Indiana Trading Halt, 17 January 2018 (**Exhibit C-91**).

32 Company Update, Indiana Resources, 19 January 2018 (**Exhibit C-92**).

33 Company Update, Indiana Resources, 19 January 2018 (**Exhibit C-92**).

34 First WS Bronwyn Barnes, paragraph 41.

35 Ntaka Hill Retention Licence, Submission to the Ministry of Minerals, 28 February 2018 (**Exhibit C-94**).

36 Indiana Memorandum, Update on Ntaka Hill Nickel Project, 16 April 2018 (**Exhibit C-97**).

37 Indiana Memorandum, Update on Ntaka Hill Nickel Project, 16 April 2018 (**Exhibit C-97**) and Indiana Memorandum, Ntaka Hill Nickel Project, 21 May 2018 (**Exhibit C-98**).

88. After the Mining Commission was constituted, the Claimants obtained indication from the Ministry of Minerals that they should apply for a prospecting licence as a replacement and proceeded to do so in May 2018.[38]

89. Various meetings between the Claimants' representatives and representatives from the Mining Commission and the Ministry of Minerals took place over the next months. The Claimants say that during these meetings, they were reassured that their title over the Project would be restored.[39] For example, the Claimants' Mr Robert Adams recounts meeting with the Deputy Minister of Minerals, Mr Stanslaus Nyongo, on 28 March 2019, where Deputy Minister Nyongo emphasized that former retention licence holders would not be disadvantaged or discriminated against.[40] Mr Adams also recounts attending a meeting with the Minister of Minerals, Mr Doto Biteko, on 19 August 2019, following which Mr Adams was of the view, based on the overall tone of the meeting, that Tanzania would return some form of tenure over the Project to the Claimants.[41] The Respondent has denied the Claimants' version of what transpired during these meetings but has not put forward its own version of what was discussed.

90. Mr Adams also states that at the meeting on 19 August 2019, the Minister requested that the Claimants hand over the drill core and associated geological data for the Project.[42] This was followed by an official request from the GST dated 11 September 2019,[43] which was reiterated on 11 October 2019 and 22 October 2019.[44]

91. In October 2019, Indiana's Chairman, Ms Bronwyn Barnes, travelled to Tanzania where she attended meetings with Mr Edwin Igenge, the Director of Legal Services of the Ministry of Minerals, as well as Professor Shukrani Manya, the head of the Mining

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38 First WS Bronwyn Barnes, paragraph 48. See also Letter from NNL to the Commissioner for Minerals and Application for a Prospecting Licence,17 May 2018 (**Exhibit C-16)** and Application for Prospecting Licence for Metallic Group Minerals at Ntaka Hill Lindi Region Nachingwea District, 17 May 2018 (**Exhibit C-100)**.

39 WS Bronwyn Barnes, paragraphs 49-52.

40 WS Robert Adams, paragraph 15-16.

41 WS Robert Adams, paragraph 31.

42 WS Robert Adams, paragraph 32.

43 GST Public Notice, 11 September 2019 (**Exhibit C-116**).

44 Letter from the GST to NNL, 11 October 2019 (**Exhibit C-118**) and Letter from the GST to NNL, 22 October 2019 (**Exhibit C-238**).

Commission. Ms Barnes was informed that subject to the Claimants and their affiliates proving that they had made investments in the Project, the Claimants would receive an alternative title and their rights as investors would be respected.[45] Ms Barnes also provided Mr Igenge and Professor Manya with a formal submission summarizing the Project's history and the Claimants' development plans.[46]

92. On 15 November 2019, the Claimants responded to the GST's request for geological data and stated that it was in the process of selecting documents for submission to the GST by mid-December 2019.

93. Further meetings also took place in November and December 2019. Ms Barnes recounts that at one such meeting on 5 December 2019, Minister Biteko confirmed to her that former retention licence holders would be given a right of first refusal with respect to former licence areas.[47]

94. On 9 December 2019, NNL submitted a letter to the Minister of Minerals stating that it was ready, and had detailed plans, to resume the development of the Project on very short notice, subject to confirmation of its tenure.[48]

95. On 19 December 2019, the Mining Commission published a "Request for pre qualification for joint development of reverted areas under formerly retention licences in Kagera (Ngara), Shinyanga (Kahama), Mbeya (Chunya), Simiyu (Bariadi and Busega), Morogoro and Lindi (Nachingwea)" (the "**Invitation to Tender**"). This Invitation to Tender included the Claimants' NH Retention Licence area.

96. The Invitation to Tender, which was addressed to all "eligible companies with Technical and Financial records in mining sector", sought "a joint operation from a [sic] financial and technical companies to develop 10 area mentioned above which were under Retention Licences of which according to Section 29 of Mining Act Cap 123 and its

45 First WS Bronwyn Barnes, paragraphs 72-77.

46 First WS Bronwyn Barnes, paragraph 77.

47 First WS Bronwyn Barnes, paragraph 83.

48 Letter from NNL to the Ministry of Minerals, 9 December 2019 (**Exhibit C-124)**.

Regulation has been reverted to Government." The joint operation was to take the form of a joint venture with State Mining Corporation ("**STAMICO**") and interested bidders were required to, among other things, agree that the State, directly or through STAMICO, would hold at least 36% to 46% of shares in the new project. In addition, interested bidders were to "commit willingness to work with small scale miners or re-allocate portion of area for small scale miners".[49]

97. The Invitation to Tender also contained the following provision on compensation:[50]

> "Successful Bidder shall commit to compensate previous licence holder for the exploration costs incurred and the Commission will facilitate the process."

98. One day after the Invitation to Tender was published, on 20 December 2019, the Mining Commission replaced the Invitation to Tender with a new version (the "**Revised Invitation to Tender**"). The Revised Invitation to Tender is identical to the Invitation to Tender, save that the provision on compensation was removed.

99. Following the Revised Invitation to Tender, the Claimants delivered to the Respondent a notice that a dispute had arisen under the BIT in relation to the Project on 14 January 2020 (the "**Notice of Dispute**").[51] The Claimants did not receive any response to the Notice of Dispute within six months.

100. The Claimants submitted their Request for Arbitration on 25 September 2020.

101. The Tribunal notes that many of the facts above are not in serious dispute between the Parties. Instead, the Parties disagree about the correct characterization of the facts.

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49 The Mining Commission's Invitation to Tender, 19 December 2019 (**Exhibit C-18**).

50 The Mining Commission's Invitation to Tender, 19 December 2019 (**Exhibit C-18**), page 3.

51 Notice of Dispute, 14 January 2020 (**Exhibit C-20**).

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

102. The Claimants submit that the Respondent's breaches of its international obligations took place in three principal steps:[52]

a. The enactment of the Amending Legislation in July 2017, which "eviscerated Tanzania's mining regime and, among other resource-nationalistic measures, repealed the legislative basis for the NH Retention Licence, the mineral right under which the Claimants held the Project";

b. The publication of the 2018 Regulations, which "confirmed the retroactive cancellation of all retention licences and the reversion of the underlying areas to the State"; and

c. The offer of the NH Retention Licence area to international public tender in December 2019, by which Tanzania "complet[ed] the expropriation."

103. The Claimants argue that these measures amount to breaches of the Respondent's obligations under Articles 2 and 5 of the BIT, and seek compensation for the loss and damage they say they have sustained as a result. In particular, the Claimants seek the following reliefs:[53]

a. A declaration that the Respondent has breached its obligations not to unlawfully expropriate the Claimants' investment and to accord the Claimants and their investment fair and equitable treatment and not to impair the Claimants' investment by unreasonable and discriminatory measures under Articles 5 and 2 of the BIT;

b. An order that the Respondent pay compensation for the loss and damage sustained by the Claimants as a result of the breaches by the Respondent of its obligations under the BIT, in the amount of USD 106,679,619.76, representing the Claimants'

52 Cl. Reply, paragraph 3.

53 Cl. Mem., paragraph 410; Cl. Reply, paragraph 664; Cl. PHB, paragraph 229.

damages and interest at a rate of 2% above the US Prime rate, compounded annually as at 1 June 2023;

c. In the alternative, should the Tribunal consider that the proper valuation date is 10 January 2018, an order that the Respondent pay compensation for the loss and damage sustained by the Claimants as a result of the breaches by the Respondent of its obligations under the BIT, in the amount of USD 121,698,826.76, representing the Claimants' damages and interest at a rate of 2% above the US Prime rate, compounded annually as at 1 June 2023;

d. An order that any counterclaim by the Respondent be rejected as inadmissible and unfounded;

e. An order that the Respondent bear the costs of the arbitration and compensate the Claimants for all the costs and expenses incurred in relation to this arbitration, including the fees and expenses of the Claimants' counsel, witnesses and experts and reasonable funding fees;

f. An order that the Respondent pay pre-award and post-award interest on all sums awarded at a rate of 2% above the US Prime rate, compounded annually until the date of payment; and

g. Any other relief the Tribunal deems appropriate.

104. The Respondent denies the Claimants' claims and argues that the Tribunal lacks jurisdiction to hear the dispute. According to the Respondent:[54]

a. The Claimants do not have any legal standing to bring the present arbitration against the Respondent.

b. There has not been any expropriation of the Claimants' investment in Tanzania.

[54] Resp. Rej., paragraph 2.

c. The evidence submitted by the Claimants is not credible. The Claimants' witness statements are hearsay and are unsubstantiated.

d. The Claimants have failed to establish the basis of their claims in relation to the alleged investment at the Ntaka Hill Project for the purposes of the compensation claimed.

105. By way of its Counter-Memorial, the Respondent sought the following reliefs:[55]

a. A declaration that the Respondent has not breached any obligations under Articles 6 and 10 of the BIT;[56]

b. A declaration that no damage was caused to and suffered by the Claimants;

c. A declaration that the Claimants have breached the provisions of Tanzanian laws governing the mining sector, the BIT and customary international law;

d. An order that the Claimants have failed to discharge the burden of proof that any measures taken by the Respondent was in violation of Tanzanian laws, customary international law and any provision of the BIT;

e. An order that the Claimants pay damages for loss suffered as a result of breaches of Tanzanian laws, and general principles of law in an amount to be determined during the course of this arbitration;

f. An order that the Claimants pay the Respondent interest (both pre- and post-Award) on the sums ordered to be paid above, at a rate to be determined during the course of this arbitration;

g. An order that the Claimants pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and the costs that the Government

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55 Resp. C-Mem., paragraph 521.

56 Resp. C-Mem., paragraph 521(a) and Resp. PHB, paragraphs 205(a) and 205(c) refer to the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments. The Tribunal presumes the Respondent intended to refer to the BIT.

has and will incur in pursuing the breaches and this arbitration, including all legal and other professional fees associated with any and all proceedings undertaken in connection with this arbitration; and

h. An order for such other relief as the Tribunal deems just and appropriate.

106. In its Rejoinder, the Respondent reiterates its prayers for an award dismissing the Claimants' claims in their entirety, an order that the Claimants bear the costs of the arbitration, and any further relief that the Tribunal deems just and proper.[57] Alternatively, in the event that the Tribunal finds in favour of the Claimants, the Respondent requests that the Claimants be awarded:[58]

a. Fair compensation based on actual historical costs incurred by the licensee on the Project as calculated by the Respondent; and

b. Simple interest on the amount at a rate of LIBOR +2%.

V. JURISDICTION

107. The Claimants have brought their claims in this arbitration pursuant to Article 8(1) of the BIT and Article 25(1) of the ICSID Convention. The Claimants submit that the jurisdictional requirements of both these provisions are satisfied as the Claimants are, or deemed to be, "companies" of the UK within the meaning of the BIT and "national[s] of another Contracting State" for the purposes of Article 25(1) of the ICSID Convention. Further, their claims concern and arise directly out of their investment in Tanzania, within the meaning of the BIT and the ICSID Convention.

108. The Respondent has disputed whether the Claimants' claims meet the jurisdictional requirements under the BIT. The Respondent's objections to jurisdiction can broadly be distilled as follows:

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57 Resp. Rej., paragraph 239.

58 Resp. Rej., paragraph 240.

a. The Claimants' claims do not arise directly out of their investment in Tanzania;

b. The Claimants' alleged investment was not "actively made"; and

c. The proper forum for the Claimants' claims is Tanzania's courts.

109. The Tribunal will address each of the Respondent's jurisdictional objections in detail.

A. NATIONALITY REQUIREMENTS UNDER THE BIT AND THE ICSID CONVENTION

110. As a preliminary point, the Tribunal considers that the Claimants satisfy the nationality requirements under the BIT and the ICSID Convention.

111. The Tribunal's jurisdiction is derived from Article 8(1) of the BIT as well as Article 25(1) of the ICSID Convention. Article 8(1) of the BIT provides:

> "Each Contracting Party hereby consents to submit to [ICSID] for settlement by conciliation or arbitration under the [ICSID Convention] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former."

112. Article 25(1) of the ICSID Convention provides:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. Where the parties have given their consent, no party may withdraw its consent unilaterally."

113. The term "companies" is defined at Article 1(d)(i) of the BIT to mean, "in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12".

114. Further, Article 8(2) of the BIT provides:

> "A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party."

115. Similarly, Article 25(2)(b) of the ICSID Convention defines a "[n]ational of another Contracting State" to include "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

116. In this case, NUKL and NNHL, the first and second Claimants, are incorporated in the UK. There is no doubt that NUKL and NNHL are companies of the UK under the BIT and nationals of another Contracting State under the ICSID Convention.

117. As for the third Claimant, NNL is a Tanzanian company that has been majority owned by NNHL (the second Claimant) since its incorporation and before the present dispute arose. Accordingly, under Article 8(2) of the BIT and Article 25(2)(b) of the ICSID Convention, NNL would be treated as a UK company under the BIT and a national of another Contracting State under the ICSID Convention.

118. Accordingly, the Tribunal finds that each Claimant entity satisfies the nationality requirements under the BIT and the ICSID Convention.

B. WHETHER THE CLAIMANTS' CLAIMS ARISE DIRECTLY OUT OF THEIR INVESTMENT IN TANZANIA

(1) Parties' Positions

119. The Respondent argues that the Claimants' claims do not arise directly out of their investment in Tanzania. According to the Respondent, NNL, which was the registered owner of the Project, was only incorporated in Tanzania on 18 May 2015. Accordingly, prior to 2015, the Claimants cannot be considered as investors in Tanzania within the meaning of the BIT. The Respondent further argues that "the Claimants have neither a basis nor justification to claim investment through licences held by previous holders."[59]

120. The Respondent also appears to dispute the shareholding of NUKL in NNHL and NNHL in NNL, arguing that NUKL's 70% shareholding in NNHL has "not been substantiated by any evidence to that effect" and that NUKL consequently "cannot claim to be investor in Tanzania."[60]

121. The Respondent further argues that the Project does not qualify as an investment under the BIT and disputes that the Claimants have made any "investment" within the meaning of the BIT at all.

122. On the other hand, the Claimants argue that the relevant question under Article 8(1) of the BIT is not whether the Claimants were "investors" prior to 2015, but whether the present dispute concerns an "investment" of the Claimants. In this regard, the manner in which the Project was owned prior to the incorporation of the Claimants in 2015 is irrelevant.

123. In any event, it is clear that from June 2015 onwards, the Claimants owned the Project. Tanzania had registered the transfer of the NH Retention Licence to NNL on 25 June 2015, following which NNL became the registered holder of the Project. NNHL holds 99.995% of the shares in NNL, through which it owned the Project indirectly. As for NUKL, the Claimants have produced share certificates evidencing NUKL's 70%

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59 Resp. Rej., paragraph 132.

60 Resp. Rej., paragraphs 130-131.

shareholding in NNHL and was also an indirect owner of the Project through this shareholding.

124. The Claimants also submit that "investment" under the BIT is defined in broad terms and includes both direct and indirect investments. In this regard, the present dispute concerns the Project, which falls squarely within the definition of "investment" under the BIT. Additionally, the Claimants made contemporaneous investments in local community infrastructure, which would also fall within the definition of "investment" under the BIT.

(2) The Tribunal's Analysis

125. The Tribunal largely agrees with the Claimants' submissions on this issue.

126. Under Article 8(1) of the BIT, the Tribunal has jurisdiction over disputes "concerning an investment of [a national or company of a Contracting Party] in the territory of [another Contracting Party]."

127. Article 1 of the BIT defines "investment" in broad terms to mean "every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made". Article 1 further provides that the term "investment" includes, but is not limited to, movable and immovable property and any other property rights, shares in a company, intellectual property rights, and "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources".

128. In this case, the present dispute concerns the Project. The Project comprised various assets in Tanzania, including shares in NNL, the NH Retention Licence, the information, data and records relating to the Project, as well as movable and immovable property at the Project site. The NH Retention Licence itself would be an example of a business concession conferred by law to search for, cultivate, extract or exploit natural resources, as contemplated under Article 1(a)(v) of the BIT. The Tribunal accepts that the Project is a qualifying investment for the purposes of Article 8(1) of the BIT.

129. The Tribunal also accepts the Claimants' evidence on the direct and indirect ownership of the Project by the Claimants from 2015 onwards, including NNHL's shareholding in NNL and NUKL's shareholding in NNHL. While the Respondent appears to dispute this, the Respondent has not adduced any evidence to contradict the share certificates and other evidence put forward by the Claimants, nor has the Respondent adequately substantiated why the Claimants' evidence in this regard is unreliable or should not be accepted.

130. As far as the ownership of the Project prior to 2015 is concerned, the Tribunal agrees with the Claimants that it is irrelevant whether the Claimants qualify as "investors" in Tanzania prior to 2015. The BIT and the ICSID Convention do not impose such a requirement for jurisdiction to be established. The requirement under Article 8(1) of the BIT is whether the dispute concerns an "investment" of the Claimants in the territory of Tanzania. The Tribunal is satisfied that it does.

131. Having reached the above conclusion, the Tribunal does not find it necessary to make a finding on whether the Claimants' investments in local community infrastructure also fall within the definition of "investment" under the BIT. It is clear to the Tribunal that the present dispute concerns the Project and that is an investment of the Claimants.

C. WHETHER THE CLAIMANTS' INVESTMENT HAS TO BE "ACTIVELY" MADE

(1) Parties' Positions

132. The Respondent argues that an investment must have been "actively made" for the BIT to apply and in its pleadings, cites the case of *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 ("***SCB HK v Tanzania***"),[61] for this proposition. The Respondent relies on this case to argue that investments must have been made by an investor in some active way, beyond simple passive ownership.[62]

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61 *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (**Exhibit RL-025**).

62 Resp. C-Mem., paragraph 345.

133. According to the Respondent, the Claimants' investment in this case was made passively, through affiliate companies, and therefore cannot fall within the definition of "investment" under the BIT.[63] In this regard, the Respondent also disputes the capital contributions allegedly made and expenditure allegedly incurred by the Claimants, arguing that the Claimants have not put forward sufficient tangible evidence to prove these allegations.[64] The Respondent also argues that "the Claimants' contribution of money or assets, duration and risks as stated do not fall within the meaning of investment as the mentioned activities were not incorporated in the Memorandum and Articles of Association of the Company".[65]

134. Further, the Respondent submits that the Claimants' alleged investment "is unjustifiable since the Claimants had not commenced mining operations nor [were they] granted a Special Mining Licence upon fulfilment of the conditions as provided under the Mining Act, 2010."[66] The Respondent alleges that "the Claimants' exploration was at initial stage which does not qualify to be an investment" and that by 2019, the Claimants no longer held the NH Retention Licence and therefore "could not start to generate revenue from the project".[67]

135. In the Claimants' Reply, the Claimants state that while the Respondent cites the *SCB HK v Tanzania* case as authority for its proposition that investments must be "actively made", it appears that the intended reference was actually to the award in a different case, *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 ("***SCB v Tanzania***").[68] In *SCB v Tanzania*, the Tribunal considered

63 Resp. C-Mem., paragraph 343.

64 Resp. C-Mem., paragraphs 343,347; Resp. Rej., paragraphs 139-148.

65 Resp. C-Mem., paragraph 346.

66 Resp. C-Mem., paragraph 344.

67 Resp. C-Mem., paragraph 352.

68 Cl. Reply, paragraph 393; *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**).

that Article 8(1) of the BIT "protects investments 'made' by an investor in some active way, rather than simple passive ownership."[69]

136. The Claimants argue that adopting this interpretation of the BIT would be inappropriate and that in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), the Tribunal is required to interpret the BIT in accordance with the ordinary meaning of its terms.[70] The BIT itself does not contain any express requirement for investments to be "actively" made. Further, the *SCB v Tanzania* interpretation would invite debate as to what qualifies as an "active" investment, which would give rise to uncertainty as to the scope of the BIT's protections and the jurisdiction of any tribunals constituted under Article 8(1) of the BIT.[71]

137. Further, the *SCB v Tanzania* award "stands in stark contrast to the approach adopted by other tribunals interpreting similarly worded bilateral investment treaties, which have found no such requirement."[72]

138. In any event, even if the *SCB v Tanzania* interpretation were adopted, each Claimant entity has made an "active" investment in Tanzania. Each Claimant's sole *raison d' être* was the Project and each Claimant made capital contributions to the Project in their own right, at least from June 2015 onwards.[73] The Claimants point to the evidence of capital contributions and historical expenditure they have submitted in this arbitration, including annual reports, financial statements and bank statements, as well as the witness statement submitted by the Respondent's own witness, Mr Mwangakala, who calculates that the Claimants and their affiliates incurred exploration costs of at least USD 17.6 million on the Project.[74] The Claimants also submit that there is no requirement under the ICSID Convention, international law or the BIT that the elements

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69 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**) at paragraph 225.

70 Cl. Reply, paragraph 394.

71 Cl. Reply, paragraph 395.

72 Cl. Reply, paragraph 396.

73 Cl. Reply, paragraphs 397-399.

74 Cl. Reply, paragraphs 407-408.

constituting an investment need to be mentioned in a company's Memorandum and Articles of Association.[75]

139. The Claimants further submit that the Respondent has not explained why the stage of development of exploration bears any relevance to the existence of a capital commitment or an investment at all. The Respondent's observation that the NH Retention Licence was cancelled and the rights thereunder reverted to the Government makes no difference to the assessment in relation to the Claimants' investment in the Project before it was taken from them.[76]

140. By way of an email dated 2 April 2023, the Respondent clarified that it had "come to realize that it has erroneously citated and issued a case of [*SCB HK v Tanzania*] instead of [*SCB v Tanzania*]" and attached the case of *SCB v Tanzania* in its email. In its Post-Hearing Brief, the Respondent has also clarified that the reference to *SCB HK v Tanzania* should be read as a reference to *SCB v Tanzania*.[77]

(2) The Tribunal's Analysis

141. The Tribunal observes that the *SCB v Tanzania* case relates to the same BIT in this arbitration and is directly relevant.

a. Whether an investment must be "actively made"

142. In *SCB v Tanzania*, the parties disagreed over the interpretation of the phrase "concerning an investment of the [national or company of one Contracting Party] in the territory of the [other Contracting Party]" in Article 8(1) of the BIT. In particular, the parties "debated the significance of the term 'of' as the preposition is used in Article 8(1)."[78] The claimant in that case argued that an investment might be "of" an individual or a company by virtue of an ownership interest in the asset, even without day-to-day control. On the other hand, the respondent in that case argued that the term "of" must

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75 Cl. Reply, paragraph 406.

76 Cl. Reply, paragraphs 408(b) and 410.

77 Resp. PHB, paragraph 54.

78 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 208.

be read to require some association between the investor and the investment, and that "something more than indirect ownership is required."[79]

143. The tribunal in *SCB v Tanzania* analysed various provisions of the BIT and noted that the BIT uses two principal prepositions to connect investor and investment: "of" and "by". The tribunal found that:

a. Article 11 of the BIT refers to "investments *by* investors", without any associated verb to shed useful light on whether "by" in Article 11 implies investment *held/owned* by investors, or investment *made* by investors. The latter would connote a more active relationship between investor and investment.[80]

b. Elsewhere in its provisions, however, the BIT "repeatedly uses a verb to address the relationship between investor and protected investments." As an example, Article 1(a) of the BIT refers to the "territory of the Contracting State in which the investment is *made*". The tribunal considered that "the verb 'made' implies some action in bringing about the investment, rather than purely passive ownership."[81]

c. In contrast, "the BIT nowhere uses the verb 'own' or 'hold' in connection with an investment by or of an investor."[82]

d. The preamble to the BIT states, among other things, that the BIT was concluded with the desire to increase "investment *by* nationals and companies of one State in the territory of the other State". In the tribunal's analysis, the term "by" here signified that "the company of the first State is the actor, and implie[d] an active role of some kind for that company." The tribunal also considered this interpretation to be consistent with "a cause-and-effect relationship" contemplated between the

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79 Standard Chartered Bank v Tanzania, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraphs 209-210.

80 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraphs 219-221.

81 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 222.

82 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 223.

BIT's "encouragement and protection … of such investments" and the increased prosperity that was the desired result. In the tribunal's view, "[i]t was difficult to see how the treaty's protections could promote investment by nationals of a Contracting State if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made."[83]

e. Article 2 of the BIT refers to creating "favourable conditions for nationals or companies of the other Contracting State *to invest* capital in its territory". The tribunal considered that the use of the active verb "to invest" again "suggest[ed] an active relationship between investor and investment."[84]

144. In light of the above, the tribunal in *SCB v Tanzania* concluded as follows:

> "230. Having considered the ordinary meaning of the BIT's provision for ICSID arbitration when a dispute arises between a Contracting State to the BIT and a national of the other Contracting State concerning an investment '*of*' the latter set out in Article 8(1) of the UK-Tanzania BIT, the context of that provision and the object and purpose of the BIT, the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where the company in turn owns the investment is not sufficient.

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83 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 228.

84 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 229.

231. The Tribunal is not persuaded that an 'investment of' a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.

232. Rather, for an investment to be 'of' an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contracts, or expertise) from one treaty-country to the other."

145. On the facts of *SCB v Tanzania*, the tribunal found that the claimant had not actually contributed actively to the investment in dispute, nor was the claimant able to demonstrate control over the relevant transactions. Accordingly, the claimant in that case failed to establish "an investment in the territory of Tanzania that would justify a finding of jurisdiction by [the *SCB v Tanzania* tribunal]."[85]

146. As the Claimants have highlighted, the interpretation adopted in the *SCB v Tanzania* case has been criticized in subsequent jurisprudence as well as academic writing.[86] For example:

a. In *Garanti Koza LLP v Turkmenistan* ("***Koza v Turkmenistan***"), the tribunal commented that the conclusion in *SCB v Tanzania* appears to have been reached based on "a somewhat strained reading of the words 'of', 'by' and 'made' in the U.K.-Tanzania BIT". The tribunal further held that nothing in the reasoning of *SCB v Tanzania* would lead it to read into the relevant bilateral investment treaty before it a requirement that an investment must have been "actively made".[87]

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85 *Standard Chartered Bank v Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (**Exhibit CL-101**), paragraph 265.

86 Cl. Reply, paragraph 396; Cl. PHB, paragraph 26.

87 *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016 (**Exhibit CL-7**), paragraph 231.

b. Similarly, the reasoning of the tribunal in *SCB v Tanzania* was described as "overly formalistic" by O. G. Repousis.[88]

c. A. Yeo and B. Karanam observed that *SCB v Tanzania* "is a significant departure from other decisions on the protection of indirect investments" and "stands in stark contrast to the rulings by other tribunals which have given a broad interpretation to 'investment'", but that the approach could be explained by the particular facts of *SCB v Tanzania*, where the claimant had not made any contribution to the relevant loans, nor did it own any substantial equity interest in the Hong Kong entity.[89]

d. C. McLachlan observed that "[a]t present the *Standard Chartered Bank* award is the only award in which jurisdiction was denied to indirect investors".[90]

147. The Tribunal also observes that there are a number of other cases where tribunals have decided to distinguish and/or not apply the approach in *SCB v Tanzania* on various grounds. For example:

a. In *Anglo American PLC v Bolivarian Republic of Venezuela*, the tribunal observed that in *SCB v Tanzania*, "the claimant had not actively controlled the assets which formed the investment, it merely held such investment passively through a subsidiary and thus could not have been considered to have invested in the respondent State. … In fact, in the *Standard Chartered Bank v. Tanzania* case, the rejection of its jurisdiction by the tribunal was not due to the indirect nature of the investment but the claimant's lack of investment in Tanzania".[91] The tribunal considered that the reference to *SCB v Tanzania* was not relevant in that case.

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88 O. G. Repousis, "The use of trusts in investment arbitration, Arbitration International", in W. W. Park (ed.), *Arbitration International* (Oxford, 2018), Vol. 34, Issue 2 (**Exhibit CL-104**), page 7.

89 A. Yeo and B. Karanam, "Indirect Investments and their Protection under International Investment Agreements", *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (Permanent Court of Arbitration, 2021) (**Exhibit CL-105**), page 5.

90 C. McLachlan *et al.*, *International Investment Arbitration Substantive Principles* (Oxford, 2017), 2nd Edition (**Exhibit CL-106**), paragraph 6.128.

91 *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 (**Exhibit CL-103**), paragraph 200.

b. In *Flemingo DutyFree Shop Private Limited v The Republic of Poland* ("***Flemingo v Poland***"), the tribunal considered that *SCB v Tanzania* "only decided whether the claimant in [*SCB v Tanzania*] actually made and/or managed the initial investment".[92]

c. Neither of the cases above applied the requirement in *SCB v Tanzania* that an investment must be "actively made".

148. All in all, it appears to the Tribunal that *SCB v Tanzania* is somewhat of an outlier in investment treaty jurisprudence. The Tribunal is minded to agree with the views expressed in *Koza v Turkmenistan* that the *SCB v Tanzania* interpretation rests upon a rather strained reading of the words "of", "by" and "made". It is not immediately apparent on the face of these words, nor their use in the BIT, that a requirement for investments to be "actively made" was intended to be introduced into the BIT. We elaborate below.

149. The starting point must be the ordinary meaning of the terms used in the BIT, read in light of the context, object and purpose of the treaty. It is trite that under Article 31 of the VCLT, a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

150. Here, the plain language of Article 8(1) of the BIT makes it clear that this Tribunal has jurisdiction over "any legal dispute arising between [in this case, Tanzania] and a national or company of [in this case, the United Kingdom] ***concerning an investment of the latter in the territory of the former***. [emphasis added]"

151. Article 1(a) of the BIT further defines "investment" broadly to mean "every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes", among other things, property rights, shares in a company "and

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92 *Flemingo DutyFree Shop Private Limited v The Republic of Poland*, PCA Case No. 2014-11, Award, 12 August 2016 (**Exhibit CL-134**), paragraph 335.

any other form of participation in a company", claims to money or performance under contract having a financial value, intellectual property rights and business concessions conferred by law.

152. Having regard to the plain wording of Article 8(1) read with Article 1(a) of the BIT, it is clear to the Tribunal that the Contracting States intended for a broad definition of investment to apply. The Tribunal finds it difficult to agree with the conclusion reached in *SCB v Tanzania* that the fact that the parties used the preposition "of" in Article 8(1) of the BIT necessarily implies or connotes that some active relationship between the investor and the investment is required. It seems to the Tribunal that such a reading would unduly elevate the significance of this preposition, to introduce a requirement which is nowhere to be found in the plain text of the BIT.

153. Similarly, this Tribunal is unable to agree that such a requirement can be said to arise by virtue of the use of the word "made" in Article 1(a) of the BIT. That an investment has to be "made" does not necessarily imply that an investment has to be "actively made". There is a distinction between the two and this Tribunal would be very reluctant to conclude, without more, that "made" equates with "actively made".

154. Therefore, on the face of Article 8(1) read with Article 1(a) of the BIT, the Tribunal's view is that the ordinary language of the BIT indicates that the term "investment" should be interpreted broadly, without an additional requirement that investments have to be "actively made".

155. The question is whether this broad definition should then be circumscribed by other provisions of the BIT, or the context, object and purpose of the BIT. In *SCB v Tanzania*, the tribunal found that its conclusion that investments must be "actively made" was reinforced by the preamble to the BIT and provisions setting out the desire of the Contracting States to promote investment "by" nationals and companies of the other Contracting State.

156. Again, however, this Tribunal is unable to agree with the reasoning in *SCB v Tanzania*. In this Tribunal's view, the preamble of the BIT, or its context, object and purpose, does

not justify the introduction of an additional requirement that is not apparent from the ordinary language of the BIT. Put another way, as the tribunal stated in *Flemingo v Poland*, "the Preamble cannot contradict the provisions of the Treaty itself."[93]

157. In this case, the expressed desire of Contracting States to promote investment "by" nationals and companies of the other Contracting State does not, in this Tribunal's view, imply any restrictions on the definition of "investment" nor introduce additional requirements for investments to come under the BIT's protection. To imbue the preposition "by" with such significance would, in this Tribunal's view, be beyond what the Contracting States intended when they entered into the BIT.

158. Instead, the Tribunal agrees with the Claimants' submission that "[i]f the U.K. and Tanzania had wished for only 'active' investments to be protected, or conversely for 'passive' investments to be excluded, they would have stated as much within the definition of 'investment' in Article 1" or other provisions of the BIT.[94] But no such provision appears in the entirety of the BIT. In fact, the Respondent itself has acknowledged that "the BIT does not specify any particular relationship between the Claimants and the investment necessary for the Treaty to apply."[95]

159. In the absence of such a provision, this Tribunal would not imply a requirement for investments to be "actively made" based on the use of prepositions in the BIT, nor the context, object and purpose of the BIT. The Tribunal also notes that in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*,[96] which was decided prior to the *SCB v Tanzania* case, that tribunal, interpreting the same UK-Tanzania BIT, did not read into the BIT any requirement that an investment must be "actively made".

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93 *Flemingo v Poland* (**Exhibit CL-134**), paragraph 321.

94 Cl. Reply, paragraph 394.

95 Resp. Rej., paragraph 136.

96 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit CL-9**).

160. Accordingly, this Tribunal would respectfully depart from the *SCB v Tanzania* case and conclude that the BIT does not require an active relationship between the investor and the investment.

b. In any event, whether the Claimants made an "active" investment

161. Nevertheless, for completeness, the Tribunal will consider the position if the *SCB v Tanzania* approach were adopted.

162. The Claimants submit that each of the Claimant entities has made an "active" investment in Tanzania and each Claimant entity's sole *raison d'être* was the Project:[97]

a. NUKL, the first Claimant, was incorporated to be the joint venture company through which the investment in the Project was held by MMH and Indiana.

b. NNHL, the second Claimant, was incorporated to act as the joint venture company for NUKL and Fig Tree.

c. NNL, the third Claimant, was the direct owner of the Project.

163. The Claimants further submit that they made capital contributions and invested in the Project in their own right from June 2015 onwards:

a. Both NNHL and NNL contributed to the total consideration for the transfer of the Project from Ngwena to NNL, as part of the joint venture arrangement with Fig Tree;[98]

b. NNHL incurred expenditures in continuance of the Project's development on NNL's behalf, as evidenced by NNL's annual reports and financial statements;[99]

97 Cl. Reply, paragraph 398.

98 Cl. PHB, paragraph 44.

99 Cl. PHB, paragraph 47.

c. The funds invested by NNHL flowed through NNL, as the direct owner of the Project, and NNL recorded corresponding liabilities to NNHL in its financial statements;[100]

d. All Project expenditures under the joint venture agreement with MMG were attributed to NUKL;[101]

e. As the company through which Indiana continued to hold an interest in the Project, all further expenditures for the Project by Indiana following NUKL's incorporation were incurred through NUKL. NUKL had also subscribed for shares in Ngwena in consideration for USD 47 million, as reflected in the annual reports and financial statements of the relevant companies.[102]

164. Having reviewed the evidence submitted in this arbitration, the Tribunal is satisfied that the Claimants did in fact make capital contributions. The Tribunal dismisses the Respondent's objections to this evidence as follows:

a. The Respondent argues that "the Claimants' contribution of money or assets, duration and risks as stated do not fall within the meaning of investment as the mentioned activities were not incorporated in the Memorandum and Articles of Association of the Company."[103] However, the Respondent has not demonstrated that the BIT requires such activities to be "incorporated in the Memorandum and Articles of Association of the Company" for them to constitute investments. In fact, as the Claimants have submitted, "[t]here is no requirement under the ICSID Convention, international law or the BIT that the elements constituting an investment need to be mentioned in a company's Memorandum and Articles of Association before it may make an investment."[104] In any case, the Claimant entities' Memorandum and Articles of Association permit their investments in

100 Cl. PHB, paragraph 44.
101 Cl. PHB, paragraph 43.
102 Cl. Reply, paragraph 399.
103 Resp. C-Mem., paragraph 346.
104 Cl. Reply, paragraph 406.

Tanzania. The Tribunal therefore does not see any merit in this argument by the Respondent.

b. The Respondent argues that the Claimants do not have "any justification to claim investment prior to 2004".[105] The Tribunal does not consider this to be relevant. As the Tribunal has found, the fact is that the Claimants did make capital contributions in Tanzania, prior to the acts of expropriation complained of.

c. Insofar as the Respondent takes issue with the Claimants' stage of exploration being at an "initial stage which does not qualify to be an investment",[106] the Tribunal does not consider this to be relevant to the question of whether the Claimants had made capital contributions or an investment in Tanzania. The BIT does not require investments to be at any particular stage or to be fully operational before they can come within the scope of protection that the BIT affords. The Tribunal agrees with the Claimants that "exploration for natural resources is a costly enterprise and constitutes an 'investment' under Article 25(1) of the ICSID Convention, as noted by other ICSID tribunals."[107]

d. The Respondent has made unsubstantiated assertions that the consideration NNHL and NNL contributed for the transfer of the Project from Ngwena to NNL "cannot be termed to amount [to an] investment".[108] The Tribunal does not accept this assertion. It is clear that under the BIT, an "investment" means "every kind of asset" and specifically includes, under Article 1(a)(ii) of the BIT, "shares in … a company and any other form of participation in a company".

e. The Respondent disputes the expenditure incurred in relation to the Project and submits that these expenditures were not reported to the Mining Commission. However, the Tribunal does not consider the reporting of expenditure to be a pre-requisite for such expenditure to constitute capital contributions or form part of an

105 Resp. Rej., paragraph142.

106 Resp. Rej., paragraph 139.

107 Cl. Reply, paragraph 408.

108 Resp. Rej., paragraph 139.

investment under the BIT. In any event, as the Claimants point out, "there was no requirement under the Mining Act 2010 for retention licence holders to report expenditure to the Mining Commission".[109]

f. As for the Respondent's assertions that the Claimants have not put forward sufficient evidence, the Tribunal disagrees. The Claimants have presented concrete evidence in the form of bank statements, annual reports, financial statements and other company documents, which the Respondent has largely ignored in its submissions. The Tribunal also notes that the Respondent's own witness, Mr Mwangakala, in his witness statement concluded that the Claimants and their affiliates had incurred exploration costs of USD 17.6 million on the Project.[110] Such exploration costs would constitute capital contributions.

g. The Respondent also argues that the Claimants were no longer the holders of the NH Retention Licence in 2019 and could not have derived revenue from the Project. In the Tribunal's view, this allegation is self-serving and irrelevant. That the Respondent had cancelled the NH Retention Licence and reverted the rights thereunder to the Government does not make a difference to the Tribunal's assessment of the capital contributions made by the Claimants and its investment in the Project, before the Respondent engaged in the conduct that is the subject of the present arbitration.

h. The Respondent submits that the Invitation to Tender "was not made with the intention of taking the Claimants' investment as alleged."[111] This is, again, irrelevant to the question of whether the Claimants made an investment in Tanzania.

165. Accordingly, even if the *SCB v Tanzania* approach were adopted and there were a requirement for investments to be "actively made", the Tribunal would find that such a

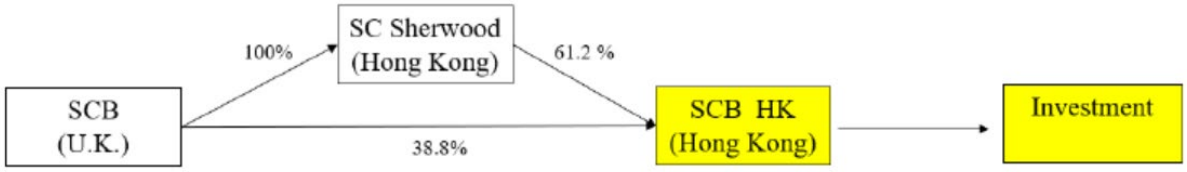
109 Cl. Reply, paragraph 408(d).

110 WS Andrew Abraham Mwangakala, pages 13-15.

111 Resp. C-Mem., paragraph 353.

requirement is satisfied in this case. There is ample evidence to show that the Claimants had made capital contributions and their investment was an "active" one.

166. The Tribunal also agrees with the Claimants' submission that the present case is on a very different factual footing from *SCB v Tanzania*. In *SCB v Tanzania*, the claimant entity was detached from the underlying investment, as shown in the corporate structure chart below:[112]

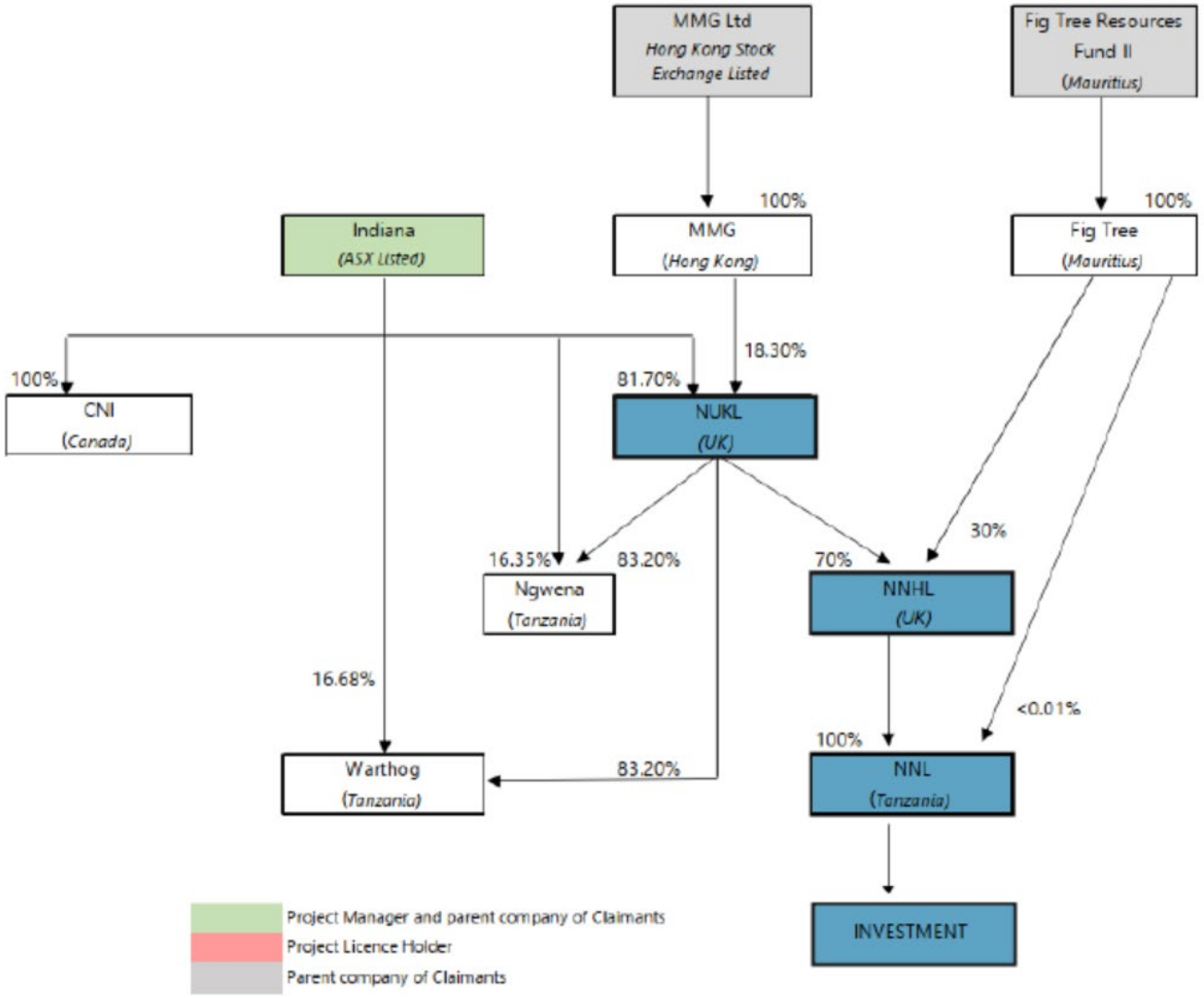


167. In the chart shown above, the claimant, SCB (U.K.), could have been removed from the diagram and it would have made no material difference to the investment.

168. On the other hand, this case deals with a very different situation. Each of the Claimant entities formed an important part of the corporate ownership structure of the Project, as shown in the corporate structure chart below: [113]

112 Claimants' opening submission (**Exhibit CD-1**), page 35.

113 Claimants' opening submission (**Exhibit CD-1**), page 38.



169. All three of the Claimant entities had a role to play in controlling the investment and contributing to it. Insofar as any requirement of "active" investment applies, it would be satisfied in this case.

170. For completeness, the Tribunal notes that the Parties have made some submissions on whether the Claimants' investment satisfies the criteria of: (i) contribution of money or assets, (ii) duration, (iii) risk, and (iv) contribution to the economic development of the host State, although both Parties also appear to agree that it is not necessary to apply such criteria in this case. The Tribunal is likewise of the view that it is not necessary to

apply these criteria in this case. However, even if these criteria were to apply, the Tribunal is satisfied that the criteria would be satisfied in this case:

a. On contribution of money or assets, as explained above, the Tribunal is satisfied that the Claimants made capital contributions in this case.

b. On risk and duration, the Tribunal is satisfied that the Claimants had invested in the Project from at least 2015 onwards, without deriving any revenue from it.

c. On contribution to the economic development of the host State, the Tribunal is satisfied that the Project satisfies this criterion. The Claimants and their affiliates discovered and defined a commercially significant nickel sulphide deposit, over which Tanzania agreed to grant the NH Retention Licence. The purpose of the Project was to develop a mineral asset to a producing mine. The Tribunal also notes that the Claimants and their affiliates' development of the Project contributed to the economic development of local communities and surrounding areas by, among other things, employment and training opportunities as well as local infrastructure.

171. For the above reasons, the Tribunal is satisfied that all three of the Claimants have made an "investment" within the meaning of the BIT and the ICSID Convention, and that the present claims arise out of that investment.

D. WHETHER THE PROPER FORUM IS THE TANZANIAN COURTS

(1) Parties' Positions

172. The Respondent submits that the dispute in this case arises out of amendments made to Tanzania's legislation, which are "in line with the requirement of the International Law which recognises the right of the United Republic of Tanzania to assert Permanent Sovereignty right for the purpose of exploring, exploiting and managing its own natural resources."[114] The Respondent argues that as a sovereign state, it "has its own laid down procedures for the enactment of the laws".[115] The Respondent further contends that

114 Resp. C-Mem., paragraph 341.

115 Resp. C-Mem., paragraph 341.

Tanzania's constitution offers a procedure for challenging the validity of a statute before the Tanzanian High Court and that the Claimants should have availed themselves of this procedure.[116]

173. With regard to Article 8(3) of the BIT, which permits a party to institute arbitration proceedings if agreement cannot be reached amicably between the parties to the dispute within 6 months, the Respondent submits that it had responded to the Claimants' Notice of Dispute dated 14 January 2020 by way of letter on 15 June 2020 to express its readiness to hold consultations with the Claimants. However, the Claimants "did not show willingness to resolve the dispute amicably."[117]

174. On the other hand, the Claimants submit that there is no requirement under the BIT to exhaust local remedies before commencing arbitration under Article 8(1) of the BIT.[118] The BIT provides investors like the Claimants a neutral forum to challenge Tanzania's measures, without being subjected to years of litigation in Tanzanian courts.

175. Further, the present claims do not concern the validity of the Amending Legislation under the Tanzanian constitution, but Tanzania's international obligations under the BIT.[119] The proper forum for such claims is arbitration under the BIT.

176. The Claimants also note that there is no dispute between the Parties that the Claimants did not receive a response to their Notice of Dispute within the six-month period prescribed by Article 8(3) of the BIT.[120] Accordingly, the Claimants were entitled to initiate this arbitration.

(2) The Tribunal's Analysis

177. The Tribunal accepts the Claimants' submissions.

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116 Resp. C-Mem., paragraphs 113-114.

117 Resp. C-Mem., paragraph 356.

118 Cl. Reply, paragraph 416.

119 Cl. Reply, paragraph 418.

120 Cl. Reply, paragraphs 372, 416.

178. The claims in this arbitration do not concern the validity of the Amending Legislation under Tanzanian law, but the question of whether the Respondent breached its obligations under the BIT. What the Tribunal is presented with are questions of international law, rather than domestic Tanzanian law, and this arbitration is the proper forum to determine these questions.

179. The Respondent's argument that it is at liberty to enact laws as a sovereign state is, of course, true, but it does not change the Tribunal's conclusion. The fact is that the Respondent has international obligations which it accepted under the BIT, including obligations to protect the investments of UK nationals or companies and to submit to arbitration pursuant to the BIT and the ICSID Convention should it breach the BIT. As Article 27 of the VCLT provides, a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." That Tanzania was entitled to enact its own laws as a sovereign state does not change its obligations under the BIT.

180. The Tribunal also notes that there is no requirement to exhaust local remedies under the BIT. Instead, Article 8(3) of the BIT provides that a party may initiate arbitration proceedings under the BIT "[i]f any such dispute should arise and agreement cannot be reached within six months between the parties to the dispute through pursuit of local remedies or otherwise". Article 8(3) of the BIT states:

> "If any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to [ICSID], either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. …"

181. In this case, both Parties agree that the Claimants issued a Notice of Dispute to Tanzania on 14 January 2020. The Respondent says that it responded by way of a letter dated 15 June 2020,[121] but it does not dispute that the Claimants only received delivery of that

[121] Resp. C-Mem., paragraph 356.

letter on 30 July 2020,[122] which falls outside the six-month period prescribed by Article 8(3) of the BIT. The Respondent has not contended or shown that any communications were made to the Claimants within the six-month period from 14 January 2020, much less that any agreement was reached within this six-month period.

182. Accordingly, the Tribunal finds that the requirements of Article 8(3) of the BIT are satisfied and that the Claimants were entitled to institute the present arbitration proceedings.

E. CONCLUSION ON JURISDICTION

183. For the reasons set out above, there is no doubt that the Tribunal has jurisdiction to hear the Claimants' claims in this arbitration. The Respondent's jurisdictional objections are dismissed.

VI. LIABILITY

184. Having established that it has jurisdiction to hear this matter, the Tribunal turns now to consider the merits of the claims in this arbitration.

185. As a preliminary point, the Tribunal notes that the Claimants have made submissions on the credibility of the Respondent's witnesses as well as adverse inferences they wish the Tribunal to draw arising from the Respondent's alleged failure to provide discovery of documents. The Tribunal will address these issues, as and where relevant, when setting out its findings below.

186. The Claimants' case is that Tanzania breached its obligations under the BIT in three principal ways:

a. Tanzania unlawfully expropriated the Claimants' investment in breach of Article 5 of the BIT;

[122] Resp. C-Mem., paragraph 356; Letter from Lalive to the Attorney General of the United Republic of Tanzania, 1 August 2020 (**Exhibit R-031**).

b. Tanzania failed to accord the Claimants and their investment fair and equitable treatment in breach of Article 2(2) of the BIT; and

c. Tanzania impaired the Claimants' investment by unreasonable and discriminatory measures in breach of Article 2(2) of the BIT.

187. As will be explained below, the Tribunal is of the view that there has been unlawful expropriation of the Claimants' investment in breach of Article 5 of the BIT. Having found that, the Tribunal does not find it necessary to decide whether there has been a breach of the obligations to accord fair and equitable treatment, nor the obligation not to impair investment by unreasonable and discriminatory means, under Article 2(2) of the BIT. The finding that there has been expropriation is sufficient to entitle the Claimants to full relief, as explained in the section on "Damages" below.

188. With that backdrop in mind, the Tribunal will focus, in this section, on the Parties' arguments on expropriation.

A. OVERVIEW

189. Under Article 5 of the BIT, investments of nationals or companies of either Contracting State shall not be expropriated or subjected to measures having the effect equivalent to expropriation, except for a public purpose related to the internal needs of that Contracting State on a non-discriminatory basis and against prompt, adequate and effective compensation. Article 5(1) of the BIT provides:

> "Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment,

shall be made without delay, be effectively realizable and freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph."

190. The Parties are in agreement on the test for expropriation under Article 5 of the BIT. In particular, the Parties agree that for there to be an expropriation, the following requirements must be met: (a) a substantial deprivation, (b) of a permanent nature, (c) without justification under the police powers doctrine. Additionally, the expropriation must be unlawful for it to be in breach of the BIT (see paragraph 252 below).[123]

191. The Tribunal will address each of these elements of expropriation below.

B. WHETHER THERE WAS EXPROPRIATION

(1) Substantial deprivation

a. Parties' Positions

192. The Claimants submit that Tanzania substantially deprived the Claimants of their investment "through a series of measures, namely repealing the legal basis of the retention licence, cancelling their retention licence, reverting the licence areas to the State, and ultimately placing the areas covered by the Claimants' licence out to public tender."[124] In support of their submission, the Claimants cite investment arbitration cases where tribunals have found that the cancellation, annulment or reversion of mining concessions or licences previously granted by the State to an investor or its local subsidiary constitute a substantial deprivation of an investment.[125]

123 Cl. Mem., paragraphs 274-275, 281.

124 Cl. Reply, paragraph 428.

125 Cl. Mem., paragraph 277.

193. On the other hand, the Respondent argues that there was no "substantial deprivation" for two main reasons:[126]

a. the Claimants "still possess all the geological data" relating to the Project; and

b. the Respondent offered the Claimants the opportunity to apply for a special mining licence or a mining licence in the area in January 2021.

194. In response, the Claimants submit that:

a. the geological data which the Claimants retain has been rendered "entirely valueless for the Claimants" as they have lost their title to the Project area. In any event, any potential residual value of such data was destroyed when illegal miners took over the NH Retention Licence area; and

b. special mining licences or mining licences do not provide the same rights and obligations as a retention licence, and cannot be said to serve as a substitute title for the Claimants' NH Retention Licence. Further, there was no guarantee that Tanzania would grant the Claimants a special mining licence or a mining licence. In fact, the Claimants did not meet the requirements to receive such a licence and considered their chances of obtaining such a licence to be remote at that time.

b. The Tribunal's Analysis

195. The question of whether there is substantial deprivation of an investment under international law turns on whether the enjoyment of the investment "has been effectively neutralized",[127] or whether there has been a substantial deprivation of "the use of reasonably expected economic benefit of the investment."[128] For substantial deprivation to be found, "there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering

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126 Resp. C-Mem., paragraphs 360-361.

127 *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016 (**Exhibit CL-12**) at paragraph 6.59, citing *CMS Gas Transmission Co v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**Exhibit CL-31**), at paragraph 262.

128 *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004 (**Exhibit CL-41**), paragraph 89.

in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part."[129]

196. Investment treaty jurisprudence also makes clear that the cancellation of mining concessions or licences can constitute a substantial deprivation of an investment. For example, in *Quiborax and Non Metallic Minerals v Plurinational State of Bolivia* ("***Quiborax v Bolivia***"),[130] the tribunal found that a decree issued by Bolivia's President which revoked the claimant's mining concessions and transferred the title of these mining concessions to Bolivia amounted to a direct expropriation. The tribunal held at paragraphs 229 to 231 as follows:

> "229. Here, it is undisputed that the Revocation Decree had the effect of transferring the title of NMM's mining concessions to the State. The Decree clearly orders ('*dispone*') the revocation of the constitutive resolutions of NMM's mining concessions, as well as their loss ('*perdida*'), directing NMM to physically hand over the concessions to the Prefecture of the Potosi Region within thirty days.
>
> 230. In compliance with this clear order, issued by the President of Bolivia himself, it is undisputed that NMM returned its concessions to Bolivia on 23 July 2004. In the Tribunal's view, this amounts to a deprivation of NMM's investments in Bolivia.
>
> 231. The fact that NMM exported ulexite that had previously been extracted until 23 September 2004 does not change this conclusion. What gave value to the investment were the concessions; without them, the investment was lost in its entirety. The fact that some product of the investment was still sold may reduce the damage, but cannot undo the economic deprivation of the investment".

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129 *Stati v Republic of Kazakhstan,* SCC Case No. V (116/2010), Award, 19 December 2013 (**Exhibit CL-89**), at paragraphs 1112-1113.

130 *Quiborax and Non Metallic Minerals v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**Exhibit CL-13**).

197. Similarly, in *Burlington Resources v Republic of Ecuador* ("***Burlington v Ecuador***"), the tribunal found that Ecuador's entry into oil fields where the claimant was operating constituted expropriation. The tribunal held at paragraphs 530 to 531:[131]

> "530. As a purely factual matter, Ecuador's entry into and occupation of Blocks 7 and 21 dispossessed Burlington of the oil fields. Such dispossession deprived Burlington not only of its oil production share – and thus of its revenues – but also of the means of production that made those revenues possible. In a nutshell, the occupation of the Blocks deprived Burlington of all the tangible property embodying its investment in Ecuador. While Burlington still had its subsidiary's rights in the [production sharing contracts] as well as the subsidiary's shares, these rights and shares had no value without possession of the oil fields and access to the oil.
>
> 531. Therefore, once Ecuador entered the oil fields, Burlington could no longer be deemed to exercise 'effective use and control' over its investment. …

198. The Tribunal finds these cases to be instructive. The Tribunal notes that the Respondent has sought to distinguish the case of *Burlington v Ecuador* on the basis that the stage of the Project here is less advanced than that in *Burlington v Ecuador*.[132] The Tribunal does not find this distinction to be convincing. What is pertinent is the taking of the investment, rather than the stage of development of the underlying investment.

199. In this case, the publication of the 2018 Regulations, similar to the Revocation Decree in *Quiborax v Bolivia*, made it clear that the NH Retention Licence no longer existed and the underlying licence areas had been reverted to the State. While the 2017 Amending Legislation, which repealed the legislative basis of retention licences under the Mining Act 2010, had created uncertainty, the 2018 Regulations confirmed the deprivation of the Claimants' mining rights. Once the NH Retention Licence was cancelled and the underlying areas reverted to the State, the Claimants could no longer

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131 *Burlington Resources v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (**Exhibit CL-14**).

132 Resp. C-Mem., paragraph 364.

be said to exercise effective use and control over their investment. In the Tribunal's view, this amounts to a substantial deprivation of the Claimants' investment in Tanzania.

200. The Tribunal turns now to address the Respondent's arguments that there was no substantial deprivation because: (a) the Claimants still hold geological data in relation to the Project; and (b) Tanzania offered the Claimants an opportunity to apply for a special or mining licence in the area. The Tribunal dismisses these arguments for the reasons below.

201. First, the drill core and the geological data held by the Claimants are specific to the Project's geography and geology. Not unlike the extracted ulexite in *Quiborax v Bolivia*, or the claimant's subsidiary's rights and shares in *Burlington v Ecuador*, what gave value to this geological data was the title to the Project area which the Claimants held under the NH Retention Licence. Without the licence, this data was of no value to the Claimants. As the Claimants have submitted, "the whole point of the exploration programme was to build the knowledge represented by the core and the geological data, once the ability to use that knowledge was made impossible by the State, the years of exploration and their related work product no longer held any value whatsoever for the Claimants".[133] The Tribunal accepts this submission and finds that the drill core and the geological data was bereft of any real value to the Claimants from the moment that the Claimants lost effective use and control of their investment.

202. Second, the Tribunal recognises that the Respondent has submitted that there was no substantial deprivation "since the Government offered the Claimants the opportunity to apply for a Special or Mining Licence and to proceed with their investment."[134] This offer was made on 17 February 2021, after this arbitration had begun. There are a few problems with this argument.

133 Cl. Reply, paragraph 431.

134 Resp. C-Mem., paragraph 361.

203. To begin, what was offered was not an actual mining licence, but an invitation to apply for a new licence. But the Respondent itself recognises that "the acquiring of the Mining Licence is not an automatic right, the Claimants have to comply with the requirements of the Mining Act, 2010."[135] There was no guarantee that Tanzania would have granted the Claimants a special mining licence or a mining licence if the Claimants had so applied.[136] In fact, the Claimants' Ms Bronwyn Barnes has explained that the Claimants did not meet the requirements to receive such a licence at the material time.[137]

204. Further, the Tribunal notes that the Claimants had sought authorisation to apply for a special mining licence in February 2018, shortly after the cancellation of the NH Retention Licence under the 2018 Regulations. This request was rejected by the Respondent.[138] In these circumstances, the Claimants had ample reason to take the view, which they did, that their chances of obtaining an alternative licence pursuant to the February 2021 invitation were remote.[139]

205. In any event, the February 2021 invitation for the Claimants to apply for an alternative licence cannot be said to undo the deprivation of the Claimants' investment. The Claimants have provided evidence that they were not able to obtain financing after 2017. By the time the invitation was made, there was no reasonable prospect that the Claimants could return to control its investment. Further, the rights and obligations under a special or mining licence are different from those under a retention licence, and the former type of licence would not provide the Claimants with the same rights as those they lost when the NH Retention Licence was cancelled.

206. Ultimately, as the Claimants put it, the February 2021 invitation "was, at most, a belated alternative offer which did not put the Claimants back in the situation in which they were prior [to] the cancellation of their retention licence."[140]

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135 Resp. C-Mem., paragraph 362.

136 Cl. Reply, paragraph 436.

137 Second WS Bronwyn Barnes, paragraph 39.

138 Cl. Reply, paragraph 437.

139 Cl. Reply, paragraph 436.

140 Cl. Reply, paragraph 437.

207. For the reasons discussed above, the Tribunal finds that there was a substantial deprivation of the Claimants' investment by 10 January 2018, when the 2018 Regulations were published.

(2) Of a permanent nature

a. Parties' Positions

208. The Claimants submit that the cancellation of the NH Retention Licence was permanent and irreversible, as it could not be (and was not) re-established. The Claimants submit that the offer of the NH Retention Licence area out to public tender by way of the 19 December 2019 Invitation to Tender "made [the] deprivation of the Claimants' investment permanent and irreversible"[141] and "complet[ed] the taking of the Claimants' investment."[142]

209. On the other hand, the Respondent asserts that the deprivation was not permanent because the public tender process was not actually concluded and the areas held under the NH Retention Licence "are still vacant to date and have not been transferred to any other investor".[143]

210. The Claimants' response to this assertion is that it is irrelevant, as the Claimants' NH Retention Licence was cancelled and with it the Claimants' rights over the Project area. The Claimants submit that expropriations can occur even when an investor retains its legal title (which is not the case here), if the investment is impaired through a "substantial deprivation of the investor's essential property rights" or the investment is "totally or significantly deprived of its value."[144]

211. As for the public tender process not being finalised, the Claimants argue that:

a. The tender process was not unfinished but "postponed" by Tanzania in August 2020, without any explanation for the postponement. The Claimants submit that the

141 Cl. Mem., paragraph 278 (emphasis in original).

142 Cl. Mem., paragraph 278.

143 Resp. C-Mem., paragraph 366.

144 Cl. Reply, paragraph 442.

Respondent's decision to "postpone" the tender process was motivated by, among other things, its knowledge that its actions had breached various international agreements, including the BIT;

b. The Revised Invitation to Tender did not include a requirement that a successful bidder compensate the previous holder for its exploration work, so the finalisation of the tender process is irrelevant to the expropriation of the Claimants' investment;

c. Since the process was only postponed, it can be resumed at any time;

d. In any event, what matters is not whether the tender process has been finalised or postponed, but that the tender process was initiated in the first place. The tender process "den[ied] once and for all any rights the Claimants may have had over the NH Retention Licence area, which Tanzania had recognised until then."

212. Additionally, the Claimants say they carried out a site visit on 11 May 2022 where they observed that the Project site had been completely taken over by illegal miners and therefore cannot be said to be "vacant". In this regard, the Claimants have submitted various photos in support of their assertion, including satellite images of the Project site dated May 2020 and May 2022 (the "**Satellite Images**"),[145] as well as photos of the Ntaka Hill site taken by the Claimants' representatives dated 11 May 2022 (the "**Photos**").[146] The Photos were shown as slides 162 and 163 of the Claimants' presentation for their Opening Statement during the Hearing. The Claimants' Ms Bronwyn Barnes' evidence was that she took the Photos using her mobile phone camera during a site visit at Ntaka Hill.[147]

213. The Respondent denies the existence of these mining operations. During the Hearing, the Respondent initially appeared to raise objections about the Claimants' presentation of the Photos, saying that they were taken in the course of without prejudice discussions and the Respondent found it "very inappropriate … for these pictures to be displayed

145 Satellite Images of the Ntaka Hill Project Site, May 2020 and May 2022 (**Exhibit C-260**).

146 Illegal Mining at Ntaka Hill, Photo No. 4 at J-Zone, 11 May 2022 (**Exhibit C-265)**; Illegal Mining at Ntaka Hill, Photo No. 5 at J-Zone, 11 May 2022 (**Exhibit C-266**).

147 Tr. Day 2, page 385:17 to page 387:2.

and to be part of the arbitration proceedings while the Parties had an agreement that none of these issues will be used in the forthcomings [sic] proceedings."[148]

214. In answer to further questions from the Tribunal though, it became apparent that what the Respondent wanted was "to be able to comment on … the characterization of [the Photos]" and "certain facts that may have become apparent to various Parties during a without-prejudice site visit".[149] As explained at paragraph 46.c above, the Tribunal invited the Respondent to set out its final position on the Photos in its post-hearing brief.

215. The Respondent also clarified during the Hearing that its objections relate to the Photos only, and not the Satellite Images.[150]

216. In its post-hearing brief, the Respondent "strongly disputed" the relevance, reliability and admissibility of the Photos on the basis that:

a. it could not be confirmed that the Photos were of the Ntaka Hill site due to a "lack of corroborative evidence that links the photographs and the actual situation in the site", such as additional evidence from any officer from the site;[151]

b. Ms Barnes could not tender the alleged mobile phone which was used to take the Photos, or explain how and who "processed" the Photos from her mobile phone. This rendered the Photos unreliable under sections 18(2) and 18(3) of the Electronic Transaction Act (Cap. 442 of 2015), which governs electronic evidence in Tanzania;[152] and

c. the Photos were taken when without prejudice negotiations were ongoing between the Parties, and should therefore be inadmissible in these proceedings.[153]

148 Tr. Day 1, page 124:18-22.

149 Tr. Day 1, page 141:1-15, page 142:7 to page 143:20.

150 Tr. Day 1, page 139:22 to page 140:6.

151 Resp. PHB, paragraph 83.

152 Resp. PHB, paragraph 73.

153 Resp. PHB, paragraphs 74-83.

b. The Tribunal's Analysis

217. The Tribunal is of the view that deprivation of a permanent nature took place in this case on 10 January 2018, when the 2018 Regulations were published. As at 10 January 2018, the Claimants' NH Retention Licence had been cancelled and the underlying areas reverted to the State. The Tribunal finds that as of this date, the Claimants had been permanently deprived of their right to participate in the control and management of the Project.

218. The Tribunal's conclusion in this regard is supported by investment treaty jurisprudence. For example, in *Quiborax v Bolivia*, the tribunal found that permanent deprivation took place on the date when the legal and economic use of mining concessions granted to the claimant was definitively lost. The tribunal held at paragraphs 233 and 234:

> "233. Finally, the Tribunal must determine if the deprivation had permanent effects. It is undisputed that, after NMM returned the concessions to Bolivia on 23 July 2004, it never again exploited those concessions. Indeed, subsequent acts by Bolivia confirmed that deprivation. On 28 October 2004, the concessions that had already been 'revoked' were also 'annulled.' Decree 28,527, which revoked the revocation about a year and a half thereafter in December 2005, did not undo the deprivation. To the contrary, Decree 28,527 expressly recognized that the concessions were annulled and the writs of annulment were definitive.
>
> 234. Hence, the date on which NMM was deprived of the economic benefits of its concessions was 23 July 2004. In the Tribunal's view, this is the date of the expropriation, as this was the date on which due to the governmental interference the legal and economic use of the concessions was definitively lost."

219. Similarly, in this case, it is not disputed that after the NH Retention Licence was cancelled by the 2018 Regulations on 10 January 2018, the Claimants were never granted another licence over the Project area and were never able to proceed with the Project. In this regard, the Tribunal sees the Invitation to Tender of 19 December 2019 as confirmatory evidence of a permanent deprivation which had taken place by 10

January 2018. The date on which the Claimants definitively lost their legal and economic use of the NH Retention Licence, and their ability to proceed with the Project, remains 10 January 2018.

220. As another example, in *Sedco, Inc v National Iranian Oil Company and the Islamic Republic of Iran*,the tribunal found that the date of expropriation was the date on which government measures resulted in a situation where there was no reasonable prospect of return of control to the claimants.[154]

221. Similarly, in this case, the 2018 Regulations did not contain any provisions on recourse for former retention licence holders. Instead, the 2018 Regulations made it clear that retention licences had been cancelled and underlying areas reverted to the State, with no provisions on any alternative title or mining rights being granted to former retention licence holders. While the 2017 Amending Legislation created uncertainty, the 2018 Regulations made the situation clear beyond a doubt. As the Claimants' witness, Mr Mathew Perrot, testified, "the Retention Licenses were cancelled in that 2017 legislation, but it wasn't clear and nobody really understood that … these Retention Licenses had been clearly revoked by the Government of Tanzania until 2018 when it was very short and sharp and said, 'That's it. It's ours now.'"[155]

222. Accordingly, the Tribunal finds that by the publication of the 2018 Regulations on 10 January 2018, the Claimants were permanently deprived of their investment in Tanzania.

223. The Tribunal is fortified in its conclusion by the Respondent's own submissions on the appropriate date for valuation. In particular, the Respondent has submitted that if the Tribunal finds that there was an expropriation of the Claimants' investment, the appropriate date for valuation is 10 January 2018, which is when the 2018 Regulations came into force. The Respondent submits that "the 2018 Regulations is the one that

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154 *Sedco, Inc v National Iranian Oil Company and the Islamic Republic of Iran*, Iran-US Claims Tribunal Cases Nos. 128 and 129, Interlocutory Award, 28 October 1985, referred to in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit CL-9**), paragraph 509(a).

155 Tr. Day 3, page 652:14-20.

reverted the area initially owned under the Retention Licence to the Government and not 19 December 2019 as wrongly determined by the Claimants (*i.e.* a day the Mining Commission issued the Invitation to Tender)."[156]

224. Further, the Respondent has also submitted that the NH Retention Licence "was cancelled through the [Amending Legislation] which repealed Sections 37 and 38 of the Mining Act, 2010 which provided for the grant of Retention Licences and the [2018 Regulations], whereby Regulation 21 cancelled all the Retention Licences and reverted all the rights over the areas to the Government of the United Republic of Tanzania ***hence there was no[t] any possibility of confirmation to the effect that the title over NH Retention Licence would be maintained*** (emphasis added)".[157]

225. For these reasons, the Tribunal considers that deprivation of a permanent nature had taken place on 10 January 2018. The date of expropriation will have implications for damages, as explained further in the section on "Damages" below.

226. In this context, nothing turns on the Parties' submissions on the Invitation to Tender issued in December 2019, as well as the presence of illegal mining operations at the Project site in May 2022. However, for completeness, the Tribunal briefly sets out its views on these issues below.

227. First, with regard to the tender process remaining unfinalized or "postponed", the Tribunal agrees with the Claimants that this fact is irrelevant. The question is whether the initiation of the tender process was a measure which amounted to expropriation. The actual outcome of the tender process is not relevant to this determination. Likewise, the Respondent's alleged motivations for postponing the tender process are not relevant.

228. Second, insofar as the presence of illegal mining operations is concerned, the Tribunal notes that the Respondent denies the Claimants' allegations and "states that there is no[t] any [proof] that the Respondent allowed illegal miners to invade the project at any material time", that the evidence submitted by the Claimants is "very [flimsy] and

156 Resp. C-Mem., paragraph 474; Resp. Rej., paragraph 230.

157 Resp. C-Mem., paragraph 288.

misleading" and that "the Claimants have failed to establish the authenticity of the facts and photos alleged to have [been] obtained at Ntaka Hill in May, 2022."[158]

229. However, while the Respondent disputes the Claimants' assertions, the Respondent has not put forward any positive evidence of its own to show what the status of the Project site is. Nor has the Respondent properly substantiated its basis for discrediting the Claimants' witness testimony on the presence of illegal mining operations at the Project site. To the contrary, the Tribunal finds the testimony given by the Claimants' witnesses on the presence of illegal mining operations at the Project site to be reliable and credible.

230. Insofar as the Respondent takes issue with the Photos, which the Tribunal is given to understand were taken during a site visit while without-prejudice discussions were ongoing between the Parties, the Tribunal does not see how this context affects the veracity or authenticity of the Photos. Sections 18(2) and 18(3) of the Electronic Transaction Act (Cap. 442 of 2015) are also inapplicable to this proceeding.

231. In the Tribunal's view, the Respondent has not put forward any credible evidence to challenge the veracity or authenticity of the Photos, nor the Claimants' testimony that there were illegal mining operations at the Project site. In fact, while the Respondent has taken issue with the Photos, the Respondent has not taken any issue with the Satellite Images, which similarly reflect the mining operations at the Project site. The Tribunal finds that the Photos and the Satellite Images are credible.

232. In fact, the Respondent's own witness, Professor Mruma, testified that there are small-scale miners carrying out small-scale operations at the Project site, without a licence from the Government.[159]

233. Accordingly, the Tribunal accepts that the Project site is no longer vacant and that illegal mining operations are taking place at the Project site. That said, the Tribunal does not

158 Resp. Rej., paragraphs 117-118.

159 Tr. Day 3, page 856:4 to page 857:1, page 873:7-21; Cl. PHB, paragraphs 100-101.

find it necessary, and does not make any findings, in relation to the Respondent's alleged involvement in such mining operations at the Project site at this juncture.

234. For the avoidance of doubt, the Tribunal also does not accept that without-prejudice privilege applies to the Photos. The fact that the Photos were taken during site visits which were made as part of the without-prejudice discussions does not cloak the Photos with a without-prejudice privilege. The Photos are not evidence of what was actually discussed between the Parties on a without-prejudice basis. The Photos are evidence of the state of the Project site, which is an independent fact. The broader context or the fact that without-prejudice discussions were afoot at the time the Photos were taken does not change that.

(3) Without justification under the police powers doctrine

a. Parties' Positions

235. The Respondent has argued that the measures it took were justified under the police powers doctrine. According to the Respondent, it has "inherent powers to invoke police powers to regulate the mining sector in the United Republic of Tanzania" and the police powers doctrine is "a fundamental principle of customary international law and supersedes Article 5 of BIT".[160]

236. Further, the Respondent argues that there were various justifications for the cancellation of the NH Retention Licence. According to the Respondent:

a. "[T]he cancellation of the Claimants' Retention Licence was intended to improve the modality of managing the mining industry operations."[161]

b. "The Claimants obtained the Retention Licences as required by the law as the mine was not economically viable due to the drop in nickel prices, but then the Claimants used the Retention Licence to acquire funds which were not used to invest in Tanzania. The Claimants have failed to prove that the alleged funds acquired at the

[160] Resp. C-Mem., paragraph 384.

[161] Resp. C-Mem., paragraph 367.

time they were holding the Retention Licence in question, were actually injected in the alleged investments made in Tanzania."[162]

c. "[T]he Government decided to exercise its police powers in regulating the mining sector by cancelling Retention Licences for public interest so as to allow those potential mines [held under Retention Licences] to operate and generate revenues to the country."[163]

237. The Claimants submit that the Respondent cannot rely on the police powers doctrine to justify its expropriation of the Claimants' investment. The Claimants say that the Respondent's submissions on the police powers doctrine appears to result from a misunderstanding by the Respondent of what the police powers doctrine is.[164] In fact, as summarised in the case of *Magyar Farming v Hungary* ("***Magyar v Hungary***"),[165] at paragraph 366, there are only two broad justifications under the police powers doctrine:

> "This being so, a review of investment awards shows that measures annulling rights of the investor – as in the present case – can be exempt from the otherwise applicable duty of compensation only in a narrow set of circumstances. These circumstances can be categorized in two broad groups:
>
> - First, the exemption from compensation may apply to generally accepted measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings, such as criminal, tax and administrative sanctions, or revocation of licenses and concessions. …
>
> - The second group consists of regulatory measures aimed at abating threats that the investor's activities may pose to public health, the environment or public order. This line of case law relates to measures such as the prohibition of harmful substances, tobacco plain packaging, or the

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162 Resp. C-Mem., paragraph -368.

163 Resp. C-Mem., paragraph 385.

164 Cl. Reply, paragraph 448.

165 Cl. Reply, paragraph 449; *Magyar Farming v Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (**Exhibit CL-113)**.

imposition of emergency measures in times of political or economic crises. …"

238. The Claimants submit that neither of these justifications are applicable in the present case.

b. The Tribunal's Analysis

239. The Tribunal accepts the legal principles on the police powers doctrine as summarised in *Magyar v Hungary* above. Applying these legal principles, the Tribunal finds that none of the reasons put forward by the Respondent would bring it within the "narrow set of circumstances" described in *Magyar v Hungary*.

240. As a preliminary point, the Tribunal also accepts the Claimants' submission that when a state asserts that it had adopted measures for a certain purpose, there must be contemporaneous evidence to show that the measures were in fact adopted for this purpose.[166] This is consistent with the analysis of other investment arbitration tribunals, such as in the case of *S.A.S. v Bolivia*.[167] The Tribunal also notes that the Respondent has not disputed the need for such contemporaneous evidence to be presented.

241. The Tribunal now turns to address each of the Respondent's purported justifications for the cancellation of the NH Retention Licence.

242. First, with regard to the Respondent's argument that the cancellation of the NH Retention Licence "was intended to improve the modality of managing the mining industry operations", the Respondent has not submitted any evidence to show how or why the cancellation would have this effect. Moreover, the Tribunal notes the ambiguity of the offered justification — "to improve the modality of managing" – and the lack of any explanation as to how that factor could outweigh the detriment to Claimants of being deprived of their mining rights. Further, the Respondent has not submitted any evidence

166 Cl. Reply, paragraph 451.

167 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 7 November 2018 (**Exhibit CL-17**).

to show that this purported justification was actually considered or envisaged by the Government when it cancelled retention licences.

243. In any event, the alleged objective of improving the modality of managing mining industry operations does not, in the Tribunal's view, fall within either of the justifications set out in *Magyar v Hungary*. This objective neither relates to enforcing existing regulations against an investor's own wrongdoings, nor to abating threats posed by the investor's activities to public health, the environment or public order. The Tribunal therefore dismisses this argument.

244. Next, the Respondent alleges that "the Claimants used the Retention Licence to acquire funds which were not used to invest in Tanzania" and that "[t]he Claimants have failed to prove that the alleged funds acquired at the time they were holding the Retention Licence in question, were actually injected in the alleged investments made in Tanzania."[168]

245. However, this allegation is, again, unsupported by any evidence. On the other hand, the Claimants have produced ample evidence showing that all of the funds raised for the Project were spent on the Project through Ngwena. Again, the Respondent's argument is dismissed.

246. Third, the Respondent also argues that the cancellation of retention licences was in the "public interest" as it would allow the potential mines held under the retention licences to operate and generate revenues for the country.[169]

247. However, this allegation is also unsupported by any evidence.

248. Further, Tanzania's Mining Act 2010 had provisions for the Minister of Minerals to require retention licence holders to apply for a special mining licence or to surrender the retention licence. In particular, under sections 38(5) and (6) of the Mining Act 2010, the Minister of Minerals could, by notice in writing, require a retention licence holder

168 Resp. C-Mem., paragraph -368.

169 Resp. C-Mem., paragraph 385.

to "show cause why he should not apply for a special mining licence in respect of the area of land subject to the retention licence", failing which the Minister could "by a further notice require the holder to apply for a special mining licence within a period of sixty days … or surrender the retention licence."[170] Thus, consistent with Tanzanian law, the Respondent could have exercised its power under the Mining Act to compel retention licence holders to apply for a special mining licence or to vacate the area, thereby allowing potential mines under the retention licence areas to operate, but it did not do so. The Respondent did not need to cancel all retention licences for the sake of allowing such potential mines to operate.

249. The Claimants have also submitted that five years after the Respondent passed the Amending Legislation, there is no operating mine in any of the areas previously held under retention licences, save for the illegal mining operations at the Project site.[171] The Respondent has not produced any evidence to contradict this submission by the Claimants.

250. In light of the above, the Tribunal is not satisfied that the Respondent can avail itself of the police powers doctrine. The arguments put forward by the Respondent are based on unsubstantiated assertions which are not supported by any credible evidence.

251. Accordingly, the Tribunal finds that the Claimants were permanently and substantially deprived of their investment in Tanzania, without justification under the police powers doctrine. In particular, the Claimants' investment in Tanzania was expropriated on 10 January 2018, when the 2018 Regulations were published.

C. LAWFULNESS OF THE EXPROPRIATION

252. The Tribunal turns next to consider the lawfulness of the expropriation. The Parties agree that the BIT protects investors against expropriatory measures that are not: (a) taken in accordance with due process of law, (b) for a public purpose, (c) in a non-discriminatory manner, and (d) accompanied by payment of prompt, adequate and

170 The Mining Act, 2010 (**Exhibit C-158**).

171 Cl. Reply, paragraph 457.

effective compensation. The Parties also agree that these criteria are cumulative, and the failure to comply with any one of the criteria would render the expropriation unlawful. In particular, the Tribunal notes that even an otherwise legal expropriation must be compensated per the terms of the BIT. The failure to pay or provide for proper compensation in and of itself renders the expropriation illegal.

253. The Tribunal addresses each of these criteria below.

(1) In accordance with due process of law

a. Parties' Positions

254. The Claimants submit that "due process of law" requires that an "actual and substantive legal procedure" be available to an investor to "raise its claims against the depriving actions already taken or about to be taken against it."[172] In particular, an expropriation said to be carried out under due process of law requires "reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute".[173]

255. The Claimants submit that no such legal procedure was available in the present case. The Respondent did not consult the Claimants nor, to the Claimants' knowledge, any of the former retention licence holders, before the NH Retention Licence was cancelled. The Claimants were not provided with any advance notice that their NH Retention Licence would be cancelled.

256. On the other hand, the Respondent argues that it acted in accordance with due process of law. According to the Respondent, the Parliament of Tanzania had issued a public notice to all stakeholders on 29 June 2017 to comment on the proposed bills, prior to the enactment of the Amending Legislation. The Respondent also says that "the Claimants participated by giving their comments through TCME as the umbrella organization of all medium and large-scale mining and exploration companies in

172 Cl. Mem., paragraph 286, citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**Exhibit CL-19**).

173 Cl. Mem., paragraph 286, citing *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**Exhibit CL-19**).

Tanzania."[174] Therefore, the Respondent says that "the Claimants were notified and participated in the enactment of the Amending Legislation through a democratic and transparent process of the legislative process legally laid down by laws of Tanzania."[175]

257. In response, the Claimants submit that:[176]

a. Unlike the Mining Act 2010, which Tanzania enacted after a large number of studies and extensive stakeholders' consultation, the Respondent has not submitted any evidence of reports or studies as part of the enactment of the Amending Legislation.

b. The Respondent relied on an emergency procedure to adopt the Amending Legislation, providing no time for proper scrutiny or debate. The hurried procedure has been criticised by TCME, commentators as well as Members of Parliament.

c. The Respondent did not provide stakeholders with reasonable advance notice. There was only one working day for stakeholders to review the Draft Bills and provide their views on them. In any event, the short delay between the stakeholders' consultation (1 July 2017) and the vote of the Amending Legislation (4 July 2017) makes it "highly doubtful that these consultations served any purpose, other than providing a pretence of due process".

d. The TCME does not represent the Claimants and did not have time to inform the Claimants of the legislative changes due to the limited time frame within which stakeholders were supposed to review the Draft Bills and provide comments. In any event, the TCME strongly criticised the consultation process, as did Members of the Tanzanian Parliament.

e. In any event, Tanzania failed to notify any stakeholders or even Members of the Tanzanian Parliament of its key expropriatory measure, *i.e.* the cancellation of retention licences. The Draft Bills that the Government shared on 29 June 2017 still

174 Resp. C-Mem., paragraph 382.

175 Resp. C-Mem., paragraph 382.

176 Cl. Reply, paragraphs 478-482.

contained the relevant provisions pertaining to the retention licence classification, with immaterial amendments. These sections were only deleted after the Parliament gathered stakeholders' views. The Government did not provide any reasons for the deletion, nor did the Parliament have an opportunity to debate the relevant provision. The Government only provided Members of Parliament with the amendment in question a few hours before the vote.

b. The Tribunal's Analysis

258. The Tribunal accepts the Claimants' submission that no reasonable advance notice was provided to the Claimants prior to the enactment of the Amending Legislation. The circumstances leading up to the enactment of the Amending Legislation are as follows:

a. In June 2017, an "investigating committee" in relation to the mining sector was reportedly commissioned and recommended that Tanzania's mining legislation be revised. [177]

b. On 28 June 2017, the Government published the Draft Bills. The Draft Bills did not contain the provision repealing the legislative basis of retention licences, *i.e.* what later became section 16 of the 2017 Act. Instead, the Draft Bills only contained minor amendments to sections 37 and 38 of the Mining Act 2010.

c. On 29 June 2017, the Parliament invited stakeholders to provide their comments on the Draft Bills by 1 July 2017, a Saturday.[178]

d. The TCME submitted a letter on 1 July 2017 to the Parliament of Tanzania. In this letter, the TCME stated, among other things, that "[t]he three [Draft] Bills if enacted into law will completely alter the legal and regulatory regime concerning the mineral and oil and gas sectors", that the Government was "seek[ing] to undo a regime concerning such an important sector of the Tanzanian economy hurriedly and without due consultation", that "[t]he existing legal and regulatory regime

177 The Economist Intelligence Unit, Government under fire over mineral export ban, 10 April 2017 (**Exhibit C- 225)**.

178 Cl. Reply, paragraph 218.

currently under review [had been] developed, from the policy level to the legal and regulatory level in a manner that provided for extensive stakeholder consultation and debate to ensure all relevant considerations were appropriately raised, considered and debated", that the TCME was "concerned by the introduction of such legislation that is likely to breach a number of international conventions, treaties and agreements to which Tanzania is a signatory", and that "[t]he scope of the proposed legislation effectively eradicates the basis on which investment in Tanzanian natural resources can be made on a secure and even playing field."[179]

e. On 3 and 4 July 2017, the Amending Legislation was passed under an emergency procedure. Section 16 of the 2017 Act was introduced by way of an amendment to the Draft Bills on 4 July 2017.

259. The Amending Legislation, despite its significant impact on Tanzania's mining regime, was passed in a matter of days. The one document which the Respondent relies on in support of its assertion that stakeholders were consulted on the Amending Legislation is the letter from the TCME dated 1 July 2017. However, there is no evidence that the TCME had consulted or notified the Claimants of the legislative changes prior to sending its letter on 1 July 2017, nor that the TCME was representing the Claimants when sending this letter. In the absence of such evidence, the Tribunal accepts the Claimants' position that they had no interaction with the TCME before the TCME submitted its comments on the Amending Legislation on 1 July 2017.[180]

260. In any event, it is clear from the letter that the TCME had strongly criticized the so-called consultation process, expressing its concerns that the legal and regulatory regime concerning the mining sector was about to be overhauled "hurriedly and without due consultation" and that the introduction of the proposed legislation "is likely to breach a number of international conventions, treaties and agreements" and "effectively eradicate[] the basis on which investment in Tanzanian natural resources can be made

179 Letter from TCME to the Parliamentary Committee on Energy and Minerals, 1 July 2017 (**Exhibit C-82**).

180 Cl. Reply, paragraph 222.

on a secure and even playing field."[181] The strong objections raised by the TCME also do not appear to have been addressed by the Parliament of Tanzania prior to the enactment of the Amending Legislation. There is certainly no evidence of that on the record.

261. The Respondent's position that stakeholders were consulted because they were given one working day of advance notice on the Draft Bills, which did not even contain crucial provisions such as the cancellation of the legislative basis for Retention Licences (which were added to the Draft Bills only after the Parliaments heard stakeholders),[182] is simply not tenable. Leaving aside the extremely short time frame within which stakeholders were expected to comment on a proposed overhaul of Tanzania's mining regime, it was impossible for anyone to have said anything about a provision which was only introduced later. The Respondent's witness, Mr Simon Igenge, accepted during the Hearing that to date, the Respondent has not explained why section 16 of the 2017 Act was only introduced on 4 July 2017, the day before the vote on 5 July 2017.[183]

262. At this juncture, the Tribunal makes a few observations regarding the Respondent's conduct in the document production phase of this arbitration.

263. Under PO2, the Tribunal directed that the Respondent produce, *inter alia*, the following categories of documents pursuant to requests made by the Claimants:

a. Documents concerning the investigations and reports of the "investigating committee" commissioned by President Magufuli in June 2017;

b. All drafts prepared between 1 June 2016 and 10 July 2017 of the Amending Legislation and all related comments;

c. Any policy papers, impact assessment studies, risk assessments, reports or exchanges issued by, or between, the Ministry of Minerals, the Ministry of Environment, Parliamentary Committees, and any other governmental bodies

181 Letter from TCME to the Parliamentary Committee on Energy and Minerals, 1 July 2017 (**Exhibit C-82**).

182 Tr. Day 4, page 1137:4-8; Cl. Reply, paragraph 572.

183 Tr. Day 4, page 1140:16-19.

setting out new goals and objectives for a reform of Tanzania's mining sector between 1 July 2016 and 10 July 2017; and

d. All correspondence between the Government of Tanzania and the stakeholders referred to in the Respondent's Counter-Memorial at paragraph 284 with respect to the Amending Legislation, and any related correspondence from the period 1 June 2016 to 10 July 2017.

264. However, save for the Draft Bills (as published on 28 June 2017) and the 1 July 2017 letter from the TCME, the Respondent has not produced any documents responsive to the above requests, saying that it had "tried to search for the requested documents without success".

265. The Claimants have asked for adverse inferences in respect of the Respondent's failure to produce such documents pursuant to Rule 34(3) of the 2006 ICSID Arbitration Rules, which require tribunals to "take formal note" of a party's failure to produce evidence, as well as paragraph 15.4 of Procedural Order No. 1 and Article 9(6) of the 2010 IBA Rules on the Taking of Evidence, which provides that the tribunal may draw adverse inferences from a party's failure to make available any evidence ordered by the tribunal to be produced. In particular, the Claimants have asked the Tribunal to draw the following adverse inferences:

a. That the reports of the investigating committee, if produced, would have revealed that the investigating committee was not pursuing a legitimate and rational policy goal when conducting its investigations and making its recommendations, but was instead focussed on increasing pressure on large foreign mining companies;

b. That either no earlier drafts of the Amending Legislation exist, or earlier drafts would have shown that the Draft Bills were prepared in haste, without conducting any impact or risk assessment studies and without any consultation or gathering external contribution from international organisations, representatives of the mining sector, or any relevant stakeholders;

c. That there were no policy papers, impact assessment studies, risk assessments, reports or exchanges setting out goals and objectives for a reform of Tanzania's mining sector leading up to the enactment of the Amending Legislation and that the Amending Legislation was prepared in an arbitrary manner, not in pursuit of any clearly articulated and rational policy goal;

d. That no stakeholder was able to provide meaningful and informed comments on the entirety of the Amending Legislation, thereby showing that the process initiated by the Respondent represented only a semblance of consultation.

266. The Claimants have also highlighted that the chairman of the investigating committee was one of the Respondent's witnesses, Professor Mruma. However, Professor Mruma failed to mention this in any of his witness statements submitted in the course of this arbitration. The Claimants argue that Professor Mruma's testimony is unreliable for the purpose of establishing the facts in this case.

267. The Tribunal finds the Respondent's justification for failing to produce documents, *i.e.* that it had "tried to search for the requested documents without success", unconvincing. The requested documents would be squarely within the Respondent's possession, custody or control, being documents relating to the Respondent's legislative process. Since the Respondent has asserted that its legislative process was open and transparent, and that it "followed due process where all the stakeholders were consulted", it must adduce evidence to substantiate that claim. The Tribunal finds that the Respondent has failed to do so. The Tribunal has already explained above why the one letter from the TCME does not show that there was any proper consultation with stakeholders.

268. In light of the above, the Tribunal draws adverse inferences against the Respondent that the Draft Bills were prepared in haste, without any proper consultation or studies, and not in pursuit of any clearly articulated policy goal.

269. That said, even without drawing the adverse inferences above, the Tribunal would nevertheless find that the Respondent did not carry out its expropriatory measures in accordance with due process of law. It is evident from the sequence of events leading

up to the enactment of the Amending Legislation, as set out above, that no reasonable advance notice was provided to the stakeholders. The alleged consultation process for the Draft Bills gave stakeholders only one working day to provide their comments. Further, the critical provision concerning the repeal of the legislative basis of all retention licences was only introduced a few hours before the Parliamentary vote on the Amending Legislation. In these circumstances, it cannot be said that there was any proper consultation or reasonable notice to stakeholders like the Claimants.

270. Accordingly, the Tribunal finds that the Respondent did not act in accordance with due process of law. This alone is sufficient to find that the Respondent unlawfully expropriated the Claimants' investment. Nevertheless, the Tribunal briefly sets out its analysis in relation to the remaining elements of an unlawful expropriation below.

(2) Public purpose

a. Parties' Positions

271. The Respondent has put forward various justifications for its cancellation of retention licences, some of which overlap with its arguments on the police powers doctrine (which has been dealt with above). According to the Respondent:

a. The 2017 Amending Legislation, which abolished the legislative basis for retention licences, "was done in good faith so as to avoid investors holding or retaining an area for a long time without further development."[184]

b. The cancellation of retention licences was carried out as, "despite being endowed with variety of minerals, mining subsector's contribution to the national economy is nominal as some potential mines were held under Retention Licences and hence not productive."[185]

c. The Amending Legislation was aimed at "improving the management of the mining sector from utilizing its mineral resources to benefit the people of Tanzania and the

184 Resp. C-Mem., paragraph 272.

185 Resp. C-Mem., paragraph 275.

investors as well."[186] Further, the Amending Legislation and the 2018 Regulations "were meant to protect Tanzanian's natural resources for the benefit of both the investors and the people of the United Republic of Tanzania."[187]

d. The cancellation of retention licences was to "address the challenges facing the mineral sector by strengthening the administrative structure and reviewing the fiscal regime relating to this sector in order to achieve a win-win situation between investors and nation."[188]

e. The cancellation of retention licences would "enable the areas held under retention to be productive and to ensure a joint operation of those areas between the State and investors."[189]

272. The Claimants submit that the various justifications submitted by the Respondent "constitute no more than slogans that do not come remotely close to justifying the cancellation of retention licences, let alone for a public purpose, or in the public interest." The Claimants also argue that no sufficient nexus has been established between the alleged justifications and the expropriation.

b. The Tribunal's Analysis

273. The Tribunal acknowledges that for the purposes of assessing whether expropriatory measures are taken for a public purpose, "states deserve broad deference."[190] As the tribunal in *Vestey Group Limited v Bolivarian Republic of Venezuela* noted at paragraph 294, a state is "free to judge for itself what it considers useful or necessary for the public good".[191]

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186 Resp. C-Mem., paragraph 277.

187 Resp. C-Mem., paragraph 282.

188 Resp. C-Mem., paragraph 367.

189 Resp. C-Mem., paragraph 442.

190 *Vestey Group Limited v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-18)**, paragraph 294.

191 *Vestey Group Limited v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-18**).

274. However, a tribunal must also assess whether the impugned expropriatory measure was "for" the public purpose expressed. In so doing, all the relevant circumstances, including the government's post-expropriation conduct, will have to be considered. In this regard, "the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose".[192]

275. Further, there must also be some genuine public interest at hand in order for the "public purpose" requirement to be satisfied. In this regard, the Tribunal agrees with the views of the tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, at paragraph 432 as follows:[193]

> "In the Tribunal's opinion, a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can marginally put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."

276. In this case, the Respondent has not produced any concrete evidence to support its assertion that the measures it took were for any public purpose. Instead, the justifications raised by the Respondent have been articulated belatedly, in the course of this arbitration. There is no contemporaneous evidence that the Respondent considered it necessary to enact the 2017 Amending Legislation or the 2018 Regulations for the various purposes or justifications it has now put forward. Despite the Tribunal's orders in the document production phase of this arbitration, the Respondent has not produced any documents relating to the 2017 Amending Legislation or the 2018 Regulations that would shed light on how or why these measures were for any public purpose.

277. During the Hearing, the Respondent's Mr Igenge admitted that to date, the Respondent has not explained why it introduced the amendment cancelling the retention licence

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192 *Vestey Group Limited v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-18),** paragraph 296.

193 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**Exhibit CL-19**), paragraph 432.

category.[194] Further, none of the committees established by the Government and the Parliament had referred to the retention license category as posing any challenge to the Tanzanian mining sector, nor was there any recommendation dealing specifically with the retention licence category.[195]

278. Accordingly, there is simply no evidence on record to show that the cancellation of all retention licences would benefit the Tanzanian people, address any challenges faced by the mining sector or improve the management of the mining sector as the Respondent has alleged.

279. In any event, even to the extent that the justifications put forward by the Respondent constitute public purposes, the Tribunal finds that the Respondent has not substantiated or shown a reasonable nexus between the justifications put forward and the expropriatory measures taken. Again, there is a serious lack of evidence on this front.

280. For the above reasons, the Tribunal cannot find on the record in this case that the expropriatory measures were for a public purpose. Even if the Tribunal were to be able to find a public purpose, it would not change the outcome of this case. The expropriation was also illegal because of the failure to provide either due process or prompt, adequate and effective compensation.

(3) Non-discriminatory basis

a. Parties' Positions

281. The Claimants submit that the Respondent's expropriation was discriminatory in that all retention licence holders bar one were foreign companies, and highlight President Magufuli's express declaration that Tanzania had launched an "economic war" against foreign mining companies.

282. On the other hand, the Respondent argues that it did not act in a discriminatory manner as the cancellation applied to all retention licence holders. The Respondent specifically

194 Tr. Day 4, page 1140:11-15.

195 Tr. Day 4, page 1142:6-19.

highlights that Retention Licence No. RL 0013/2014 held by a Tanzanian majority owned company, Precious Metals Refinery Company Limited ("**Precious Metals**"), was among the cancelled Retention Licences. The Respondent also denies that President Magufuli ever said that he would launch an economic war against foreign companies, submitting that these words are merely commentary from journalists.

b. The Tribunal's Analysis

283. The Tribunal notes that other than Precious Metals, the Respondent has not alleged that any of the other retention licence holders who were affected by the cancellation of retention licences were local companies. The Claimants' assertion that all retention licence holders bar one were foreign companies therefore remains unrebutted.

284. However, it appears from the Respondent's own submissions that Precious Metals was granted a mining licence. Accordingly, it appears that unlike the Claimants, Precious Metals received compensation for the loss of its retention licence.

285. In this regard, the Tribunal ordered that the Respondent disclose correspondence and other documents exchanged between the Respondent and Precious Metals concerning the Respondent's decision to grant Precious Metals a mining licence. However, the Respondent failed to produce any responsive documents. The Claimants have requested the Tribunal to infer that the responsive documents would have shown that the State gave Precious Metals preferential treatment on the basis of its Tanzanian nationality. The Tribunal draws this adverse inference.

286. In respect of President Magufuli's comments, the Tribunal notes that several news sources other than CNBC Africa had also reported that President Magufuli used the term "economic war" in his statement on foreign companies.[196]

287. In any event, leaving aside any news articles which may be described as journalistic commentary, the Tribunal notes that in the course of Parliamentary debates, investments

[196] Mining.com, Tanzania suspends granting of new mining licences, 5 July 2017 (**Exhibit C-77)**; CNBC Africa, Tanzania's President Magufuli threatens to close mines if talks delayed, 24 July 2017 (**Exhibit C-231)**; IPPmedia, The cost of JPM's economic warfare, 28 May 2017 (**Exhibit C-317)**; The Africa Report, Is Magufuli's economic nationalism working?, 9 May 2019 (**Exhibit C-318)**.

in the mining sector which had "largely been made by large foreign investors" and which have "not benefited Tanzanians and the nation as a whole" were cited as part of the context for introducing the Draft Bills.[197] Further, foreign mining companies were variously described as "looters" and "thieves". One Member of Parliament noted as follows during the parliamentary debate on the Draft Bills:

> "… today, almost 20 years after the enactment of the Mining Law, every CCM member or ordinary Member of Parliament or Minister standing in Parliament speaks with great emotion and passion that foreign investors are thieves and looters of our resources. The same CCM government that has put in place a mechanism that facilitated the theft and looting of our resources for all these years has introduced in Parliament a Bill to change all the laws that provide tax relief, freedom and protection for foreign investors, using the same Emergency Document."[198]

288. It is therefore apparent to the Tribunal, even leaving aside the news articles cited by the Claimants, that the purpose of the Amending Legislation was to target foreign mining companies and was discriminatory.

(4) Prompt, adequate and effective compensation

a. Parties' Positions

289. The Parties appear to agree that no prompt, adequate and effective compensation was offered to the Claimants. There is no dispute between the Parties that Respondent has not provided any compensation to Claimants concerning the loss of the retention license.

290. Instead, the Respondent argues that no compensation was due because the expropriation was done in exercise of the State's police powers, which renders the Claimants' alleged

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197 The Parliament of Tanzania, Hansard of 4 July 2017 (with English translation from Swahili original) (**Exhibit C-310)**.

198 The Parliament of Tanzania, Hansard of 4 July 2017 (with English translation from Swahili original) (**Exhibit C-310)** page 207. See also pages 221, 224 and 226.

investment "not compensable". The Respondent further argues that the Claimants abused their retention licences. The Claimants dispute these allegations.

b. The Tribunal's Analysis

291. Insofar as the police powers doctrine is concerned, the Tribunal has addressed this issue above in considering whether the measures taken were for a public purpose. In short, the Tribunal does not accept that the Respondent can avail itself of the police powers doctrine in this case. Consequently, the Tribunal does not accept the Respondent's submission that the Claimants' investment was "not compensable". There is no doubt that a licence is a right and taking away that right calls for compensation. In fact, this was acknowledged by the Respondent in the original Invitation to Tender, before the provision on compensation stating that the "Successful Bidder shall commit to compensate [the] previous licence holder for the exploration costs incurred and the Commission will facilitate the process"[199] was abruptly removed the next day in the Revised Invitation to Tender.[200]

292. As for the Respondent's assertion that the Claimants abused the retention licences, the Tribunal observes that this assertion has been made for the first time in the course of these arbitration proceedings. There is no evidence that prior to the commencement of this arbitration, the Respondent had ever taken issue with the Claimants' use of the NH Retention Licence, or any other retention licences held by the Claimants. More importantly, the Respondent has not provided any evidence to substantiate its assertion that the Claimants abused their retention licences.

293. Accordingly, the Tribunal finds that no prompt, adequate and effective compensation was offered to the Claimants. Therefore, the expropriation was also illegal for this reason.

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199 See the Mining Commission's Invitation to Tender 19 December 2019 (**Exhibit C-18)**, page 3; *cf* also the Mining Commission's Revised Invitation to Tender, 20 December 2019 (**Exhibit C-19**), page 3.

200 Cl. Mem., paragraphs 234-236, 327.

D. CONCLUSION ON EXPROPRIATION

294. For the reasons set out above, the Tribunal concludes that the Respondent unlawfully expropriated the Claimants' investment in breach of Article 5 of the BIT. The Tribunal finds that the date of the expropriation was 10 January 2018, when the 2018 Regulations were published and confirmed that the NH Retention Licence was cancelled and the underlying areas reverted to the State. The enactment of the Amending Legislation in July 2017 had created significant doubt but by 10 January 2018, the situation was confirmed. The post hoc events subsequent to 10 January 2018, including the issuance of the Invitation to Tender and the Revised Invitation to Tender, are in the Tribunal's view confirmatory evidence but the date of expropriation remains 10 January 2018.

E. OTHER ISSUES

295. As explained above, having found that the Respondent unlawfully expropriated the Claimants' investment in breach of Article 5 of the BIT, the Tribunal does not find it necessary to make findings in respect of Article 2(2) of the BIT.

296. For completeness, the Tribunal notes that the Respondent had sought, as part of its prayers for relief in its Counter-Memorial, an order that "the Claimants pay damages for loss suffered as a result of the breaches of Tanzanian laws, and general principles of law in an amount to be determined during the course of these proceedings", as well as interest on these sums.

297. The Tribunal dismisses the Respondent's prayer for such relief. Leaving aside the question of the admissibility of such a counterclaim by the Respondent, the Tribunal notes that the basis of this prayer for relief has been left completely unsubstantiated by the Respondent. No evidence whatsoever has been introduced by the Respondent showing what losses it allegedly suffered. There is simply nothing in the record on which the Tribunal could possibly grant the Respondent's prayer for relief.

VII. DAMAGES

298. Having established liability, the Tribunal turns to consider the question of damages.

299. At the outset, the Tribunal dismisses the Respondent's objections that "the Claimants are not entitled to any full reparation for the losses suffered as a result of the violation of BIT" because the Claimants allegedly: (a) were "not investors in Tanzania prior to 2015", (b) "abused the use of their Retention Licences to acquire funds that were not invested in Tanzania", (c) invested funds in the Project "contrary to the requirements of the Tanzania Foreign Exchange Regulations"; and (d) "were not allowed to conduct further exploration activities following the grant of a retention licence under sections 37 and 38 of the 2010 Mining Act." The Tribunal notes that these objections are irrelevant, have not been substantiated, are not supported by any evidence whatsoever, or are contradicted by the evidence on the record, and/or have been raised belatedly in the course of this arbitration for the first time.

300. More fundamentally, it is trite that a State must provide full reparation for the injury caused by its breach of international obligations. None of the allegations raised by the Respondent modify this principle of law. The Claimants are entitled to full reparation for the unlawful expropriation of their investment.

301. On quantification, the Tribunal notes that the Parties are largely in agreement on the appropriate standard of compensation and the approach to be adopted in assessing the Claimants' alleged losses. In particular, the Parties agree that the appropriate standard of compensation under the BIT is the "fair market value" of the Claimants' investment, and that the appropriate valuation method to be used is the cost approach.[201] The Tribunal elaborates below on the cost approach before analysing the principal areas of difference between the Parties.

302. As a preliminary point, the Tribunal had invited both Parties, in their post-hearing briefs, to address the Tribunal on the admissibility and weight to be given to the evidence of the Respondent's Mr Mwangakala, who was presented as a fact witness in the

[201] Tr. Day 3, page 909:21 to 910:3.

proceeding but whose evidence seemed to be mostly expert in nature. In particular, Mr Mwangakala had indicated that his testimony was aimed specifically at responding to the report prepared by the Claimants' expert on quantification, Mr Travis Taylor.[202]

303. In their post-hearing brief, the Claimants submit that Mr Mwangakala is not a fact witness. However, the Claimants argue that Mr Mwangakala is "clearly not independent"[203] because, among other things, he is a negotiator for the Government in disputes with other mining investors and he does not dispute that his role is to achieve the best outcome possible for the Government.[204] Therefore, the Claimants argue that his opinions should not be given weight as expert evidence either.

304. Nonetheless, the Claimants do not consider it necessary to exclude Mr Mwangakala's Witness Statement and oral testimony entirely as inadmissible.[205] To the extent that the Tribunal wishes to consider Mr Mwangakala's evidence, the Claimants' position is that Mr Mwangakala's evidence should be treated as an extension of the Respondent's legal submissions.[206]

305. The Respondent's position as set out in its post-hearing brief initially appears to be that Mr Mwangakala is "a factual witness competent to testify on valuation of a mining project for the purpose of fair compensation".[207] However, the Respondent also submits that Mr Mwangakala "testified and provided opinion as a factual witness" at the Hearing,[208] and that his evidence "apart from being factual evidence, … has a value of expert evidence"[209] and "was of expertise in nature rather than facts".[210] The Respondent's final position is that insofar as any part of Mr Mwangakala's evidence

202 WS Andrew Abraham Mwangakala, paragraph 10; Tr. Day 3, page 890:9-12.
203 Cl. PHB, paragraphs 125.
204 Tr. Day 3, page 893:8-22.
205 Cl. PHB, paragraph 134.
206 Cl. PHB, paragraphs 125, 134.
207 Resp. PHB, paragraph 88.
208 Resp. PHB, paragraph 89.
209 Resp. PHB, paragraph 90.
210 Resp. PHB, paragraph 95.

appears to the Tribunal to be expert opinion in nature, the Respondent requests that it be considered admissible expert evidence.

306. The Respondent also disputes the Claimants' allegations that Mr Mwangakala is not an independent expert. While the Respondent does not deny that Mr Mwangakala is a Government employee, it argues that this puts Mr Mwangakala in the same position as Mr Travis Taylor, who was hired and paid by the Claimants. Additionally, the Respondent submits that Mr Mwangakala's employment by the Government is "not an issue if a witness is testifying or giving opinion which are true basing on the accounting authorities and valuation principles."[211]

307. The Tribunal is of the view that despite the scope of his testimony, Mr Mwangakala is not an independent expert, unlike the Claimants' expert Mr Travis Taylor. In fact, Mr Mwangakala did not provide a declaration of independence together with his witness statement, as required of experts under paragraph 17.4 of Procedural Order No. 1. Mr Mwangakala also agreed under cross-examination that he was formerly employed by the Ministry of Minerals since 2003 and remained a civil servant as at the date of the Hearing.[212] Mr Mwangakala cannot by any means be said to be independent from the Respondent.

308. Additionally, the Tribunal notes that in the course of cross-examination, Mr Mwangakala admitted to a number of errors in his calculations arising from "oversight". For example, Mr Mwangakala admitted that in his calculations of interest, he had applied the wrong start date,[213] the wrong end date,[214] the wrong currency,[215] and the wrong interest rate.[216]

309. In light of the above, the Tribunal will fully consider Mr. Mwangakala's testimony, but nevertheless must approach his evidence in this proceeding with a certain amount of

211 Resp. PHB, paragraphs 100-101.

212 Tr. Day 3, page 891:6 to page 892:2.

213 Tr. Day 4, page 1053:3-10.

214 Tr. Day 4, page 1053:11 to page 1054:10.

215 Tr. Day 4, page 1054:11-20.

216 Tr. Day 4, page 1054:17 to page 1057:22.

circumspection. The Tribunal will consider the specific points made by Mr Taylor and Mr Mwangakala in relation to each area of disagreement between the Parties below.

A. THE COST APPROACH

310. The Parties agree, and the Tribunal accepts, that the fair market value standard is the adequate measure of loss for the purposes of calculating compensation to the Claimants in this case.

311. Fair market value is "one of the widely used bases of value in business valuation" and is usually understood as "the price at which the asset would change hands between a hypothetical and able willing buyer and a hypothetical willing and able seller, acting at arms' length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts".[217]

312. In this case, it is not disputed that the amount of compensation owed to the Claimants is the fair market value of the Claimants' investment at the valuation date, less the proceeds from the sale of assets by the Claimants in mitigation of its losses, plus any additional losses suffered by the Claimants.[218] The Tribunal will therefore proceed on this basis.

313. Further, the Parties agree, and the Tribunal accepts, that the valuation method to be applied in determining fair compensation to the Claimants is the cost approach. The cost approach estimates the value of a company based on the historical costs incurred or the amounts invested.

314. The Parties also agree that pursuant to the International Valuation Standards (the "**IVS**"), the cost approach should seek to capture "all of the Costs that would be incurred by a typical participant" and that these costs would include all direct and indirect costs

217 Resp. C-Mem., paragraph 472.

218 Cl. Reply, paragraphs 607-608; Resp. Rej., paragraph 213.

that would be required to recreate that asset, including overheads and a profit margin such as a return to investors.[219]

315. However, the Parties differ as to the manner in which the cost approach should be applied. In this regard, there are two principal areas of difference between the Parties:

a. The specific costs to be included; and

b. Whether a multiple should be applied.

316. Additionally, the Parties also differ on the relevant valuation date as well as the interest to be applied.

317. The Tribunal will address each of the areas of disagreement between the Parties below.

B. COSTS TO BE INCLUDED

(1) Parties' Positions

318. The Parties disagree on the relevant exploration costs to be included, as well as whether management costs should be included.

319. On the issue of exploration costs, the Claimants and their affiliates had carried out work on the Project in two main exploration phases:

a. First, from July 2004 to March 2011, the Claimants' affiliates carried out exploration work on the broader, 200 square kilometre Nachingwea area (the "**First Exploration Phase**"); and

b. Secondly, from March 2011 onwards, exploration efforts were focussed on the more narrowly defined, 48 square kilometre Ntaka Hill area (the "**Second Exploration Phase**").

320. The Claimants argue that the exploration costs incurred during both phases should be included, as the exploration costs incurred in the First Exploration Phase was what led

[219] Tr. Day 3, page 912:1 to page 913:15.

to the delineation of the Ntaka nickel intrusion and the ability to whittle down the Project area from a wider prospecting area to a narrower project area in the Second Exploration Phase.

321. On the other hand, the Respondent argues that only exploration costs incurred within the 48 square kilometre Ntaka Hill area should be included in the cost calculations. Accordingly, the Respondent accepts that the exploration costs incurred during the Second Exploration Phase, *i.e.* where exploration activities were only carried out in the area eventually retained under the NH Retention Licence, should be included. As for the First Exploration Phase, Mr Mwangakala has, in his calculations, pro-rated the costs incurred by apportioning the costs based on the relevant size of the licence area as compared to the broader prospecting area covered in the First Exploration Phase.

322. Mr Taylor has stated that in his view, Mr Mwangakala's approach to apportioning costs makes the following implicit assumptions which are unreasonable and unsubstantiated:

a. First, that costs for work outside the retention licence area are entirely irrelevant to the Claimants', or a hypothetical third party's, understanding of the nickel sulphide deposits within the Ntaka Hill area; and

b. Secondly, that all historical expenditure was incurred equally over the entire area, as opposed to being focussed on the most prospective areas at any given time.[220]

323. However, in respect of the first assumption, Mr Taylor has explained that he would expect a typical mining company to follow the same process as the Claimants and their affiliates "in terms of exploring a broader area before focussing on the most valuable parts of the deposit and relinquishing certain areas of the original tenement which were found to be less prospective."[221] The Claimants' expert Mr Perrot had also explained that the Claimants and their affiliates identified the most attractive targets through exploration works to scope out the mineralisation at Ntaka Hill.[222] Mr Taylor is also of

220 Second ER Travis Taylor, paragraph 3.2.20.

221 Second ER Travis Taylor, paragraph 3.2.25.

222 First WS Mathew Perrot, paragraphs 22, 25.

the view that the costs incurred by the Claimants and their affiliates in exploring the wider Nachingwea area cannot be said to be "exceptional", as any typical market participant would need to incur similar costs.[223]

324. As for the second assumption, Mr Taylor has stated that in his view, Mr Mwangakala's assumption "is overly simplistic and fails to reflect the reality that efforts were focussed on defining the Ntaka nickel sulphide intrusion. Put more simply, the later focus of the Claimants [in the Second Exploration Phase] would not have been possible without the exploration efforts of previous quarters."[224] Mr Taylor has also explained that contemporaneous reports show that "most of the exploration costs were incurred in the relevant [NH Retention Licence] area … given that identifying and defining resources at Ntaka Hill was the primary purpose of the work performed at all tenements".[225]

325. Another area of difference between the Parties is the types of source documents considered by Mr Mwangakala and Mr Taylor in their respective cost calculations. It appears that Mr Mwangakala, in his cost calculations, included only costs which are recorded in quarterly reports that were stamped by the Tanzanian government (the "**Stamped Reports**"). On the other hand, Mr Taylor's view is that "it is not necessary for cost reports to be submitted to the appropriate government entity for such costs to be considered relevant to a valuation exercise. What is relevant is that there is evidence the costs were in fact incurred."[226] Mr Taylor has considered, in addition to the Stamped Reports, other forms of evidence of the costs incurred, such as management spreadsheets that tracked quarterly expenditures, licence applications and financial statements.

326. A third area of difference between the Parties relates to non-exploration costs. Whereas Mr Mwangakala's assessment of the costs incurred does not include any non-exploration costs, Mr Taylor has included non-exploration costs such as professional fees and management overheads, on the basis that they would be incurred by a typical

223 Second ER Travis Taylor, paragraph 3.2.27(b).

224 Second ER Travis Taylor, paragraph 3.2.29.

225 Second ER Travis Taylor, paragraphs 3.2.30-3.2.32.

226 Second ER Travis Taylor, paragraph 3.2.7.

market participant seeking to recreate the Project and attain the same understanding of the site's geology as the Claimants.[227]

(2) The Tribunal's Analysis

327. The Tribunal agrees with Mr Taylor's approach on the costs to be included, namely, that:

a. Costs incurred in the First Exploration Phase outside the retention licence area should be included;

b. There is no requirement that costs have to be recorded in Stamped Reports to be considered for the purposes of valuation. The Tribunal is satisfied that the costs which Mr Taylor included in his calculations were actually incurred, as there is contemporaneous supporting evidence of the same; and

c. Professional fees and management overheads should be included.

328. The Tribunal elaborates below.

329. **First**, with regard to costs outside the retention licence area, the Tribunal accepts Mr Taylor's evidence that a typical mining company seeking to replicate the Project would have needed to incur costs exploring a larger area, before being able to hone in on the most valuable parts of the deposit while relinquishing some of the less prospective areas under the original licence. The Tribunal also accepts Mr Taylor's evidence that the Claimants and their affiliates did not incur any atypical or exceptional costs during their exploration of the Project, and that all the exploration activities carried out during the First Exploration Phase in the broader prospecting area were part of a coherent project intended to exploit and extract nickel sulphide from the Ntaka intrusion.

330. The Tribunal notes that in the course of the Hearing, the Respondent's Professor Mruma agreed that as part of an exploration process, a prospector or explorer would start with a wider area and then narrow down the parts of the orebody it may wish to mine.

[227] Second ER Travis Taylor, paragraphs 3.2.12-3.2.16.

Professor Mruma also agreed that if a company expends costs in exploring that wider area, that is not wasted expenditure because it would have helped them to confirm which areas to focus on going forward. The relevant portion of Professor Mruma's testimony is set out below:[228]

> "Q. And that's why, under the Mining Act 1998 and the Mining Act 2010, for that matter, Prospecting License holders who sought to renew their Licences had to give up 50 percent of the Prospecting License area because the law required that an exploration process – as it progresses, the prospector or explorer narrows in on the parts of the wider orebody it may wish to mine; correct?
>
> Are you with me?
>
> A. Yes.
>
> Q. Okay. But are we agreed that you can't obtain that knowledge without starting wider and then narrowing down; correct?
>
> A. Correct.
>
> Q. Okay. So, given that understanding, if a company expends costs in exploring areas that eventually fall outside of the Mine Plan, that is not wasted expenditure because it helped them confirm which areas to focus on going forwards; correct?
>
> A. Correct."

331. However, Professor Mruma stated that in the case of the Project, a different mining approach was adopted. Professor Mruma explained his view as follows:

> "The other approach is, you know, a deposit, they knew that there is Ntaka. So, you for apply for a Prospecting Licence at Ntaka. And from now on, decision, you

[228] Tr. Day 3, page 714:2-21.

decided to expand exploration to the other sides of the licensed areas, for the purpose of trying to add values. So if you do that, then you are regional explorations and not entitled for recovery. … If you start with a broad zone and you narrow down into potential areas, then you are entitled to include regional scale exploration. … [In this case, t]hey took license because they knew that there is Ntaka Hill, and when they were doing exploration there, they opted to broaden for the purpose of adding additional targets. …"[229]

332. On the other hand, Mr Mwangakala agreed, during cross-examination, that a third party seeking to recreate the Project from scratch would have to start from the 7,200 square kilometre Nachingwea property, rather than the 48 square kilometre NH Retention Licence area. The relevant portion of Mr Mwangakala's testimony is set out below:[230]

"Q. Now, assuming a third party would try to recreate the asset from scratch, the Ntaka Hill Project asset from scratch, assuming they would start from the 7,200-square-kilometre Nachingwea property, would they go directly to the 48 square kilometres that ended up as the Retention License?

Yes or no.

A. They would go to the Nachingwea property, correct.

Q. They --

A. The Nachingwea property.

Q. They would go to the 7,200 square metres; correct?

A. Correct, which includes the other projects.

Q. Which includes the Ntaka Hill Project and the other projects. …"

229 Tr. Day 3, page 876:5 to page 877:8.

230 Tr. Day 4, page 1021:3-18.

333. The Tribunal does not agree that the exploration approach adopted in respect of the Project was as Professor Mruma described, *i.e.* where the Claimants and their affiliates already knew that there was a nickel intrusion at Ntaka Hill, applied for a licence in respect of the Ntaka Hill area, and subsequently progressed with their exploration work by expanding outside the Ntaka Hill area. The Tribunal finds that the facts are otherwise. The contemporaneous evidence shows that in the initial phases of the Project, the Claimants' affiliates had carried out exploratory work over the broader 200 square kilometre Nachingwea area, before they were able to gain the geological understanding and data necessary to locate the most valuable parts of the deposit and to focus on the NH Retention Licence area.

334. As explained above, the four prospecting licences which Tanzania had granted to Warthog in 2004 covered the entire 7,269 square kilometre Nachingwea exploration area. Following further research and exploration work, nickel sulphide deposits were discovered at Ntaka Hill and this became the focal point of nickel sulphide exploration at the Project.[231] The area covered by the NH Prospecting Licence, which was first issued in April 2007, over time reduced in size from an initial 200 square kilometre exploration area to a focused 48.81 square kilometre area covering the identified mineral resource at Ntaka Hill.

335. The contemporaneous evidence therefore flatly contradicts Professor Mruma's version of events, *i.e.* that the Project started with exploration at the Ntaka Hill area and expanded outwards. Instead, it is clear from the evidence that the Project started with a survey of a broader area, before being narrowed down to a smaller area where the most valuable parts of the mineral deposit were found.

336. Based on Professor Mruma's admission, in such a situation, it is appropriate to include costs for the exploration work carried out in the broader prospecting areas. Accordingly, the Tribunal accepts Mr Taylor's approach in including costs incurred during the First Exploration Phase outside of the retention licence area.

231 First WS Mathew Perrot, paragraph 28.

337. **Second**, on the issue of the Stamped Reports, the Respondent has argued that a large part of the evidence which Mr Taylor used in his calculations should be disregarded because this evidence was "not reported/submitted to the Mining Commission as required under Section 100(1) and Second Schedule of the Mining Act 2010", which as the Respondent says is a mandatory requirement of the law. The Respondent says that the Claimants' evidence of costs incurred, other than the Stamped Reports, is inauthentic. In Mr Mwangakala's calculations, only costs which are supported by the Stamped Reports are included.

338. The Tribunal does not accept the Respondent's submission. The purpose of the requirement for quarterly reports to be stamped was explained by counsel for the Respondent in response to questions by the Tribunal. In particular, counsel for the Respondent explained that the requirement for stamping relates to issues of taxation, in that "those costs which have never been submitted will not be allowed to be deducted at the time when you go for mine development", and that "there are other regulatory penalties under the Mining Act for mandatory compliance".

339. However, the situation at hand is an arbitration seeking to determine proper compensation for an expropriation, and the evidence which Mr Taylor relied on seems to the Tribunal to be unimpeached except for the formality of this evidence not having been submitted to or stamped by the Government. Notably, the Respondent has not pointed to any numbers which it finds wrong or doubtful. There has been no substantive attack on the contents of the documents relied on by Mr Taylor.

340. To the contrary, as Mr Taylor explained, there is adequate evidence on record to confirm that these exploration costs were actually incurred and the amounts in the documents relied on by Mr Taylor can be reconciled to other contemporaneous records of expenditures. One such category of contemporaneous records is audited financial statements, which Mr Mwangakala accepted during cross-examination as constituting an accepted source under the IVS for establishing costs incurred.[232] The IVS certainly

[232] Tr. Day 3, page 917:3-8; Cl. PHB, paragraph 152.

do not require that evidence of costs incurred must be submitted to or stamped by any governmental entity.

341. Further, the Respondent's Professor Mruma accepted, in the course of cross-examination, "that the Claimants and their affiliates did actually carry out extensive exploration work at the Project over the course of 17 years" and he made "no criticism of the quality of that exploration work".[233] Despite this admission, the Respondent has not put forward any proper basis for excluding the costs which do not appear in Stamped Reports.

342. In light of the foregoing, the Tribunal accepts Mr Taylor's approach in including costs that are supported by contemporaneous evidence, even if there is no Stamped Report recording such costs.

343. **Third**, with regard to management overheads, the Tribunal agrees that such costs should be included in the fair market value of the Project. As Mr Taylor explained, such costs should be included because management costs are central to any exploration activity and "the Project would not be able to progress without direction and input from the Project Manager".[234] Mr Taylor also assessed the amount of management costs directly related to the Project because "the Project would not be able to progress without direction and input from the Project Manager", on the basis of the relevant project manager's financial statements for each of the financial years concerned.[235]

344. On the other hand, while the Respondent "disputes [the] inclusion of management costs",[236] the Respondent does not substantiate why such costs should not be included. This omission is difficult to understand when Mr Mwangakala had, in the course of the Hearing, accepted that indirect costs that would be required to recreate the asset should be included in the assessment, per IVS guidance,[237] and the IVS specifically mention

233 Tr. Day 3, page 699:6-16.

234 First ER Travis Taylor, paragraph 5.3.2.

235 Cl. Mem., paragraph 384.

236 Resp. C.-Mem., paragraph 506.

237 Tr. Day 3, page 912:9-15.

"professional fees", "overheads" and "other fees (commissions, etc)" as examples of such indirect costs. Mr Mwangakala further agreed that if one deviates from the IVS list, an explanation should be given.[238]

345. The Respondent also has not offered any alternative calculations for management costs, nor has it taken issue with Mr Taylor's calculations of management costs. Instead, the Respondent simply states that it disputes the inclusion of management costs, and Mr Mwangakala has disregarded these costs altogether in his calculation of the Project's fair market value.

346. The Tribunal accepts Mr Taylor's evidence that management costs are part of the indirect costs that would be required to replace or recreate the asset, per the IVS guidance, and therefore should be included in the assessment of fair market value. In the absence of any alternative calculations by the Respondent, the Tribunal accepts Mr Taylor's calculation of the overall management costs associated with the Project's exploration activities.

C. APPLICATION OF A MULTIPLE

(1) Parties' Positions

347. Mr Taylor adopted a specific cost approach called the Multiple of Exploration Expenditure ("**MEE**") method to assess the fair market value of the Claimants' Project. This method, which is endorsed by various mineral property valuation standards, involves applying a multiplier to the exploration costs to reflect the outcome of exploration activities. A multiple greater than 1 reflects that a hypothetical buyer would be willing to pay a premium over the historical exploration costs in exchange for the immediate use of the underlying project, especially in light of the time required to recreate the asset.

238 Tr. Day 3, page 914:4-6.

348. According to Mr Taylor, the fact that the Project had already defined resources and reported results that warranted further exploration justified applying a premium over historical costs (*i.e.* a multiple greater than 1).

349. On the other hand, the Respondent has argued that the inclusion of a premium to the Project's fair market value is not justified. According to Mr Mwangakala, there has not been "any progression of the assets beyond the primary stage of Scoping Study (or Preliminary Economic Assessment)",[239] the Project was still at an early stage of development, where it would not have sold at a premium to its historical exploration costs, and the inclusion of a premium was predicated on the mistaken assumption that the Claimants would automatically have been granted a special mining licence.

350. In response, Mr Taylor has explained that a project at the same development stage as the Claimants' and with similar exploration results would typically sell at a value above its historical expenditure, *i.e.* implying a multiple greater than 1. Mr Taylor has also highlighted academic literature and market data which demonstrate that exploration projects, *i.e.* projects that have not yet received a special mining or mining licence, generally sell at a premium to historical costs.

351. In his calculations, Mr Taylor applied a Prospectivity Enhancement Multiplier ("**PEM**") of 1.8, based on historical Project transactions and industry guidance, to the exploration costs incurred in respect of the Project.

(2) The Tribunal's Analysis

352. The Tribunal accepts Mr Taylor's use of the MEE method to assess the fair market value of the Project. In this regard, the Tribunal notes that Mr Mwangakala had accepted that historical costs should be adjusted in calculations of a fair market value. The relevant portion of Mr Mwangakala's evidence in this regard is set out below:[240]

239 WS Andrew Abraham Mwangakala, paragraph 57.

240 Tr. Day 4, page 1032:21 to page 1033:16.

"Q. Now, you agree with me … that costs alone are only an indication of value; correct?

A. Correct, based on a particular approach to valuation.

Q. So, if undue time, inconvenience, risk, or other factors are involved, a buyer may be willing to pay more for an asset or less?

A. Or less, correct.

…

Q. So, you would adjust the historical costs to achieve a Fair Market Value?

A. Correct."

353. As Mr Taylor explained, applying a PEM "captures the perceived return that would be expected by a seller and the premium a buyer would likely assign to expenditure based on the outcome of exploration activity".[241] In this case, "[t]he fact that it would take many years to recreate the Project's geological knowledge indicates that a hypothetical purchaser would be willing to pay a premium over cost."[242]

354. Mr Mwangakala also acknowledged that the MEE method is consistent with valuation guidance, and in particular, that the MEE method was recommended as a primary valuation approach by the Canadian Institute of Mining, Metallurgy, and Petroleum ("**CIMVAL**") Code.[243] Mr Mwangakala further agreed that under the IVS, the cost approach should include "a profit margin such as a return to investors".[244]

355. In light of the above, the Tribunal accepts that the MEE method is in line with valuation guidance such as the IVS and should be applied in this case to determine the fair market value of the Project.

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241 Second ER Travis Taylor, paragraph 4.3.4.

242 Second ER Travis Taylor, paragraph 4.3.6.

243 Tr. Day 4, page 1036:12-21.

244 Tr. Day 3, page 912:13-18.

356. As for the PEM to be applied, the Tribunal does not agree with Mr Taylor that a PEM of 1.8 is warranted in this case. Mr Taylor had arrived at a PEM of 1.8 after considering typical PEMs applied in the valuation of mineral resource assets, as well as the PEMs implied by historical transactions in the Project. Specifically, Mr Taylor considered the following historical transactions in the Project:

a. **The 2012 CNI transaction**: Indiana's acquisition of the 62.8% of shares in CNI not already held by itself on 17 September 2012 in a transaction valued at US$26.4 million. At the time, CNI held 75% of the Project. Mr Taylor calculates the value of the Project implied by the CNI transaction to be US$56.1 million. Mr Taylor also calculates the Project's historical expenditures through to the quarter ended 30 September 2012 to be US$27 million.

b. **The 2013 MMG transaction**: MMG's agreement to solely fund up to US$60 million in three stages in return for up to a 60% earn-in interest in the Project in 2013. Under the first of these stages, MMG funded US$10 million in return for a 15% interest. After completing the first stage, MMG elected not to invest further in the Project. Mr Taylor calculates the value of the Project implied by the MMG transaction to be US$56.7 million based on the first stage transaction. Mr Taylor also calculates the Project's historical expenditure through to the quarter ended 30 September 2013 to be US$36.2 million.

c. **The 2015 Fig Tree transaction**: Indiana's agreement with Fig Tree in March 2015 for Fig Tree to obtain an interest of between 30% and 70.65% in the Project, depending on the success of its geotechnical study, for US$6 million and a commitment to solely fund a feasibility study. Ultimately, Fig Tree acquired a 30% interest in the Project for about US$2 million. Mr Taylor calculates the value of the Project implied by the Fig Tree transaction to be US$6.7 million. Mr Taylor also calculates the Project's historical expenditure through to the quarter ended 31 December 2014 to be US$46 million.

357. Based on the above, Mr Taylor calculated the following implied PEMs for each historical transaction in the Project:

a. A PEM of 2.1 implied by the 2012 CNI transaction;

b. A PEM of 1.6 implied by the 2013 MMG transaction; and

c. A PEM of 0.1 implied by the 2015 Fig Tree transaction.

358. However, Mr Taylor took the view that the PEM implied by the Fig Tree transaction is not a relevant or appropriate comparable in this case.[245] According to Mr Taylor, "the valuation of the Project implied by the executed Fig Tree transaction, and associated PEM, is considerably lower than those implied by the CNI and MMG transactions because [of] Indiana's need for additional capital and the difficulty of raising funds in the market at the time".[246] Mr Taylor also notes that Fig Tree had recognised, internally, that the Project had significant value and that "[t]he PEM implied by Fig Tree's internal valuations of the Project was considerably higher at between 1.6 and 4.9."[247]

359. Mr Taylor concludes in his report as follows:[248]

> "I conclude that 1.6 to 2.1 represents a reasonable range of PEMs for the valuation of the Project, based on the CNI and MMG transactions and I use the midpoint of this range of 1.8 to value the Project as at 18 December 2019. I consider that a PEM of 1.8 may be conservative in light of … academic studies I reviewed, which indicate that a PEM of 2.5 to 3.0 is appropriate for a Project containing indicated resources; and [t]he fact that by December 2019 Indiana's understanding of the Project has improved, and therefore the Project's stage of development has progressed, since the CNI and MMG transactions."

360. During the Hearing, Mr Taylor also clarified that he did not include the PEM implied by the Fig Tree transaction in the scale of comparables, and that the PEM of 1.8 he

245 Tr. Day 4, page 1282:12-21.

246 First ER Travis Taylor, paragraph 5.4.15.

247 First ER Travis Taylor, paragraph 5.4.15.

248 First ER Travis Taylor, paragraph5.4.16.

arrived at represented the midpoint of the PEMs of 2.1 and 1.6 implied by the CNI transaction and the MMG transaction respectively.[249]

361. The Tribunal is of the view that the historical transactions relating to the Project are instructive and guidance should be taken from them in determining an appropriate PEM to be applied in this case. These transactions involved the Project itself and are directly relevant in considering the fair market value of the Project. Such transactions would likely be considered by a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when considering an acquisition of the Project. The Tribunal therefore finds that such historical transactions would represent relevant benchmarks in the determination of an appropriate PEM.

362. The Tribunal agrees with Mr Taylor's analysis that the circumstances of the Fig Tree transaction in 2015 set it apart as an outlier from the other two historical transactions in the Project. Nevertheless, the Tribunal does not agree that the 2015 Fig Tree transaction should therefore be excluded altogether from consideration. Instead, the 2015 Fig Tree transaction remains relevant and the Tribunal would include it in the scale of comparables when determining a PEM, although substantially discounting the weight it should be afforded.

363. In the Tribunal's view, in looking at the three comparables, the present case is much closer to the 2012 CNI transaction and the 2013 MMG transaction, than to the 2015 Fig Tree transaction, bearing in mind Indiana's urgent need for additional capital and the general market sentiment at the time of the Fig Tree transaction.

364. In respect of the 2012 CNI transaction, the Tribunal notes that at the relevant time, Indiana already had a shareholding in CNI. The 2012 CNI transaction was to enable Indiana to acquire all the remaining shares of CNI which Indiana did not already own. Additionally, aside from the Project, CNI had an interest in an exploration property in St Stephen, Canada. In Mr Taylor's calculations, he considered that the value of CNI in

[249] Tr. Day 4, pages 1283:11 to 1284:4.

2012 was essentially the value of its 75% stake in the Project, as CNI's expenditure on that other exploration property was "minimal" compared to its expenditures on the Project.

365. As for the 2013 MMG transaction, that transaction concerned an agreement in which MMG, a third party, agreed to various stages of funding in return for an interest in the Project. Under the first stage of funding, MMG agreed to provide US$10 million of funding to earn a 15% interest in the Project. Mr Taylor's calculation of a 1.6 PEM was based on this first stage of funding, as MMG did not ultimately proceed with the remaining stages of funding.

366. Taking these circumstances into account, the Tribunal considers that the MMG transaction in 2013 represents a more relevant benchmark for the purposes of calculating a PEM, as compared to the CNI transaction in 2012. The MMG transaction concerned the acquisition of an interest in the Project by a third party, and is more akin to a transaction in the open market. On the other hand, the CNI transaction concerned the acquisition by Indiana of the remaining shares in CNI, a company in which Indiana already had an interest.

367. Overall, having considered the three comparables and all the relevant circumstances, the Tribunal finds that the PEM that should be applied in this case is 1.6, rather than 1.8. This is the PEM implied by the 2013 MMG transaction, which the Tribunal considers is the most relevant benchmark out of the three historical transactions. A PEM of 1.6 also sits somewhere between the PEMs implied by the 2012 CNI transaction and the 2015 Fig Tree transaction. It is also within the scale of what Mr Taylor calculates as the PEM implied by Fig Tree's internal valuations of the Project in 2015.

D. VALUATION DATE

(1) Parties' Positions

368. On the appropriate date of valuation, the Claimants have put forward the date of 18 December 2019. As submitted in the Claimants' Memorial:[250]

> "According to Article 5(1) of the BIT, the proper date for the assessment of the fair market value of the Claimants' investment for a lawful expropriation is 'immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier'. In the present case, the expropriation of the Claimants' investment was completed on 19 December 2019, when the Mining Commission issued the Invitation to Tender, effectively offering the NH Retention Licence areas to the highest bidder. Therefore, as set out in the BIT, the relevant valuation date is 18 December 2019 …"

369. On the other hand, the Respondent has argued that the appropriate date of valuation is the date on which the 2018 Regulations were enacted, *i.e.* 10 January 2018. The Respondent submits in its Counter-Memorial as follows:[251]

> "The Respondent submits that, in the event that the Tribunal finds that there was any expropriation of Claimants' investment, then the appropriate date of valuation is 10 January 2018, which is [the] date when the 2018 Regulations came into force, taking into consideration that, the 2018 Regulations is the one that reverted the area initially owned under Retention Licence to the Government and not 19 December 2019 as wrongly determined by the Claimants (*i.e.* a day the Mining Commission issued the Invitation to Tender). The Respondent denies the Claimants' valuation date and maintains its position that the said tender was not finalised and therefore cannot be used as valuation date for expropriation purposes."

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250 Cl. Mem., paragraph 367.

251 Resp. C.-Mem., paragraph 474.

(2) The Tribunal's Analysis

370. The Tribunal has explained above that in its view, the date of expropriation in this case is 10 January 2018, rather than 19 December 2019.

371. The Tribunal also considers that under customary international law, a State must provide full reparation for the injury caused by its breach of international obligations. As set out in the *Chorzow Factory* case, "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[252] Similarly, the ILC Articles on State Responsibility provide at Article 31(1) that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[253]

372. The Tribunal notes that the Claimants had asked for damages based on a valuation date of December 2019 rather than January 2018. However, having found that the expropriation took place on 10 January 2018, the Tribunal considers it appropriate, and in line with customary international law, that the date of valuation should also be 10 January 2018. The Tribunal agrees with the Respondent's submissions in this regard. Using 10 January 2018 as the date of valuation would, in the Tribunal's view, best "wipe out all the consequences of the illegal act" of expropriation in this case and "reestablish the situation which would, in all probability, have existed" if the expropriation had not occurred. Conversely, the Claimants would not be adequately compensated for their losses arising from a January 2018 expropriation, if the date of valuation were December 2019.

373. Insofar as the impact on quantum is concerned, Mr Taylor explained during the hearing that the two valuation dates do not materially affect the assessment of fair market value. As Mr Taylor explained:

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252 *Case Concerning the Factory at Chorzów (Germany v Poland)*, PCIJ Series A, No. 17, Judgement No. 13 (Merits), 13 September 1928 (**Exhibit CL-79**), page 47.

253 ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) (**Exhibit CL-78**), page 8.

"Also important to note that Mr. Mwangakala's Valuation Date is different from mine. He uses 10th of January 2018, versus my December 2019 date, but this does not materially affect things. If I was to adopt Mr Mwangakala's Valuation Date, this would not affect my assessment of the Project's Fair Market Value materially because – well, there's only a .1 million difference anyway, because there was very little cost between 2018 and 2019."[254]

374. However, there will be an impact on the pre-award interest payable. In particular, and as the Claimants have submitted, "while an earlier valuation date of 10 January 2018 would reduce the principal amount claimed by slightly less than USD 0.1 million, it would, however, result in more pre-award interest being applied and therefore a higher damages figure."[255] During the Hearing, counsel for the Claimants stated that if the Respondent insists, the Claimants would be happy to accept more pre-award interest on the basis of the Respondent's valuation date:[256]

"… Frankly, the choice of Valuation Date does not materially affect the amount of damages due to the Claimants. This is because both Parties' primary Valuation Method calculate the value of the Project by reference to historical costs rather than by reference to expected nickel prices at the time of the expropriation.

Where the choice of Valuation Date, however, does make a difference is with interest. Using the Respondent's Valuation Date, the Claimants' total compensation would increase by around USD 14 million once you take into account pre-award interest. Honestly, I don't quite understand the Respondent's argument here, but this, again, shows how reasonable the Claimants' damages case is.

The December 2019 Valuation Date is legally founded. It is not a date randomly picked to maximize damages. But, of course, if the Respondent insists, the

254 Tr. Day 4, page 1179:3-11.

255 Cl. Reply, paragraph 641.

256 Tr. Day 1, pages 160:15 to 161:13.

Claimants are very happy to take the USD 14 million of pre-award interest on top of what is owed based on the December '19 Valuation Date."

375. Accordingly, the Tribunal does not understand the Claimants to be objecting to a date of valuation of 10 January 2018.

376. For the reasons explained above, the Tribunal finds that the appropriate date of valuation in this case is 10 January 2018. The Tribunal will deal with interest below.

E. INTEREST

(1) Parties' Positions

377. The Parties agree that in the event the Tribunal finds that the Respondent breached its obligations under the BIT, the Claimants would be entitled to pre-Award and post-Award interest. Specifically, the Respondent acknowledges that the Claimants should be compensated "for the time value and opportunity cost of money".

378. Further, the Parties agree that the Claimants are entitled to interest at a normal commercial rate and that interest at a rate of USD Prime + 2% constitutes such a normal commercial rate.

379. However, whereas Mr Taylor considers it appropriate to compound interest annually, the Respondent "disputes the compounding of interest". Mr Mwangakala, in his calculations, applies a simple interest rate, without explaining why compound interest is not suitable.

(2) The Tribunal's Analysis

380. The Tribunal awards compound interest as sought by the Claimants, in respect of both pre-Award interest and post-Award interest. Pre-award interest will run from the date of valuation, *i.e.* 10 January 2018.

381. The Tribunal notes that compound interest is the norm in international arbitration. For example, as the tribunal held in *Wena Hotels v Egypt*, "compound interest may be and, in absence of special circumstances, should be awarded to the claimant as damages by

international tribunals."[257] In this case, the Respondent has not put forward any "special circumstances" that would justify an award of simple interest, rather than compound interest.

382. As Mr Taylor explained during the Hearing, "compounding is normal and commercial, because it reflects economic realities. … [T]he U.S. prime rate, like most other benchmark rates, assumes compounding. So, by taking that rate and using it as simple interest, you're not adequately compensating the Claimants."[258]

383. Further, Mr Mwangakala agreed, in the course of cross-examination, that it is "common practice in the bank sector to compound interest when calculating interest" and that "the U.S. prime rate is [commonly] based on the understanding that the interest would be compounded".[259]

384. In light of the above, the Tribunal is satisfied that interest at a rate of USD Prime + 2%, compounded annually, constitutes a normal commercial rate.

F. CONCLUSION ON DAMAGES

385. In its post-hearing brief, the Claimants submitted the following damage calculations based on a valuation date of 10 January 2018 and a PEM of 1.6: USD 76,630,483,[260] comprising a fair market value of USD 76,645,491, less USD 15,008 as proceeds from the sale of certain assets.

386. Additionally, the Claimants submit that they have suffered further losses of USD 73,978.76 in ensuring the maintenance and surveillance of the core at the Ntaka Hill base camp, and subsequently transferring the core to a remote, safe location.[261]

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257 *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**Exhibit CL-99**), paragraph 129.

258 Tr. Day 4, page 1182:14-21.

259 Tr. Day 4, page 1052:1-12.

260 Cl. PHB, paragraph 196, footnote 239.

261 Cl. PHB, paragraphs 198-200.

387. The Claimants' total loss therefore amounts to USD 76,704,461.76, excluding interest.

388. The Tribunal accepts the calculations put forward by the Claimants and accordingly awards the Claimants USD 76,704,461.76 in damages and additional losses, excluding interest.

VIII. COSTS

A. CLAIMANTS' COSTS SUBMISSIONS

389. In its submissions on costs, the Claimants submit that the Respondent should bear the total arbitration costs incurred by Claimants, including their legal fees and expenses and the Tribunal's fees and expenses[262] totaling USD 4,284,161.

390. The Claimants argue that they are entitled to their full costs due to the Respondent's consistently dilatory and obstructive conduct throughout this proceeding, which forced the Claimants to incur what would otherwise be unnecessary and avoidable costs.[263] Among other things, it took the Respondent over three months from the date of the Claimants' Request for Arbitration to appoint an arbitrator, and the Respondent failed to comply with any of the procedural deadlines it had negotiated and agreed upon with the Claimants.[264] The Claimants also highlight that the Respondent has systematically failed to pay its share of the advance on costs of the proceeding.[265]

391. Further, even after the Parties exchanged document production requests and subsequently applied to the Tribunal for its determination of those requests, the Respondent only produced a handful of documents in response to the Claimants' document production requests. In particular, the Respondent did not submit with its

262 Cl. PHB, paragraph 228.

263 Cl. PHB, paragraph 218.

264 Cl. PHB, paragraphs 219-220.

265 Cl. PHB, paragraph 221.

Rejoinder a single document out of the thousands of documents which the Claimants requested by its document production requests. [266]

392. The Claimants submit that their costs are reasonable considering their lean legal team, compared to the size of the Respondent's legal team, and they only engaged an expert as necessary. The Claimants also efficiently met all procedural deadlines, and worked in good faith with the Respondent to agree on procedural calendar adjustments.[267]

393. The Claimants further submit that depending on the date on which the Respondent pays damages, costs and interest, the Claimants will also incur *additional* funding costs pursuant to the funding agreement entered into between the Claimants and their third party funder, LCM.[268] This would amount to a minimum of USD 11,582,023.53 (*i.e.* 3 times the outstanding funding amount of USD 3,860,674.51 as at 19 April 2023) if the Respondent proceeds with payment under the Award before August 2023, and a minimum of USD 13,512,360.78 (*i.e.* 3.5 times of USD 3,860,674.51) if the payment occurs after August 2023.[269]

394. The Claimants have submitted the following claims for legal and other costs:

DESCRIPTION	**AMOUNT / USD**
ICSID/Tribunal's Fees (including USD 150,000 paid as the Respondent's share of the first advance on costs)	**425,000**
Cost of Legal Representation	**2,966,877.27**
a. LALIVE legal fees and expenses	2,727,677.62

266 Cl. PHB, paragraphs 222-223.

267 Cl. PHB, paragraph 225.

268 Cl. Costs Schedule, paragraph 2.

269 Cl. Costs Schedule, paragraphs 2, 11.

DESCRIPTION	AMOUNT / USD
b. Boies Schiller Flexner LLP ("**BSF**") legal fees and expenses	239,199.65
Quantum expert's fees and expenses	**419,433.75**
Claimants' direct costs	**472,850**
TOTAL	**4,284,161**

B. RESPONDENT'S COSTS SUBMISSIONS

395. In its submissions on costs, the Respondent submits that the Claimants should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses and the Tribunal's fees and expenses totaling USD 1,865,384.39, within 60 days of the date of dispatch of this Award. In the alternative, each party should bear its own legal costs and share the Tribunal's fees and expenses, administrative fees and other charges related with the use of the hearing facility equally.[270]

396. The Respondent argues that the Claimants should bear all the costs and expenses of these proceedings because:

a. the Respondent has demonstrated that the Claimants' claims are inconsistent and unsustainable;[271]

b. the Claimants have no *locus standi* and should not have brought their claims before the Tribunal, because NUKL and NNHL have never been issued any retention licences, and NNL is a Tanzanian company and not an "investor" for the purposes

[270] Resp. PHB, paragraph 268.

[271] Resp. PHB, paragraphs 223, 232.

of these proceedings, which cannot take the benefit of the BIT or ICSID Convention;[272]

c. even if the Tribunal finds that there was expropriation, the Claimants' claims for damages were overly speculative, exaggerated, made in bad faith and relied on calculations on costs that were not actually incurred in the Project;[273]

d. the Government had acted in accordance with the laws of Tanzania and the Amending Legislation were not in any way arbitrary;[274] and

e. the Claimants made unnecessary submissions and personal attacks on the late President Magufuli and increased costs by submitting voluminous exhibits with limited relevance to the claims. The Respondent alleges that such conduct amounts to misconduct and bad faith;[275] and

f. the Claimants sought orders from the Tribunal on issues that were already previously determined, such as regarding document production.[276]

397. The Respondent's position is that the costs it has incurred in its defence are entirely reasonable in light of the volume of material filed by the Claimants. Further, the Respondent's defence was conducted by its state attorneys, who charge a substantially lower billable rate compared to comparable practitioners in the private sector,[277] and the Respondent has been "exceptionally conservative in quantifying its costs"[278] (including for travel and other expenses).

272 Resp. PHB, paragraph 224.
273 Resp. PHB, paragraphs 227, 231.
274 Resp. PHB, paragraphs 228-229.
275 Resp. PHB, paragraphs 234-239.
276 Resp. PHB, paragraphs240-241.
277 Resp. PHB, paragraphs 243-245.
278 Resp. PHB, paragraph 245.

398. The Respondent has submitted the following claims for legal and other costs (excluding advances made to ICSID):[279]

DESCRIPTION	**AMOUNT / USD** (at the exchange rate of TZS 2,350: USD 1)
Tribunal's Fees	**800,000**
Cost of Legal Representation	**931,979**
c. State Attorneys	353,191
d. Administrative staff	120,213
e. Witnesses Costs	54,996
f. Travelling costs	208,685
Disbursement Costs	**133,405.39**
a. Hyper-linking of documents	425.53
b. Printing and photocopy costs	24,595.74
c. Conference room costs	64,042.55
d. Courier costs / Postage costs	42,639.43
e. Material and supplies	1,702.13
TOTAL	**1,865,384.39**

[279] Resp. PHB, page 95.

C. PARTIES' COMMENTS ON THEIR RESPECTIVE COST SCHEDULES

399. On 20 April 2023, the Tribunal invited the Parties to provide any comments they might have on their respective costs submissions and costs schedules by 1 May 2023. The Claimants provided their comments on 1 May 2023 ("**Cl. Costs Comments**"). The Respondent's comments were only received by the Tribunal Secretary on 6 May 2023 ("**Resp. Costs Comments**") due to an alleged technical issue with the Respondent's counsel's emails.

400. The Tribunal will not address every issue raised in the Cl. Costs Comments or the Resp. Costs Comments. The Tribunal turns specifically to the additional third-party funding costs claimed by the Claimants (see paragraph 393 above).

401. The Respondent argues that the Claimants' claim in this regard is "unreasonable in the context of an international arbitration of this nature*"* and the Claimants have failed to provide sufficient information to establish that these costs (a) have been reasonably disbursed by the third-party funder, LCM; (b) have indeed been incurred; and (c) are reasonable in amount.[280] The Respondent also submits that the Claimants' arrangement with LCM is aimed at unjustly enriching the Claimants and their funder.[281]

402. The Respondent highlights the following points in respect of the Claimants' claim for third-party funding costs:

a. the Claimants' claim for 3 or 3.5 times the amount of the outstanding funding equates to 300% or 350% interest on the amount, and is unreasonable and lacks any financial justification;[282]

b. there is no proof that the third-party funding costs were paid to the Claimants;[283]

280 Resp. Costs Comments, paragraphs 5-5.1.

281 Resp. Costs Comments, paragraph 14.

282 Resp. Costs Comments, paragraph 14.

283 Resp. Costs Comments, paragraph 5.2.

c. none of the three Claimants was a party to the alleged funding arrangement. Based on a news article referred to in the Resp. Costs Comments,[284] it is Indiana (the Claimants' parent company) that appeared to have engaged LCM;[285]

d. the Claimants have never disclosed any agreement between them and LCM or Indiana (who are not party to this case) as far as litigation funding is concerned. The Claimants' claim thus lacks legal basis;[286]

e. if there exists a third-party funding agreement between the Claimants and their funder, this was a "personal agreement that was done at their own peril" and the arrangement was not communicated to either the Tribunal or the Respondent. Consequently, it should not affect the Respondent;[287]

f. if there exists a third-party funding agreement between the Claimants and their funder, the claim for third-party funding costs should also not be considered part of the Claimants' costs, but should form part of any damages to be awarded to the Claimants if they are successful in these proceedings;[288] and

g. the Claimants' claim for third-party funding is not supported by international law, the ICSID Convention or ICSID Rules, because Rule 14 of the ICSID Arbitration Rules relating to third-party funding was only introduced in July 2022. The Claimants did not comply with the requirements of Rule 14 of the Arbitration Rules 2022. In any event, the Claimants' request for arbitration was filed in September 2020 before the introduction of the said Rule, which cannot apply retroactively.[289]

284 Resp. Costs Comments, footnote 1.

285 Resp. Costs Comments, paragraphs 5.3-5.4.

286 Resp. Costs Comments, paragraph 5.5

287 Resp. Costs Comments, paragraph 14.

288 Resp. Costs Comments, paragraph 14.

289 Resp. Costs Comments, paragraph 15.

D. THE TRIBUNAL'S DECISION ON COSTS

403. The Tribunal has a wide discretion to allocate the arbitration costs between the Parties. Article 61(2) of the ICSID Convention reads:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

404. Rule 28(1) of the Arbitration Rules further provides:

> Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide … with respect to any part of the proceeding, that the related costs … shall be borne entirely or in a particular share by one of the parties.

405. The Tribunal is of the view that the "costs follow the event" approach is the most appropriate in this case. This approach is consistent with the principle in *Chorzow Factory* that an injured party be restored to the position it would have been in, had the breach not occurred.[290] Both Parties also accept that this would be the appropriate approach.[291]

406. As the Claimants are the successful party in this arbitration, the Tribunal finds that it is reasonable for the Respondent to bear the full sum of the Claimants' arbitration costs, as set out at paragraph 394 above.

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290 *Case Concerning the Factory at Chorzów (Germany v Poland)*, PCIJ Series A, No. 17, Judgement No. 13 (Merits), 13 September 1928 (**Exhibit CL-79**), page 47.

291 Cl. PHB, paragraphs 210-213; Cl. Costs Comments, paragraph 3; Resp. PHB, paragraphs 213-215; Resp. Costs Comments, paragraph 3.

407. The Tribunal considers the Claimants' costs of legal representation to be in line with the level of fees normally charged by major international law firms. The Tribunal does not accept the Respondent's submission that the professional fees incurred by BSF should be disregarded and that allowing such costs would unjustly enrich the Claimants.[292] The Tribunal notes that the Respondent and Tribunal were duly informed that Mr. Timothy L. Foden had moved to BSF and would continue to act as co-counsel for the Claimants in his new capacity (see paragraphs 22 and 23 above).

408. However, the Tribunal does not consider it reasonable to award the Claimants the *additional* funding costs it seeks pursuant to the funding agreement entered into between the Claimants and their third party funder, LCM (see paragraph 393 above). The Tribunal agrees with the Respondent that the Claimants have failed to provide sufficient information to establish that their claim for 3 or 3.5 times the amount of the outstanding funding amount is either reasonable or compensable. The Tribunal does not accept the Claimants' position that they have established in their Memorial that they are entitled to recover *inter alia* reasonable funding costs.[293]

409. For completeness, the Tribunal is not persuaded by the Respondent's other objections to the Claimants' claim for funding costs at paragraphs 402.b to 402.g above. While the Claimants have not disclosed the third party funding agreement between them and LCM or Indiana, the Tribunal's view is that the Claimants are not obliged to do so. Further, it is not accurate for the Respondent to claim that the arrangement was not communicated to either the Tribunal or the Respondent. The Tribunal notes that the Respondent's counsel in fact questioned the Claimants' Ms Bronwyn Barnes on the Claimants' litigation funding arrangement at the Hearing.[294] The Respondent's allegation that the Claimants failed to comply with Rule 14 of the Arbitration Rules 2022 is also irrelevant since the Arbitration Rules 2022 do not apply and the Claimants are not relying on the same.

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292 Resp. Costs Comments, paragraphs 9-10.

293 Cl. Mem., paragraph 409; Cl. Reply, paragraphs 661, 663.

294 Tr. Day 2, page 397:13 to page 401:19.

410. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
President, Mr. Cavinder Bull SC	108,621.91
Co-arbitrator, Mr. Doak Bishop	71,041.21
Co-arbitrator, Justice Sanji Mmasenono Monageng	147,700.32
ICSID's administrative fees	126,000
Direct expenses (estimated)	55,476.70
Total	**508,840.14**

411. The above costs have been paid out of the advances made by the Parties.[295] As a result, each Party's share of the costs of arbitration amounts to USD 254,420.07.

412. Accordingly, the Tribunal orders the Respondent to pay the Claimants USD 254,420.07 for the expended portion of the Claimants' advances to ICSID and USD 3,859,161 to cover the Claimants' legal fees and expenses.

IX. AWARD

413. For the reasons set forth above, the Tribunal unanimously decides as follows:

(1) The Tribunal has jurisdiction over the dispute submitted to it in this arbitration;

(2) The Respondent unlawfully expropriated the Claimants' investment in Tanzania, in breach of Article 5 of the BIT;

(3) The Respondent shall pay the Claimants USD 76,704,461.76 in damages and additional losses;

[295] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

(4) 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;

(5) 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;

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

(7) All other claims are dismissed.

THE ARBITRAL TRIBUNAL

Doak Bishop
Arbitrator
Date: 07/14/ 2023

Sanji Mmasenono Monageng
Arbitrator
Date: 07/14/ 2023

Cavinder Bull
President of the Tribunal
Date: 07/14/ 2023