INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

United Republic of Tanzania
Applicant

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

DECISION ON PRELIMINARY OBJECTIONS PURSUANT TO ICSID ARBITRATION RULE 41(5)

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

Secretary of the ad hoc Committee
Ms. Aurélia Antonietti

Date of dispatch to the Parties: 2 February 2024

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I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment ("**Annulment Application**" or "**Application**") of the award rendered on 14 July 2023 ("**Award**") in the arbitration proceeding ICSID Case No. ARB/20/38 between Nachingwea U.K. Limited (UK) (**NUKL**), Ntaka Nickel Holdings Limited (UK) **(NNHL**), two companies incorporated in the United Kingdom, and Nachingwea Nickel Limited (Tanzania) (**NNL**), a company incorporated in the United Republic of Tanzania (together "**Claimants**"), and the United Republic of Tanzania ("**Applicant**" or "**Respondent**" or "**Tanzania**"). They are collectively referred to as the "**Parties**".

2. The dispute in the original proceeding was submitted by the Claimants to the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") on 25 September, 2020 on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, in force since 2 August 1996 ("**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated 18 March 1965 ("**ICSID Convention**").

3. The tribunal in the original proceeding was composed of Mr. Cavinder Bull SC (president), Mr. Doak Bishop and Justice Sanij Mmasenono Monageng (arbitrators) ("**Tribunal**").

4. The dispute concerns the development by the Claimants of the Ntaka Hill Nickel Project, a mining operation for the exploitation of nickel located in south-eastern Tanzania. The dispute arose from certain changes to Tanzania's regulatory framework for mining projects, as the State reformed its mining regulations and mining licenses regime in July 2017. More specifically, in January 2018, Tanzania modified the legal basis for granting retention licenses, and in 2019, the Claimants' retention licenses were subsequently cancelled without compensation. The dispute was brought under the investor-State dispute settlement provisions (Article 8) of the BIT.

5. The Tribunal decided unanimously:

> *That the Centre has jurisdiction and the Tribunal has competence over the dispute;*
>
> *That the Respondent unlawfully expropriated the Claimants' investment in Tanzania;*
>
> *That the Respondent shall pay the Claimants USD 76,704,461.76 in damages and additional losses;*
>
> *The Respondent shall pay the Claimants compound interest at the rate of 2% above the USD Prime rate on the amount awarded in (3) above, such compound interest to run from 10 January 2018 until the date upon which payment is made;*
>
> *The costs of the arbitration, including the fees and expenses of the Tribunal and ICSID, shall be borne by the Respondent. The Respondent shall accordingly pay the Claimants USD 254,420.07 as reimbursement for the Claimants' share of the costs of the arbitration;*
>
> *The Respondent shall pay the Claimants USD 3,859,161 in respect of the Claimants' legal costs and expenses;*
>
> *and dismissed all other claims.*[1]

6. The Applicant asserts three grounds for annulment in accordance with Article 52(1) (b), (d) and (e) of the ICSID Convention.

7. The Claimants have filed an objection to the Applicant's Application under ICSID Arbitration Rule 41(5) contending that it is "*manifestly without legal merit*".

II. PROCEDURAL HISTORY

8. For the purposes of the present Decision, the Committee recalls the Procedural History presented in its 'Decision on the Stay of Enforcement of the Award', dated 31 October 2023, and completed it with new developments.

9. On 25 July 2023, Tanzania filed the Annulment Application with ICSID pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"), and requested the stay of enforcement of the Award "*until the Application for Annulment is decided upon*".[2]

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1 Award, ¶ 413.

2 Application, ¶ 42.

10. On 28 July 2023, the ICSID Secretary General registered the Annulment Application and notified the Parties that, pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

11. On 24 August 2023, the *ad hoc* Committee ("**Committee**") was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Professor Dr. Rolf Knieper (German), serving as President, Ms. Bertha Cooper-Rousseau (Bahamian), and Professor Githu Muigai, EGH, SC (Kenyan). On the same day, the Parties were informed that the annulment proceeding was deemed to have begun on that date, and that Ms. Aurélia Antonietti, ICSID Senior Legal Adviser, would serve as Secretary of the Committee.

12. On 2 September 2023, the Applicant sent an e-mail to the Centre, that was not received before 6 September 2023, in which (i) it agreed to 11 October 2023 as the date of the First Session, and (ii) it maintained its request for the stay of enforcement.

13. On 5 September 2023, the Claimants informed the Committee that they would oppose the request for a maintenance of the stay of enforcement. Further, they informed the Committee of their intention to submit a preliminary objection to the Application for Annulment as being manifestly without legal merit, in accordance with ICSID Arbitration Rule 41(5). They proposed to brief and hear this objection immediately after the First Session, together with the Applicant's request for the continuation of the stay of enforcement. In that perspective, they submitted a proposal for a calendar.

14. By letter of 6 September 2023, the Applicant objected to the Claimants' proposal to hear the request for the stay of enforcement and the objection under ICSID Arbitration Rule 41(5) together after the First Session. It proposed a procedural calendar in accordance with these indications.

15. In a letter of 8 September 2023, the Claimants proposed an adapted form of a procedural calendar according to which the request for the stay of enforcement and the application for a decision under ICSID Arbitration rule 41(5) would be heard together.

16. On 7 September 2023, not having received the advance payment of 125,000 USD requested from Tanzania on 31 August 2023, the ICSID Secretariat notified the Parties that (i) the Applicant was in default of payment, (ii) either Party had the opportunity to pay the required sum within 15 days, and (iii) that the Secretary-General might suspend the proceeding if no payment was received before 22 September 2023. By letter sent by

e-mail on 6 September and received on 8 September 2023, the Applicant requested to be allowed to make the "*payment at-least in the end of this month of September or earlier October 2023 as it has not finalized internal approval processes for payment*."

17. On 15 September 2023, the Committee notified the Parties of its decision to separate the submissions and hearing on the Claimants' request to reject the Annulment Application in accordance with ICSID Arbitration Rule 41(5) from the First Session and the hearing on the stay of enforcement, to afford each Party two rounds of submissions, for which it proposed a timetable, and to hear the Parties on the request during the week of 18 December 2023 remotely, for instance on 20 December 2023. It invited the Parties to try to agree on the timetable and on an date for a hearing during that week. By separate e-mails dated 18 and 19 September 2023, both Parties agreed to the timetable and remote hearing on 20 December 2023.

18. On 26 September 2023, the Centre received the Applicant's advance payment in an amount of USD 125,000, as requested.

19. On 6 October 2023, the Parties submitted their joint proposals concerning the draft Procedural Order No. 1, as well as a hearing schedule for the issue of the stay of enforcement.

20. On 11 October 2023, the Committee held the First Session and a hearing on the continuation of the stay of enforcement.

21. On 16 October 2023, the Claimants submitted their 'Memorial on its Preliminary Objection to the Applicant's Annulment Application under ICSID Arbitration Rule 41(5)' ("**Memorial**"), together with legal authorities.

22. On 31 October 2023, the Committee rendered its 'Decision on the Stay of Enforcement of the Award'. It decided to maintain the stay under the condition that the Applicant provide an undertaking on the compliance with the Award in case of the rejection of its Application for Annulment, failing which it would lift the stay under the condition that the Claimants and their controlling shareholder issue an undertaking affirming to reimburse the Applicant if the Award were annulled at a later stage.

23. On 13 November 2023, the Applicant submitted its 'Response to the Claimants' Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules' ("**Response**"), together with factual exhibits ad legal authorities.

24. On 27 November 2023, the Claimants submitted their 'Reply on its Preliminary Objection to the Applicant's Annulment Application under ICSID Arbitration Rule 41(5)' ("**Reply**"), together with further legal authorities.

25. On 11 December 2023, the Applicant submitted its 'Rejoinder on the Claimants' Reply to its Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules' ("**Rejoinder**"), together with further legal authorities.

26. The Parties having submitted their undertakings as required under the Decision on Stay on 6 November 2023 and 19 December 2023 respectively, the Committee notified the Parties by letter of 19 December 2023 that the stay was continued.

27. On 20 December 2023, a hearing on the Claimants' Rule 41(5) Objection took place by videoconference ("**Hearing**"). The following persons were present at this hearing:

Tribunal:	
Prof. Dr. Rolf Knieper	President of the Committee
Prof. Githu Muigai	Member of the Committee
Ms. Bertha Cooper Rousseau	Member of the Committee
Assistant to Prof. Muigai:	
Ms. Wambui Muigai	
ICSID Secretariat:	
Ms. Aurélia Antonietti	Secretary of the Committee
Mr. Pierre Nosewicz	ICSID Secretariat
For the Claimants:	
Counsel:	
Mr. Ben Love	Boies Schiller Flexner LLP
Mr. Sagar Gupta	Boies Schiller Flexner (UK) LLP
Mr. Jan Kunstyr	Boies Schiller Flexner (UK) LLP
For Tanzania:	
Counsel:	
Dr. Boniphace Luhende	Counsel for Respondent-Office of the Solicitor General
Ms. Salome S. Magessa	Counsel for Respondent-Office of the Solicitor General

Ms. Consesa Kahendaguza	Counsel for Respondent-Office of the Solicitor General
Mr. Baraka Nyambita	Counsel for Respondent-Office of the Solicitor General
Ms. Lydia Thomas	Counsel for Respondent-Office of the Solicitor General
Ms. Neisha Shao	Counsel for Respondent-Office of the Solicitor General
Ms. Angelina Ruhumbika	Counsel for Respondent-Office of the Solicitor General
Mr. Edwin Webiro	Counsel for Respondent-Office of the Solicitor General

III. THE PARTIES' REQUEST FOR RELIEF

28. The Claimants request that the Committee grant the following:

> *(a)* ***DECLARE*** *that Tanzania's claims in its Annulment Application are manifestly without legal merit;*
>
> *(b)* ***DISMISS*** *with prejudice Tanzania's claims in its Annulment Application pursuant to ICSID Arbitration Rule 41(5);*
>
> *(c)* ***ORDER*** *Tanzania to bear the costs of this annulment proceeding and compensate the Claimants on a full indemnity basis and with interest for all their costs and expenses incurred in relation to this proceeding, including the fees and expenses of their counsel and in-house counsel, the fees and expenses of the Committee, and ICSID's other costs and fees; and*
>
> *(d)* ***AWARD*** *such other and further relief to the Claimants as the Committee deems appropriate.*[3]

29. The Applicant requests that the Committee grant the following:

> *(a)* ***DECLARE*** *that; Tanzania's Application for Annulment has legal merit;*
>
> *(b)* ***DISMISS*** *the Claimant's objection under ICSID Arbitration Rule 41(5);*
>
> *(c)* ***ORDER*** *that; the Claimant bears the costs of this objection under ICSID Arbitration Rule 41(5)*[4] *as well as annulment proceedings.*
>
> *(d)* ***ORDER*** *such other relief the Ad hoc Committee deems just and appropriate to grant.*[5]

30. During the Hearing, the Applicant amended its prayer for relief with respect to the costs of the annulment proceeding and requests now "*that each party should bear its own expenses, and on the costs payable under Article 59 and 60 of the ICSID Convention,*

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3 Memorial, ¶ 6.1.

4 Transcript Hearing on Rule 41(5) Objection, pages 45 and 67.

5 Response, ¶ 97.

which are administrative and Tribunal's costs or Committee's costs, the parties should share equally".[6]

IV. THE STANDARDS OF THE PARTIES' APPLICATIONS

31. Tanzania applies for the annulment of the Award and asserts that the Tribunal manifestly exceeded its powers (Article 52(1)(b) ICSID Convention), departed seriously from a fundamental rule of procedure (Article 52(1)(d) ICSID Convention), and failed to state the reasons on which its Award is based (Article 52(1)(e) ICSID Convention) in a variety of ways.

32. The Claimants apply for the "*summary dismissal*"[7] of Tanzania's Application for annulment by raising a preliminary objection based on Arbitration Rule 41(5).

33. The applications are intertwined and necessitate an appreciation of their respective requirements and standards.

A. THE STANDARD FOR THE ANNULMENT OF THE AWARD

34. The Parties agree on the "*well established principle that annulment is an extraordinary remedy subject to threshold requirements*", "*a narrow and exceptional remedy which is not appealable*", requiring "*exceptional circumstances, and that under such exceptional and highly limited circumstances the impugned award be annulled*".[8] According to the Applicant, the purpose of annulment "*is to safeguard and guarantee procedural justice and the fairness of the arbitration proceedings*"[9] and according to the Claimant to "*safeguard the integrity, not the correctness of the outcome*".[10]

35. They further agree that annulment "*is neither an appeal nor a rehearing*"[11], that "*an appeal is explicitly excluded in the ICSID framework and […] that the Committee does not have the authority to redress the merits of the dispute and or to substitute the Tribunal's determination by its own convictions*".[12] The Claimants underline that "*the factual*

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6 Transcript Hearing on Rule 41(5) Objection, page 44.

7 Memorial, ¶ 4.1.

8 Response, ¶¶ 30, 31, 82; Memorial, ¶¶ 3.1-3. 2; Reply, ¶ 2.2.

9 Response, ¶ 81; Rejoinder, ¶¶ 7, 14.

10 Memorial, ¶ 3.3; Claimants' Reply, ¶ 2.2.

11 Memorial, ¶ 3.3; Rejoinder, ¶ 13.

12 Response, ¶¶ 42, 80; Application, ¶ 20; Reply, ¶ 2.3.

findings of the Tribunal are not subject to review"[13], and that under ICSID Arbitration Rule 34 "*tribunals and not annulment committees* […] *are given the power over the admissibility of evidence and its probative value*".[14]

36. Article 52(3) of the ICSID Convention gives committees the authority to annul an award, if and to the extent the requirements are met; they have no obligation to do so.[15]

37. Further, they both agree that the Applicant "*need[s] to demonstrate*"[16] that the requirements of one or several grounds for annulment are met, although the Applicant submits that it suffices to state the grounds and claims for procedural irregularities of the award in the application, and later assert their existence and elaborate their analysis in the memorial on annulment.[17] The Claimants disagree with this latter view and refer to Rule 50(1)(c)(iii) which provides "*that the* ***application*** *for annulment, not a subsequent memorial, must "****state in detail*** *... the grounds on which it is based*"".[18]

38. The Parties agree that "*solely*" the grounds enumerated in Article 52(1) ICSID Convention may be invoked in an application for annulment.[19]

39. The Applicant submits that Article 52(1) ICSID Convention should be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"). It adds that the interpretation should be "*broad*" and "*liberal*"[20]. The Claimants insist that the remedy is "*narrowly circumscribed*"[21] but does not question the applicability of Article 31 VCLT.

40. The Committee shares the Parties' common opinion. Article 52(1) ICSID Convention (a "*party may request annulment* […] *on one or more of the following grounds*"), of Article 53(1) ICSID Convention ("*The award shall be binding on the parties and shall not be subject to any appeal* […] *except those provided for in this Convention*"), and of Rule 50(1)(c)(iii) ("*These grounds are limited to the following*") can only have the "*ordinary*

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13 Reply, ¶ 3.4.

14 Transcript Hearing on Rule 41(5) Objection, page 8.

15 Reply, ¶ 2.4.

16 Memorial, ¶ 3.5.

17 Response, ¶¶ 57-59, 72, 75, 78, 80; Application, ¶ 46; Rejoinder, ¶ 25.

18 Memorial, ¶ 3.16 (bold in original).

19 Application, ¶ 21; Memorial, ¶ 3.16.

20 Response, ¶ 82.

21 Memorial, ¶¶ 3.1, 3.16.

meaning" (Article 31 VCLT) that the remedy of annulment is extraordinary and exceptional, that no other than the five grounds may lead to it, that no appeal is admissible, and that the applicant has to establish the existence of one or more of the five grounds. In that vein, Rule 34 prohibits the reassessment of the probative value of evidence by committees. The general rules of interpretation, as provided for in Article 31 VCLT, apply to the ICSID Convention, being an "*international agreement concluded between States*" (Article 2(1)(a) VCLT).

41. As to the Parties' divergent positions on the issue of the standard and necessary details required in the initial application, the Committee shares the observations of previous committees, which have identified the "*practice,* [that] *the party requesting annulment of the award makes a short submission, stating the grounds for annulment of the award and summarily identifying the arguments in support of those grounds. This is done on the understanding that the parties will have a later opportunity to submit written arguments in support of their request once the ad hoc committee has been constituted*".[22]

42. Irrespective of the initial intentions of Rule 50(1)(c), the "*trend reflected in the pronouncements of other Committees has been that such a requirement should not preclude the applicant from the opportunity to develop its arguments during the proceedings*".[23]

43. Given such practice and trend, applicants for annulment may rely in good faith on an interpretation of Rule 50(1)(c) which allows them to submit a short application, asserting the grounds for annulment and identifying the complaints, and affords them with the opportunity to develop their arguments in subsequent submissions.

44. Interrupting this process by accepting an objection under Rule 41(5) implies, in practice, the risk of a violation of due process of law, unless the objection is not based on an alleged underdeveloped application for annulment but on other reasons, which might establish separately that the application is 'manifestly without legal merit'. That could be the case

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22 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on the Preliminary Objection of Elsamex S.A. against the Application for a Preliminary Injunction of Elsamex S.A. Annulment of the Award Submitted by the Republic of Honduras (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶ 121.

23 *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision of the *ad hoc* Committee on the Preliminary Objection Raised by the Bolivarian Republic of Venezuela (English unofficial translation from the Spanish original), 8 March 2016 (A/CL-72), ¶ 88 (footnotes omitted).

if not even a *prima facie* case is submitted by an applicant, and no argument in support of further elaboration of the initial application could possibly satisfy the requirements of one of the grounds of annulment.

45. Consequently, pursuant to Rule 41(5), parties in annulment proceedings may be entitled to file an objection, (as will be developed below) but given the structure of ICSID proceedings, parties risk, instead of saving costs and time, to add both, since a committee needs to hear the Rule 41(5) objections in respect of due process and must not restrict the parties' right to be heard.

46. The Committee will examine the characteristics of the Application in the present case in due course.

47. In its Application, Tanzania has invoked three grounds for annulment, namely "*that (i) the Tribunal manifestly exceeded its powers; (ii) there was a serious departure from a fundamental rule of procedure; and (iii) the Tribunal failed to state the reasons on which the Award and* [sic] *how it was arrived at*".[24]

48. The Applicant has not developed its argument on the legal grounds in the Application. Rather, it has alleged twenty-one annullable errors, whereby the Tribunal, it believes, manifestly exceeded its powers, departed from a fundamental rule of procedure and/or failed to state the reasons on which the Award is based.[25] In its Response to Claimants' 41(5) objection and in the oral presentation at the Hearing, the Applicant reiterates that, at the present stage, the submission is still preliminary, and that it will expand on the Application in its forthcoming Memorial on Annulment.[26] It insists that the Application advances a *prima facie* case on the three invoked grounds for annulment.[27]

49. With respect to the legal standard of the three asserted grounds, the Parties submit as follows.

50. As to the alleged **manifest excess of powers** (Article 52(1)(b) ICSID Convention), the Applicant contends that tribunals exceed their powers when they exceed "*their powers and jurisdiction*" or fail to apply "*imperative jurisdictional requirements*" and the "*proper*

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24 Application, ¶ 40.

25 Application, ¶ 41.

26 Response, ¶¶ 26, 32, 52, 72.

27 Transcript Hearing on Rule 41(5) Objection, pages 48-50, 62-63.

law", that they must exercise their power "*wisely*" and not "*misuse*" it, and that such excess is manifest, when "*such anomalies are plain on its face, self-evident, easily recognizable and should not require an elaborate arrangement to establish*".[28]

51. The Claimants submit that tribunals may exceed their power "*either in exercise of jurisdiction or failure to apply proper law*", and that such excess is manifest when it is "*evident on the face of the Award or readily discernible*".[29] As tribunals are judges of their own competence (Article 41(1) ICSID Convention), committees are not authorized to "*reconsider jurisdictional decisions* de novo", and they must not annul awards if the tribunal's "*analysis is "tenable"*".[30] Further, a manifest excess of powers must cause "*serious consequences for the Parties*".[31]

52. The Committee shares the Parties' opinion to the extent that they dove-tail. That implies that committees do not have the authority to scrutinize tribunals' findings, neither on jurisdiction nor on the merits as to their correctness or their 'wisdom'. Such scrutiny would inevitably amount to a decision on appeal, which is – as the Parties recognise – not admitted under the ICSID Convention.

53. As to the alleged **serious departure from a fundamental rule of procedure** (Article 52(1)(d) ICSID Convention), the Applicant submits that the ground "*includes; lack of impartiality on the part of an ICSID Tribunal or failure to grant equal treatment to the parties, the right to be heard, meaningful deliberation, and the tribunal's obligation to respect the rules that they themselves establish for the proceedings, including those governing evidentiary issues*".[32] The ground includes "*biasness*" of tribunals.[33] Procedural justice and the fairness of arbitration proceedings must be safeguarded and guaranteed.[34] Committees are to determine whether "*the award is truly an award, i.e. a result arrived at*

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28 Response, ¶¶ 33-36; the Applicant relies on *Eksokol S.P.A in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017 (A/RL-05), ¶ 41.

29 Memorial, ¶¶ 3.5, 3.6; Claimants rely – among others – on *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022 (A/CL-95), ¶ 60.

30 Memorial, ¶ 3.7; Claimants rely *on Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011 (A/CL-54), ¶ 99.

31 Reply, ¶ 3.17(a).

32 Response, ¶ 67.

33 Response, ¶ 67.

34 Response, ¶ 81; Rejoinder, ¶ 35.

***fairly**, under **due process** and with transparency*".[35] Since Article 52(1)(d) ICSID Convention provides for the remedy, Tanzania says, it is not precluded from asserting it now, even if not raised before the Tribunal.[36]

54. Relying on existing jurisprudence, the Claimants argue that 'fundamental rules' refer to a set of minimum standards of procedure which are essential to the integrity of the arbitral process, and which must, therefore, be respected and observed by tribunals. The threshold for rules of procedure to be fundamental is high; they concern the conduct of the tribunal and not the substance of awards.[37] The departure is serious when it had a material effect on the award.[38] Finally, the allegation of a violation must be introduced in a timely manner; if not it is waived.[39]

55. The Committee recognises that the Parties agree on the following broad principle: the Claimants refer correctly to a set of minimum standards which the Applicant characterises equally correctly, with one exception. The Committee cannot consider that rules which tribunals 'themselves establish for the proceedings' are fundamental, as alleged by the Applicant, and they cannot be included into any general minimum standard.

56. The issue of timeliness of the complaint and a possible waiver in accordance with Rule 27 are relevant and will be examined where appropriate, as well as any impact on the Tribunal's decision of alleged violations of the same.

57. As to the alleged **lack of reasons** (Article 52(1)(e) ICSID Convention), the Applicant presents

> *"five situations in which this ground is satisfied. These are: contradictory reasons, frivolous and inadequate reasons, insufficient reasons, implicit reasons and unintelligible reasons. As for contradictory reasons, the Arbitral practice shows that the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all or they must be such as to be incapable of standing together on any reasonable reading of the decision."*[40]

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35 Rejoinder, ¶ 19 (bold by Applicant); Applicant relies *on CDC Group PLC vs. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June2005 (A/RL-15), ¶ 36.

36 Response, ¶ 43.

37 Memorial, ¶ 3.10.

38 Memorial, ¶ 3.11.

39 Memorial, ¶ 3.12.

40 Response, ¶ 46.

58. It submits further that a lack of reasons exists when "*the reasons are not sufficient to preserve the decision reached by the Tribunal*", either because they do not "*justify the award*" or they do not "*enable the reader to follow the reasoning of the Tribunal on points of fact and law*".[41]

59. The Claimants agree with most of the Applicant's characterisations, and also rely on a partly identical chain of arbitral decisions,[42] as long as it remains clear that tribunals do not have to explain each statement and each conclusion that has been reached,[43] and that committees do not re-consider the adequacy, the correctness or the persuasiveness of the tribunals' reasoning, which would inevitably amount to an unauthorised appeal.[44]

60. The Committee notes the general consensus in the jurisprudence for the meaning of "fail to state reasons". Also, it agrees with the widely used descriptions, as long as they do not jeopardize the objective of the provision to provide a motivation for the award and thereby guarantee the sound administration of justice, and do not venture into the sphere of an appeal. Consequently, the terms "insufficient" or "inadequate" reasons may be appropriate if understood to describe reasons which cannot be followed by a willing and intelligent reader. However, it is clear that these terms will lead to an inadmissible appeal if they extend to reasons which a party considers too weak or inadequate to justify the determination of the tribunal.

B. THE STANDARD FOR THE OBJECTION UNDER RULE 41(5)

61. In annulment proceedings, the preliminary objection under Rule 41(5) that a claim is manifestly without legal merit is an exceptional remedy against an exceptional remedy.

62. The Claimants contend that the "*purpose of the rule is to prevent parties and tribunals from becoming entangled in lengthy and unnecessary proceedings*",[45] and that it is

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41 Response, ¶ 48.

42 The most recent being: *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Decision on Annulment, 31 July 2023 (A/CL-104), ¶ 282.

43 Memorial, ¶ 3.15.

44 Memorial, ¶¶ 3.13-3.14.

45 Memorial, ¶ 4.2.

applicable *mutatis mutandis* to annulment proceedings by virtue of Rule 53,[46] which provides:

> *"The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee."*

63. According to the Claimants, the *mutatis mutandis* application allows Rule 41(5) to apply to annulment proceedings which are concerned with the procedural integrity and not with the correctness of a tribunal's legal and factual findings – this is undisputed between the Parties. Therefore, "*annulment allegations that concern the correctness of the Tribunal's legal or factual findings or any alleged errors that have no impact on the outcome of the award are inadmissible on annulment and warrant dismissal under ICSID Arbitration Rule 41(5)*".[47]

64. The Applicant does not contest the applicability of Rule 41(5) by virtue of Rule 53. It asserts that the "*preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a Tribunal needs investigate* [sic] *such facts, such an issue cannot be raised as a preliminary objection on a point of law*".[48] The Applicant relies on the same awards as the Claimants for the interpretation of the terms "without legal merits" and "manifestly" but disagrees as to their application in the present case.

65. With respect to the relevance of legal merits, the Parties rely on the award in *Lotus v. Turkmenistan*, where the tribunal held:

> *"The consequence of a summary dismissal under Rule 41(5) is that the claim set out in the request for arbitration proceeds no further. The tribunal rules, in effect, that there is no point in proceeding with the claim because it cannot succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is*

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46 Memorial, ¶ 3.18; Claimants rely on: *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62); *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5) (English unofficial translation from the Spanish original), 8 March 2016 (A/CL-72), ¶¶ 70-71; *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), 21 July 2022 (A/CL-94).

47 Memorial, ¶ 3.19.

48 Rejoinder, ¶ 4; Transcript Hearing on Rule 41(5) Objection, page 34.

> *identified. If the claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed: but if the tribunal is satisfied than no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point."*[49]

66. With respect to the term "manifestly", the Parties submit, both relying on the award in *Transglobal v. Jordan*, that it means 'evident', 'obvious', 'clearly revealed to the eyes, mind or judgment',[50] and where the tribunal held that the applicant is

> *"to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognizes that this exercise may not always be simple […]. The exercise may thus be complicated; but it should never be difficult."*[51]

67. The Claimants assert that this standard, developed for original arbitral proceedings, must be adapted to annulment proceedings to mean a "*legal impediment to an application for annulment*", as is the case – as considered by annulment committees –

> *"(a) where the applicant invokes an annulment ground which does not exist under Article 52 of the ICSID Convention;*
>
> *(b) where the applicant is in reality seeking simply to re-litigate the merits of the arbitration because it disagrees with the outcome of the Tribunal's decision on a legal or factual issue; or*
>
> *(c) where the applicant's complaints, even if accepted, would not materially alter the outcome of the award."*[52]

68. The Applicant does not contest the standard but asserts that its "*application for annulment demonstrates manifestly legal merit*".[53] It contends that with its Application, it "*raised a prima facie case*" on three grounds for annulment which were understood by the Claimants and which were sufficiently clear at that stage to engage the debate on the merits of the Application. It would be premature for the Committee to accept the Claimants' 41(5) objection, thus ruling on the annullability of the Award, without having afforded the

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49 *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (A/RL-04 and A/CL-85), ¶ 158.

50 Response, ¶¶ 17, 54; Memorial, ¶ 4.4.

51 *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (A/CL-46 and A/RL-01), ¶¶ 88, 92.

52 C Memorial, ¶ 4.7; Reply, ¶ 3.2.

53 Response, ¶ 60.

Applicant an opportunity "*to appear before the Committee and elaborate the grievances which we have highlighted from the Award*".[54]

69. This Committee is aware that all previous committees which had to decide on the applicability of Rule 41(5) concluded, after carefully pondering the different arguments, that this Rule is applicable *mutatis mutanda* to annulment proceedings by virtue of Rule 53. While originally intended to prevent respondent States[55] and tribunals from "*becoming entangled in lengthy and unnecessary proceedings*" as formulated by the Claimants,[56] committees have taken the important principle of procedural economy into consideration, and have extended the interpretation to encompass the other party and *ad hoc* committees as being protected from evidently unmeritorious claims. The first committee to decide the question, in *Elsamex v. Honduras*, considered that the

> *"purpose of Rule 41(5) is to avoid unnecessary and costly proceedings, which is ultimately in the interest of both parties to the dispute. If "for any reason" it is clear that the application for annulment cannot be granted by the ad hoc committee, the ad hoc committee must have the power to terminate the proceedings at an early stage. This interpretation in favour of the application of Rule 41(5) in annulment proceedings is supported by the literal wording of Rule 53, which as has been seen allows mutatis mutandis the application of that Rule to annulment proceedings."*[57]

70. *Ad hoc* committees are conscious of two consequences of such broad interpretation, namely (i) that the Rule 41(5) objection intervenes in situations when the applicants have not yet fully pleaded their case, and (ii) that, contrary to original proceedings, decisions that accept a Rule 41(5) objection are final and cannot be remedied.[58] They have taken these problematic consequences into consideration. The committee in *Elsamex v.*

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54 Transcript Hearing on Rule 41(5) Objection, pages 48-49, 62-63.

55 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶ 98; *RSM v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (A/RL-03), ¶ 2.1.1, where the tribunal states that Rule 41(5) was adopted "*in response to criticism from certain states that no procedure existed for the expeditious dismissal of patently unmeritorious claims*".

56 Memorial, ¶ 4.2.

57 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶ 100; the decision was confirmed by the committee in *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5) (English unofficial translation from the Spanish original), 8 March 2016 (A/CL-72), ¶¶ 70-73; and *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), 21 July 2022 (A/CL-94), ¶¶ 154-155.

58 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶¶ 120-124.

Honduras concluded its detailed analysis by finding that "*an adaptation of Rule 41(5) should be made to make it appropriate and applicable to annulment proceedings*", imposing "*a higher standard of conviction on the ad hoc Committee in order to be able to accept the Rule 41(5) exception*".[59] These findings were followed by the committees in *Venoklim* and *Dominion*.[60]

71. Out of respect for due process, this Committee does not see a reason to deviate from this *jurisprudence constante*.

72. The *Elsamex* committee focused its attention particularly on "*the most commonly invoked* [grounds for annulment]*, namely that the court has manifestly exceeded its powers (Article 52(1)(b)); there is a serious departure from a rule of procedure (Article 52(1)(d); and the award fails to state the grounds on which it is based (Article 52(1)(e))*",[61] as argued in Tanzania's Application, and found that

> *"it cannot accept the preliminary objection under Rule 41(5) without applying Article 52, with the additional difficulty that its decision would be based on the limited information available and at an early stage of the proceedings. On the other hand, the Committee must reject the exception under Rule 41(5) as long as it harbours some doubt as to the merits or lack of legal merit of the Application for Annulment."*[62]

73. The committee recognises '*for example*' that a Rule 41(5) objection is justified (1) when other grounds than the ones named in Article 52 ICSID Convention are invoked, or (2) when the annulment application is used to re-litigate the merits of the case in an appeal, or (3) when the application is manifestly lacking legal support even if the factual

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59 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶¶ 117, 125.

60 *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5) (English unofficial translation from the Spanish original), 8 March 2016 (A/CL-72), ¶¶ 76, 79-99; *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), 21 July 2022 (A/CL-94), ¶¶ 156-158.

61 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶ 127.

62 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶ 129.

allegations were presumed to be valid, whereby the credibility and plausibility of such allegations are to be accepted.[63]

74. This Committee agrees with such analysis and findings. They are a consequence of the *mutatis mutandis* applicability of an objection under Rule 41(5) to annulment proceedings. It understands that the *Elsamex* committee's presentation of circumstances warranting the rejection of an annulment application are but-for examples, and that there may be others, as the *Dominion* committee points out.[64] The Committee interprets Rule 50 – in agreement with *Venoklim* – as imposing *"the practice whereby the party seeking annulment of an award makes a submission setting out the grounds for annulment of the award and identifying, at least in summary form, the reasons for those grounds. This is on the understanding that the applicant will have a later opportunity to develop more fully and in writing the arguments supporting the grounds identified and "detailed" in its application once the ad hoc committee has been constituted*".[65]

75. The Committee is also aware that, in none of the precedent annulment cases, the Rule 41(5) objection has been granted, and that, therefore, the objection has each time prolongated the proceedings instead of saving time and money through a summary dismissal of annulment applications. This is certainly partly due to the fact that annulment proceedings are, as a general rule, less time and cost intensive because they are focused on five narrowly circumscribed grounds.

76. The Committee has decided to remain in the realm of the existing doctrine held unanimously by committees. The Committee observes, however, that since no previous *ad hoc* committee has granted the Rule 41(5) objection, this raises doubts as to the practicability of the objection in annulment cases in light of the tenets of due process. Nevertheless, the Committee considers that whether the present doctrine changes will depend on the parties' autonomy and evolving circumstances.

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63 *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (English unofficial translation from the Spanish original), 7 January 2014 (A/CL-62), ¶¶ 107-108, 130-131.

64 *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the *ad hoc* Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), 21 July 2022 (A/CL-94), ¶ 159.

65 *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5) (English unofficial translation from the Spanish original), 8 March 2016 (A/CL-72), ¶ 99.

77. The present proceeding may be a case in point: the Applicant submitted twenty-one complaints, each of which, it says, fulfils the non-specified criteria of two or three of the grounds listed in Article 52(1) ICSID Convention[66]. The Claimants recall that

> *"the Committee is required to assess each claim advanced by the Applicant separately; there is no requirement to consider Tanzania's allegations in toto. It follows that if the Committee were to find that some of Tanzania's allegations were not manifestly meritless, then it can still strike out the other allegations. This would help streamline the process and bring focus to the annulment proceedings."*[67]

78. The Parties agree and request, as formulated by the Applicant, "*that if the Committee at this stage finds, out of the claims that we have raised, out of the 21, maybe five, two or one has legal merit, then they can dismiss the rest and uphold those that they consider to have a prima facie case, so that is our understanding, that is correc*t".[68]

V. THE ANALYSIS OF THE PRELIMINARY OBJECTION IN APPLICATION OF THE STANDARDS

79. The Committee will consider whether one, some or all of the twenty-one complaints in the Application and the submissions filed so far are to be rejected for manifest lack of legal merit under Rule 41(5).

A. THE ALLEGED FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

80. The Applicant asserts that the twenty-one complaints meet the requirements of three grounds for annulment. While the Committee may need more information to be able to assess the Tribunal's conduct, it is certainly able to assess without further information the Award, and whether the Tribunal violated its duty to state the reasons on which it is based. The Committee has the Award at its disposal, and that is all it needs to determine whether there is an absence of reasons with respect to any of the allegations made by the Applicant, or whether the reasons are 'contradictory', 'frivolous', 'inadequate', 'insufficient', and/or 'unintelligible' as asserted by the Applicant. As a threshold matter, the Committee states that it will not take into consideration that the Applicant declares itself dissatisfied with the Award,[69] as it has no authority to re-consider the Tribunal's "*findings of fact and*

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66 Application, ¶ 41.

67 Memorial, ¶ 4.2; Transcript Hearing on Rule 41(5) Objection, pages 10-11.

68 Transcript Hearing on Rule 41(5) Objection, page 52.

69 Application, ¶ 39; Response, ¶ 9.

law",[70] "*to redress the merits of the dispute and or to substitute the Tribunal's determination by its own convictions*", as the Applicant acknowledges.[71]

81. Therefore, the Committee will examine *a limine* whether the Tribunal provided reasons in the Award or whether it failed to do so as asserted by the Applicant.

82. **First,** the Applicant asserts a lack of reasons for the Tribunal's assumption that all three Claimants "*are investors under the BIT*".[72]

83. In paragraphs 2-3 and 52-67 of the Award, the Tribunal describes and analyses in detail the corporate structure to which the Claimants belong, and the development of the project in Tanzania which was formally owned over time by different entities of the Claimants' affiliates, and which was owned by the Claimants as from 2015. This is uncontested, and the Applicant states explicitly that since 2015 "*the Claimants have been the owners of the Project, directly through NNL, and indirectly through NNHL and NUKL*".[73]

84. In paragraphs 119-131 of the Award, the Tribunal, after exposing the Parties' positions, describes and analyses in detail, by referring to Articles 1 and 8(1) of the BIT, that the Project, a complex endeavour of nickel exploration, was an investment in Tanzania, that for the purposes of the dispute, it is relevant to know who the owner of the Project was as from 2015, and that the Claimants were, indeed, the owners.

85. The Committee has neither sufficient knowledge of the record, nor the authority to examine whether the Tribunal's findings are correct. However, it considers that the Tribunal has stated the reasons for its findings, and that these findings are consistent, and neither frivolous, contradictory nor unintelligible.

86. In any event, irrespective of how the Applicant might want to expand this argument, it will fail to establish that there are no reasons or that they are contradictory or unintelligible, in view of the plain reading of the Award which provides the Committee with enough information on the basis of the Tribunal's determination.

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70 Reply, ¶ 3.10.

71 Response, ¶ 42.

72 Application, ¶ 41 A.

73 Application, ¶ 29.

87. **Second** and **third**, the Applicant asserts that the "*Tribunal manifestly exceeded its powers, departed from a fundamental rule of procedure and* ***failed to state the reasons*** *in deciding that the February 2021 invitation for the Claimants to apply for an alternative licence could not be said to have deprived the Claimants investment while the evidence in records show that the Claimants were not able to obtain financing after 2017*," and that "*there was no reasonable prospect that the Claimants could return to control its investment*".[74]

88. In paragraphs 192-207 of the Award, the Tribunal examines whether there was a substantial deprivation of the Claimants' investment. It presents the Parties' positions, including their contradictory arguments with respect to the invitation of February 2021 to apply for an alternative mining license (paragraphs 192-194). In its own analysis, the Tribunal interprets the meaning of the term "deprivation", discusses case law dealing with the cancellation of mining licenses, and concludes that, indeed, such cancellation "*can constitute a substantial deprivation of an investment*" (paragraphs 195-198).

89. In paragraphs 199-200, the Tribunal applies this standard to the case before it and concludes that the cancellation of the existing license in 2017/2018 was a deprivation. In paragraphs 200-207, the Tribunal engages with the Respondent's argument that the invitation to apply for an alternative license in February 2021 undid the cancellation. It rejects the Respondent's arguments for a variety of reasons. The Applicant reiterates these arguments in this proceeding. One of the reasons, which the Tribunal states consistently and plausibly, relates to the undisputed fact that in 2018, the Claimants had already made efforts to obtain an alternative license and that these efforts had been rejected. The Tribunal deduces from there, without contradiction, that the chances to obtain the license now were remote, and that they were not able to obtain further financing as there was no reasonable prospect of being able to return to control the investment. After this analysis, the Tribunal agrees with the Claimants' allegation that the invitation to apply for an alternative license "*did not put the Claimants back in the situation in which they were prior* [to] *the cancellation of their retention licence*".[75]

90. It is evident on the face of the Award that the Tribunal states reasons on which it bases its decision to accept an expropriation. The Committee was able to follow the structure and the substance of the reasoning without difficulty and has not found contradictions or other

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74 Application, ¶ 41 B. i and ¶ 41 B. ii (the ground examined in this Section is in bold).

75 Award, ¶ 206.

annullable errors of such reasoning. It has not tried to determine whether the Tribunal's determination was correct, because it is not authorized to do so.

91. Again, an expansion of the argument will not possibly lead to another conclusion in view of the Award which provides the Committee with enough information on the Tribunal's analysis.

92. **Fourth**, the Applicant asserts that the "*Tribunal departed from fundamental rules of procedure and* ***failed to state the reasons*** *in accepting the without-prejudice privilege photos and satellite images without any corroborating evidence submitted by the Claimants to prove that the said photos and satellite images were taken from the disputed area*".[76]

93. The Award clarifies that the photos and the satellite images were discussed in the context of the issue of the permanent deprivation of the investment, also through alleged and contested illegal mining operations, as discussed in its paragraphs 208-234. The Tribunal finds that the illegal mining operations were documented by the photos and satellite images and the statement of one of the Respondent's witnesses, Professor Mruma, but were not decisive for its determination of a permanent deprivation, and only "*for completeness,* […] *sets out its views on these issues*".[77]

94. In paragraphs 212-216 of the Award, the Tribunal presents the Parties' positions on the issue of illegal mining and the contested evidence and relevance of the photos, which the Committee will discuss at a later stage. When realising that the issue was disputed during the arbitration hearing and that the Respondent wanted an opportunity to comment on them, the Tribunal invited the Respondent to do so in post-hearing briefs. The Tribunal believes that the issue concerned the photos only, which were taken privately during a site-visit during without-prejudice negotiations, and not the satellite images, as confirmed by the Respondent.

95. In paragraphs 228-234 of the Award, the Tribunal explains that the photos document that in 2022 the site was no longer vacant but occupied by illegal miners, and that this evidence is corroborated by the uncontested satellite images as well as the Respondent's witness,

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76 Application, ¶ 41 B. iii.

77 Award, ¶¶ 226-234.

Professor Mruma. The Tribunal rejects the Respondent's assertion that the context, in which the photos were taken, affects "*the veracity or authenticity of the Photos*".[78]

96. The Committee has neither sufficient knowledge of the record nor the authority to examine whether the Tribunal's findings are correct. However, it realises that the Tribunal has stated the reasons for its findings, and that these findings are consistent, and neither frivolous, contradictory nor unintelligible.

97. Again, an expansion of the argument will not possibly lead to another conclusion.

98. **Fifth**, the "*Tribunal departed from fundamental rules of procedure and **failed to state the reasons** in determining that the Claimants have produced ample evidence showing that all of the funds raised for the Project were spent on the Project through Ngwena without referring to any such evidence*".[79]

99. In paragraphs 235-238 of the Award, the Tribunal presents the Parties' positions on the justification of Tanzania's change of its mining legislation and the termination of the Claimants' retention license, including the allegation that the Claimants did not use their funds to invest them fully in Tanzania thus not generating revenues for the country.

100. In paragraphs 239-251, the Tribunal develops its finding that the burden of proof for the justification rests with the Respondent and concludes that the Respondent made unsubstantiated assertions which are not supported by evidence, while the "*Claimants have produced ample evidence showing that all of the funds raised for the Project were spent on the Project*".[80]

101. The Committee has no authority to examine whether the Tribunal has treated the evidence before it correctly. However, it is able to determine at this stage of the proceeding, and with the Award at its disposal, that the Tribunal stated the reasons for its findings, and that these reasons are intelligible, not contradictory and sufficient to understand the Tribunal's motivation, leading from A to B.

102. **Sixth**, the Applicant asserts that the "*Tribunal departed from a fundamental rule of procedure **and failed to state the reasons** in drawing adverse inferences against the*

78 Award, ¶¶ 230-231.

79 Application, ¶ 41 B. iv.

80 Award, ¶ 245.

Respondent and concluding that the Draft Bills were prepared in haste, without any proper consultation or studies, and not in pursuit of any clearly articulated policy goal".[81]

103. In paragraphs 68-98 of the Award, the Tribunal describes and analyses the evolution of Tanzania's mining legislation and the consequences for the Claimants' retention license in detail. It specifies among other things that: (i) the government published three draft bills on 28 June 2017, inviting stakeholders on 29 June 2017 "*to provide their opinion on the Draft Bills by 1 July 2017, a Saturday*" (paragraph 71 of the Award), (ii) the Tanzanian Chamber for Minerals and Energy qualified the process as being pursued "*hurriedly and without due consultation*" (paragraph 72 of the Award), and (iii) the parliament passed three laws on 3 and 4 July 2017.

104. In paragraphs 254-257 of the Award, the Tribunal presents the Parties' positions on whether due process of law had been respected during the cancellation of the retention license and the reform of the mining legislation.

105. In paragraphs 258-270, the Tribunal develops its own analysis on the issue. It takes note that the amending legislation, which had far-reaching consequences for the sector, "*was passed in a matter of days*" and that there was no serious consultation process prior to its enactment. The Tribunal determines that the Respondent had a duty "*to adduce evidence to substantiate its claim*" to have exercised due process of law, such as policy papers, studies, drafts, and impact assessments of the planned legislation. Further, the Tribunal finds that the Respondent's justifications for its lack of production of evidence were "*unconvincing*", and that adverse inferences are appropriate as to the haste, lack of proper consultation or studies and the absence of a "*clearly articulated policy goal*".

106. In paragraph 269, the Tribunal summarises the long and exhaustive development of reasons by stating that "*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*".[82]

107. The Committee has no authority to judge whether the Tribunal's inferences and reasons are correct. This being said, it is already able to determine at this stage of the proceeding that the Tribunal's reasons are stated, and that they are non-contradictory, intelligible and

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81 Application, ¶ 41 B. v.

82 Award, ¶ 269.

sufficient. No further expansion of the Applicant's argument will change this finding, which is based on the Award before the Committee.

108. **Seventh**, the Applicant asserts that the "*Tribunal departed from fundamental rules of procedure and* ***failed to state the reasons*** *in determining that 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*".[83]

109. In paragraph 271 of the Award, the Tribunal summarises the Respondent's justifications for the cancellation of the Claimants' license as being a contribution to the national development and the economy, the improvement of the management of the mining sector for the benefit of the people of Tanzania, the protection of natural resources, the strengthening of the administrative structure, and the improvement of the joint operation between the State and investors.

110. In paragraphs 273-280, the Tribunal develops its opinion, in reference to arbitral jurisprudence, that broad deference should be conceded to States to identify measures for public purposes. At the same time, tribunals must assess whether measures are, indeed, for the expressed public purpose, and whether a genuine interest of the public is defined. For tribunals to be able to do so, the asserting party must adduce contemporaneous evidence. The Tribunal further develops in detail that the Respondent has not only introduced the public purpose justification belatedly but has also not produced any concrete evidence for any of the alleged justifications, neither at its own initiative nor after having been ordered to do so during the document production phase. On the contrary, the Tribunal notes, "*Respondent's Mr Igenge admitted*" that there was no explanation of the amendments leading to the cancellation of the retention licenses, that the Government and the Parliament have not referred to the licenses as posing a challenge to the mining sector, and that there was no recommendation as to retention licenses. The Tribunal states finally that in any event the Respondent has not substantiated a reasonable nexus between the alleged justifications and the expropriatory measures. "*Again*", it says, "*there is a serious lack of evidence on the front*" (paragraph 280). Based on these well documented arguments and

[83] Application, ¶ 41 B. vi.

the evidence on record, the Tribunal formulates its conclusion that the Respondent has not established the existence of a public purpose.

111. The Committee has no authority to reappraise the correctness of the Tribunal's arguments nor of its appreciation of the evidence, and it will address the issue of the Tribunal's treatment of evidence at a later stage. However, already at this stage, it disposes of the decisive information, i.e., the Award, to judge that the Tribunal stated the reasons for its decision, and that these reasons are not contradictory, intelligible and are sufficient.

112. **Eighth** and **nineth**, the Applicant asserts that the "*Tribunal departed from fundamental rules of procedure and* ***failed to state the reasons*** *[…] that the purpose of the amending Legislation was to target foreign mining companies"* (a) "*in concluding without any evidence*", and (b) "*by acting as witnesses/claimants' counsel […] apart from the Claimants' evidence*".[84]

113. In paragraphs 281 and 282 of the Award, the Tribunal points to the Parties' disputed positions as to the discriminatory character of the cancellation of the retention license, and states that the Claimants alleged that all holders of such license except one were foreign companies. In response, the Respondent alleged that the cancellation measures applied to all holders of retention licenses including one Tanzanian majority owned company. In paragraph 283, the Tribunal concludes that these statements do not contradict each other and that the Claimants' assertion remains unrebutted.

114. In paragraphs 284-285, the Tribunal states that "*it appears from the Respondent's own submission*" that the Tanzanian majority owned company was granted a mining license in compensation for the loss of the retention license, that it ordered the Respondent during the document production phase to produce correspondence and other documents concerning this mining license, which the Respondent failed to do, and as a result, draws the adverse inference that the documents would have shown that the company received preferential treatment. This means that as a result, the Tribunal deduces that only foreign companies with retention licenses were affected. In paragraphs 286-287, the Tribunal engages with the evidence submitted by the Claimants, i.e., four exhibits being news sources and one exhibit documenting the parliamentary debate, which flatly contradicts

[84] Application, ¶ 41 B. viii and ix.

the Applicant's affirmation that the Claimants had not submitted any evidence[85] but confirms the Applicant's affirmation that the Claimants had submitted evidence.[86] The Tribunal analyses this evidence and concludes that it documents that the legislation in 2017 was discriminatory. In paragraph 288, the Tribunal concludes that 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*".

115. On its face, the Award presents reasons on which it is based. The Committee was able to follow them from the Parties' positions to the Tribunal's conclusion, as they are intelligible and sufficient, and they do not contradict each other. The Committee does not see a basis for the Applicant's allegation that the Tribunal acted as witness and/or counsel for the Claimants, therefore, it is not necessary to assess the Tribunal's analysis of evidence.

116. As with the previous issues, an expansion of this argument will not lead to a different determination.

117. **Tenth**, the Applicant asserts that the "*Tribunal departed from fundamental rule of procedures and **failed to state the reasons** by shifting the burden of proof to the Respondent in regards to the inclusion of overhead costs in the valuation contrary to the general principle of evidence which requires that he who alleges must prove*".[87]

118. Throughout the Application, the Respondent does not differentiate between the three asserted grounds for annulment. The present assertion triggers the Committee's analysis of the grounds for annulment. However, the Committee finds that it is not feasible to claim that the Tribunal may have failed to state the reasons "*by shifting the burden of proof*", as asserted by the Applicant. Which party correctly bears the burden of proof is an issue of procedure and not of reasons. Therefore, the Committee decides that the Applicant's request to annul the Award for lack of reasons by shifting the burden of proof is rejected because it is manifestly without legal merit.

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85 Application, ¶ 41 B. viii.

86 Application, ¶ 41 B. ix.

87 Application, ¶ 41 B. x.

119. **Eleventh**, the Applicant asserts that the "*Tribunal departed from fundamental rules of procedure and **failed to state reasons** of failure to discuss the Independence of Mr. Taylor as questioned by the Respondent*".[88]

120. In paragraphs 302-309 of the Award, the Tribunal discusses the quality and independence of Respondent's (expert) witness Mr. Mwangakala, after having asked the Parties to brief it on the matter. It distills from the Parties' post-hearing briefs that Mr. Mwangakala has been a salaried employee of the Tanzanian government since 2003, that his role in disputes was "*to achieve the best outcome possible for the Government*", that his role was seen as ambivalent between a fact and an expert witness, and that he did not provide a declaration of independence as provided in paragraph 17.4 of Procedural Order No.1. The Tribunal deduces from these elements that "*Mr. Mwangakala is not an independent expert, unlike the Claimant's expert Mr Trevis Taylor*", who – as the Tribunal could have added but did not because it was undisputed – did provide a declaration of independence in each of his expert reports, was not an employee of the Claimants but a partner in a consultant firm that paid him out of proceeds of the contract it had with the Claimants, and whose role raised no ambiguity. The Respondent's objective – as found by the Tribunal – was not to doubt the independence of Mr. Taylor but to prove that Mr. Mwangakala was "*in the same position as Mr Travis Taylor*".

121. The Committee finds that the Tribunal clearly states the reasons why it considers that Mr. Mwangakala's and Mr. Taylor's roles and qualifications are different and the Committee has no problem following them.

122. An expansion of this argument at a later stage will not possibly lead to a different conclusion.

123. In Section VI.B.II. of its Application for Annulment (**Thirteenth** to **Nineteenth**),[89] the Applicant lists "*annullable features of Award on issues related to Award damages*". It alleges that the Tribunal:

- ignored the Respondent's evidence of spin-off projects;[90]

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88 Application, ¶ 41 B. xi (emphasis in bold added by Committee).

89 Application, ¶ 41 B. ('Twelfth' does not assert a lack of reasons).

90 Application, ¶ 41 B. xiii.

- accepted the Claimants' expert's evidence on necessary costs for exploration in a larger area and on the absence of exceptional costs;[91]

- accepted reports as evidence although they were not stamped;[92]

- ignored the Respondent's witness evidence on the Claimants' capital contributions, which was only 17.6 million USD;[93]

- relied on the Claimants' expert's opinion when applying the Prospective Enhancement Multiplier (PEM) instead of applying another one "*as required by principles of Comparable Transactions Valuation*";[94] and

- ignored evidence when including MMG Ltd and Fig Tree shares "*in quantum computation without evidence showing that there was a company resolution authorizing the Claimants to institute arbitral proceedings or express authorization from the minority shareholders or make them party to this dispute*".[95]

124. All these complaints concern the Tribunal's treatment of evidence. These are foremost issues of observance of procedural rules. Indeed, the Applicant asserts serious departures from fundamental rules of procedure with respect to them, and the Committee will deal with these assertions later in this Decision. At the same time, the Applicant asserts for each issue a failure by the Tribunal to state its reasons. The Respondent does not specify in what way the Tribunal failed to do so; however, the Committee assumes that the Respondent asserts the absence or the insufficiency of reasons in the Award. The Committee will now analyse whether there is legal merit to such assertions.

125. **Thirteenth, fourteenth** and **fifteenth**, the Tribunal presents the Parties' positions on the relevant exploration costs in paragraphs 318-324 of the Award. In paragraphs 327-336, it weighs the arguments of both Parties' experts and other contemporaneous evidence, and concludes to accept the Claimants' expert's approach and calculations. The Tribunal agrees (and explains why) that exploration in a wider area was appropriate, that it was

91 Application, ¶ 41 B. xiv and ¶ 41 B. xv.
92 Application, ¶ 41 B. xvi.
93 Application, ¶ 41 B. xvii.
94 Application, ¶ 41 B. xviii.
95 Application, ¶ 41 B. xix.

sound mining practice to relinquish less prospective areas, and that during this phase, no atypical or exceptional costs were incurred.

126. The Committee has neither the capacity nor the authority to re-appraise the correctness of the Tribunal's reasoning. However, it states, without hesitation, that reasons are provided, and that they are not contradictory nor unintelligible.

127. **Sixteenth**, the Tribunal presents the Parties' positions on the evidentiary value of un-stamped reports in paragraph 325 of the Award. In paragraphs 337-342, the Tribunal develops the argument that the requirement of reports to be stamped related to taxation issues, as explained by counsel for the Respondent, and that it was of no relevance for their veracity in the context of evidence. It further found that the numbers and amounts in the unstamped reports were corroborated by other contemporaneous evidence and not contested by the Respondent.

128. Again, the Committee has neither the capacity nor the authority to analyse the correctness of the Tribunal's reasoning. However, it states without hesitation that the Tribunal's reasons are provided, and that they are not contradictory nor unintelligible.

129. **Seventeenth**, the Applicant does not quote the Tribunal's reasoning correctly when stating that the Tribunal agreed with the Respondent's witness Mr. Mwangakala that the investment "*was **only** 17.6 million*".[96] In paragraph 164(f) of the Award, the Tribunal explains consistently and clearly why it believes that the Claimants' evidence, as detailed in paragraph 138 of the Award, shows that they have made capital contributions. One of the many items presented is the witness statement of Mr. Mwangakala, who calculated costs and capital contributions "*of **at least** USD 17.6 million on the Project*".

130. Again, the Committee has neither the capacity nor the authority to analyse the correctness of the Tribunal's reasoning. However, it states, without hesitation, that the Tribunal's reasons are provided, and that they are not contradictory nor unintelligible.

131. **Eighteenth**, the Tribunal presents the Parties' positions in paragraphs 347-352. In paragraphs 352-367, it weighs the Parties' experts' arguments and concludes that a reasonable multiplier over historical transaction costs is appropriate to arrive at the fair

96 Application, ¶ 41 B. xvii (bold by Committee).

market value of the Claimants' Project, as uncontested between the experts, and that the multiplier should be lower than the one calculated by the Claimants' expert.

132. Again, the Committee has neither the capacity nor the authority to analyse the correctness of the Tribunal's reasoning. However, it states, without hesitation, that the Tribunal's reasons are provided, and that they are not contradictory nor unintelligible.

133. **Nineteenth**, the Tribunal has determined, after a detailed analysis of the corporate structure, the Claimants' place within the Claimants' affiliates, and the Claimants' legal capacity, that the Claimants and not the minority shareholders are parties in interest to the dispute,[97] and that they have an investment in Tanzania, in accordance with Articles 1 and 8 of the BIT.[98] Under these circumstances and legal setting, the Tribunal does not have to look for "*a company resolution authorizing the Claimants to institute arbitral proceedings*".[99]

134. The Committee finds that the Tribunal has stated the reasons on which it bases the Award, correctly omitting reasons which it did not find relevant. These reasons are intelligible and not contradictory.

135. **Twentieth**, the Applicant asserts that the "*Tribunal departed from fundamental rules of procedure and* ***failed to state reasons*** *in awarding costs*" and "*resorted to Solomonic wisdom on the basis that the costs are in line with the level of fees normally charged by major law firms without explaining the guidelines for reference as a result depicted bias against the Respondent*".[100]

136. In paragraphs 389-398 of the Award, the Tribunal presents the Parties' cost submissions, and in paragraph 399-402, the Parties' comments on the respective cost schedules. In paragraphs 403-412, the Tribunal develops its arguments on costs and its decision. It recalls that Article 61(2) ICSID Convention bestows wide discretion on it to allocate costs, explains that it finds the "*costs follow the event*" approach most appropriate, recalls that the Claimants' costs of legal representation are "*in line with the level of fees normally charged by major international law firms*", considers it unreasonable to award the

97 Award, ¶¶ 2, 52-67, 110-130, 161-168.

98 Award, ¶¶ 119-171.

99 Application, ¶ 41 B. xix.

100 Application, ¶ 41 B. xx (bold by Committee).

Claimants the additional funding costs, in agreement with the Respondent, and explains why it does not accept other objections made by the Respondent.

137. The Committee finds that the Tribunal has stated the reasons on which it bases its decision on costs in consideration of the Parties' arguments. The reasons are intelligible and not contradictory.

138. In summary, the Committee finds that the Applicant's assertions that the Tribunal has failed to state the reasons on which it based the Award on nineteen occasions are without legal merit. The Committee had no difficulties coming to this conclusion by reviewing the Award and did not find a great deal of scrutiny was necessary to come to this conclusion. The Committee is convinced that an expansion of the Applicant's arguments would not alter its decision. Finally, the Committee has reviewed the most important piece of evidence, namely the Award, and has no need to be assisted by further arguments to understand the Tribunal's reasons.

139. Therefore, the Committee rejects at this stage the Applicant's Application to annul the Award for a lack of reasons.

B. THE ALLEGED MANIFEST EXCESS OF POWERS

140. **First**, the Applicant asserts that the "*Tribunal* ***manifestly exceeded its powers****, departed from a fundamental rule of procedure and failed to state the reasons in deciding that all of the three Claimants are investors under the BIT*".[101]

141. It asserts that the Tribunal disregarded the Respondent's arguments on jurisdiction,[102] and that "*the Committee is obliged to reconsider the Tribunal's jurisdictional decision whether was* [sic] *wisely exercised by the Tribunal*".[103]

142. In paragraphs 52-62 of the Award, the Tribunal describes and analyses the evolution of the Project in Tanzania and of the corporate structure of the affiliated companies and concludes that *"*[t]*hrough these joint venture arrangements, the Claimants became owners of the Project: NNl directly and NNHL and NUKL indirectly through their shareholding in NNL*". In paragraphs 110-118, the Tribunal applies and interprets Article 8(2) of the BIT

101 Application, ¶ 41.A (bold by Committee).

102 Application, ¶ 41.A; Response, ¶ 37.

103 Response, ¶ 35.

and Article 25 ICSID Convention and concludes that "*each Claimant entity satisfies the nationality requirements under the BIT and the ICSID Convention*", the first and second Claimants being incorporated in the UK, and NNL, being a Tanzanian company, through majority ownership by the second Claimant. In paragraphs 119-131, the Tribunal develops its argument that the three Claimants held an investment in 2017, i.e., at the time of the reform of mining legislation and the cancellation of the license, which they funded.

143. This is also the position of the Claimants. However, it is not different from the position of the Applicant: It agrees that since 2015 "*the Claimants have been the owners of the Project, directly through NNL, and indirectly through NNHL and NUKL*", that the new mining regime was introduced in 2017,[104] and it alleges that the Claimants did not invest all of the funds raised for the Project into it, but it does not allege that the Claimants invested **no** funds in the Project.[105]

144. The Committee has no authority to assess whether the Tribunal argued "*wisely*" when establishing its competence and the jurisdiction of ICSID. As to the quality of investors and the objection *ratione personae*, the Committee considers that the Tribunal carefully analysed the requirements for its competence and the jurisdiction of ICSID, as provided in Article 8(2) of the BIT and Article 25 of the ICSID Convention. Also, the Committee has studied the Applicant's submissions and finds that, concretely, they do not put into question the existence of the Tribunal's competence and jurisdiction of ICSID. Consequently, no further submission by the Applicant, expanding on the previous ones, will establish that the Tribunal determined erroneously its competence and that of ICSID's jurisdiction over the dispute.

145. Therefore, the Applicant's assertion that the Tribunal manifestly exceeded its powers by accepting jurisdiction is manifestly without legal merit.

146. **Second**, the Applicant asserts a manifest excess of powers, in addition to a departure from a fundamental rule of procedure and a failure to state reasons, "*in deciding that the February 2021 invitation for the Claimants to apply for an alternative licence could not*

104 Application, ¶¶ 29-30.

105 Application, ¶ 41.B. iv.

be said to have deprived the Claimants investment while the evidence in records show that the Claimants were not able to obtain financing after 2017".[106]

147. The Applicant does not specify in what way the Tribunal may have manifestly exceeded its powers. In considering the Applicant's sub-section on the "Grounds for Annulment on Merits" in the Application, the Committee assumes that the Applicant submits that the Tribunal failed to apply the "proper law", since that is what it contends to be the standard.[107]

148. The Claimants have brought their claims under the BIT. In paragraphs 184-191 of the Award, the Tribunal reviews possible bases for the claims and concludes that Article 5 of the BIT is the most appropriate one, as it protects against expropriation and "*measures having the effect equivalent to expropriation*". Further, the Tribunal determines in paragraphs 192-234 that "*permanent deprivation*" is one of the central elements of expropriation. In that context, it discusses the Respondent's defense, as to whether an invitation in February 2021 by Tanzania for the Claimant to apply for another mining license, was able to undo the effect of the deprivation. The Tribunal rejected this defense.

149. The Committee finds that the Tribunal has applied and interpreted the 'proper law', i.e., Article 5 of the BIT. It does not have the authority to judge whether the interpretation is correct.

150. In summary, the Applicant's contentions that the Tribunal committed annullable errors by exceeding its powers when it (i) accepted its competence and jurisdiction, and (ii) applied and interpreted Article 5 of the BIT, have no legal merit. The lack of legal merit is manifest, as a careful reading of Articles 1, 5 and 8 of the BIT, Article 25 ICSID Convention and the pertinent passages of the Award suffices to reveal that the Applicant's contentions are wrong.

151. Therefore, the Committee rejects at this stage the Applicant's Application to annul the Award for a manifest excess of powers.

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106 Application, ¶ 41.B. i.

107 Response, ¶ 33.

C. THE ALLEGED SERIOUS DEPARTURES FROM FUNDAMENTAL RULES OF PROCEDURE

152. A tribunal may state the reasons on which its award is based, act within the limits of its competence and jurisdiction, and apply the proper law, thus not exceeding its powers, while still committing an annullable error by seriously departing from a fundamental rule of procedure. The Applicant blurs the distinction between the three grounds for annulment when it amalgamates them without differentiating between the specific requirements for each ground for most of the twenty-one allegations presented.

153. The Committee must determine separately at this stage of the proceeding whether the Application, based on the assertion of a serious departure from a fundamental rule of procedure, is manifestly without legal merit. This issue is not pre-determined by the fact that the Committee has found that the grounds of a lack of reasons and an excess of powers are manifestly without legal merit.

154. At this point in time and procedure, the question is whether the Applicant has made out a *prima facie* case and presented arguments, which, if and when expanded at a later stage, may lead the Committee to find that the Tribunal made annullable errors in the way it has conducted the proceeding. This question does not address the substance and quality of the Award but the conduct of the Tribunal, and can, therefore, not be answered by an analysis of the Award on its face.

155. The Applicant contends that the Tribunal departed seriously from a fundamental rule of procedure by, first, refusing to hear its arguments and engage with the evidence produced by it, and/or, second, lacking impartiality and neutrality by being hostile and biased to Tanzania and by systematically privileging the Claimants' arguments, evidence and expert statements[108], when:

- deciding that all Claimants are investors (allegation 1);
- deciding that the invitation to apply for an alternative licence was without relevance for the deprivation of the investment although the real issue was the lack of access to financing (allegation 2);

[108] Response, ¶¶ 67 and 81.

- deciding that there was no longer a prospect to return to the area and control its investment (allegation 3);

- accepting private photos as evidence without scrutinising the pictured objects, in the one-sided interest of the Claimants (allegation 4);

- stating that the Claimants had produced evidence on expenditure on the project without referring to it (allegation 5);

- refuting the Respondent's evidence on the legislative process in 2017 (allegation 6);

- disregarding the evidence on the positive effects of the cancellation of all retention licences on the economy of Tanzania (allegation 7);

- deciding with partiality and bias that the legislation of 2017 targeted foreign companies (allegation 8);

- deciding without evidence that the legislation of 2017 targeted foreign companies (allegation 9);

- "*acting as witnesses/claimant's counsel by indicating that apart from the Claimants' evidence*" it found that the purpose of the mining legislation of 2017 targeted foreign companies (allegation 10);

- shifting the burden of proof regarding the inclusion of overhead costs in the damage valuation (allegation 11);

- disregarding Tanzania's arguments on the (in-)dependence of the Claimants' expert (allegation 12);

- demonstrating partiality when determining the valuation date in a way that increased the damage amount in favour of the Claimants (allegation 13);

- ignoring the Respondent's evidence regarding spin-off projects (allegation 14);

- accepting the Claimants' expert's opinion to the detriment of the Respondent's opinion on exploration costs in the wider area (allegation 15);

- accepting the Claimants' expert's opinion on the nature of the exploration costs (allegation 16);

- accepting unstamped reports without verifying whether they were submitted to the Mining Commission in accordance with the Mining Law (allegation 17);

- disregarding the Respondent's expert's evidence on the actual investment (allegation 18);

- disregarding the Respondent's evidence with respect to the prospectivity enhancement multiplier (PEM) (allegation 19);

- releasing the Claimants from proving that the minority shareholders had authorized them to initiate arbitral proceedings or make them party to the dispute (allegation 20); and

- failing to explain the guidelines for costs on legal representation (allegation 21).[109]

156. The Committee notes that, with regard to a number of allegations:

- notably numbers 1 and 3, the Applicant submits that the Tribunal refused to respect its right to be heard and did not take its arguments into consideration;

- notably numbers 2, 6, 7, 14, 18 and 19, the Applicant submits that the Tribunal refused to take its evidence into consideration or neglected it to favour evidence proffered by the Claimants;

- notably numbers 4, 5, 9, 15, 16 and 17, the Applicant submits that the Tribunal privileged evidence proffered by the Claimants and/or was satisfied with the Claimants' inconclusive evidence; and

- notably numbers 8, 10, 11, 12, 13 and 20, the Applicant submits that the Tribunal violated its duty to act impartially and without bias.

157. The Committee further notes that in allegation 21 the Applicant does not refer to any rule of procedure. For this reason, the Committee dismisses the Respondent's submission for

[109] Application, ¶ 41 A. and B.

annulment of the Award based on a departure from a rule of procedure with respect to the Tribunal's determination on the allocation of costs. It is manifestly without legal merit.

158. As to the remaining twenty allegations, the Committee realizes that some of them are extremely preliminary, lacking substance and legal basis when reviewed one by one. However, when reviewed grouped together, they may indicate infringements of the right to be heard and of the duty of impartial and equal treatment.

159. At the same time, the Committee is conscious that the impartiality of tribunals, the equal treatment of parties and the right to be heard are among the most fundamental general requirements of due process of law and for the integrity of the arbitral process. The Committee believes that it should be extremely hesitant to take procedural decisions that hinder a party from presenting fully its grievances as to violations of such fundamental rights, and dismissing summarily an application for annulment, which an applicant expects to develop in the course of a proceeding for a committee's detailed analysis and determination. Therefore, the Committee determines that the Applicant be given the opportunity to present its case in the normal course of the annulment proceeding, and for the Claimants to be given the opportunity to rebut the same. This is all the more appropriate as annulment proceedings are limited in scope, time and costs, and the procedural economy due to summary decisions under Rule 41(5) is limited.

160. For these reasons, the Committee decides to reject the Claimants' preliminary objection that the Application is manifestly without legal merit as far as it is based on the ground that the Tribunal seriously departed from a fundamental rule of procedure, except for allegation 21. The Committee does not further examine the individual allegations, as they must be considered individually and grouped together.

161. This decision does not imply any determination as to the pertinence and well-foundedness of the allegations. They will be analysed during the annulment proceeding.

VI. COSTS

162. The annulment proceeding continues albeit with a reduced focus on alleged serious departures from fundamental rules of procedure. The Claimants were partly successful in their preliminary objection.

163. The Claimants maintain that "*it makes more sense to allocate costs at the end of the proceeding, once the entire conduct of the proceeding can be seen*".[110]

164. The Applicant agrees to "*leave it to the* [Committee] *at a later stage to make a finding that costs should follow the event*".[111]

165. Therefore, the Committee agrees with the Parties and will make a decision on costs for this Decision together with its determination on the Annulment Application.

VII. DECISION

166. For these reasons, the Committee decides as follows:

a) The Claimants' preliminary objection under Rule 41(5) is granted with respect to the Application for Annulment based on Article 52(1)(b) – manifest excess of powers – , and on Article 52(1)(e) – failure to state the reasons on which the Award is based – and on allegation 21 pertaining to Article 52(1)(d) – a serious departure from a fundamental rule of procedure – as defined in paragraphs 157/160 of this Decision.

b) The Claimants' preliminary objection under Rule 41(5) is dismissed with respect to the Application for Annulment based on Article 52(1)(d) – a serious departure from a fundamental rule of procedure – with the exception of allegation 21 as determined under paragraph 166(a) of this Decision.

c) The Committee reserves its decision on costs until its Decision on the Application for Annulment.

110 Transcript Hearing on Rule 41(5) Objection, pages 60-61.

111 Transcript Hearing on Rule 41(5) Objection, page 67.

Ms. Bertha Cooper-Rousseau
Member of the Committee
Date: 1 February 2024

Prof. Githu Muigai
Member of the Committee
Date: 1 February 2024

Prof. Dr. Rolf Knieper
President of the Committee
Date: 1 February 2024