

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE INTERNATIONAL
CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB/24/51

SARAMA RESOURCES LTD

CLAIMANT

V.

BURKINA FASO

RESPONDENT

**RESPONDENT'S COUNTER-MEMORIAL ON MERITS
AND MEMORIAL ON JURISDICTION**

Counsel for Respondent

**Curtis, Mallet-Prevost,
Colt & Mosle LLP**

**SCPA BIRBA-GUITANGA
& ASSOCIES**

30 March 2026

**CURTIS, MALLET-PREVOST, COLT &
MOSLE LLP**
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

SCPA BIRBA-GUITANGA & ASSOCIES
SOCIÉTÉ D'AVOCATS
Ouagadougou – Tampouy –
Rue 22.02 Echangeur du Nord

TABLE OF CONTENTS

	Page #
I. INTRODUCTION	1
A. Overview of Claimant's Case and Respondent's Defence and Jurisdictional Objection	1
B. Structure of the Counter-Memorial and Memorial on Jurisdiction.....	16
II. FACTUAL BACKGROUND	17
A. Sarama's Limited and Intermittent Exploration Activities in the Tankoro Area Left It Nowhere Near Development	18
1. Sarama Has Always Been a Small Company With Limited Resources and No Record of Successfully Developing a Mining Project	19
2. Sarama Acquired the Tankoro Permit for a Negligible Purchase Price.....	20
3. After Conducting Significant Exploration Works, Sarama Conveyed Much of Its Interest in the Tankoro Area to Acacia for Modest Value	21
4. After Investing in Further Exploration Works, Acacia Did Not Pursue the Project and Transferred Its Interest in the Tankoro Area Back to Sarama for an Even Lower Value.....	25
5. When the Tankoro Permit Expired, Sarama Was Not Close to Proceeding With Development.....	28
B. Sarama's Rights in the Tankoro Area Were Extinguished in 2020 and Not Renewed Thereafter	33
1. Sarama Received the Maximum Number of Renewals Allowed Under the Law	42
2. When the Tankoro Permit Expired in December 2020, Sarama Lost All of Its Legal Rights in the Tankoro Area.....	46
3. The Ministry's October 2020 Information Note Was Not an Unexpected or Improper Interference with Mining Rights	53
4. But for the Reservation of the Tankoro Permit Area to the State, Sarama Would Have Been Subject to Prohibitions on Obtaining New Rights in the Area	61
5. Claimant's December 2020 Application for a New Exploration Permit Was Not Valid	66
6. The June 2021 Information Note Did Not "Annul" the October 2020 Information Note	73

7.	The Ministry Did Not Grant Sarama a New Exploration Permit in November 2021 in Response to Its August 2021 Application.....	76
8.	The Ministry Was Not Required to Grant Sarama's August 2021 Application	95
9.	The Minister Did Not "Concede" in 2023 That the "Tankoro 2 Permit" Had Already Been Granted	100
10.	The Minister Did Not Impose Improper Conditions on the Grant of a New Exploration Permit.....	111
11.	The Minister Did Not Revoke the Purported "Tankoro 2 Permit", Which Never Existed	120
12.	The Ministry Did Not Improperly Grant a New Exploration Permit for Tankoro to Soleil in 2024	130
C.	The Bondi Deposit is a Smaller and Poorly Explored Area That Was Never Subject to Regulation by Burkina Faso.....	134
1.	The Bondi Deposit Is a Smaller Deposit That Sarama Purchased from Orezone in 2017	134
2.	Sarama Was Granted the Djarkadougou Permit When the Arrêté Was Issued.....	141
3.	Orezone's Poor Quality Exploration Work and Sarama's Downgrading of the Resource Estimate	144
4.	The Expiration of the Djarkadougou Permit and the Issuance of a New Djarkadougou 2 Permit	149
5.	The Djarkadougou Permit Was Not Affected by any Measure or Act by Burkina Faso	151
(a)	The Bondi Deposit Was Never Subject to Any Legislation or Regulation by Burkina Faso	151
(b)	Sarama Remains to Date the Owner of the Djarkadougou 2 Permit.....	151
D.	The "Additional Projects" Were Minor Assets That Either Sarama Did Not Control and Operate or Had Not Been Explored	153
1.	The Karankasso Project Was Not Controlled or Operated by Sarama.....	153
2.	The Koumandara Project Had Barely Been Explored and No Resource Had Been Estimated	159
3.	The Additional Projects Were Not Affected by Any Government Measure	162
(a)	Sarama's Rights in the Karankasso Project Did Not Expire	162

(b) The Koumandara Project Was Not Subject to Any Regulation Either.....	164
4. The Additional Projects Lacked Funding Prior to the Rejection of Sarama’s “Tankoro 2 Permit” Application.....	164
E. Sarama’s Liability Theory Based on the Nesting Nature of Its Deposits Is Flawed and in Any Event Irrelevant.....	166
F. Sarama’s Presentation of the Progress and Status of the Project Is Unsupported, Contradictory and Misleading	168
1. Claimant Alleges That a PEA and a Mine Plan Had Been Prepared or Almost Complete but Fails to Produce These Documents.....	168
2. Claimant’s Narrative on Funding Opportunities Is Also Misleading.....	173
III. JURISDICTION AND ADMISSIBILITY	181
A. The Tribunal Lacks Jurisdiction Ratione Materiae.....	182
1. The Tribunal Lacks Jurisdiction Ratione Materiae With Respect to Some of Claimant’s Purported Investments.....	182
2. The Tribunal Lacks Jurisdiction Ratione Materiae With Respect to Investments Not Made in Accordance With the Law	185
B. The Tribunal Lacks Jurisdiction Ratione Personae as Claimant Is Not an “Investor of a Party”.....	186
1. Claimant Is Owned or Controlled by Investors of a Non-Party.....	191
(a) The Meaning of “Investors of a Non-Party”	192
(b) The Relevant Temporal Framework.....	193
(c) Claimant Is Owned by Investors of a Non-Party	194
(d) Claimant is Controlled by Investors of a Non-Party.....	196
2. Claimant Lacks Substantial Business Activity in Canada.....	199
3. The Treaty’s Object and Purpose Confirm the Exclusion.....	201
4. Conclusion	202
C. Claimant’s Claims Are Subject to the Time Limitation in the Treaty	202
IV. LIABILITY	203
A. General Considerations	203
1. Claimant’s Treaty Claims Are Entirely Dependent on Its Fictional Account of the Facts	203

2.	The Standards of Treatment Invoked by Claimant Apply Only to Covered Investments and Not to Attempts to Make Investments.....	205
3.	Claimant Is Not Entitled to Base Claims on “Imported” Standards From the Korea-Burkina Faso BIT	209
B.	Article 10 – Expropriation	211
1.	The Expropriation Standard Applies Only to Measures That Have an Expropriatory Character and Expropriatory Effect on an Investment.....	213
2.	The Ministry’s Handling of Claimant’s Tankoro Permit Application Did Not Have an Expropriatory Character	215
3.	The Ministry’s Handling of Claimant’s Tankoro Permit Application Did Not Have an Expropriatory Effect on an Investment.....	223
4.	There Was No Direct Expropriation of Claimant’s Investments.....	228
5.	The Requirements of an Expropriation Are Irrelevant as No Expropriation Occurred	231
6.	The Ministry’s Handling of Claimant’s Tankoro Permit Application Did Not Constitute an Expropriation of Claimant’s Other Investments	236
C.	Article 6 – Fair and Equitable Treatment.....	239
1.	The Treaty’s FET Standard Requires an Investor to Establish a High Level of Wrongfulness in the State’s Conduct.....	239
2.	The Ministry’s Conduct Was Not Manifestly Arbitrary	248
3.	The Ministry Did Not Breach a Transparency or Due Process Obligation	258
D.	Article 4 – National Treatment.....	265
E.	Article 5 – Most-Favoured Nation Treatment.....	269
V.	DAMAGES	269
A.	Under International Law Only Certain and Non-Speculative Damages May Be Awarded.....	272
B.	Claimant’s Outlandish and Exaggerated Damages Claim Must Be Rejected as Entirely Speculative.....	276
1.	The USD 290 million Claim Based on Multiplied Sunk Costs Is Highly Speculative.....	277

(a)	Only Relevant and Reasonable Sunk Costs May Be Compensated.....	277
(b)	Claimant's Cost Base Is Unreliable and Artificially Inflated as It Includes Costs That Are Irrelevant and Unreasonable.....	280
2.	The MEE Method with the Associated PEM Is Inappropriate and Highly Speculative and Should Be Rejected Outright	286
3.	The USD 215 million Value Based on Accuracy's Comparable Transactions Approach Is Flawed.....	295
C.	FMV Is Best Achieved Using Market Capitalisation and Same-Asset Contemporaneous Transactions	299
1.	Contemporary Market Capitalization and Past Transactions Constitute a Particularly Persuasive Benchmark for FMV	299
2.	The Market Capitalisation of Sarama Is a Reliable Proxy for FMV and Was USD 6.4 million at the Time of the Alleged Breach.....	301
3.	Real-Life Contemporary Transactions in Sarama's Project Are Reliable and Compelling Valuation Benchmarks and Provide Values of Only a Few Millions	303
VI.	CLAIMANT'S CLAIMS ON INTEREST SHOULD BE DISMISSED	307
VII.	COSTS	309
VIII.	CONCLUSION AND REQUEST FOR RELIEF	309
IX.	RESERVATION OF RIGHTS	309

I. INTRODUCTION

1. Burkina Faso (“Respondent”) submits this Counter-Memorial on Merits and Memorial on Jurisdiction in response to the Memorial submitted by Sarama Resources Ltd (“Claimant” or “Sarama”) dated 31 October 2025 (“Memorial”).¹ It addresses Claimant’s claims that Burkina Faso breached the Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (the “BIT”, “Treaty”, or “Canada-Burkina Faso BIT”).

A. Overview of Claimant’s Case and Respondent’s Defence and Jurisdictional Objection

2. The Introduction to Claimant’s Memorial tells, in summary terms, a story of a mining company that had tremendous success with its exploration efforts in Burkina Faso, had full legal mining rights, and was on the verge of rapidly proceeding with development and highly profitable production until becoming a victim of a hostile new government that unlawfully expropriated its mining rights to transfer them to a politically-connected Burkinabe company. Such a story, if true, would certainly provide a compelling basis for a tribunal to award damages under an investment treaty.

3. After advancing that abridged narrative in the Introduction, Claimant attempts to maintain it in the more detailed account set forth in the body of its Memorial and the supporting statements of its three fact witnesses—Andrew Robert Mune Dinning, Executive Chairman and Chief Executive Officer of Sarama;² Jack Hamilton, Vice

¹ References in the forms “R-” and “RL-” refer, respectively, to exhibits and legal authorities submitted herewith by Respondent. References in the forms “C-” and “CL-” refer, respectively, to exhibits and legal authorities submitted by Claimant.

² First Witness Statement of Mr Andrew Robert Mune Dinning, dated 31 October 2025 (“Dinning WS1”). Mr Dinning is also a founder of Sarama.

President of Exploration of Sarama;³ and Paul Schmiede, Vice President of Corporate Development of Sarama⁴—and the report of its damages experts, Edmond Richards and Simon Procopiou of Accuracy.⁵ Under this more fully articulated account, Claimant asserts that Burkina Faso is guilty of breaching its obligations under the Treaty and is required to pay Claimant an immense amount of damages for the following reasons.

- (i) After its exploration permit for its Tankoro mining project (the “Tankoro Permit”) expired on 17 December 2020, the Minister of Energy, Mines and Quarries (the “Minister” or “Minister of Mines”), who was Oumarou Idani (“Minister Idani”) at the time, orally told Sarama “not to worry” about the permit expiring and advised that Claimant would be allowed to continue its exploration activities without one.⁶
- (ii) In October 2020, just a couple months ahead of the expiration of the Tankoro Permit, Minister Idani issued a confusing and legally baseless Information Note that announced that the Tankoro permit area and a number of other permit areas covered by expiring permits would be reserved to the State, which suggested that the Ministry was considering seizing the permit holders’ rights.⁷
- (iii) Despite the Minister’s announcement, Sarama was “comforted” after Minister Idani again orally advised it “not to worry” about its mining rights, as they remained “protected”, and so submitted an application for a new exploration permit on 18 December 2020, and expected that it would be quickly approved pursuant to the normal “first come, first served” permitting practice of the Ministry of Energy, Mines and Quarries (the “Ministry” or “Ministry of Mines”).⁸

³ First Witness Statement of Mr Jack Hamilton, dated 21 October 2025 (“Hamilton WS1”). Mr Hamilton is also a founder of Sarama.

⁴ First Witness Statement of Mr Paul Schmiede, dated 31 October 2025 (“Schmiede WS1”).

⁵ Expert Report of Mr Edmond Richards and Mr Simon Procopiou, dated 31 October 2025 (the “Accuracy Report”).

⁶ Memorial, ¶ 137.

⁷ Memorial, ¶¶ 138-142.

⁸ Memorial, ¶¶ 142-143.

- (iv) In June 2021, the Ministry, now under a new Minister, Bachir Ismael Ouedraogo (“Minister Ouedraogo”), issued a new Information Note that “annulled” the October 2020 Information Note and announced that Tankoro and the other reserved permit areas would be available for permitting, and in doing so, orally advised Sarama that the new Minister was addressing the prior Minister’s “mistakes”.⁹
- (v) After the Ministry invited applications for Tankoro and the other permit areas in August 2021, Sarama immediately submitted an additional application despite having already submitted a “first in line” application in December 2020 because the Ministry orally advised it that the prior application would not be considered because Sarama had “submitted it under the previous administration.”¹⁰
- (vi) In November 2021, Minister Ouedraogo sent Sarama a letter that granted it a new exploration permit for Tankoro, such that it became the “legal owner of the Tankoro 2 Permit” upon paying the roughly USD 3,200 permitting fee specified in the letter.¹¹
- (vii) After obtaining the “Tankoro 2 Permit”, Sarama continued with its exploration activities and progress towards development, and was “not particularly concerned” with how the Ministry thereafter never issued the *arrêté* for the permit because an *arrêté* is a mere “receipt” of the grant of the permit that is not legally significant to the grant of mining rights.¹²
- (viii) In March 2022, the Ministry notified Sarama that its December 2020 application for a new exploration permit for Tankoro had been rejected, but that was “merely a formality” because the Ministry knew that it had already granted the permit through Minister Ouedraogo’s 24 November 2021 letter.¹³
- (ix) In October 2022, a new Minister, Simon-Pierre Boussim (“Minister Boussim”), was appointed who was hostile to Western companies such as

⁹ Memorial, ¶ 145; Hamilton WS1, ¶¶ 85-86.

¹⁰ Memorial, ¶¶ 145-146; Hamilton WS1, ¶ 87.

¹¹ Memorial, ¶¶ 6, 148.

¹² Memorial, ¶¶ 148-150; Dinning WS1, ¶ 101.

¹³ Hamilton WS1, ¶ 87, n. 145.

Sarama and intent on seizing their assets to benefit Burkinabe and Russian companies.¹⁴ As part of that strategy, Minister Boussim made the “shocking” announcement that he considered the Tankoro permit area to be an asset of the State.¹⁵

- (x) After Sarama showed Minister Boussim the November 2021 letter that granted it the “Tankoro 2 Permit”, the Minister responded with a nonsensical excuse for why that permit had been granted “in error” such that it could not be recognised.¹⁶
- (xi) Minister Boussim then imposed improper conditions on the grant of a new permit, including a bizarre demand that Sarama persuade the Government of Canada to change its policy relating to Burkina Faso’s ability to obtain surveillance drone technology, and an “extortionate” and “arbitrary” payment demand that was likely a request for a “bribe”, which the Minister suspiciously offered to reduce in later discussions with Sarama.¹⁷
- (xii) After Sarama explained that it could not satisfy those conditions, Minister Boussim unlawfully and retroactively revoked the “Tankoro 2 Permit” on 25 August 2023.¹⁸
- (xiii) After expropriating Sarama’s mining rights in Tankoro, the Minister transferred those rights to a Burkinabe mining company, Soleil Mining S.A. (“Soleil”), thereby confirming the discriminatory and expropriatory purpose of the revocation.¹⁹
- (xiv) The expropriation of Sarama’s investments caused it an immense loss. Its exploration works had established that the Tankoro area included highly valuable gold resources (the “Tankoro Deposit”), and it was so clear that the resources “could be efficiently and economically extracted” and processed that Sarama could proceed with development in an expedited

¹⁴ Memorial, ¶¶ 185-186.

¹⁵ Memorial, ¶ 204.

¹⁶ Memorial, ¶ 214; Dinning WS1, ¶ 152.

¹⁷ Memorial, ¶¶ 209-217; Hamilton WS1, ¶ 107.

¹⁸ Memorial, ¶¶ 224-226.

¹⁹ Memorial, ¶ 230.

manner, including by skipping the normal step of preparing a pre-feasibility study.²⁰

- (xv) The revocation of the “Tankoro 2 Permit” also destroyed the value of Sarama’s other investments in Burkina Faso because the other mining rights it held were highly valuable to the holder of a permit for the Tankoro area because the other areas, and the Bondi area in particular, could be developed and operated in a “highly synergistic” manner with the Tankoro area but would not be economically viable on their own or with any other areas.²¹
- (xvi) The Multiple of Exploration Expenditure (“MEE”) methodology is used for valuing the fair market value of mining rights and would have been used by buyers had Sarama sold its mining interest in Burkina Faso ahead of the expropriation.²² That methodology, which is based on the value added by Sarama’s extensive and highly successful investment in exploration and pre-development activities, results in a value of USD 242 million (when averaged with the result of a “comparable” transactions analysis) for Sarama’s expropriated assets as of the valuation date of 24 August 2023.²³

4. This more detailed account could, if true, also provide a basis for obtaining a large award of damages. However, the Tribunal might have found when reading the Memorial that it involves a number of assertions that are less than convincing on their face, such as the repeated claims of oral assurances and the characterisation of an *arrêté* as a “receipt” of little legal significance. The Tribunal might have also noted that many of Claimant’s key factual assertions depend solely on the testimony of its witnesses, who are all self-interested Sarama executives, shareholders and founders of the company.

²⁰ Memorial, ¶¶ 156-157.

²¹ Memorial, ¶¶ 119, 122, 131.

²² Memorial, ¶¶ 461-463.

²³ Memorial, ¶ 477.

5. As Respondent shows below, those signs that Claimant's account might not be accurate were the tip of the iceberg. A closer review shows that the account is a cynical made-for-arbitration fiction. Claimant and its witnesses have badly misrepresented the facts and contemporaneous documentary evidence as well as the applicable mining laws and regulations to create a case for liability, and its experts have applied an inappropriate methodology and used Claimant's inaccurate inputs to reach an extremely inflated valuation of Claimant's alleged damages.

6. Respondent reviews the extensive defects in Claimant's case on jurisdiction, facts, liability and damages in detail below.

7. With respect to jurisdiction, Respondent shows that: (i) the Tribunal does not have jurisdiction *ratione materiae* with respect to some of Claimant's purported investments as they do not fall within the definition of "investment" under the Treaty and/or appear to have not been made in accordance with the law; (ii) the Tribunal lacks jurisdiction *ratione personae* because Claimant does not qualify as an "investor of a Party" under the Treaty; and (iii) Claimant's claims are subject to the time limitation in the Treaty.

8. With respect to the facts, Respondent shows that Claimant's narrative is an outright fiction. On the Tankoro project, which is the heart of Claimant's case, Respondent establishes the following points.

- (i) Sarama allowed the Tankoro Permit to expire in December 2020 knowing that the normal result of expiration would be that Sarama would lose all legal rights in the permit area and be subject to the provisions of the mining law and regulations that prohibit the prior holder from applying for a new exploration permit for the same area for one year and from receiving mining rights in the area for two years.²⁴

²⁴ *Infra*, ¶¶ 72-82.

- (ii) Sarama could have retained legal rights in the area had it submitted a timely application for an operating permit. Sarama did not do so because it had not determined that the Tankoro Permit was economically viable to develop and was not close to meeting the requirements for such an application, which included, *inter alia*, submitting a feasibility study and a business plan.²⁵
- (iii) Sarama understood exactly what was being done through the Ministry's October 2020 Information Note, which expressly identified the legal bases for reserving permit areas to the State following the expiration of exploration permits for the purpose of allowing the Ministry to review the areas to decide whether to develop them through the State or reallocate them. In the case of reallocation, the law provided for the Ministry to not follow the normal permitting procedure and instead seek to obtain value for the areas through a tender process as the areas had become unencumbered assets of the State and the prior exploration works could have increased their value.²⁶
- (iv) As the October 2020 Information Note specified that the reserved permit areas would be unavailable for permitting immediately after the expiration of the prior permits and would remain so "until further notice," Sarama did not genuinely believe that its December 2020 application for a new permit was valid. It appears to have submitted the application as it was seeking to raise funds from investors and wanted to give the impression that it had a valid "first in line" application pending.²⁷
- (v) The June 2021 Information Note did not "annul" the October 2020 Information Note. Rather, it advised that the Ministry had decided to not develop the reserved areas through the State and was proceeding with reallocation. The only change from the originally anticipated process was that the Ministry had determined that the State had not developed the capacity to conduct a competitive bidding process and so would instead invite applications from companies interested in acquiring the reallocated areas. In doing so, the Ministry would impose "special conditions" on the grant of a new permit, which would include, in particular, an acquisition price

²⁵ *Infra*, ¶¶ 38-39.

²⁶ *Infra*, ¶¶ 83-101.

²⁷ *Infra*, ¶¶ 112-125.

for the corresponding asset, given that the Ministry would be disposing of State assets that could have significant value given the prior exploration works.²⁸

- (vi) The June 2021 Information Notice specified that the Ministry would give “special consideration” to prior holders such as Sarama in reallocating permit areas because it had accepted that they might be best positioned to move forward with development of the areas. As part of that policy decision, the Ministry elected to not enforce the prohibitions that would prevent prior holders from applying for or receiving a new exploration permit for the same area.²⁹
- (vii) It was only because the Ministry reserved the Tankoro permit area for review and applied the different process for reallocating reserved areas, including the imposition of an acquisition price condition, that Sarama had a possibility of applying for a new permit. As such, Sarama’s attack on the review and reallocation process as an unlawful departure from the normal permitting procedure is incongruous and self-defeating.³⁰
- (viii) The Minister’s 24 November 2021 letter did not purport to grant a new permit to Sarama and instead expressly stated that further processing was required, which is no doubt why Sarama and its witnesses have, quite tellingly, cited only to the application form and not to the actual letter in claiming that it granted the new permit. Sarama understood that further processing would be needed to identify the required special conditions on the grant of a permit as the letter was issued by the same Minister, Minister Ouedraogo, who issued the June 2021 Information Note explaining that permits for reallocated areas would be granted subject to special conditions to be identified by the Ministry.³¹
- (ix) An *arrêté* is not an inconsequential “receipt” of the grant of a permit. Under the law, an exploration permit can be granted only through an *arrêté* issued

²⁸ *Infra*, ¶¶ 126-131.

²⁹ *Infra*, ¶¶ 126-131.

³⁰ *Infra*, ¶¶ 102-111.

³¹ *Infra*, ¶¶ 132-168.

by the Minister, which is a formal order or decree that makes clear that it is the legal instrument that grants mining rights.³²

- (x) Prior to engaging investment arbitration counsel to prepare its case, Sarama repeatedly recognised in its public statements to investors and communications to others after November 2021 and into 2023 that it had not received the so-called “Tankoro 2 Permit” and only “anticipated” that it would be issued.³³
- (xi) The Ministry’s March 2022 letter that informed Sarama of the rejection of its December 2020 application for a new permit for the Tankoro area did not mention that the rejection was because the permit had already been granted to Sarama—as it obviously would have done if that had occurred. Rather, the letter explained that the application had been rejected because the Tankoro area had been reserved to the State.³⁴
- (xii) Whether because of the political turbulence in Burkina Faso associated with the January and September 2022 *coups d’état* and related impact on the functioning of the public administration of the State, or complications resulting from the review and rejection of Sarama’s December 2020 application in March 2022, the Ministry did not proceed with the processing of Sarama’s August 2021 application until being prompted to do so by Sarama in late 2022 and early 2023.³⁵
- (xiii) The new Minister who began the position in October 2022, Minister Boussim, did not act with any hostility to Sarama. He correctly explained how the Tankoro permit area had been handled, including in becoming a State asset following the expiration of the Tankoro Permit, and was being reallocated subject to special conditions, including the imposition of an asset acquisition price condition.³⁶ In doing so, the Minister maintained the policy, which was highly favourable to Sarama, of not enforcing the

³² *Infra*, ¶¶ 222-242.

³³ *Infra*, ¶¶ 129-131.

³⁴ *Infra*, ¶¶ 112-125.

³⁵ *Infra*, ¶ 57.

³⁶ *Infra*, ¶¶ 42, 126-128.

prohibitions that would normally apply to prior holders and instead giving them special consideration.³⁷

- (xiv) Minister Boussim did not make changing Canada's policy regarding surveillance drone technology a condition of the grant of a new permit for Tankoro. It was Sarama that proposed that it attempt to assist with the matter and when it reverted to say that it was unable to do so, the Minister indicated no concern whatsoever with that unsurprising result and maintained that he was open to granting the new permit subject only to the acquisition price condition.³⁸
- (xv) Minister Boussim did not impose an "extortionate" or "arbitrary" acquisition price condition, and did not request a "bribe". As Sarama's witnesses acknowledge, the Ministry explained that the targeted mining asset price accounted for the prior exploration expenditures, and it makes little sense for Sarama to attack that approach when it is the basis of its damages valuation.³⁹ The Ministry was, in any case, free to set the price it wished for the sale of its asset, and was free to reduce the price if it considered that appropriate. The allegation that the Minister was seeking a "bribe" is a baseless attempt to disparage him and the Ministry. The acquisition price condition, which was likewise imposed with respect to other reallocated permit areas, was openly discussed in official correspondence and communications with third parties.⁴⁰
- (xvi) Rather than unlawfully and retroactively revoking the "Tankoro 2 Permit", the Minister's 25 August 2023 letter merely informed Sarama that its application was rejected as Sarama was unwilling to pay the required price for the acquisition of the State's asset.⁴¹
- (xvii) The rejection of Sarama's application was not aimed at expropriating its mining rights to enable them to be transferred to Soleil. Sarama had no legal rights in the Tankoro area and the Ministry had spent months discussing the grant of the permit to Sarama, and did so while applying the

³⁷ *Infra*, ¶¶ 102-111.

³⁸ *Infra*, ¶¶ 60, 158, 200-206.

³⁹ *Infra*, ¶¶ 207-221.

⁴⁰ *Id.*

⁴¹ *Infra*, ¶¶ 222-242.

aforementioned policy of not enforcing the prohibitions that would normally apply and giving Sarama special consideration. After rejecting Sarama's application, the Ministry openly marketed the permit area before eventually granting an exploration permit to Soleil in late May 2024.⁴² Soleil was required to also pay an acquisition price, which was lower than the amount that the Ministry had hoped to receive, which was in large part due to Sarama's refusal to comply with its obligation to transfer the data from its exploration activities to the Ministry.⁴³

- (xviii) When the Ministry rejected Sarama's application in August 2023, Sarama was nowhere near proceeding to development, just as it was not close when the Tankoro Permit expired in December 2020. The limited "evidence" it now submits of its alleged progress with the preparation of a Preliminary Economic Assessment ("PEA") and arranging financing for development was manufactured in mid-2023 to support an arbitration case after Sarama realised that it would not be able to mislead the Minister into believing that the "Tankoro 2 Permit" had been granted, or in persuading him to reallocate the permit area to Sarama free of the acquisition price condition.⁴⁴
- (xix) In its audited annual financial statements and its quarterly financial reports throughout 2022 and 2023, Sarama repeatedly specified that "the Company is in the process of exploring its principal mineral properties and has not yet determined whether the properties contain gold reserves that are economically recoverable."⁴⁵
- (xx) Claimant has almost completely ignored the difficult operating conditions in Burkina Faso that would have significantly hindered its attempts to obtain financing and its development and operation works.

9. While of secondary importance, Claimant's assertions about the Bondi permit area and its other projects in Burkina Faso are similarly flawed as Respondent

⁴² *Infra*, ¶¶ 243-252.

⁴³ *Id.*

⁴⁴ *Infra*, ¶¶ 353-387.

⁴⁵ **Ex. C-0256**, Sarama Resources Ltd, Consolidated Financial Statements 2022, dated 30 March 2023, p. 12; **Ex. C-0011**, Sarama Resources Ltd, Consolidated Financial Statements 2023, dated 28 March 2024, p. 12.

details below.⁴⁶ As will be shown, the Bondi deposit had been poorly explored, which forced Sarama to downgrade the resource estimate for this deposit. As regards the Karankasso project, Sarama was a non-operating and non-controlling joint venture participant that merely attended meetings and hardly met its minimum expenditure requirements, which resulted in the continuous decrease of its interest in the joint venture prior to the alleged breach. Finally, the Koumandara project was just an “option” according to Claimant, which envisioned that funds would be allocated to that deposit only once Tankoro had been brought into commercial production. It had barely been explored and was ultimately sold by Sarama for USD 160,000.

10. Claimant’s submissions on the interpretation and application of the Treaty’s standards of treatment are also highly flawed. For the sake of thoroughness, Respondent fully reviews them below, but this is not a case in which the nuances of treaty interpretation are significant. Claimant’s claims are wholly dependent on its fictionalised account of the facts. With the collapse of its allegation of an unlawful and discriminatory retroactive revocation of the “Tankoro 2 Permit”, there is nothing left to its case. Further, aside from their lack of factual merit, Claimant’s claims fail because they are concerned with its attempt to make a new investment and not the treatment of a covered investment under the Treaty given that all of its rights in the Tankoro area were extinguished when the Tankoro Permit expired in December 2020. Indeed, that is one of the reasons that Claimant has gone to such lengths to claim that it obtained the “Tankoro 2 Permit” in November 2021 and thereby became the “legal owner” of mining rights in the Tankoro area.

⁴⁶ *Infra*, ¶¶ 253-306.

11. Because Claimant's case on damages is, like its account of the facts, so aggressively distorted, a few points bear highlighting here.

- (i) Claimant has focused on an expropriation claim, while also wrongly claiming that the “but for” standard for reparation that applies to the other treaty standards also requires compensation for the fair market value of the affected investments.⁴⁷ It has done that because it knows that it has no chance of establishing with reasonable certainty that, but for, the impugned conduct of Burkina Faso, Sarama would have proceeded to production and generated profits justifying compensation.
- (ii) Claimant's MEE method is not an appropriate means of determining the fair market value of its investments.⁴⁸ The method would not have been used by a buyer at the time, or now, and is easily susceptible to being applied in a manner that allows the valuer to obtain whatever result is desired.
- (iii) Claimant's experts have applied the MEE method in a manner that produces a disproportionate result of USD 290 million, USD 260.8 million after factoring in the State's carried interest, by including improper and exaggerated expenditures in the calculation and unjustifiably applying multipliers that are not appropriate for a project in such an early development stage in a high-risk environment.⁴⁹ Claimant's experts have also produced a flawed “comparables” analysis yielding an improbable value of USD 223.1 million.⁵⁰ They have then averaged the two values to reach an over-inflated result of USD 242 million.⁵¹
- (iv) As Sarama was a publicly traded company at the time of the alleged expropriation, its market capitalisation of USD 6.4 million in August 2023—which was consistent over the prior year and accounts for the value of the entire company, and not just the allegedly mistreated investments—provides a far more realistic basis for valuing its alleged damages.⁵²

⁴⁷ *Infra*, ¶¶ 594-597.

⁴⁸ *Infra*, ¶¶ 627-652.

⁴⁹ *Infra*, ¶¶ 584-585.

⁵⁰ *Id.*

⁵¹ *Infra*, ¶ 585.

⁵² *Infra*, ¶¶ 665-674.

Claimant's experts' attempt to explain away the relevance of the market price as, e.g., not reflecting sufficient trading volume or "privileged information regarding Sarama's future plans", is not persuasive.

- (v) Claimant's experts' valuation also stands in stark contrast to the transactions Sarama was involved in relating to the Tankoro project and its other projects in Burkina Faso. In 2014, Sarama agreed to transfer much of its interest in the Tankoro area and entire South Houndé Project to Acacia Mining plc ("Acacia").⁵³ To obtain 50% of that interest, Acacia merely had to contribute USD 7 million towards the cost of exploration activities over the specified term. Claimant tries, again unpersuasively, to explain away that far more modest valuation as providing no indication of the actual value of its projects by asserting that Sarama was forced into the transaction because it was facing problems raising financing for exploration because a decline in gold prices in 2014 (which was relatively modest) led investors to instead invest in cannabis and cryptocurrencies.⁵⁴
- (vi) Claimant's attempt to explain away Acacia's decision to not proceed with the South Houndé Project and transfer its interest in it back to Sarama for an even more modest amount is likewise not credible. Acacia invested more than USD 12 million on exploration activities from 2014 to 2018 and subsequently withdrew from the South Houndé Project, accepting to be reimbursed approximately USD 1 million by Sarama, effectively writing off more than USD 10 million.⁵⁵ Claimant says that this transaction was no indicator of the value of Tankoro and the South Houndé Project because Acacia was facing financing problems at the time such that it had to be acquired by Barrick Mining Corporation ("Barrick") just as it was concluding the transaction with Sarama. Claimant fails to note that Barrick, which is one of the largest mining companies in the world and had a market capitalisation over USD 20 billion at the time, already owned approximately 64% of Acacia.⁵⁶ Barrick was more than capable of accurately valuing the

⁵³ *Infra*, ¶¶ 675-678.

⁵⁴ *Infra*, ¶¶ 28-30.

⁵⁵ *Infra*, ¶¶ 675-678.

⁵⁶ *Infra*, ¶ 36.

project and would not have allowed Acacia to lose a highly valuable asset because of Acacia's alleged financing problems.

- (vii) Claimant also attempts to explain away the low valuation reflected in its transactions regarding its other assets in Burkina Faso, such as its interests in the Bondi permit area, on the basis that the holder of the Tankoro permit was uniquely positioned to profitably develop the Bondi area because of the "synergies" with Tankoro. Given the uncertainties with the attributes of the resources in the two areas, "synergistic" development and production was not at all certain. But even putting that aside, Claimant's assertion that the holder of a permit for the Tankoro area would be the only entity able to leverage the synergies is unfounded. There were other mining companies in similar proximity, including some with operating mines that could have been interested in acquiring rights in the Bondi area if such synergies so clearly existed.⁵⁷
- (viii) Claimant's case on damages (as well as liability) ignores how it accepted the application of the relevant mining laws and regulations in seeking and obtaining the approvals to acquire and renew the Tankoro Permit, and is therefore bound by the provision in the primary implementing regulation of the mining law that states: "The rejection of requests for allocation, renewal, assignment, amodiation, [or] transmission of mining titles or authorisations does not entitle the holder to any compensation or compensation whatsoever."⁵⁸

12. In addition to establishing the foregoing points regarding the defects in Claimant's narrative, Respondent shows below that Claimant and its witnesses have been reckless in misrepresenting the documentary evidence and the content of the applicable laws and regulations. Indeed, with some of their citations, Respondent initially assumed it was reviewing the wrong documents as nothing in them reflected Claimant's assertions.

⁵⁷ *Infra*, ¶¶ 345-351.

⁵⁸ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 19.

13. The only explanation for this approach is that Claimant knows that it does not have a tenable case for all the reasons noted above, and so decided that the best strategy was to advance the most compelling claim of blatantly wrongful conduct it could conceive of (*i.e.*, a discriminatory, unlawful, and corrupt expropriation of an investor's investment just as the investor was about to proceed to high levels of profitability) in the hope that Burkina Faso would either agree to settle the case for an undue amount or allow the case to be adjudicated on a default basis such that Claimant's account might not be scrutinised by the Tribunal.⁵⁹

14. Respondent sincerely appreciates the Tribunal's decision to give it additional time to prepare this submission. Respondent has sought to provide the Tribunal with an accurate and complete picture of the relevant facts, including the content of Burkinabe law, so that it is positioned to make an informed decision on the issues before it. On some points, Respondent would like to have had some additional time, but it believes that it has already been able to show that Claimant's claims are invalid and an attempt to use the Treaty and ICSID Convention to obtain an immense and unjustified windfall of hundreds of millions of dollars at the expense of the Burkinabe public. Respondent looks forward to providing more details to support that conclusion in its Rejoinder submission.

B. Structure of the Counter-Memorial and Memorial on Jurisdiction

15. The remainder of the Counter-Memorial and Memorial on Jurisdiction is structured as follows. Part II sets forth Respondent's account of the relevant facts. Part III

⁵⁹ To be certain, Respondent does not consider such a strategy sensible and believes that the Tribunal would, in a default scenario, still perform its function of ensuring that Claimant met its burden of substantiating all the elements of its claims. It would, however, be the case that, without Burkina Faso's input, the Tribunal's ability to assess the veracity of Claimant's claims would be significantly reduced.

sets forth its objections regarding jurisdiction and admissibility. Part IV sets forth its defences to the merits of Claimant's BIT claims. Part V sets forth its defences regarding Claimant's case on causation and damages and addresses particular issues relating to Claimant's requested relief. Part VI addresses pre- and post-award interest. Part VII addresses the allocation of the Parties' costs. Part VIII sets forth Respondent's conclusion and requested relief. Part IX contains Respondent's reservation of rights.

16. This Counter-Memorial and Memorial on Jurisdiction is accompanied by a witness statement from Mr Souleymane Kéré dated 30 March 2026.⁶⁰ He is a trained judge who has presided over several Burkinabe courts prior to his appointment as technical advisor to the Minister of Mines in 2022.

17. It is also accompanied by an expert report from Mr James Searby dated 30 March 2026. Mr Searby is an independent financial economist and a consultant to Masin. He has opined on the damages valuations put forward by Claimant's experts from Accuracy. Mr Searby's report is accompanied by an appendix authored by Mr Thierry Rousseau, a trained geologist and mining specialist.⁶¹

II. FACTUAL BACKGROUND

18. Respondent reviews below the factual background to Claimant's claims of breaches of the Treaty. Rather than proceeding strictly chronologically, Respondent separately reviews: (i) Sarama's limited exploration works under the Tankoro Permit and its disposal and reacquisition of a large part of its interest in the permit on the basis of a very modest assessment of its value; (ii) the permitting issues relating to the Tankoro

⁶⁰ First Witness Statement of Souleymane Kéré, dated 30 March 2026 ("Kéré WS1").

⁶¹ Expert Report of Mr James Searby dated 30 March 2026 ("Searby Report"). Mr Rousseau's technical opinion is dated 30 March 2026 and is referred to as "Searby Report, Appendix 3, Rousseau Opinion".

Permit, including its expiration in December 2020 and the contrived and baseless claim that the Ministry granted and then unlawfully revoked the “Tankoro 2 Permit”; (iii) Sarama’s limited and unpromising exploration activities in the Bondi permit area; (iv) Sarama’s so-called “Additional Projects”, which were minor assets that it did not control and operate or had not explored; and (v) Sarama’s current position on the progress and status of the “Sanutura Project”, which is unsupported, contradictory and misleading.

19. For ease of readability, Respondent often refers to Sarama Mining Burkina SARL (“SMB”), the holding company that was the holder of the Tankoro Permit, as Sarama or Claimant.

A. Sarama’s Limited and Intermittent Exploration Activities in the Tankoro Area Left It Nowhere Near Development

20. Respondent reviews Sarama’s exploration activities and alleged preparations for an attempt to work towards development in more detail further below in addressing Sarama’s damages claim, to the extent that it is able to do so on the basis of the information thus far provided by Sarama. Here, Respondent briefly reviews the basic facts of Sarama’s investment in the Tankoro area and its exploration activities, including how Sarama: (i) came to the project as a newly formed company with few resources and no record of successfully bringing mining projects to production; (ii) acquired the Tankoro Permit for a modest purchase price in 2012 (and only after assuring that the original holder received the *arrêté* granting an extension of the permit); (iii) conveyed a large portion of its interest in the Tankoro Permit and overall “South Houndé Project” in 2014 to another company, Acacia, for modest value through an earn-in agreement, and then reacquired that interest for even more modest value from Acacia in 2019; and (iv) was not close to

even attempting to proceed to development and production when it reached the end of the 12-year maximum term for an exploration permit in December 2020.

1. Sarama Has Always Been a Small Company With Limited Resources and No Record of Successfully Developing a Mining Project

21. By Claimant's own account, Sarama made its purported investments in Burkina Faso as a recently formed company with modest resources and no record of successfully developing mining projects in Burkina Faso or anywhere else. As Mr Dinning states:

Sarama is a junior exploration company and, unlike major mining firms such as Rio Tinto or BHP Billiton, it does not maintain substantial cash reserves. Sarama reports its cash and cash equivalents in its annual reports, and in its forward-looking Management's Discussion and Analysis ("MD&A") statements. For example, as at 30 September 2021, when Sarama announced its intention to pursue a second listing on the ASX, the Company held cash and cash equivalents of US\$ 1,616,889.19. Because of this, Sarama needed to continually raise funds to advance exploration and development to continue to progress the Sanutura Project and Additional Projects ⁶²

22. Respondent recognises that Claimant's witnesses and other Sarama employees had significant experience working for other companies, including some with a record of success. Respondent also recognises that there is nothing improper about pursuing business opportunities through a newly formed company. The character and capacity of Sarama is, however, an important issue in this case because of the narrative that Claimant has constructed as the basis for its claims. Claimant wants the Tribunal to believe that a small and inexperienced company operating in a high-risk environment with

⁶² Dinning WS1, ¶ 29.

almost no funds was ready to rapidly proceed from: (a) not having completed its exploration work and not having even begun work on a PEA; to (b) completing a bankable feasibility study, while skipping the standard step of preparing a pre-feasibility study, and then quickly raising funding for development and beginning profitable operations.

23. Given the status and results of the exploration work that was done for Tankoro, and the challenging operating environment in Burkina Faso at the time—which would have significantly impacted Claimant’s ability to raise financing—Claimant’s “but for” counterfactual scenario of fast-tracked development and success would be extremely optimistic even for major mining companies with extensive financial and technical resources. For a company like Sarama, the scenario is an unrealistic fantasy.

2. Sarama Acquired the Tankoro Permit for a Negligible Purchase Price

24. According to Sarama, it began discussions with Mr Ousmane Birba, a Burkinabe mining entrepreneur, in 2010 regarding the possible acquisition of his interest in the Tankoro Permit, which he had acquired on 17 December 2008.⁶³ Rather than immediately purchasing the permit, Sarama, through SMB, entered into an option agreement with Mr Birba on 18 January 2011 that gave it the right to undertake exploration works in the Tankoro permit area and acquire a 100% interest in the permit, subject to receiving the Ministry’s approval of the transfer.⁶⁴ The agreement provided that SMB could acquire the Tankoro Permit by paying Mr Birba USD 300,000 in a series of instalments and meeting an obligation to conduct approximately USD 25,000 in

⁶³ Memorial, ¶¶ 63, 71.

⁶⁴ Memorial, ¶ 77; **Ex. C-0041**, Option Agreement between Sarama Mining Burkina Faso Suarl and Ousmane Birba, dated 18 January 2011.

exploration works in the permit area within a three-year period.⁶⁵ If Sarama elected to acquire the Tankoro Permit, Mr Birba would be entitled to 1.5% of the total revenues from any gold extracted under the permit, which Sarama could repurchase for a price of USD 1 million.⁶⁶ Mr Birba retained the right to continue *orpaillage* in the permit area until Sarama began commercial production of gold or obtained an operating permit.⁶⁷ After meeting its obligation to expend USD 25,000 on exploration activities, Sarama exercised its right to acquire 100% of his interest in the Tankoro Permit in the autumn of 2012, and memorialised that transaction on 2 November 2012.⁶⁸

3. After Conducting Significant Exploration Works, Sarama Conveyed Much of Its Interest in the Tankoro Area to Acacia for Modest Value

25. Sarama asserts that, after acquiring the Tankoro Permit in late 2012, it “continued and intensified” its exploration activities,⁶⁹ and was successful in finding that there was significant development potential. According to Mr Dinning, the exploration works conducted by late 2013 were very positive and enabled the company to “estimate[] that the Tankoro Deposit contained approximately 1.5 million ounces of gold, including only materials with at least 0.8 grams of gold per tonne in the estimate.”⁷⁰ He also asserts that by early 2014, the preliminary metallurgical testing “indicated the potential for heap leach processing of oxides, which is an efficient, low capital, low operating cost and cost-effective processing method for gold extraction.”⁷¹

⁶⁵ Memorial, ¶ 78.

⁶⁶ Memorial, ¶ 78.

⁶⁷ Memorial, ¶ 78.

⁶⁸ Memorial, ¶ 94.

⁶⁹ See, e.g., Hamilton WS1, ¶ 54.

⁷⁰ Dinning WS1, ¶ 53.

⁷¹ Dinning WS1, ¶ 54.

26. Despite those findings, which supposedly led Sarama to be highly positive about the value and potential of the Tankoro permit area, Sarama began discussions to transfer a large portion of its interest in the Tankoro Permit and the overall South Houndé Project to another company, Acacia Mining plc (“Acacia”), at some point in 2014. On 26 November 2014, Sarama concluded an earn-in agreement that provided for Acacia to obtain a 50% interest in the South Houndé Project, including the Tankoro Permit, in exchange for contributing USD 7 million towards the cost of exploration activities, and 75% if it contributed USD 14 million over the specified term.⁷²

27. As discussed further below in connection with Claimant’s case on damages, this transaction is hard to square with Claimant’s valuation of its alleged mining rights in Tankoro and the South Houndé Project.⁷³ As such, Claimant tries to explain away the immense gap between the value that it ascribed to its assets in the Acacia transaction and the value it now claims by asserting that the transaction was required because of the decline in the price of gold in 2014. As Mr Dinning states:

In 2014, the gold price dropped significantly. As a result, it became difficult and expensive for Sarama to raise funds to continue its exploration works. We needed to find another way to continue the exploration and development of the Tankoro Deposit.⁷⁴

28. Earlier in his witness statement, Mr Dinning discussed this decline in gold price as follows:

Sarama was not the only Canadian company experiencing this problem [of obtaining sufficient funding] and multiple

⁷² Memorial, ¶¶ 103-104; Dinning WS1, ¶ 59; **Ex. C-0125**, Earn-In Agreement as regards to the South Houndé Project between African Barrick Gold Plc and Sarama Resources Ltd, dated 26 November 2014.

⁷³ *Infra*, ¶¶ 675-680.

⁷⁴ Dinning WS1, ¶ 58. See also Memorial, ¶ 103 (same).

Canadian listed companies were seeking a secondary listing on the ASX. This was in part because the gold price dropped significantly during the 2010s and the Canadian market had switched its focus from investing heavily in natural resources to investing in cannabis products and cryptocurrency.⁷⁵

29. There was a decline in gold prices in 2014, but it should be viewed in context. At the time of concluding the options agreement with Mr Birba in January 2011, the price was approximately USD 1333.50/ounce.⁷⁶ While the price surpassed USD 1700/ounce at times in 2012 and early 2013, it had gone down to USD 1331.50/ounce, approximately the same as the January 2011 price, by July 2013.⁷⁷ At the time Sarama concluded the earn-in agreement with Acacia in late November 2014, the price was approximately USD 1200/ounce.⁷⁸ And while the price increased in later years, it was only in the range of USD 1800-1900 when the Ministry rejected Claimant's application for a new exploration permit for Tankoro in August 2023.⁷⁹ As such, the price changes do not explain Sarama's inability to raise funds in 2014 and openness to disposing of much of its interest in the Tankoro Permit for drastically less than the amount indicated by Claimant's current valuation, even accounting for how the further exploration works done in conjunction with Acacia somewhat increased the mineral resource estimate for Tankoro.

30. Mr Dinning's suggestion that investors shifted from mining companies to cannabis and cryptocurrencies as a result of the decline in gold prices in 2014 is no more

⁷⁵ Dinning WS1, ¶ 30.

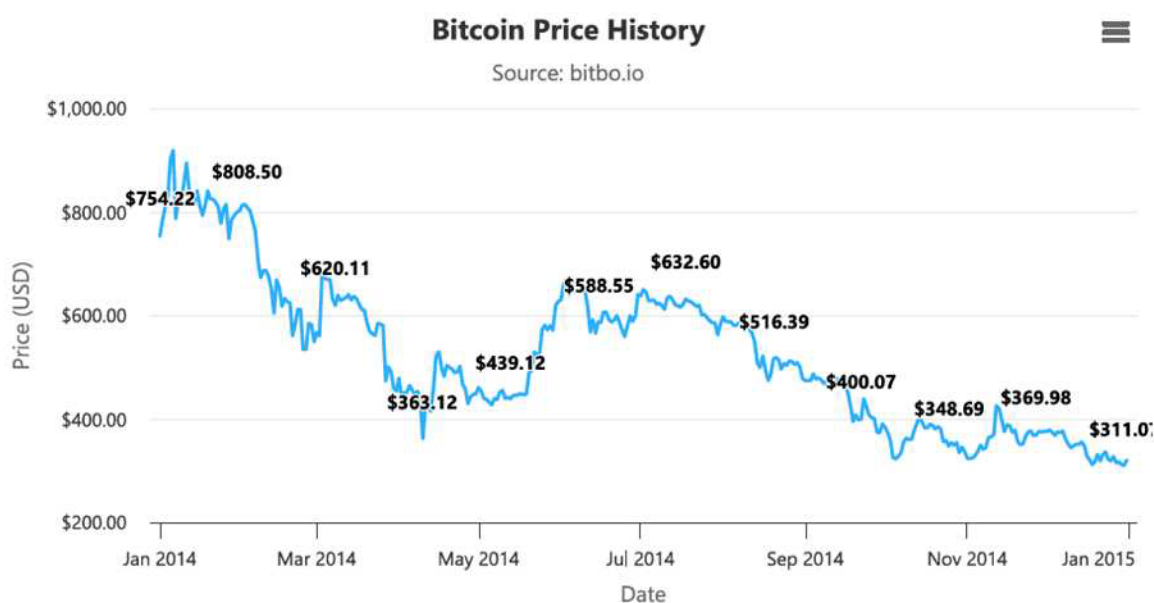
⁷⁶ **Ex. R-0001**, Macrotrends, *Historical Gold Prices: 30 Year Historical Chart*, at www.macrotrends.net/1333/historical-gold-prices-100-year-chart.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

convincing in explaining Sarama’s low inferred valuation of the South Houndé Project. Even if investment in cannabis and cryptocurrencies significantly increased in 2014, it is hardly the case that those “assets” captured so much investment that other companies in other industries were unable to obtain financing—whether through investors or lenders—even when they held highly valuable assets. Further, while Respondent does not have ready data on investment flows in the cannabis industry, the assertion that a shift to investing in cryptocurrencies was somehow the cause of an investment freeze in the mining sector that resulted in Sarama being forced to accept an unduly low valuation in the Acacia transaction does not fit with the price of Bitcoin in 2014, as indicated in the table below.⁸⁰



⁸⁰ **Ex. R-0002**, BiTBO, *Price of Bitcoin in 2014*, at <https://charts.bitbo.io/price/2014>.

4. After Investing in Further Exploration Works, Acacia Did Not Pursue the Project and Transferred Its Interest in the Tankoro Area Back to Sarama for an Even Lower Value

31. According to Claimant, “Sarama continued to manage the South Houndé Project for the first two years under the Earn-In Agreement [with Acacia], and between 2014 and 2016 conducted further metallurgical testworks, RC and AC drill programmes,” and “achieved very strong results from the first phase of that programme by April 2016.”⁸¹ According to Mr Schmiede, those exploration works enabled Sarama to increase its mineral resource estimate for the Tankoro Deposit to 2.1 million ounces in 2016.⁸² Around the same time period, Sarama also allegedly received “excellent” results from its “heap leach testwork programme,” which “confirmed that the Tankoro Deposit is ‘highly amenable to heap leach processing’.”⁸³

32. Claimant further asserts that, after Acacia took over as the manager of the South Houndé Project in 2017, it met its minimum expenditure requirements to acquire a 50% interest in the project, with Sarama closely monitoring its activities and results.⁸⁴ According to Mr Schmiede, “by August 2017, Sarama and Acacia’s combined exploration work led to the ‘delineation of the Tankoro Deposit over a significant strike length, depth and lateral extent’,” and resulted in “new drill holes, which show[ed] the depth of the mineral resource and demonstrated good potential to expand the mineral resource at depth.”⁸⁵

⁸¹ Memorial, ¶ 105.

⁸² Schmiede WS1, ¶ 33.

⁸³ Memorial, ¶ 108.

⁸⁴ Memorial, ¶¶ 109-110.

⁸⁵ Schmiede WS1, ¶ 35.

33. Despite those supposedly highly positive results, Acacia elected to not commit the additional funds for further exploration works to be entitled to acquire an additional 25% in the South Houndé Project. According to Mr Dinning, Acacia stopped meeting its expenditure targets at some point in 2017 such that he found it necessary to arrange a meeting with its management in February 2018 in which he advised “that Acacia was delinquent in its responsibilities under the Earn-In Agreement and that they needed to move forward with exploration expenditure and operations pursuant to the agreement or exit.”⁸⁶ According to Claimant, that meeting did not lead to Acacia changing course and meeting its expenditure obligations, which led to Sarama and Acacia entering a Conditional Heads of Agreement in November 2018 that provided for Acacia’s exit from the project.⁸⁷ Thereafter, Sarama and Acacia entered into a Termination Agreement on 14 May 2019 by which Sarama regained 100% ownership of the South Houndé Project in exchange for “pa[y]ing] cash reimbursements totalling US\$ 2 million in a series of scheduled payments,” and subject to Sarama granting Acacia limited rights in future potential production and warrants over Sarama shares.⁸⁸ Claimant further explains that, after Barrick “reacquired Acacia” in September 2019, “Sarama entered into a new Termination Agreement with Barrick TZ Limited, which replaced the Termination Agreement with Acacia.”⁸⁹

⁸⁶ Dinning WS1, ¶ 65.

⁸⁷ Memorial, ¶ 114. See also **Ex. C-0169**, Conditional Heads of Agreement between Acacia Mining plc and Sarama Resources Ltd (Exit of the Earn-In Agreement dated 26 November 2014 in Respect of the South Houndé Project), dated 26 November 2018.

⁸⁸ Memorial, ¶ 115. See also **Ex. C-0173**, Termination Agreement between Acacia Mining Plc and Sarama Resources Ltd (regarding the South Houndé Project), dated 14 May 2019.

⁸⁹ Memorial, ¶ 116. See also **Ex. C-0179**, Termination Agreement between Barrick TZ Limited and Sarama Resources Ltd (regarding the South Houndé Project), dated September 2019.

34. As discussed in more detail below, the Termination Agreements, which were concluded when gold was in the range of USD 1300-1500/ounce,⁹⁰ indicate that Sarama and Acacia set a very modest value for the Tankoro project of USD 2.5 million.⁹¹ Notably, at the time they did that, Sarama and Acacia had already completed or largely completed the exploration works that provided for an increase in the Tankoro mineral resource estimate to 0.6 million indicated ounces and 1.9 million inferred ounces of gold, *i.e.*, close to the estimate that is the basis for Claimant's current valuation.

35. Claimant's excuse for the drastic divide between the valuation indicated in connection with Acacia's exit from the South Houndé Project and its current valuation is that Acacia had been forced to cut back on its expenditures and sell its interest in the project for such a modest amount because of the problems it began facing in July 2019 with one of its Tanzanian operations, which "severely impact[ed] [its] cashflow."⁹²

36. Claimant has based its account of why Acacia did not proceed with investing in the exploration of Tankoro on the testimony of its witnesses and has failed to provide contemporaneous communications with Acacia supporting their testimony. Respondent will need to seek relevant documents from Claimant to properly assess that account. For now, a couple points bear noting. First, despite whatever "cashflow" problems Acacia was facing, it would have handled its purportedly extremely valuable interest in the South Houndé Project in a rational manner, including by exploring opportunities to obtain financing to proceed with the works, seeking fair value from Sarama for the return of its

⁹⁰ **Ex. R-0001**, Macrotrends, *Historical Gold Prices: 30 Year Historical Chart*, at www.macrotrends.net/1333/historical-gold-prices-100-year-chart.

⁹¹ *Infra*, ¶ 676.

⁹² Memorial, ¶ 36.

interest, or finding a way to directly or indirectly sell its interest to another buyer. Second, Acacia was not a tiny independent company until it was acquired by Barrick in 2019. Barrick owned over 64% of Acacia prior to becoming the full owner of the company in 2019,⁹³ and is a highly sophisticated and well-resourced company that had a market capitalization of over USD 20 billion in May 2019 when the first Termination Agreement between Sarama and Acacia was concluded.⁹⁴ If the South Houndé Project was worth anything close to the amount that Claimant claims, Barrick would have understood that and ensured that Acacia retained its interest in the project or obtained appropriate value for it rather than returning it to Sarama for a small fraction of the actual value. Indeed, there is no reason to believe that Barrick would have allowed Acacia to agree to any significant discount in the transaction.

5. When the Tankoro Permit Expired, Sarama Was Not Close to Proceeding With Development

37. Sarama allowed the Tankoro Permit to expire on 17 December 2020 when the end of the final renewal period allowed under the law ended. Sarama did that knowing that all of its rights in the Tankoro area and deposit would be extinguished and that the area and deposit would revert to being an unencumbered asset of the State. Sarama also knew that, under the normal rules, it would be subject to prohibitions on applying for or receiving mining rights in the same permit area.

38. Under the law, had Sarama submitted a valid application for an operating permit for the Tankoro area by the deadline specified by the law, which was 90 days prior

⁹³ **Ex. R-0003**, A. Mizner, *Barrick Takes Acacia Mining Private*, AFRICAN LAW & BUSINESS, 23 September 2019.

⁹⁴ **Ex. R-0004**, Macrotrends, *Barrick Mining Market Cap: 2012-2025*, at www.macrotrends.net/1333/historical-gold-prices-100-year-chart.

to the expiration of the Tankoro Permit, it would have been entitled to receive one, and therefore would have continued to enjoy mining rights in the area.

39. Such an application required submission of, *inter alia*, “a feasibility study prepared by a firm approved in Burkina Faso or internationally recognised,” “a development and exploitation plan for the deposit,” “an environmental and social impact study carried out in accordance with the regulations in force,” “a plan to integrate the mine into the local and national economy,” “a plan for training and skills transfer to local managers and staff and a system for promoting these managers and staff,” “a site closure and rehabilitation plan,” and “a ground plan specifying the land reserved for the operation and installation of industrial units and other infrastructures.”⁹⁵ Further, if the application were accepted, it would result in Sarama being obligated to initiate production within two years, subject to forfeiture of the permit if it failed to do so.⁹⁶ Sarama was not even remotely close to being able to submit a bankable feasibility study and the other requirements of the application, much less able to proceed to production within two years.

40. By its own account, at the time the Tankoro Permit expired in December 2020, Sarama had extensive exploration work left to complete and had not even yet raised funds to conduct a PEA. As Mr Hamilton states:

As the exceptional renewal period for the Tankoro Permit neared its expiration date of 17 December 2020, Sarama still needed to undertake final exploration works to: (a) refine our geologic and metallurgical understanding of the Tankoro Deposit; (b) raise money to finance a Preliminary Economic

⁹⁵ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 70.

⁹⁶ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 114.

Assessment (“PEA”); and (c) finalise our mine construction plan.⁹⁷

41. While Respondent will need to obtain documents from Claimant to properly assess its claims that it subsequently significantly advanced towards development, it is important to highlight here an important feature of that allegation, which is that the very limited and questionable evidence that Claimant has submitted largely refers to activity that occurred in 2023. There is little if any evidence of progress towards development from December 2020 through 2022, particularly in terms of obtaining financing and progressing with a PEA. There is a reason for that.

42. Sarama had no legal rights in the Tankoro area after 17 December 2020. Further, as discussed below, it knew from the Ministry’s October 2020 Information Note that the Tankoro permit area would be reserved to the State for review and unavailable for permitting upon its expiration.⁹⁸ It was not until June 2021 that the Ministry announced that it was making Tankoro and other reserved permit areas available for reallocation, and applications for such reallocated areas were not invited until August 2021.⁹⁹ While Sarama submitted an application in August 2021, the Minister’s 24 November 2021 letter acknowledging receipt of the application clearly did not grant the permit and instead requested payment of the fee to proceed with the processing.¹⁰⁰ While Sarama now pretends otherwise, it knew that a purpose of the further processing was to identify the special conditions that would be imposed on a grant of the permit. The January 2022

⁹⁷ Hamilton WS1, ¶ 76.

⁹⁸ *Infra*, ¶¶ 72-82.

⁹⁹ *Infra*, ¶¶ 126-131.

¹⁰⁰ *Infra*, ¶¶ 132-168.

coup d'état and broader political turbulence then impacted the functioning of the Government and Sarama did not hear from the Ministry until March 2022 when it received the notice of the rejection of the application for a new exploration permit for Tankoro that Sarama had submitted on 18 December 2020. It was only after a new Minister was appointed in October 2022 following the second *coup d'état* that Sarama further engaged in discussions about receiving a new exploration permit for the Tankoro area. That new Minister quickly made clear that no “Tankoro 2 Permit” had been granted and that the Tankoro area remained a State asset.

43. Respondent reviews those facts in more detail below. The point to note here is that Sarama did not meaningfully progress with obtaining financing and preparing a PEA during that period because it could not have done so without having valid mining rights over the Tankoro area. That did not change in 2023. As noted, the new Minister appointed in October 2022 made clear that no “Tankoro 2 Permit” had been granted.¹⁰¹ What did change is that Sarama shifted from being a mining company to being a mechanism for an investment treaty arbitration. It is no coincidence that the time at which Sarama was realising that it would not be able to mislead the new Minister into believing that the permit had already been granted, is the same time that Sarama ramped up its discussions with lenders and tried to give the impression that it was “actively advance[ing] several workstreams towards the completion of a detailed [PEA] that would allow it to skip the preparation of a Pre-Feasibility Study (‘PFS’) and move directly to a Definitive Feasibility Study (‘DFS’) and, ultimately, construction of the Project.”¹⁰²

¹⁰¹ See Kéré WS1, ¶¶ 12-15.

¹⁰² Memorial, ¶ 22.

44. Mr Dinning is fairly open about the timing of these efforts in his statement, as he explains:

In June 2023, Sarama announced that it had completed its previously announced AUD 2 million equity placement, and that Sarama intended to use all net proceeds from the placement to complete the PEA for the Sanutura Project. Sarama was going to use the results of the PEA to raise further proceeds for advancement of the Project.

By 25 August 2023, Sarama had substantially completed all necessary workstreams for the PEA. Mr Schmiede held primary responsibility for the PEA. I held primary responsibility for the project financing workstream.

...

By August 2023, Sarama had conducted extensive discussions with Taurus Funds Management (“Taurus”) regarding debt financing for the Project.¹⁰³

45. As detailed below, Sarama knew by February 2023 at the latest that the Ministry was not accepting its claim to have been granted the “Tankoro 2 Permit” in November 2021, and any possible doubt in that regard was eliminated by Minister Boussim in his communications with Sarama in May 2023.¹⁰⁴ Thus, it is clear that Sarama’s “efforts” in mid-2023 to move towards preparing a PEA and raising financing for the project were performative and aimed at covering up one of the major holes in its arbitration case, which is how production, even in mid-2023, was far too uncertain and far away to enable Sarama to either claim a right to lost profits or establish that the project had a fair market value that was drastically higher than the market capitalisation of the entire publicly traded company.

¹⁰³ Dinning WS1, ¶¶ 107-108, 112.

¹⁰⁴ *Infra*, ¶¶ 180-199.

46. Although Claimant made those efforts to create some “evidence” to support its claim that it was on fast-track to development and highly profitable production when Burkina Faso purportedly expropriated its investments in August 2023, its financial statements and reports from the time period, which it was required to publish after being listed on the Australian Stock Exchange, tell a very different story. For example, its FY 2022 Consolidated Financial Statements, which were independently audited and signed by Mr Dinning, describe the company’s “Business Activities” as follows:

The consolidated entity, consisting of Sarama Resources Ltd. and its subsidiaries is in the exploration stage and its principal business activity is the sourcing and exploration of mineral properties. As at December 31, 2022, the Company is in the process of exploring its principal mineral properties and has not yet determined whether the properties contain gold reserves that are economically recoverable.¹⁰⁵

47. The company’s other audited Consolidated Financial Statements and its quarterly financial reports throughout the relevant time period included the same language.¹⁰⁶

B. Sarama’s Rights in the Tankoro Area Were Extinguished in 2020 and Not Renewed Thereafter

48. Sarama’s entire case depends on its claim that Burkina Faso is guilty of an “unvarnished expropriation of [its] marquee mining asset,” which is the Tankoro Deposit.¹⁰⁷ Sarama’s core narrative to that effect is as follows.

¹⁰⁵ Ex. C-0256, Sarama Resources Ltd, Consolidated Financial Statements 2022, dated 30 March 2023, p. 12.

¹⁰⁶ See, e.g., Ex. C-0011, Sarama Resources Ltd, Consolidated Financial Statements 2023, dated 28 March 2024, p. 12.

¹⁰⁷ Memorial, ¶ 2.

- First, after Sarama's exploration permit, the Tankoro Permit, expired on 17 December 2020, the then Minister, Minister Idani, orally gave Sarama permission to continue its exploration activities without a permit.¹⁰⁸
- Second, through a letter of 24 November 2021, the subsequent Minister, Minister Ouedraogo, granted Sarama a new exploration permit for the Tankoro area (the so-called "Tankoro 2 Permit") that gave it "perfected" legal rights in the area and deposit.¹⁰⁹
- Third, in August 2023, a "hostile" new Minister, Minister Boussim, unlawfully revoked the "Tankoro 2 Permit" and imposed extortionate and improper conditions on the grant of a new permit that Sarama could not satisfy, and by doing so, "destroyed the totality of Sarama's investments in the Sanutura Project and the Additional Projects."¹¹⁰

49. Claimant has had each of its fact witnesses advance this narrative of an unlawful revocation of the "Tankoro 2 Permit".¹¹¹ As detailed below, it is a made-for-arbitration fiction that is inconsistent with the contemporaneous documentary evidence and applicable laws and regulations. In reality, following its limited exploration activities and lack of financing,¹¹² Sarama allowed the Tankoro Permit to expire in December 2020. It did so knowing that the expiration meant Sarama lost all its rights in the Tankoro Deposit and permit area more generally such that full control over the permit area reverted to the State.¹¹³ The expiration of the permit also meant that Sarama no longer had an investment in the Tankoro area as of 18 December 2020.

¹⁰⁸ Hamilton WS1, ¶ 78; Dinning WS1, ¶ 94.

¹⁰⁹ Memorial, ¶ 6.

¹¹⁰ Memorial, ¶ 53.

¹¹¹ Dinning WS1, ¶¶ 164-166; Schmiede WS1, ¶¶ 5, 45, 64, 68, 110, 133; Hamilton WS1, ¶¶ 62, 111.

¹¹² See *supra*, ¶¶ 20-47.

¹¹³ *Infra*, ¶¶ 72-82.

50. Sarama allowed the Tankoro Permit to expire because it had exhausted the maximum number of renewal terms for an exploration permit allowed under the law.¹¹⁴ Facing the end of the 12-year total maximum exploration term, Sarama could only retain legal rights in the Tankoro area by applying for and receiving an operating permit. As noted above, Sarama did not apply for an operating permit because it was nowhere near proceeding to development. It had not undertaken enough exploration works to determine whether developing the Tankoro area was economically viable or how it could be done, and without the evidence of viability or a business plan, could not raise financing for proceeding to development.¹¹⁵ Sarama also knew that it could not satisfy the requirements for submitting an application and would not have been able to comply with the obligations that would attach to an operating permit if one were granted.

51. Ahead of the expiration of the Tankoro Permit, the Ministry announced in October 2020 that it would be applying the already established legal framework for the handling of permit areas covered by expired permits to the Tankoro permit area and a number of other permit areas.¹¹⁶ As these permit areas were considered to have potentially more value and potential for development because of the prior exploration works, the legal framework provided that the areas would be reserved to the State rather than made available for new permitting in the normal manner. The Ministry, through the Bureau of Mines and Geology of Burkina (“BUMIGEB”), would then determine whether they should be developed by the State. If the Ministry decided to not develop the reserved areas through the State, it was to reallocate them through a competitive bidding process

¹¹⁴ *Infra*, ¶¶ 63-71.

¹¹⁵ *Infra*, ¶¶ 352-387.

¹¹⁶ *Infra*, ¶¶ 83-101.

rather than in the normal “first come, first served” manner to generate revenue and advance the objective of operationalising (*i.e.*, developing) the permit areas.¹¹⁷

52. In its 1 June 2021 Information Note, the Ministry, which was then under Minister Ouedraogo, announced that it had decided to reallocate Tankoro and a number of other permit areas that had been reserved to the State.¹¹⁸ As the Ministry had not yet developed the capacity to conduct a competitive bidding process, it explained that it would instead invite companies to submit applications and would give prior holders “special consideration” because some had asserted that they would be best positioned to advance to development if they were able to resume their exploration activities.¹¹⁹ The June 2021 Information Note also explained that the grant of new permits would be subject to the imposition of “special conditions” identified by the Ministry.¹²⁰

53. Sarama attacks the Ministry’s application of that special legal framework for permit areas covered by expired permits. It claims that it was an unlawful and improper interference with its mining rights, and that the Ministry had no authority to depart from the normal procedure for awarding permits, including by imposing additional “special conditions” on the grant of permits, such as an acquisition price designed to enable the State to obtain reasonable value for the allocation of its assets. Those attacks are manifestly incorrect as the legal framework for reserving permit areas covered by expired permits had a clear legal basis, , which was the same implementing regulation for Law No. 036-2015/CNT (the “2015 Mining Code”) that established the procedures for

¹¹⁷ *Infra*, ¶¶ 106-108.

¹¹⁸ *Infra*, ¶¶ 126-131.

¹¹⁹ *Id.*

¹²⁰ *Id.*

permitting in normal circumstances, which was Decree No. 2017-0036 of 26 January 2016 (“Decree No. 2017-0036”) that established the procedures for permitting in normal circumstances,¹²¹ and a 2018 Ministerial decree, Order No. 2018-024 of 9 February 2018 (“Order No. 2018-024”), issued pursuant to that decree.¹²²

54. Just as importantly, Claimant’s attacks on the Ministry’s application of the legal framework for reserving permit areas to the State are senseless because Sarama would have been subject to the prohibitions on applying for or receiving new exploration rights in the Tankoro permit area had the normal process been followed. Under Decree No. 2017-0036, which Sarama relies on for its claim that other aspects of the normal process should have been followed, when an exploration permit expires without the holder proceeding to an operating permit, the holder automatically loses all rights in the permit area and is additionally to be issued a withdrawal notification that results in the holder being prohibited from applying for legal rights in the same permit area for one year, and from receiving legal rights in the permit area for two years.¹²³

55. Thus, it is pointless for Sarama to argue that the Ministry acted wrongfully by applying the special procedure that applied to reserved areas, including the imposition of additional conditions on the grant of a permit, when the application of that special procedure, including the possibility of reallocating the permit areas to the prior holders, is the only reason that Sarama was given an opportunity to apply for a new exploration

¹²¹ The full name of the decree is 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations of 26 January 2016. **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Articles 67-68.

¹²² **Ex. R-0005**, Order No. 2018-024 of 9 February 2018.

¹²³ *Infra*, ¶¶ 102-111; **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Articles 67-68.

permit rather than being subject to the prohibitions. The application of the special procedure not only benefitted Sarama but was crucial to it having a possibility of obtaining new rights in the Tankoro permit area.

56. While Sarama submitted an application for a new exploration permit on 6 August 2021, Minister Ouedraogo did not grant Sarama a new exploration permit in November 2021 as Sarama alleges. As Sarama has always understood, the Minister did not even purport to grant the permit in his 24 November 2021 letter. Instead, the letter explicitly stated that further processing would be required, which was appropriate because the Ministry needed to identify the special conditions that would be imposed on the grant of a new permit just as it had announced it would do in the June 2021 Information Note issued under the same Minister. Further, the Minister could not have granted the permit through such a letter even if he had intended and purported to do so. The 2015 Mining Code provides that an exploration permit must be granted through an *arrêté* from the Minister, which is a formal decree or order.¹²⁴ To overcome this fatal defect in its case, Sarama has resorted, quite absurdly, to defining “*arrêté*” as a mere “receipt” of the grant of the permit that is of no legal consequence.¹²⁵

57. While Minister Ouedraogo’s 24 November 2021 letter indicated that the Ministry would proceed with the processing of the application if Sarama paid the processing fee, which it did on 29 November 2021, the turbulence in Burkina Faso associated with the January and September 2022 *coups d’état* severely disrupted the functioning of the Government, including the Ministry. Further, the situation was

¹²⁴ **Ex. C-0130**, Law No. 036/2015/CNT, Mining Code of Burkina Faso (“2015 Mining Code”), Articles 5, 11, 31. See also Kéré WS1, ¶¶ 20-22.

¹²⁵ Memorial, Table of Abbreviations at p. iii (p. 4 of the pdf) and ¶ 45(f).

complicated by Sarama's decision to submit an invalid application for a new exploration permit for the Tankoro area in December 2020. The Ministry rejected that application soon after it was filed because the permit area had been reserved to the State, but mistakenly did not transmit the notification of the rejection to Sarama until March 2022. As such, the Ministry did not proceed with the processing of Sarama's 6 August 2021 application for a new exploration permit until Sarama reached out to Minister Boussim following his appointment in October 2022 to request that he grant the permit.

58. Contrary to Sarama's allegations, Minister Boussim did not demonstrate any hostility to the company or act with expropriatory intent. Even after Sarama attempted to mislead him into believing that it had already been granted the "Tankoro 2 Permit", Minister Boussim remained open to discussions with Sarama. Indeed, in accurately describing how the Tankoro permit area had been handled after its expiration, Minister Boussim explained that the Ministry had not issued a withdrawal notification to Sarama so that it would not be subjected to the normal prohibitions on prior holders of expired permits and would have a possibility of applying for a new exploration permit for the Tankoro area.¹²⁶

59. Minister Boussim also did not impose extortionate and unlawful demands as Sarama alleges. Rather, he acted in accordance with the established legal framework in requiring an acquisition price as one of the "special conditions" for the reallocation of the permit area, which had become an unencumbered asset of the State with the expiration of the Tankoro Permit. As the Ministry had not developed the capacity to conduct a competitive bidding process as had been envisioned, setting a target price and

¹²⁶ *Infra*, ¶¶ 102-111.

inviting companies to accept it was a reasonable means of achieving the objective of generating revenue from the reallocation of the reserved areas, especially given the effectively nominal cost of the processing fee for obtaining an exploration permit in normal circumstances (*i.e.*, for new permit areas that had not shown promise based on the prior exploration works). As Sarama understands all of that, it has resorted to characterising the acquisition price requirement as a “bribe”.¹²⁷ This allegation is baseless. The Minister openly requested the payment, recorded the request in official communications, and even discussed it with the Canadian ambassador. There was never any genuine question that if Sarama had wished to proceed with the new permit, it would have made the payment in the normal manner such that it would have been formally recorded and received by the State. The only actual issue was whether Sarama was willing and able to pay the specified amount.

60. Just as baseless is Sarama’s claim that Minister Boussim demanded that Sarama convince the Government of Canada to change its policy regarding the release of drone technology to Turkey in connection with Turkey’s supply of surveillance drones to Burkina Faso. It was Sarama itself that raised the issue. The Government’s concern with the need to obtain better surveillance capacity to deal with the security situation was known at the time, and Sarama offered its assistance to improve its standing with the Ministry. When Sarama reverted to the Minister to explain that it had made an effort to influence Canada but was unable to assist, the Minister thanked Sarama for its effort and proceeded to discuss the possibility of proceeding with the grant of the new exploration

¹²⁷ Hamilton WS1, ¶ 107.

permit if Sarama could pay the acquisition price, and in doing so, indicated no concern whatsoever with Sarama's inability to impact Canada's policy.

61. Sarama ultimately advised Minister Boussim that it was not able to pay the requested acquisition price. Sarama knows that its inability to obtain the funds to receive the new permit is hard to square with its claim that its prior exploration activities had established that the Tankoro Deposit was extremely valuable and could be quickly advanced to production. As such, it has created the excuse that it did not make the payment because of its concern with giving in to an "extortionate" demand for a "bribe". This is, again, not serious. If Sarama's exploration works had truly shown that development was economically viable with production imminent, and that legal rights in the Tankoro permit area, along with Sarama's otherwise valueless other mining rights, were worth USD 242 million in mid-2023, it should have had no difficulty obtaining financing to pay the acquisition price. Sarama has advanced the allegation that the payment condition was an "extortionate" request for a "bribe" to cover for that shortcoming and create an excuse for not paying it (while also disparaging the Government).

62. In addition to being meritless, Sarama's allegations regarding Minister Boussim's imposition of additional conditions on the grant of a new permit are irrelevant to its claims. The Minister never imposed a condition regarding the drone technology issue and, as discussed in more detail below, did not act arbitrarily or otherwise improperly in imposing the acquisition price condition. However, even assuming, *arguendo*, that he did so, that would not constitute treatment of a covered investment under the BIT and would instead be a matter regarding the admission of an investment.¹²⁸

¹²⁸ *Infra*, ¶¶ 390-397.

To be certain, the same is true of all of Sarama's allegations regarding the handling of the Tankoro area following the expiration of the Tankoro Permit. Sarama has gone to such lengths to claim that it was granted the "Tankoro 2 Permit" through Minister Ouedraogo's 24 November 2021 letter because it understands that it no longer had any legal rights or investment in the Tankoro area after the Tankoro Permit expired and that everything the Ministry did thereafter relates only to Sarama's attempt to make a new investment in Tankoro. As discussed further below, all of Sarama's complaints about the Ministry's conduct after the expiration of the Tankoro Permit in December 2020, therefore, relate only to the admission of an investment and not to whether Burkina Faso breached any of its obligations in the BIT concerning the treatment of investments.

1. Sarama Received the Maximum Number of Renewals Allowed Under the Law

63. As discussed above, the Tankoro Permit was originally granted to Mr Birba through the issuance of an *arrêté*, Order No. 2008-08-242/MCE/SG/DGMGC of 17 December 2008.¹²⁹ On 21 September 2011, Mr Birba submitted an application for the first renewal of the licence.¹³⁰ The report indicated that it was prepared by Mr Michel Mercier, who was, according to Sarama, its General Manager for Africa at the time and its expert on Burkina Faso's mining laws and regulations.¹³¹ As such, it appears that Sarama considered it important to ensure that Mr Birba obtained a valid renewal of the Tankoro Permit through the issuance of an *arrêté* before proceeding with its acquisition.

¹²⁹ **Ex. R-0006**, Order No. 2008-08-242/MCE/SG/DGMGC of 17 December 2008; **Ex. C-0041**, Option Agreement between Sarama Mining Burkina Faso Sual and Ousmane Birba, dated 18 January 2011, p. 28, Annex B (attaching Decree No. 2008/08-242/MCE/SG/DGMGC in relation to the grant of the Tankoro Permit to Mr Ousmane Birba dated 17 December 2008).

¹³⁰ **Ex. R-0007**, Fiche de renseignement pour renouvellement - Ousmane Birba dated 21 September 2011.

¹³¹ Memorial, ¶ 62; Hamilton WS1, ¶ 25.

64. As Mr Birba's application for a renewal of the Tankoro Permit was submitted prior to 90 days before the expiration of the permit, as required by the law, he was entitled to a renewal. As such, on 15 December 2011, the Ministry granted a renewal by issuing Order No. 2011-11/407/MCE/SG/DGMGC.¹³² This *arrêté*, which was again issued pursuant to the 2003 Mining Code, specified: "The permit shall be valid only until 17 December 2014. It may be renewed in accordance with the laws and regulations in force."¹³³

65. On 5 November 2012, Mr Birba requested the transfer of the Tankoro Permit to Sarama pursuant to Article 36 of the 2003 Mining Code. On 10 November 2012, Sarama sent a letter of commitment to the Minister, in which it undertook without reservation to assume all the rights and obligations arising from the exploration permit as well as the mining legislation of Burkina Faso in connection with the transfer of the permit.¹³⁴ On 29 March 2013, the Minister issued Order No. 2013-000058/MME/SG/DGMG, which transferred the Tankoro Permit to Sarama.¹³⁵ Article 3 of the Order stated: "The permit is valid from 17 December 2011 to 17 December 2014. It may be renewed in accordance with the laws and regulations."¹³⁶

¹³² **Ex. C-0042**, Ministry of Mines, Order No. 2011-11/407/MCE/SG/DGMGC in relation to the first renewal of the Tankoro permit to Mr Ousmane Birba, 18 January 2011.

¹³³ **Ex. C-0042**, Ministry of Mines, Order No. 2011-11/407/MCE/SG/DGMGC in relation to the first renewal of the Tankoro permit to Mr Ousmane Birba, 18 January 2011, Article 3.

¹³⁴ **Ex. C-0106**, Letter from Mr. Ousmane Birba to the Minister of Mines (requesting authorisation of transfer) dated 5 November 2012.

¹³⁵ **Ex. C-0044**, Order No. 2013-000058/MME/SG/DGMG/ dated 29 March 2013 (transferring the Tankoro exploration permit to Sarama Mining Burkina Sarl).

¹³⁶ **Ex. C-0044**, Order No. 2013-000058/MME/SG/DGMG/ dated 29 March 2013 (transferring the Tankoro exploration permit to Sarama Mining Burkina Sarl).

66. As of 17 December 2014, the expiry date of the Tankoro Permit, the mining registry had not recorded an application for a second renewal of the permit even though Article 35 of the 2003 Mining Code required that a renewal application be submitted at least three months prior to the expiration date.¹³⁷ It was only on 12 February 2015, nearly eight months after missing the deadline for applying for a renewal, that Sarama submitted an application for a second renewal.¹³⁸

67. Although Sarama was not eligible to receive a second renewal of the Tankoro Permit, the then Minister, Boubacar Ba, issued Decree No. 2015-000283 on 16 September 2015, granting it in violation of the applicable mining regulations.¹³⁹ Respondent was unaware of this improper grant of the renewal until examining Claimant's Memorial. It is currently investigating the matter and reserves all rights in that regard. For now, it appears that, whatever the reasons for the permit being renewed might have been, it was not done in accordance with the law.

68. On 15 September 2017, Sarama sent the Minister a request for a third exceptional renewal of the Tankoro Permit.¹⁴⁰ In a letter dated 2 May 2018, the Minister of Mines notified Sarama of the exceptional renewal fees, amounting to FCFA 50,000,000 and requested that Sarama pay the amount to initiate the processing of its exceptional renewal application in accordance with the regulations in force.¹⁴¹ On 17 July 2019, the

¹³⁷ **Ex. C-0075**, 2003 Mining Code.

¹³⁸ **Ex. R-0008**, Letter of Transmission dated 23 March 2015, with Report for the renewal of the Tankoro permit dated March 2015.

¹³⁹ **Ex. C-0045**, Decree No. 2015 000283/MME/SG/DGCM in relation to the second renewal of the TANKORO permit of Sarama Mining Burkina SARL (renewing the Tankoro Permit for the second time).

¹⁴⁰ **Ex. R-0009**, Fiche de dépôt de demande - Sarama Mining dated 15 September 2017.

¹⁴¹ **Ex. R-0010**, Letter from the Minister of Mines to Sarama dated 2 May 2018 (notifying Sarama of the exceptional renewal fees).

Minister issued Order No. 2019-150/MMC/SG/DGCM granting Sarama a third exceptional renewal of the Tankoro Permit.¹⁴² Article 3 of the Order stated: “The permit is valid from 18 December 2017 to 17 December 2020. It cannot be renewed in accordance with the legislative and regulatory provisions in force.”¹⁴³

69. To support the characterisation of an *arrêté* as a meaningless “receipt” in connection with its claim that the Minister’s 24 November 2021 letter was the key instrument that conveyed legal rights and granted the “Tankoro 2 Permit”, Claimant highlights the time that passed between the Minister’s 2 May 2018 letter requesting payment and the issuance of the *arrêté* on 17 July 2019.¹⁴⁴

70. This argument ignores the applicable law. Article 105 of the 2015 Mining Code specifies that a permit holder can continue mining activity ahead of the issuance of the *arrêté* only with respect to renewals in certain circumstances. It states:

Mining titles are renewable by the issuing authority in the same way, at the request of the holder, presented at least three months before the expiry of the current period of validity.

Renewal is automatic when the holder has fulfilled his obligations under the provisions of the present code and submitted an application in compliance with mining regulations. If no decision has been taken on the said renewal application before the expiry of the current period of validity, the validity of the said mining title is automatically extended,

¹⁴² **Ex. C-0046**, Order No. 2019-150/MMC/SG/DGCM of 17 July 2019 renewing exploration permit No. 284, known as “Tankoro”.

¹⁴³ **Ex. C-0046**, Order No. 2019-150/MMC/SG/DGCM of 17 July 2019 renewing exploration permit No. 284, known as “Tankoro”.

¹⁴⁴ Memorial, ¶ 111 (“Sarama received the *arrêté* two years later, in July 2019. As set out above, the Minister was required to issue the *arrêté* within 60 days of receiving proof of payment of the permit fee. As Mr Dinning explains, as a matter of practice the Minister of Mines often took more than 60 days to issue the *arrêté*.”); Dinning WS1, ¶ 46(d) (“As I set out above, the applicant becomes the legal owner of the permit following the receipted payment of the permit fee, and the Ministry is required to issue the *arrêté* to the permit holder within 60 days. However, in practice the Ministry very often took more than 60 days to issue the *arrêté*.”).

without formality, until regularization by the competent authority.

However, this extension applies only to the part of the perimeter of the prospecting permit covered by the application for renewal of the mining title or issue of an operating permit.

If renewal is refused, the land covered by the mining title is released from any rights resulting therefrom as from zero hours on the day following the date of notification of the refusal decision.¹⁴⁵

71. Accordingly, the Ministry's handling of the third renewal is unexceptional and Sarama is wrong to suggest that it supports the theory that Sarama obtained mining rights through the issuance of the Minister's 24 November 2021 letter inviting it to pay the permitting fee so that the processing of its application could continue.¹⁴⁶ The fact that the 2015 Mining Code specifically provided that "the validity of the said mining title is automatically extended" in the narrow circumstance in which a holder that has complied with its obligations submits a valid application for renewal 90 days before the expiration date confirms that: (i) mining activity is not allowed without a valid mining title; and (ii) the Mining Code cannot be read as implicitly providing for a similar right to an automatically granted mining title in connection with an application for a new exploration permit.

2. When the Tankoro Permit Expired in December 2020, Sarama Lost All of Its Legal Rights in the Tankoro Area

72. As noted above, when the Ministry granted the exceptional third extension of the Tankoro Permit, it specified that the permit would expire on 17 December 2020 and could not be further renewed thereafter as the 2015 Mining Code prohibited renewals of

¹⁴⁵ **Ex. C-0130**, 2015 Mining Code, Article 105.

¹⁴⁶ Kéré WS1, ¶¶ 20-22.

an exploration permit beyond the third renewal.¹⁴⁷ As the holder of the permit, Sarama was entitled to apply for an operating permit until 90 days prior to the expiration date (*i.e.*, by 17 September 2020). As Sarama did not submit such an application, all of its legal rights in the Tankoro permit area, including in the Tankoro Deposit, were extinguished on 17 December 2020 such that the State regained full unencumbered legal rights over the permit area and deposit.

73. Sarama cannot contest those facts. Soon before the Tankoro Permit expired, Sarama acknowledged that it would do so. In its 8 December 2020 letter to the Ministry, Sarama stated:

[A]fter 12 years of validity (9 regular and 3 exceptional), the Tankoro permit expires on 17 December 2020. We hereby submit the summary report on the expiry of the permit, covering the period from 17 December 2008 to 17 December 2020.¹⁴⁸

74. Sarama also cannot deny that it did not submit or attempt to submit an application for an operating permit prior to the 17 September 2020 cut-off date. As noted above, such an application required submission of, *inter alia*, a feasibility study and a development and exploitation plan,¹⁴⁹ and would also result in Sarama being obligated to initiate production within two years.¹⁵⁰ Sarama was not even remotely close to being able to submit a bankable feasibility study much less proceed to production within two years.

¹⁴⁷ *Supra*, ¶ 68.

¹⁴⁸ **Ex. R-0011**, Letter of Transmission dated 8 December 2020, with Summary Report on the Expiry of Tankoro Permit (No. 284).

¹⁴⁹ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 70.

¹⁵⁰ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 114.

75. As those basic facts are fatal to its case, Sarama has resorted to misrepresentations and misdirection in an attempt to avoid them. Strangely, Sarama does this in different ways in different parts of its Memorial. In the Introduction, Sarama advances a wholesale alternative reality to give the Tribunal the impression that it maintained uninterrupted legal rights in Tankoro, stating:

In late 2021, as the expiration date of its Tankoro Permit approached, Sarama lodged a new permit application with the Ministry. The Ministry approved the application as a matter of routine, and Sarama paid the requisite fee, thereby becoming the legal owner of the Tankoro 2 Permit.¹⁵¹

76. This is bizarre. The Tankoro Permit unquestionably expired on 17 December 2020 and not in “late 2021”.¹⁵² It is also unquestionable that Sarama did not submit a new permit application prior to that expiration date. As discussed further below, it is additionally untrue that the Ministry approved the application and that Sarama thereafter paid the fee and had “its new permit in hand.” In its own press releases and investor disclosures Sarama repeatedly acknowledged through 2022 that it had not received the so-called “Tankoro 2 Permit” and only hoped that it would be issued. The only explanation for Sarama beginning its Memorial with such a blatantly false account of crucial facts is that it hoped to either pressure Burkina Faso into an undue settlement or

¹⁵¹ Memorial, ¶ 6.

¹⁵² The reference to “2021” might seem to be a typographical error, except that it is paired with the blatantly false claim that Sarama submitted an application for a new permit prior to the expiration of the Tankoro Permit. Further, Sarama’s summary of the facts in the Introduction then goes on to falsely claim that Sarama had, “[b]y 2022”, proceeded with preparing the PEA and was in advanced negotiations with plant manufacturers and specialist mining lenders. Memorial, ¶ 7. Sarama’s account later in the Memorial (which is not credible in its own right) is that none of that happened until mid-2023. Given how the Introduction goes on to place those alleged facts in the context of other developments in 2022, it appears that the references to the incorrect years reflect a deliberate choice to advance an account that Sarama considers more compelling in the Introduction with no concern with whether it is consistent with the subsequent more detailed account of the facts.

proceed with the arbitration on a default basis such that the Memorial would never be subjected to scrutiny.

77. Sarama's more detailed account of the expiration of the Tankoro Permit later in the Memorial shows why it chose to advance the fiction in the Introduction. As Sarama cannot deny that the permit expired on 17 December 2020, it resorts to having Mr Hamilton advance the far-fetched claim that Minister Idani advised him that Sarama did not need to be concerned with the expiration of the permit because the Ministry would allow it to continue exploration activities without a permit. The full paragraph of the Memorial setting forth this more detailed account reads:

In anticipation of the Tankoro Permit's expiry, in early August 2020, Mr Hamilton and SWA's senior geologist, [REDACTED], had met with Minister Idani, the Minister of Mines at the time. Mr Hamilton and Mr [REDACTED] explained that Sarama's Tankoro Permit was in the exceptional renewal period but that Sarama would not be able to finish its exploration activities by the end of the exceptional renewal period on 17 December 2020. Accordingly, they informed Minister Idani that Sarama intended to apply for a new exploration permit in anticipation of commissioning of a PEA for the Tankoro Property and the Sanutura Project as a whole. As Mr Hamilton explains, Minister Idani told him "not to worry" and that the Ministry would allow Sarama to continue exploration activities at the Tankoro Property once the exceptional renewal period had expired. Mr Hamilton later memorialised this conversation in a letter to Minister Idani dated 4 August 2020.¹⁵³

78. Mining rights do not persist on the basis that a government official tells a permit holder "not to worry" about the expiration of its permit. The 2015 Mining Code specifies in Article 11 that exploration and exploitation activities may only be carried out

¹⁵³ Memorial, ¶ 137.

when “authorised under a mining title.”¹⁵⁴ And under Article 5 of the 2015 Mining Code, a mining title is defined as “the regulatory act giving the prerogative to carry out the exploration or exploitation of mineral substances in accordance with the provisions of this code.”¹⁵⁵

79. Further, the 2015 Mining Code and its main implementing regulation, Decree No. 2017-0036, which Sarama and Mr Hamilton were very familiar with, specify that, expiration of a permit has significant implications. The 2015 Mining Code reviews some of the consequences of a withdrawal under Articles 112 or 113, which include, *e.g.*, the permit area being immediately released from all rights and obligations,¹⁵⁶ the holder being required to dismantle its installations, if any, and repair any environmental damage within six months,¹⁵⁷ and buildings, shafts, and other works permanently installed for mining purposes transferring to the State free of charge by operation of law.¹⁵⁸ Further, the Ministry is entitled to receive all the data from an exploration permit holder’s exploration activities, which becomes the property of the State when the permit expires.¹⁵⁹

¹⁵⁴ **Ex. C-0130**, 2015 Mining Code, Article 11.

¹⁵⁵ **Ex. C-0130**, 2015 Mining Code, Article 5, definition of “Mining title”.

¹⁵⁶ **Ex. C-0130**, 2015 Mining Code, Article 115.

¹⁵⁷ **Ex. C-0130**, 2015 Mining Code, Article 116.

¹⁵⁸ **Ex. C-0130**, 2015 Mining Code, Article 117.

¹⁵⁹ **Ex. C-0130**, 2015 Mining Code, Article 184 (“The Administration is authorized to receive up-to-date records, declarations, information, reports, and documents, the content, form, and frequency of submission of which are specified by regulation. The information, data, and documents thus obtained may not, without the authorization of the holder or beneficiary, be made public or disclosed to third parties by the Mining Administration before the expiration of a three-year period from the date on which they were obtained. Any official of the Mining Administration with knowledge of the information and the content of the documents is subject to the same obligation of confidentiality.”), Article 185 (“After analysis, and when they no longer need them for their own purposes, holders of mining titles and beneficiaries of industrial quarrying authorizations hand over oriented drill cores with all data, numerical data relating to geological, regolith, geophysical and geochemical work, the results of chemical analyses, metallurgical analyses and the various models produced on their permit to the Mining Administration for safekeeping.”); **Ex. C-0275**, Decree No. 2017-036, Article 16 (“Pursuant to Article 184 of Law No. 036-2015/CNT of June 26, 2015, establishing the Mining Code of Burkina Faso, any holder of a mining title or beneficiary of an authorization

That is significant because that data is a potential source of significant value if the Ministry decided to reallocate the permit to another company. As discussed further below, Decree No. 2017-0036, which is one of the primary implementing regulations for the 2015 Mining Code, additionally provides for the possibility of the prior holder being subject to prohibitions on applying for or receiving mining rights in the same permit area following the expiration of its exploration permit.

80. Mr Hamilton's claim that Minister Idani told him "not to worry" about needing a permit is thus a heavy-handed case of Sarama attempting to fix the holes in its case through the self-serving testimony of its witnesses. Any doubt in that regard is dispelled by an examination of Sarama's assertion that Mr Hamilton contemporaneously "memorialised" the conversation in his 4 August 2020 letter to Minister Idani.¹⁶⁰ That letter does not mention the meeting or discussion with Minister Idani, much less assert that the Minister had assured Mr Hamilton that Sarama did not need to worry about the expiration of its exploration permit.¹⁶¹ To be certain, as the letter discussed Sarama's concern with the upcoming expiration of the permit, Mr Hamilton would certainly have referred to the meeting with Minister Idani just days earlier and his assurance that Sarama did not need to worry about the permit and would be allowed to continue exploration activities without one if such an assurance had been given. As the letter makes no mention of the meeting or the assurance, it is evidence that Mr Hamilton's testimony is a fabrication.

is required to provide the Mining Authority with the declarations, information, reports, and documents whose content, form, and frequency are defined by order of the Minister of Mines.").

¹⁶⁰ Memorial, ¶ 137.

¹⁶¹ **Ex. C-0187**, Letter from Sarama to the Minister of Mines, dated 4 August 2020, p. 2.

81. Mr Hamilton's claim is also inconsistent with Minister Idani's subsequent conduct. As discussed in more detail further below, on 12 October 2020, Minister Idani issued the Information Note explaining that the Tankoro permit area would be withheld from permitting along with a number of other areas for which permits were expiring so that a committee could assess how it would be managed in the context of reserving some areas for development by the State or reallocation through a competitive bidding process. Mr Hamilton tries to reconcile the issuance of the Information Note with his claim that Minister Idani assured him that Sarama could continue its exploration activities without a permit by characterising the Information Note as an unexpected "about-face" by the Minister.¹⁶² That argument is not credible. As shown below, the Ministry's 12 October 2020 Information Note was not a spontaneous act by the Minister or the result of a sudden change in policy. The process for reserving and reviewing permit areas following the expiration of an exploration permit was established by the Ministry in February 2018, and Minister Idani was adhering to that process in issuing the Information Note.¹⁶³ As such, at the time of giving the alleged assurance to Sarama in August 2020, the Minister knew that the Tankoro permit area would need to be reserved by the State in the manner explained in the Information Note if Sarama did not apply for an operating permit. Had Sarama been planning on submitting such an application, which was not the case, it would have informed the Minister of that intention in their August 2020 meeting. By its own account, Sarama did not do so. As such, while the Minister could not have been certain that Sarama would not still apply for an operating permit, it is not realistic to think that he

¹⁶² Memorial, ¶ 138; Hamilton WS1, ¶ 79.

¹⁶³ **Ex. R-0005**, Order No. 2018-024 of 9 February 2018.

would have assured Sarama that it did not need to worry about the expiration of its permit and could continue its exploration activities without one.

82. Sarama has resorted to reckless misrepresentations about how it applied for a new permit prior to the expiration of the Tankoro Permit and far-fetched claims that the Minister told it “not to worry” and that it could continue exploration activities without a permit, because Sarama knows that the expiration of the permit is fatal to its case. Upon the expiration of the Tankoro Permit on 17 December 2020, all of Sarama’s legal rights in the Tankoro area were extinguished and it ceased to have an investment in Tankoro. As such, even if Sarama’s complaints about the Ministry’s conduct after 17 December 2020 were credible, *quo non*, they could, at most, relate only to the admission of an investment and not to the treatment of an investment under the BIT’s standards of protection.

3. The Ministry’s October 2020 Information Note Was Not an Unexpected or Improper Interference with Mining Rights

83. As part of its attempt to persuade the Tribunal that it held uninterrupted rights over the Tankoro area, or would have done so but for the allegedly improper actions of the State, Sarama mischaracterises the October 2020 Information Note as an unexpected and improper attempt by the State to unreasonably take control of permits belonging to Sarama and other mining companies and interfere with their operations. According to Sarama, the Information Note designated certain permits for review and informed permit holders that the permits would become “unavailable” with no explanation of the legal basis for the action or the rationale for the selection of the permits.¹⁶⁴

¹⁶⁴ Memorial, ¶¶ 138-140.

84. That characterisation again relies entirely on the testimony of Sarama's witnesses. Mr Dinning claims that the Information Note was "confusing" and that he had never before "heard of the notion that the permit zones were or could be 'reserved' for the State."¹⁶⁵ He also asserts that it was not clear "why the Tankoro Permit had been included on the list, or how the Ministry had selected the other 40 permits on the list as falling within the zones 'reserved' for the State."¹⁶⁶ For his part, Mr Hamilton claims that the Information Note meant "that Burkina Faso was interested in taking over the Tankoro Property for itself and would not allow Sarama to continue its exploration and mine development works."¹⁶⁷ He also claims to recall "local Burkinabe employees sharing rumours with me from their contacts at the Cadastre that Minister Idani had prepared paperwork at the Ministry to grant the Tankoro Permit to another company owned by one of his friends."¹⁶⁸

85. The account of Sarama and its witnesses does not withstand even slight scrutiny. The October 2020 Information Note clearly explains its legal basis, stating:

Under the provisions of Article 1 of Decree No. 2017-036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVC/MCIA of 26 January 2017 on the management of mining titles and authorisations, the creation of zones reserved for the State is planned.

The procedures for creating and managing these zones are defined by order No. 2018-024 of 09 February 2018.¹⁶⁹

¹⁶⁵ Dinning WS1, ¶ 93.

¹⁶⁶ Dinning WS1, ¶ 93.

¹⁶⁷ Hamilton WS1, ¶ 79.

¹⁶⁸ Hamilton WS1, ¶ 81.

¹⁶⁹ **Ex. C-0053**, Ministry of Energy, Mines and Quarries, Information Note, dated 12 October 2020, p. 1.

86. The Information Note also clearly explained the rationale for the selection of the permit areas being reserved for review, stating:

As part of the operationalisation of these areas, a list of sixteen (16) research permits, whose expiry is imminent, and for which an application for renewal within the legal period has not been registered or is no longer possible, was drawn up on 12 October 2020, with a view to an in-depth review by a committee.¹⁷⁰

87. The Information Note additionally explained that, because the listed permit areas were being reviewed for that purpose, they would not be available for new permitting following the expiration of the existing permits, stating:

Applicants for mining permits and authorisations are informed that the surface areas covered by these exploration permits will be unavailable from the next day at midnight of the expiry date of each permit, until further notice.¹⁷¹

88. The nature and purpose of the Ministry's reservation of Tankoro and the other listed permit areas are made even more clear by a review of the two instruments referenced in the note, which are Decree No. 2017-0036 and Order No. 2018-024.

89. Article 1 of Decree No. 2017-0036 states:

Areas reserved for the State may be created by the department in charge of the mining cadastre.

The procedures for creating and managing these areas are defined by order of the Minister responsible for mines.¹⁷²

¹⁷⁰ **Ex. C-0053**, Ministry of Energy, Mines and Quarries, Information Note, dated 12 October 2020, p. 1.

¹⁷¹ **Ex. C-0053**, Ministry of Energy, Mines and Quarries, Information Note, dated 12 October 2020, p. 1.

¹⁷² **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 1(4). *See also id.*, Article 1(1) ("The management of mining titles and authorisations provided for in the Mining Code shall be governed by the provisions of this decree.").

90. Order No. 2018-024 is the means by which the Minister established those procedures. In short, the order provides that permit areas that revert to the State as a result of the withdrawal, relinquishment, or expiration of the permit can become “special zones” that are “reserved for the State”.¹⁷³ Prior to being reallocated through new permits, these “special zones” are transferred to BUMIGEB, which is charged with conducting an evaluation of the permit area to determine whether the State should itself pursue the development of the permit area or whether the permit area should be reallocated to a private company.¹⁷⁴ Following BUMIGEB’s evaluation, it makes a report to the Ministry, which decides how to proceed. In the case that it decides against having the State develop the permit area, the area is to be reallocated through a competitive bidding process,¹⁷⁵ which is expressly allowed by the 2015 Mining Code.¹⁷⁶ Notably, because the reallocation involves, *inter alia*, the transfer of the data from the prior holder’s exploration works, which is required to be transferred to the Ministry upon the expiration of an exploration permit, the Ministry concludes asset transfer agreements when reallocating the permit areas and does not merely grant a new permit.

91. Accordingly, the Ministry was not, as Sarama and its witnesses assert, reviewing existing permits to assess whether to revoke or suspend the permits. Nor was it interrupting or interfering with permit rights or exploration activities. Rather, it was reviewing permit areas covered by expiring permits to assess the possibility of development of those permit areas by the State. All of the 16 listed permit areas,

¹⁷³ **Ex. R-0005**, Order No. 2018-024 of 9 February 2018, Articles 2, 4.

¹⁷⁴ *Id.*, Article 7.

¹⁷⁵ *Id.*

¹⁷⁶ **Ex. C-0130**, 2015 Mining Code, Article 14.

including the Tankoro area, were already imminently reverting to the State because no further renewals were allowed or the deadline for applying for a renewal or operating permit had already passed. The current holders were allowed to persist with their exploration activities for the short remaining duration of their permits, but would be required to cease the activities upon the expiration of the permits, which would have been the case even if the Ministry had not decided to reserve the permit areas for potential development by the State.

92. As Sarama and the other holders of the expiring permits had no remaining rights in the permit areas upon the expiration of the permits, the assertion that there was an improper taking or interference with their rights is frivolous. All the legal rights in the permit areas reverted to the State upon the expiration of the permits, and the Ministry was free to take as much time as it wished to undertake that review, just as it was free to decide whether and how to develop or reallocate the permit areas, which were its unencumbered assets.

93. There is nothing unreasonable about the Ministry's policy in that regard. Given the State's interest in operationalising the areas to promote the development of its mineral resources and create jobs and revenue, it was sensible for the Ministry to assess how to manage permit areas that had not progressed to development under the prior permit holders. That was particularly true for cases like Tankoro in which the holder had received the maximum 12-year exploration term and had found indications of potential viability but had not progressed to applying for an operating permit. It was also entirely reasonable for the Ministry to assess whether development should be done through the State, both for the purpose of achieving the overall development objective and the

objective of building the State's capacity to directly develop its mineral resources, or should be reallocated through a competitive bidding process, as the State has a legitimate public interest in allocating its mineral resources in such a manner.

94. The allegation from Claimant and its witnesses that the October 2020 Information Note was unexpected is just as meritless. Decree No. 2017-0036 and Order No. 2018-024 were published in Burkina Faso when they were issued. Decree No. 2017-0036—which Sarama and its witnesses have referenced for other purposes—was a significant implementing regulation for the 2015 Mining Code. It addressed a number of important issues beyond the creation of special zones reserved for the State, and indicated in Article 1 that Order No. 2018-024 would be forthcoming. Any serious mining company would have monitored the issuance of such regulations and decrees and carefully reviewed them.

95. Moreover, the Ministry issued an almost identical Information Note on 28 July 2020, which announced that the Danyimi permit area, which was covered by an exploration permit held by Sarama that was expiring on 20 September 2020, was being reserved to the State and would be unavailable from the date of expiration until further notice.¹⁷⁷ As Mr Dinning has emphasised how Sarama was a junior mining company with “a small executive team” consisting of himself, Mr Hamilton, and Mr Schmiede,¹⁷⁸ Respondent and the Tribunal will need to wait to see whether he considers it feasible to claim that he and Claimant's other witnesses never became aware of the 28 July 2020 Information Note, notwithstanding his testimony as to how Sarama's local employees

¹⁷⁷ **Ex. R-0012**, Ministry of Energy, Mines and Quarries, Information Note, dated 28 July 2020.

¹⁷⁸ Dinning WS1, ¶ 5.

regularly visited the office of the DGCM to check for announcements, which is how he claims they became aware of the October 2020 Information Note.¹⁷⁹

96. Even accepting the fiction that Sarama had been unaware of Decree No. 2017-0036 and Order No. 2018-024 prior to receiving the October 2020 Information Note, it is not credible for Mr Dinning and Mr Hamilton to claim that they did not understand the nature, purpose, and legal basis of the Ministry's action. As discussed above, the October 2020 Information Note clearly explained that it was based on those two legal instruments. Sarama would have immediately reviewed Decree No. 2017-0036 and Order No. 2018-024 upon becoming aware of the Information Note if it was not already familiar with them—especially as Mr Dinning claims that he found it “confusing”¹⁸⁰—and would have had no difficulty understanding what was being done, particularly as its management team includes experienced mining professionals advised by lawyers in Burkina Faso and elsewhere.

97. The fact that Mr Dinning and Mr Hamilton continue to persist with their mischaracterisations of the October 2020 Information Note in their witness statements is even more unserious. Even assuming, *arguendo*, that they were not already familiar with Decree No. 2017-0036 and Order No. 2018-024 and did not bother reviewing them even after receiving the Information Note, they would unquestionably have reviewed those instruments with counsel in preparing their witness statements in this arbitration. Mr Dinning and Mr Hamilton have feigned continued ignorance of the instruments because they know that they show that the Ministry's actions were clear and reasonable

¹⁷⁹ Dinning WS1, ¶ 93.

¹⁸⁰ Dinning WS1, ¶ 93.

and did not involve any interference with the permit rights of Sarama or other mining companies.

98. It bears noting that the account in the Memorial and witness statements of Mr Dinning and Mr Hamilton of how the action being taken pursuant to the October 2020 Information Note was unexplained and unclear does not even align with the account that Sarama set forth in its earlier submissions. In its 30 November 2023 Notice of Intent, Sarama indicated that it had no difficulty understanding what was being done through the Information Note and the impact it would have on future permitting:

On October 2020, prior to the expiration of the Tankoro Permit, the Minister issued an information notice that listed permits, including the Tankoro Permit, for in-depth examination by a committee formed by the Ministry of Energy, Mines and Quarries as part of the operationalisation of areas reserved for the State. The notice also informed permit holders that the permits listed would be unavailable from midnight on their expiry date until further notice.¹⁸¹

99. Sarama's Request for Arbitration, which was filed in December 2024, described the October 2020 Information Note in similar terms, including in recognising that the permit area would be unavailable for new permits until further notice.¹⁸²

100. Sarama and its witnesses have mischaracterised the October 2020 Information Note and feigned ignorance of its purpose, legal basis, and consequences to distract from the significance of the expiration of the Tankoro Permit. The Information Note confirms that all of Claimant's rights in the Tankoro area were extinguished when

¹⁸¹ **Ex. C-0067**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries, dated 29 November 2023, ¶ 3.7.

¹⁸² Request for Arbitration, ¶ 46.

the exploration permit expired on 17 December 2020 (just as they would have been had the Information Note not been issued).¹⁸³

101. In sum, the October 2020 Information Note was not an unexpected and unexplained interference with Sarama's exploration rights and activities as Sarama and its witnesses assert. Rather, the process of reserving permit areas covered by expiring permits had a clear basis in the 2015 Mining Code and its implementing regulations, as was explained to Sarama. Further, the reservation of the Tankoro permit area to the State did not interfere with Sarama's exploration rights or activities as Sarama had no such rights upon the expiration of the Tankoro Permit on 17 December 2020.

4. But for the Reservation of the Tankoro Permit Area to the State, Sarama Would Have Been Subject to Prohibitions on Obtaining New Rights in the Area

102. Aside from being meritless, Sarama's attacks on how the Tankoro permit area was improperly reserved to the State following the expiration of the Tankoro Permit are incongruous because, had that not been done, the normal process would have been for Sarama to have been subject to prohibitions on applying for and receiving a new exploration permit for the Tankoro permit area.

103. Article 112 of the 2015 Mining Code reviews circumstances in which a mining title or authorisation may be withdrawn by the Ministry, without indemnity or compensation, subject to a 60-day formal notice. These include circumstances such as the holder engaging in exploitation activities outside of the permit area, delaying operating

¹⁸³ As noted above and discussed in more detail below, the 2015 Mining Code and its implementing regulations provide that, when an exploration permit expires at the end of its term, the holder loses all rights in the permit area and becomes subject to prohibitions on applying for or receiving a new exploration permit for the same area. The October 2020 Information Note provided for the Tankoro permit area to be handled in a different manner as it was being reserved to the State, but it did not affect the expiration of the Tankoro Permit or the cessation of Sarama's rights in the permit area.

work without authorisation, and failing to comply with environmental and social impact obligations.¹⁸⁴ Article 113 of the 2015 Mining Code then specifies:

Withdrawal occurs without formal notice if the holder of the mining title or authorization:

- engages in the illicit sale or transaction of mineral substance.
- employs or tolerates the employment of children on its site.
- fails to renew a permit or authorization at the end of its period of validity. . . .¹⁸⁵

104. The 2015 Mining Code goes on to review some of the consequences of a withdrawal under Articles 112 or 113, which include, *e.g.*, the permit area being immediately released from all rights and obligations,¹⁸⁶ the holder being required to dismantle its installations and repair any environmental damage within six months,¹⁸⁷ and buildings, shafts, and other works permanently installed for mining purposes transferring to the State free of charge by operation of law.¹⁸⁸

105. Decree No. 2017-0036 is one of the primary implementing regulations for the 2015 Mining Code. Pursuant to Article 67 of Decree No. 2017-0036, the Ministry is to pronounce the “withdrawal” of an exploration permit pursuant to Article 113 of the 2015 Mining Code when “the holder refrains from applying for the renewal of the permit within the required time limits or does not apply for an operating permit.”¹⁸⁹ Article 68 of

¹⁸⁴ **Ex. C-0130**, 2015 Mining Code, Article 112.

¹⁸⁵ **Ex. C-0130**, 2015 Mining Code, Article 113 (emphasis added).

¹⁸⁶ **Ex. C-0130**, 2015 Mining Code, Article 115.

¹⁸⁷ **Ex. C-0130**, 2015 Mining Code, Article 116.

¹⁸⁸ **Ex. C-0130**, 2015 Mining Code, Article 117.

¹⁸⁹ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 67.

Decree No. 2017-0036 then imposes restrictions on the prior holder in cases of a withdrawal, stating:

The holder of a research permit that has been withdrawn may not submit an application for a research permit before the expiry of the period of one (01) year from the date of notification of the withdrawal order. It also has a maximum period of six (06) months to dismantle its facilities and repair any damage caused to the environment.

It may not acquire, either partially or directly or indirectly, rights over the same scopes as after a period of two (02) years following the date of notification of the decision to withdraw the research permit.¹⁹⁰

106. That policy is entirely reasonable. The 2015 Mining Code provided for holders of exploration permits to enjoy a generous time period of up to 12 years to conduct exploration activities. If they could not proceed to an operating permit in that time period, it was reasonable to preclude them from immediately acquiring new exploration rights in the same permit area given the State's interest in operationalising the permit areas and developing its mineral resources. If there were no such restrictions, holders of expiring permits could potentially circumvent the clear prohibition in the law on additional renewals beyond the maximum 12-year limit given the normal "first come, first served" approach to granting exploration permits.

107. There is no question that Sarama was subject to a withdrawal notification under Article 67 of Decree No. 2017-0036 as it exhausted the allowable renewal terms and did not apply for an operating permit prior to the 90-day deadline ahead of the expiration of the Tankoro Permit. Had the Ministry issued a withdrawal notification, the

¹⁹⁰ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 68.

consequence would have been that Sarama would have been precluded from applying for a new exploration permit for one year from the date of the withdrawal notification and from receiving legal rights in the Tankoro permit area for two years following the date of the withdrawal notification.

108. If it were true that Sarama's exploration works under the Tankoro Permit had established that the Tankoro Deposit was so highly valuable as Sarama alleges, applying the normal procedure (*i.e.*, permitting on a "first come, first served" basis and subject to payment of an effectively nominal fee) would have resulted in another mining company submitting an application for an exploration permit for the Tankoro area before Sarama was allowed to apply one year after receiving the withdrawal notification from the Ministry, which likely would have been some time in December 2021 or January 2022 depending on how long it took the Ministry to issue the withdrawal notification.

109. It was only because the Ministry adopted the policy of reserving permit areas covered by expiring exploration permits to the State and treating them differently that a possibility of Sarama applying for and receiving new exploration rights in the Tankoro permit area arose. As discussed further below, in deciding to reallocate Tankoro and other reserved permit areas in June 2021, the Ministry elected to allow for the holders of the expired permits to receive new exploration permits. It had heard from a number of such holders who had lobbied to be able to continue exploration works and had decided that it should be possible for new exploration permits to be provided to them (even while also considering other companies) as it accepted that continuing with the prior holder could support the objective of quickly operationalising the permit area.

110. Sarama, Mr Dinning, and Mr Hamilton are undoubtedly aware of Articles 112 and 113 of the 2015 Mining Code, and Articles 67 and 68 of Decree No. 2017-0036, and understood how Sarama could have been precluded from regaining rights in the Tankoro permit area. Mr Hamilton states that he considered “Burkina Faso an attractive country for investment, in part because the country had clear and well-documented mining regulations and laws, specifically the 2003 Mining Code and later the 2015 Mining Code.”¹⁹¹ In addition, he and Mr Dinning have emphasised their familiarity with Decree No. 2017-0036 and expectation that the Ministry would adhere to it (where it would suit Sarama’s interests).¹⁹² Moreover, they both received Minister Boussim’s 10 May 2023 and 6 July 2023 letters to Sarama discussed further below, which explained how the Ministry, in the context of considering the possibility of reallocating reserved permit areas to prior holders, had not proceeded with the issuance of a withdrawal notification to Sarama pursuant to Article 67 of Decree No. 2017-0036 because of the restrictions on Sarama that would result if the Ministry did so.

111. Despite their knowledge of the law and regulations, Mr Dinning and Mr Hamilton have ignored the withdrawal provisions and pressed the Tribunal to believe that Sarama would have held uninterrupted exploration rights in the Tankoro area had the Ministry not unexpectedly and without legal basis reserved the area to the State. As discussed further below, they have also persisted with the incongruous claim that the Ministry had no legal right to follow the special process established for handling reserved permit areas, including by imposing special conditions on the grant of new permits, even

¹⁹¹ Hamilton WS1, ¶ 68.

¹⁹² See, e.g., Hamilton WS1, ¶ 100; Dinning WS1, ¶ 157.

as their case depends on the Ministry departing from the normal procedures so as to apply that special process.

5. Claimant's December 2020 Application for a New Exploration Permit Was Not Valid

112. Even though the October 2020 Information Notice clearly stated that the listed permit areas would be unavailable until further notice, Sarama filed an application for a new exploration permit on 18 December 2020. While Sarama's submissions regarding the application are inconsistent, its primary account is that, as it did not understand what the Ministry was doing through the October 2020 Information Note, it filed the 18 December 2020 application with the belief that it would be promptly approved by the Ministry pursuant to the normal "first come, first served" practice.¹⁹³ Sarama further asserts that its "pending" application was delayed only because elections in Burkina Faso resulted in a change of government and new Minister,¹⁹⁴ and was then rejected in March 2022 only as a "formality" because the Ministry had already accepted the application that it invited Sarama to submit in August 2021.¹⁹⁵

113. This account is another fiction. As detailed below, Sarama and its witnesses could not possibly have believed that its 18 December 2020 application was valid and would be processed and accepted by the Ministry. They also know that when the Ministry eventually rejected the 18 December 2020 application in March 2022, it made no mention of the "Tankoro 2 Permit" allegedly granted to SMB in response to the August 2021 application, and instead rejected the December 2020 application because it

¹⁹³ Memorial, ¶ 143; Hamilton WS1, ¶ 82.

¹⁹⁴ Memorial, ¶ 144; Hamilton WS1, ¶ 83.

¹⁹⁵ Hamilton WS1, ¶ 87.

had been invalidly submitted when the permit area was reserved and unavailable for permitting.

114. According to Sarama, shortly after becoming aware of the October 2020 Information Note, Mr Hamilton had another meeting with Minister Idani in which the Minister purportedly again told him “not to worry” about Sarama’s rights in Tankoro, but also “would not commit to removing the Tankoro Permit from the list of permits designated for ‘operationalisation’.”¹⁹⁶ Sarama further asserts that, as the Minister’s comments were not sufficiently comforting, “Mr Dinning and Mr Hamilton decided that the best strategy would be for Sarama to lodge an application at the Cadastre for a second exploration permit over the Tankoro Deposit” because “[d]espite the uncertainty Sarama’s executive team felt over the First Information Notice, Sarama knew that the Ministry ordinarily dealt with applications on a ‘first come, first served’ basis.”¹⁹⁷

115. Sarama’s assertions on this issue again depend largely on the testimony of Mr Hamilton. Although Mr Hamilton claims that Minister Idani told him “not to worry” after he asked about how the allegedly mysterious and unclear October 2020 Information Note would affect Sarama’s mining rights, he also says that this alleged assurance was not sufficiently comforting.¹⁹⁸ Mr Hamilton then states:

My colleagues and I reported back to Mr Dinning and Mr Schmiede about our meeting with Mr Idani. We were alarmed by these events, so we sat down as a team, including with our colleagues in Canada and Australia, to strategize about how to appeal to the government to reconsider its decision to “operationalise” the Tankoro Property. We concluded that we should press ahead to apply for the

¹⁹⁶ Memorial, ¶ 142 (quoting Hamilton WS1, ¶ 81).

¹⁹⁷ Memorial, ¶ 143.

¹⁹⁸ Hamilton WS1, ¶ 81.

Tankoro 2 Permit as we had planned and previewed to the Ministry in my letter dated 4 August 2020. According to our understanding of the 2015 Mining Code and regulations, there was no reason why the Ministry of Mines should not grant us the Tankoro 2 Permit. SMB thus filed an application for a new exploration permit over the Tankoro Deposit on 18 December 2020.¹⁹⁹

116. As always, Mr Hamilton's testimony is not credible. As a first point, he and Mr Dinning must have understood that, had the Tankoro permit area not been reserved to the State pursuant to the October 2020 Information Note, the normal rules would have applied, which, as just discussed above, would have meant that Sarama would, *inter alia*, be prohibited for applying for a new exploration permit for the area for one year following receipt of the withdrawal notification. Mr Hamilton's testimony also ignores how the October 2020 Information Note explicitly stated that the listed permit areas, including the Tankoro area, would be unavailable for permitting following the expiration of the existing permits and would remain unavailable until further notice, and listed the legal bases for handling the permit area in that manner.²⁰⁰ Thus, Mr Hamilton and Mr Dinning could not possibly have believed that "there was no reason why the Ministry of Mines should not grant us the Tankoro 2 Permit" if Sarama filed an application on 18 December 2020.

117. On this point, Sarama and its witnesses have again been unconcerned with consistency in setting forth their reckless allegations. While Mr Hamilton now claims that he and his colleagues believed that the Ministry would proceed with granting a new exploration permit in response to the 18 December 2020 application, Sarama's prior

¹⁹⁹ Hamilton WS1, ¶ 82.

²⁰⁰ *Supra*, ¶¶ 85-89.

submissions tell a different story. As noted above, its 30 November 2023 Notice of Intent shows that Sarama understood what was being done.²⁰¹

118. Sarama's December 2024 Request for Arbitration includes a similar description of the October 2020 Information Note.²⁰² It also explained that, rather than submitting the 18 December 2020 application with the expectation that it would be imminently granted, as Mr Hamilton now claims, Sarama submitted the application only to preserve its rights:

The notice informed permit holders that the permits listed would be unavailable from midnight on their expiry date until further notice. In order to preserve its rights, SMB nevertheless filed an application for a new exploration permit over the Tankoro Deposit on 18 December 2020.²⁰³

119. To be certain, the claim that the purpose of filing the application was to “preserve its rights”, is also not credible. Sarama understood that its rights in the Tankoro permit area were extinguished with the expiration of the Tankoro Permit. Further, the October 2020 Information Note was entirely clear in specifying that the reserved permit areas were unavailable for permitting immediately following the expiration of the prior permits, and Sarama could readily see that there was a clear legal basis for that action. Moreover, as noted above, had the Tankoro permit area not been reserved to the State, it would have been handled in the normal way such that Sarama would have been

²⁰¹ **Ex. C-0067**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries, dated 29 November 2023, ¶ 3.7 (“On 12 October 2020, prior to the expiration of the Tankoro Permit, the Minister issued an information notice that listed permits, including the Tankoro Permit, for in-depth examination a committee formed by the Ministry of Energy, Mines and Quarries as party to the operationalisation of areas reserved for the State. The notice also informed permit holders that the permits listed would be unavailable from midnight on their expiry date until further notice.”).

²⁰² Request for Arbitration, ¶ 46.

²⁰³ Request for Arbitration, ¶ 46.

prohibited from applying for or receiving a new exploration permit for the area.²⁰⁴ As such, even if the October 2020 Information Note could somehow be considered illegitimate, the notion that Sarama had rights that could be preserved through the 18 December 2020 application does not make sense.

120. Given the foregoing, there appear to have been other reasons for Sarama's submission of the 18 December 2020 application. First, Sarama was in the process of attempting to raise more funds and wanted to be able to represent to potential investors that it had a pending "first in line" application for a new permit for Tankoro. Second, Sarama may have hoped that there was a chance that the prohibition on prior holders and invalidity of the application would be overlooked. In that regard, it is strange that Sarama named the requested permit area "Tankoro 2" in its application. While permit areas in Burkina Faso sometimes are named in that style, it is done for separate but related areas.

121. Mr Hamilton goes on to claim that the 18 December 2020 application was not processed only because the November 2020 elections resulted in a change in government and the appointment of a new Minister, which caused a delay in the processing of Sarama's "pending" application.²⁰⁵ This testimony must be rejected for the same reasons as his testimony that he and his colleagues saw "no reason why" the Ministry would not grant a new exploration permit in response to the 18 December 2020 application. In short, Mr Hamilton and his colleagues understood that, pursuant to the established legal framework the Tankoro permit area had been made unavailable for

²⁰⁴ *Supra*, ¶¶ 102-105.

²⁰⁵ Hamilton WS1, ¶ 83.

permitting “until further notice” as it had been reserved by the State and was going a review process.

122. Mr Hamilton's testimony that he believed that Sarama had a “pending” application that was delayed only by the change of Ministers also does not fit with the fact that Sarama submitted an additional application for a new exploration permit for the Tankoro area in August 2021 after the Ministry invited new applications in its 1 June 2021 Information Note, which is discussed further below. Mr Hamilton claims that Sarama did that because, sometime before August 2021, he came to understand “through Mr [REDACTED]’s conversations with officials at the Cadastre that the Ministry would not consider Sarama’s 18 December 2020 application because we had submitted it under the previous administration.”²⁰⁶ This unsubstantiated assertion is again not credible. Mr Hamilton understood that the 18 December 2020 application was not valid because the Tankoro area was not available for permitting at the time the application was submitted. Mr Hamilton is plainly disparaging the Ministry by asserting that it would reject an application for being submitted under the prior administration while also attempting to reconcile his testimony as to how Sarama submitted the 18 December 2020 application with the expectation that it was valid and would be granted with the fact that the company then submitted a second application after the Ministry gave the “further notice” in June 2021 that was anticipated in the October 2020 Information Note.

123. After deciding in June 2021 to reallocate the permit areas that had been reserved to the State and inviting new applications for the Tankoro area in August 2021, the Ministry notified Sarama on 15 March 2022 that its 18 December 2020 application

²⁰⁶ Hamilton WS1, ¶ 87.

had been rejected. Sarama asserts that the Ministry rejected the 18 December 2020 application only because it was required to take a decision on “every application it receives” and “could not accept it since it had already granted the Tankoro 2 Permit in response to the August Application.”²⁰⁷ This assertion again relies on the testimony of Mr Hamilton,²⁰⁸ who states in a footnote:

Much later, on 15 March 2022, Sarama received a letter from the Ministry rejecting the 18 December 2020 application. This was, however, merely a formality since the Ministry at that point had already granted the Tankoro 2 Permit to SMB on 24 November 2021.²⁰⁹

124. Respondent addresses further below the false claim that the Ministry granted Sarama a new exploration permit in response to its August 2021 application. The point to note here is that the Ministry’s 15 March 2022 letter clearly explained that the 18 December 2020 application was being rejected because the Tankoro permit area was one of the areas reserved by the State.²¹⁰ Further, the Ministry actually rejected the application soon after it was submitted, but did not communicate that decision until much later. Respondent has not yet determined the reason for the delay, but it may be due to how Claimant was applying for a permit area that was not even available for permitting.

125. Claimant and Mr Hamilton have ignored the explanation in the 15 March 2022 letter and claimed that the Ministry instead rejected the 18 December 2020

²⁰⁷ Memorial, ¶ 149.

²⁰⁸ In asserting in the Memorial that the Ministry rejected the 18 December 2020 application because it had already granted the “Tankoro 2 Permit” to Sarama in November 2021, Claimant cites only to the witness statement of Mr Dinning. Memorial, ¶ 149 (citing to Dinning WS1, ¶ 46(b)). The cited portion of Mr Dinning’s statement only makes the point that the Minister either accepted or rejected permit applications and says nothing about the reasons for the rejection of the 18 December 2020 application.

²⁰⁹ Hamilton WS1, ¶ 87, n. 145.

²¹⁰ **Ex. C-0213**, Letter from Direction Générale du Cadastre Minier to Sarama, dated 15 March 2022.

application as “merely a formality” because it had already granted the “Tankoro 2 Permit” in response to the August 2021 application because they know that if it were true that the Ministry had already granted the permit in November 2021, the 15 March 2022 letter would have identified that as the reason for rejecting the 18 December 2020 application. Again, the only explanation for such reckless misrepresentations is that Claimant counted on a quick settlement or the Tribunal not even looking at the relevant documents in deciding the case on a default basis.

6. The June 2021 Information Note Did Not “Annul” the October 2020 Information Note

126. As the October 2020 Information Note indicated, the Ministry withheld the Tankoro permit area for review along with the 15 other permit areas that had been covered by exploration permits that expired. On 1 June 2021, the Ministry issued a further Information Note announcing that those 16 permit areas would be made available for new exploration permits. It explained that there would not be a competitive tendering process as Order No. 2018-024 had envisioned because “in the current state of the legal and regulatory system, the Mining Administration does not have mechanisms allowing for the competitive tendering of mining titles and authorisations classified in the State’s portfolio.”²¹¹ The Information Note also noted that the reallocation would be “subject to special conditions which will be set out in the granting orders”,²¹² and that the holders of the expired permits would receive “special consideration” if they were interested in continuing their exploration work.²¹³

²¹¹ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021, p. 1.

²¹² **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021, p. 1.

²¹³ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021, p. 1.

127. As part of its effort to characterise the October 2020 Information Note as an improper interference with mining rights, Claimant claims that the June 2021 Information Note “annulled” the prior note.²¹⁴ Claimant’s argument again relies on the testimony of Mr Hamilton, who asserts: “On 1 June 2021, Minister Ouedraogo indeed reopened the Cadastre and the Ministry issued a new information notice annulling the prior 12 October 2020 notice.”²¹⁵

128. The June 2021 Information Note did not annul the October 2020 Information Note. To “annul” a legal instrument is to find it legally invalid or null and void.²¹⁶ Nothing in the June 2021 Information Note suggests that the Ministry had determined that the October 2020 Information Note was legally deficient or improper in any way. Rather, the June 2021 Information Note merely indicated that the listed permit areas were being made available for permitting, which was always understood to be a potential outcome of the review process, and explained that it would not be possible for that to be done through a competitive tendering process as had been planned. Notably, in making that announcement, the June 2021 Information Note again explained the reason for withholding the listed permit areas for review, stating: “As part of the operationalisation of the zones reserved for the State, information notes had been taken to make research permits unavailable which arrived at the end of the renewal or exceptional renewal period.”²¹⁷

²¹⁴ Memorial, ¶ 145.

²¹⁵ Hamilton WS1, ¶ 85.

²¹⁶ **Ex. RL-0001**, Bryan A. Garner, BLACK’S LAW DICTIONARY, 9th ed. (Thomson Reuters, 2009), Definition of “annul”; **Ex. RL-0002**, Merriam-Webster, at <https://www.merriam-webster.com/dictionary/annul>.

²¹⁷ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021, p. 1.

129. Unsurprisingly, Claimant exaggerates the significance of the comment in the June 2021 Information Note that prior permit holders would be given “special consideration”. In his witness statement, Mr Dinning asserts:

The Second Information Notice stated that “special consideration” would be given to applications made by the previous holders of those permits.

The Second Information Notice was a great relief. Sarama announced to its shareholders that it anticipated that its permits would be “prioritised for processing” as a result of the Second Information Notice.²¹⁸

130. Saying that prior holders would be given “special consideration” does not equate to announcing that they would be “prioritised for processing”. The Information Note indicates that the Ministry had heard from prior holders that were interested in obtaining new exploration permits. The Ministry was open to the possibility of allowing them to do that given the possibility that the prior holders would be best positioned to quickly resume exploration activities and proceed to development. However, it still needed to closely consider their applications given that, for some of the permit areas, such as Tankoro, the prior holders had not progressed to operating licenses despite holding the permits for the maximum term of 12 years. As such, saying that the prior holders would receive “special consideration” meant exactly what those terms indicate, which is that the Ministry would give particular attention to applications from the prior holders, and not that it was committed to approving their applications or prioritising them for processing.

²¹⁸ Dinning WS1, ¶¶ 97-98 (citing to **Ex. C-0200**, Sarama Resources Ltd, Press Release, Sarama Resources Provides Update on Permitting and Corporate Activities, dated 14 June 2021).

131. The fact that Sarama advised its investors that it had learned from the June 2021 Information Note that its permits were being “prioritised for processing” is telling. It exaggerates the significance of the “special consideration” comment to give investors the impression that there was little or no doubt that Sarama would receive a new exploration permit for Tankoro and all that was in question was how long it would take for the application to be processed. Notably, while Sarama made the “prioritised for processing” announcement in the first paragraph of the body of its communication to investors, which was dated 14 June 2021, one of the fine-print endnotes in the announcement described the possibility of Sarama obtaining new permits in quite different terms, stating:

The Djarkadougou and the Tankoro Exploration Permits which host the Bondi and Tankoro Deposits respectively, are going through a process with the government of Burkina Faso and the Company anticipates them to be re-issued as new, full-term exploration permits. The Company is in discussion with senior government officials to expedite this process and anticipates these permits will be issued in due course, though there can be no assurance that the process will be successfully completed on a timely basis, or at all.²¹⁹

7. The Ministry Did Not Grant Sarama a New Exploration Permit in November 2021 in Response to Its August 2021 Application

132. Sarama’s entire case depends on the claim that the Ministry granted it the “Tankoro 2 Permit” in November 2021 after submitting a second application for a new exploration permit for the Tankoro permit area in August 2021. As shown below, this claim is manifestly untrue. The 24 November 2021 letter from Minister Ouedraogo that

²¹⁹ **Ex. C-0200**, Sarama Resources Ltd, Press Release, Sarama Resources Provides Update on Permitting and Corporate Activities, dated 14 June 2021, p. 3 (emphasis added).

Sarama relies on as the instrument that granted it new legal rights did not purport to do that and instead clearly stated that further processing of the application was required, including for the purpose of identifying any special conditions that would be imposed.²²⁰ Given the turbulence in Burkina Faso thereafter, including from the January 2022 *coup d'état*, the Ministry did not proceed with the processing of the application and never issued the *arrêté* that constitutes the grant of legal rights. Contrary to its current fiction, Sarama and its witnesses have always understood that Sarama never received the “Tankoro 2 Permit.”

133. Sarama asserts that it had its employee, Mr [REDACTED] wait outside the Cadastre office starting at 2:00 am on 1 June 2021 to ensure that SMB would be “first in time” to submit an application for a new exploration permit for the Tankoro area following the announcement that it was being made available. According to Mr Dinning:

Because we wanted to ensure that SMB’s application was “first in time”, Mr Iboudo [*sic*] agreed to stand outside the Cadastre Cadastre [*sic*] at two o’clock in the morning on that date to ensure he would be first in line when the Cadastre reopened. As I recall, the Ministry turned Mr Iboudo [*sic*] away and informed him that, in contrast to its past practice, it would invite companies to submit permit applications on specific dates.²²¹

134. Given the litany of falsehoods in the submissions of Sarama and its witnesses, all of Mr Dinning’s testimony must be considered suspect. However, if Mr Dinning’s account of how Mr [REDACTED] waited outside the Cadastre offices is accurate, it confirms that the Ministry made clear to Mr [REDACTED] that the Tankoro area was not being

²²⁰ See Kéré WS1, ¶¶ 20-22.

²²¹ Dinning WS1, ¶ 98.

made available on a “first come, first served” basis and that the Ministry was going to instead invite applications from multiple companies.

135. As noted above, it was sensible for the Ministry to not follow a “first come, first served” approach with permit areas that had become available following the expiration of prior exploration permits. And that is particularly true with respect to permit areas that had shown some potential for development based on the prior exploration works but had not progressed to an operating license despite the prior holder using the full 12-year exploration period. A “first come, first served” approach for such permit areas would not suit the policy objectives of generating revenue and operationalising the State’s mineral resources. In any case, under the normal rules, prior holders would be prohibited from applying for a new exploration permit.²²²

136. In his witness statement, Mr Dinning goes on to say that the Ministry called Mr [REDACTED] on 6 August 2021 to inform him that Sarama was being invited to apply for an exploration permit for the Tankoro area.²²³ Respondent cannot confirm whether or not such a call was made. What is manifestly incorrect is Mr Dinning’s further claim that the Ministry granted Sarama the new exploration permit on 24 November 2021 such that it became the legal owners after paying the processing fee. He asserts:

On 24 November 2021, the Ministry sent a letter to SMB approving the August Application and granting SMB the Tankoro 2 Permit on the condition precedent that SMB pay the fixed permitting fee of 2 million CFA francs within 10 days. SMB paid the requisite fee and presented receipt of payment

²²² *Supra*, ¶¶ 102-105.

²²³ Dinning WS1, ¶ 99.

to the Ministry on 29 November 2021, becoming the legal owner of the Tankoro 2 Permit.²²⁴

137. Claimant advances the same assertions in the Memorial.²²⁵ Notably, Claimant and Mr Dinning cite only to Sarama's permit application form and do not cite Minister Ouedraogo's 24 November 2021 letter in claiming that the letter approved the application and granted the permit, even though it would be natural, to say the least, to cite the letter if its contents support their arguments.²²⁶ The letter begins by acknowledging receipt of Sarama's application.²²⁷ Rather than saying that the permit had been granted subject to a condition precedent, the letter instead then invites Sarama to pay the FCFA 2 million fee (approximately USD 3,200 at the time) "in order to allow for the finalization of the processing of your file in accordance with the laws and regulations in force in Burkina Faso."²²⁸

138. As discussed above, because the Ministry was reallocating a permit area following the expiration of an exploration permit, the Ministry did not follow the same process that would apply for a new permit area. As the Ministry explained in the June 2021 Information Note, it would give "special consideration" to prior holders rather than taking a "first come, first served" approach, and that would involve assessing

²²⁴ Dinning WS1, ¶ 99.

²²⁵ Memorial, ¶ 148.

²²⁶ Dinning WS1, ¶ 99 (citing to **Ex. C-0059**, Payment slip for grant of Tankoro 2 Permit issued by Ministry of Energy, Mines and Quarries, dated 24 November 2021); Memorial, ¶ 148 (same). Claimant cites the 24 November 2021 letter only much later in the Memorial in briefly referring to how Sarama had previously been granted the "Tankoro 2 Permit". Memorial, ¶ 206.

²²⁷ **Ex. C-0206**, Letter from Ministry of Mines to Sarama, dated 24 November 2021 ("I have the honor to acknowledge receipt of your letter registered on August 6, 2021, with the General Directorate of Mining Registry under code 4272, in which you requested a permit called 'TANKORO 2' located in the provinces of Bougouriba, Poni, and Comoe for gold exploration.").

²²⁸ **Ex. C-0206**, Letter from Ministry of Mines to Sarama, dated 24 November 2021. See also Kéré WS1, ¶¶ 20-22.

whether it was sensible to proceed with the prior holder despite its failure to progress to an operating permit. The June 2021 Information Note also explained that “given the interest of the mining titles concerned, the reallocation of said titles is subject to special conditions which will be set out in the granting orders [*i.e.*, the *arrêtés*].”²²⁹ Accordingly, as Minister Ouedraogo indicated, further processing of the application was required, including to determine the “special conditions” that would be required for a grant of the permit.

139. As part of their claim that the Ministry granted Sarama the “Tankoro 2 Permit” through the 24 November 2021 letter, Claimant and its witnesses argue that such letters are the key legal instruments that convey legal rights. They say that the *arrêté* that was never issued is a mere “receipt” of the grant of the permit that is of no legal significance. To that end, Mr Dinning testifies:

I was not particularly concerned when we did not receive the *arrêté* immediately after the Ministry granted us the Tankoro 2 permit. As I explained above, the *arrêté* is an administrative receipt or record. The Ministry had already legally granted the Tankoro 2 Permit to SMB, and so we pressed on with advancing the Sanutura Project through pre-development.²³⁰

140. Mr Hamilton likewise claims that an *arrêté* is merely “an administrative record or receipt for the permit.”²³¹ Claimant’s list of definitions in the Memorial similarly defines “*arrêté*” as an “administrative record or receipt of the permit ownership.”

²²⁹ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021, p. 1. See also Kéré WS1, ¶¶ 20-22.

²³⁰ Dinning WS1, ¶ 101. See also Dinning WS1, ¶ 46(d) (defining *arrêté* as “an administrative record or receipt for the permit”); Hamilton WS1, ¶ 88; Memorial, ¶ 148.

²³¹ Hamilton WS1, ¶ 69.

141. The assertion that the Minister's 24 November 2021 letter was the key legal instrument while the *arrêté* was merely a "receipt" of the prior grant of the permit that is of no legal significance is plainly incorrect. As noted, the Minister's 24 November 2021 letter did not in any way purport to grant legal rights and instead made clear that further processing was required. More importantly, the 2015 Mining Code unequivocally establishes that it is the *arrêté* from the Minister which grants the exploration permit. Article 31 states: "The exploration permit shall be granted, subject to prior rights, by order [*"arrêté"* in the French]²³² of the Minister responsible for mines to any natural or legal person who has submitted an application in accordance with mining regulations."²³³

142. It is the law that governs whether or not Sarama received an exploration permit and not the company's perceptions of the significance of a letter from the Ministry. To be certain, however, no serious mining company would disregard such clear language of the applicable mining law and conclude that a communication like the 24 November 2021 letter equates to the grant of a mining right. Rather, mining companies understand that it is imperative that they assess how legal rights are granted under the applicable laws and regulations and ensure that the rights they seek to rely on have been validly obtained.

143. An example of that can be seen in a 2022 technical report from a mining company, Fortuna, that acquired a company that operated a nearby gold mine in Burkina Faso. The technical report's discussion of permitting issues and mining rights explains that an exploration permit is granted by the issuance of an *arrêté* by the Minister:

²³² **Ex. C-0130**, 2015 Mining Code (French version), Article 31.

²³³ **Ex. C-0130**, 2015 Mining Code, Article 31 (emphasis added).

The Yaramoko Gold Mine is located approximately 200 kilometers (km) southwest of Ouagadougou in the Balé Province in western Burkina Faso (Figure 1). The property consists of one exploration permit of 170.13 square kilometers (km²) and one exploitation permit of 22.89 km². Exploration permits are granted by order of the Ministère des Mines, des Carrières et de l'Énergie of Burkino Faso. . . .

The land tenure information presented herein is derived from copies of the order of the Ministère des Mines, des Carrières et de l'Énergie granting the exploration permit. The original Yaramoko Exploration Permit was issued for gold exploration and granted by Arrêté ministériel No. 2013-000102/MME/SG/DGMD and was registered in the name of Roxgold Burkina Faso SARL (Roxgold BF), a wholly-owned subsidiary of Roxgold.²³⁴

144. The report goes on to discuss how Roxgold was subsequently granted an operating permit through the issuance of a decree by the Minister.²³⁵ It then illustrates how mining companies carefully assess whether mining rights have been validly obtained by explaining that Qualified Persons (“QPs”) had reviewed the legal opinion provided to Fortuna that had confirmed the validity of the permit, stating:

In the opinion of the QP's:

- Fortuna has been provided with a legal opinion supporting the validity of the *permis d'exploitation* issued by the Government of Burkina Faso, and which confirms that these rights are in good standing. The validity of the *permis d'exploitation* is reviewed regularly with the relevant authorities and all

²³⁴ **Ex. R-0013**, Fortuna Silver Mines Inc: Yaramoko Gold Mine, Burkina Faso Technical Report, 31 December 2022, p. 30 (emphasis added).

²³⁵ **Ex. R-0013**, Fortuna Silver Mines Inc: Yaramoko Gold Mine, Burkina Faso Technical Report, 31 December 2022, p. 31 (“Roxgold Sanu was awarded a *Permis d'exploitation industrielle* through Decree 2015-074 PRES-TRANS/PM/MME/MEF/MERH for the Yaramoko property on January 30, 2015.”).

appropriate annual reports and fees have been submitted.²³⁶

145. Sarama has not referenced or exhibited any legal opinions advising it that the Ministry's 24 November 2021 letter granted it a new exploration permit or that Sarama became the "legal owner of the Tankoro 2 Permit" after satisfying the purported condition precedent of paying the processing fee. Documents it has submitted for other purposes do, however, indicate that Sarama was advised that it would not have legal rights in the Tankoro area until receiving an *arrêté* granting it such rights.

146. Cube's fifth report, which was issued in February 2022 and was authored by Mr Schmiede and other Qualified Persons ("Cube Report"), reviews the "Mineral Tenure of the Project" (*i.e.*, the permitting status), noting that legal matters reflect the advice received from Burkina Faso counsel, Yanogo-Bobson Lawyers. While the advice was contained in a 4 August 2020 letter (which Claimant has chosen to not exhibit despite being entitled to waive privilege to do so), the report's table summarising the status of the company's permits shows that Sarama understood that exploration permits were granted through the issuance of an *arrêté* as it shows that exploration permits exist depending on whether an *arrêté* has been granted.²³⁷ The table's indication that the exploration term does not begin until the *arrêté* is issued further shows that Sarama understood that communications like Minister Ouedraogo's 24 November 2021 letter do not grant exploration rights.

²³⁶ **Ex. R-0013**, Fortuna Silver Mines Inc: Yaramoko Gold Mine, Burkina Faso Technical Report, 31 December 2022, p. 36.

²³⁷ **Ex. C-0029**, Sanutura Project NI 43-101 Technical Report dated 7 February 2022 ("Fifth Cube Report of 2022"), p. 30.

Table 4-2 Mineral Tenure Details

Property	Area	Holder ⁽²⁾	Exploration Permit ID	Current Term Expiry	Status	Sarama Interest	Vendor Trailing Commercial Terms
Bamako 2	121km ²	SWA SARL	Arrête 2019-180/MMC/SG/DGCM	13 October 2022	Granted, 1 st term of 3 terms	100% direct interest	1.5% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Bini ⁽¹⁾	95km ²	Sarama Mining Burkina SARL	Arrête 2020-063/MMC/SG/DGCM	6 May 2022	Granted, 3 rd term of 3 terms	100% direct interest	n/a
Boboro	223km ²	SWA SARL	No arrêté issued yet	TBC, will be 3 years from issue of arrêté (expected to be 14 January 2024)	Granted, 3 rd term of 3 terms	100% direct interest	1.0% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Danyimi 2 ⁽¹⁾	40km ²	Sarama Faso SARL	No arrêté issued yet	TBC, will be 3 years from issue of arrêté (73rd/24, 16 July 2024)	Granted, 1 st term of 3 terms	100% direct interest	1.5% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Djankadougou 2 ⁽¹⁾	169km ²	SWA SARL	No arrêté issued yet	TBC, will be 3 years from issue of arrêté (73rd/24, 15 August 2024)	Granted, 1 st term of 3 terms	100% direct interest	see additional details below
Gbingué 2 ⁽¹⁾	28km ²	Sarama Mining Burkina SARL	Arrête 2021-229/MMC/SG/DGCM	13 September 2024	Granted, 1 st term of 3 terms	100% direct interest	n/a
Nakar	197km ²	SWA SARL	Arrête 2019-126/MMC/SG/DGCM	20 June 2022	Granted, 1 st term of 3 terms	100% direct interest	1.0% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Ouango 2 ⁽¹⁾	65km ²	Sarama Mining Burkina SARL	Arrête 2020-300/MMC/SG/DGCM	17 February 2023	Granted, 1 st term of 3 terms	100% direct interest	1.5% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Tankoro 2 ⁽¹⁾	250km ²	Sarama Mining Burkina SARL	No arrêté issued yet	TBC, will be 3 years from issue of arrêté (73rd/24, 15 December 2024)	Granted, 1 st term of 3 terms	100% direct interest	1.5% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1M
Tyikoro ⁽¹⁾	37km ²	Sarama Faso SARL	Arrête 2020-149/MMC/SG/DGCM	20 June 2022	Granted, 3 rd term of 3 terms	100% direct interest	n/a
Wenikera 2 ⁽¹⁾	250km ²	La Société de Valorisation de Minerais d'Or	No arrêté issued yet	TBC, will be 3 years from issue of arrêté	Exceptional renewal term expired. Grant of new permit pending correction of administrative errors. Will be 1 st term of 3 terms once granted.	Sarama entitled to 100% via binding agreement	1.5% NSR payable to vendor which Sarama has the right to cancel by payment of US\$1.5M

147. Regardless of whether they received further legal advice from Yanogo-Bobson Lawyers or other Burkina Faso counsel, Sarama and its senior management, including Mr Dinning and Mr Hamilton, have never genuinely believed that Sarama was granted an exploration permit in November 2021. As noted, they have avoided citing Minister Ouedraogo's 24 November 2021 letter in claiming that it granted the permit because they know the letter does not include any language suggesting such a grant. They also know that the Tankoro permit area was being handled in a special manner following its reservation to the State as explained in the June 2021 Information Note such that the normal permitting process did not apply and further processing was required including to determine the special conditions that would apply. In addition, they know that an *arrêté* is the instrument which grants the exploration permit and is not a mere receipt. While they selectively pretend to be unfamiliar with some of the implementing regulations, Mr Dinning and Mr Hamilton are unquestionably familiar with the above-quoted provision

of the 2015 Mining Code that specifies that an exploration permit is granted by the *arrêté*.²³⁸

148. Sarama, Mr Dinning, and Mr Hamilton also know that the Minister's *arrêts* do not look anything like a “receipt” and instead indicate that they are the instrument through which legal rights are granted. Sarama received *arrêts* for the renewals of the Tankoro Permit (as well as for the transfer of the permit to it). The Tribunal can review those *arrêts* and see that they are formal and meaningful documents. The *arrêts* begin by reviewing the relevant legal bases for the relevant action—from the Constitution of Burkina Faso, to the Mining Code, to the relevant decrees—and then declare the action being effectuated in authoritative terms. For example, after reviewing the legal bases for renewing an exploration permit, the *arrêté* for the second renewal of the Tankoro Permit states:

ARTICLE 1: The permit of SARAMA MINING BURKINA SARL called “TANKORO”, located in the provinces of Comoé du Poni and Bougouriba for the search for gold, is renewed under the conditions of this order.²³⁹

149. The disingenuousness of Claimant's claim that it was granted the “Tankoro 2 Permit” in November 2021 is further confirmed by a review of its contemporaneous statements. In its news releases directed towards investors, Sarama repeatedly acknowledged after November 2021 and through 2022 that the permit had not

²³⁸ **Ex. C-0130**, 2015 Mining Code, Article 31.

²³⁹ **Ex. C-0045**, Arrêté No. 2015 000283/MME/SG/DGCM in relation to the second renewal of the Tankoro permit of Sarama Mining Burkina SARL dated 16 September 2015. See also **Ex. C-0045**, Arrêté No. 2015 000283/MME/SG/DGCM in relation to the second renewal of the Tankoro permit of Sarama Mining Burkina SARL dated 16 September 2015 (showing the precise design of the *arrêté* and the stamps included on it); **Ex. C-0044**, Arrêté No. 2013 000058/MME/SG/DGMG in relation to transfer of the TANKORO permit to SARAMA MINING BURKINA SARL dated 29 March 2013; **Ex. C-0046**, Arrêté No. 2019/150/MMC/SG/DGCM in relation to the exceptional renewal of exploration permit n°284 named TANKORO of SARAMA MINING BURKINA SARL (N°IFU : 00027503X) dated 17 July 2019.

yet been granted. The descriptions of the permitting status were often highly misleading for the apparent purpose of persuading investors to believe that the company had received new mining rights in Tankoro. However, they also made clear, typically in the fine-print endnotes, that the “Tankoro 2 Permit” had not been granted and might never be granted.

150. In its first news release after paying the processing fee, which was issued on 1 December 2021, Sarama was superficially quite aggressive in giving the impression that the new exploration permit had been granted:

Sarama Resources Ltd. (“Sarama” or the “Company”) (TSX-V:SWA) is pleased to announce that the Government of Burkina Faso has granted⁽⁶⁾ the Company a new Exploration Permit (the “Permit”) covering the Tankoro 2 Property (“Tankoro 2” or the “Property”) in south-western Burkina Faso.

...

Sarama’s President and CEO, Andrew Dinning commented:

“We are very pleased to have the new Tankoro 2 Exploration Permit granted. This follows the recent issuance of several other key Exploration Permits for the Project and demonstrates the commitment of the Government of Burkina Faso to support the country’s exploration sector.”²⁴⁰

151. That superficially unambiguous announcement of the grant of the “Tankoro 2 Permit” was heavily qualified, if not altogether contradicted, by the following fine-print endnote indicated by the “⁽⁶⁾” reference in the above-quoted text. That endnote read:

6. The Government of Burkina Faso has processed the requisite documents to facilitate the grant of the new, full-term

²⁴⁰ **Ex. C-0207**, Sarama Resources Limited, *Sarama Resources Granted New Exploration Permit for Tankoro Deposit in Burkina Faso, Set to List On ASX*, dated 1 December 2021, p. 1.

Tankoro 2 and Djarkadougou 2 Exploration Permits (the “Permits”) and subsequently issued the invitation to pay the permit issuance fees (the “Fees”) and the Fees were paid within the requisite 10-day timeline. Following the payment of the Fee, the issuance of the Permit’s arrêté and related paperwork becomes an administrative process during which time the Company may undertake work on the Tankoro 2 and Djarkadougou 2 Properties. The Company expects the arrêtés and related paperwork to be issued in due course. The Properties were formerly known as Tankoro and Djarkadougou respectively, but have been renamed as part of the process of re-issuing the respective Permits.²⁴¹

152. The announcement was then further qualified by the following fine print “caution regarding forward looking information” that followed the endnotes:

Information in this news release that is not a statement of historical fact constitutes forward-looking information. Such forward-looking information includes, but is not limited to, the updated mineral resource estimate, statements regarding the Company’s future exploration and development plans, the potential for the Sanutura and Karankasso Projects to host economic mineralisation, the potential for open pit and underground mining at the Sanutura Project, the potential to expand the present oxide component of the existing estimated mineral resources at the Sanutura Project, the intention for the Company to undertake a dual listing on the ASX, to raise proceeds in connection with that listing and the use of any such proceeds, the timing for the receipt of new arrêtés for the Tankoro 2 and Djarkadougou 2 Exploration Permits by the Government of Burkina Faso. . . .

There can be no assurance that any mineralisation that is discovered will be proven to be economic, or that future

²⁴¹ **Ex. C-0207**, Sarama Resources Limited, *Sarama Resources Granted New Exploration Permit for Tankoro Deposit in Burkina Faso, Set to List On ASX*, dated 1 December 2021, p. 6 (emphasis added).

required regulatory licensing or approvals will be obtained. . . .²⁴²

153. While it may seem surprising that Sarama would be so aggressive in attempting to mislead investors, the 1 December 2021 announcement also provides an explanation for that conduct as it notes that the grant of a new exploration permit for Tankoro was “the final item outstanding” to allow Sarama’s listing on the Australian Securities Exchange.²⁴³ As the company needed to list on the exchange just to raise the few million dollars it needed to continue its exploration activities, it was apparently willing to push the boundaries, if not make clear misrepresentations, to make that happen.

154. Sarama’s 12 May 2022 news release issued almost six months after the alleged grant of the permit in November 2021 again specified in an endnote that the Ministry had merely taken the steps “to facilitate the grant of the new, full-term Tankoro 2 [permit],” and that the company “expects the *arrêtés* and related paperwork to be issued in due course.”²⁴⁴ Following the endnotes, the May 2022 news release also included a further similar fine-print “caution” that recognised that it was uncertain whether the permits would be obtained.²⁴⁵

155. Notably, the 12 May 2022 news release did not maintain the same aggressive “above-the-line” assertion that the “Tankoro 2 Permit” had already been

²⁴² **Ex. C-0207**, Sarama Resources Limited, *Sarama Resources Granted New Exploration Permit for Tankoro Deposit in Burkina Faso, Set to List On ASX*, dated 1 December 2021, p. 6 (emphasis added).

²⁴³ **Ex. C-0207**, Sarama Resources Limited, *Sarama Resources Granted New Exploration Permit for Tankoro Deposit in Burkina Faso, Set to List On ASX*, dated 1 December 2021, p. 1 (“Receipt of the Permit was the final item outstanding in the Company’s preparations to list on the Australian Securities Exchange (‘ASX’) and will allow recommencement of exploration on the Sanutura Project (the ‘Project’) which hosts a significant mineral resource and an abundance of exploration targets.”).

²⁴⁴ **Ex. R-0014**, Sarama Resources Limited, *Sarama Resources Commences +50,000m Drill Program At Sanutura Project*, 11 May 2022, p. 6, n. 4.

²⁴⁵ *Id.*, p. 6 (emphasis added).

granted as had been included in the 1 December 2021 announcement. That softening of Sarama's stance to its investors may be due to the company needing to account for: (i) how the *arrêté* had still not been issued as would have been the case had the application actually been accepted in November 2021 subject only to the condition precedent of the payment of the fee; and (ii) how the Ministry had made no mention of the "Tankoro 2 Permit" already being granted in November 2021 in rejecting Sarama's 12 December 2020 application on 15 March 2022, and instead explained that the rejection was due to how the Tankoro permit area had been reserved to the State.²⁴⁶

156. Sarama's Management Discussion and Analysis ("MD&A") from later in May 2022 similarly recognised the uncertainty of the company receiving the permit:

This MD&A contains "forward-looking information" within the meaning of applicable Canadian securities legislation. Forward-looking information includes, but is not limited to . . . timing and receipt of approvals, consents and permits under applicable legislation, and the adequacy of financial resources. . . .

Forward-looking information is subject to a variety of known and unknown risks, uncertainties and other factors that could cause actual events or results to differ from those expressed or implied by the forward-looking information, including, without limitation: . . . uncertainty regarding our ability to acquire necessary permits and comply with their terms ²⁴⁷

157. As discussed further below, Sarama has submitted internal "summaries" it says were contemporaneously prepared to "memorialise" discussions with Government officials and other actions relating to its permitting efforts. These summaries are plainly

²⁴⁶ *Supra*, ¶ 113.

²⁴⁷ **Ex. R-0015**, Sarama Resources Limited, *Management's Discussion and Analysis of Financial Results for the three months (first quarter) ended March 31, 2022*, dated 30 May 2022, p. 1.

self-serving and are no more reliable than the testimony of Sarama's witnesses. That said, as with its news releases, the summaries provide evidence of the falsity of Sarama's current account of its receipt of the "Tankoro 2 Permit". The summary allegedly prepared on 30 November 2022 by Mr [REDACTED] on behalf of Mr Hamilton discusses the "current permit situation" and explains that "[t]here are . . . six (6) permits pending granting (TANKORO, DJARKADOUGOU, WERINKERA, DANYMI, NOUMOUSO and KONGORоба)" of which "five were in state reserves (TANKORO, WERINKERA, DANYMI, NOUMOUSO and KONGORоба)."²⁴⁸ Rather than describing *arrêtés* as meaningless "receipts" that follow the grant of a permit, the summary refers to them as "granting decrees".²⁴⁹

158. The evidence also shows that Sarama told others that it had not received the "Tankoro 2 Permit". A December 2022 email to Mr Hamilton from an assistant to the Ambassador to Canada updates him on the Ambassador's discussion with the Minister regarding Sarama. It indicates that the Ambassador had been briefed by Sarama on the issues it was facing and its objectives with respect to the Ministry as it explains that, in her meeting with the Minister, "[t]he ambassador insisted on the urgency of the problem for Sarama that can not [*sic*] more raise money to continue its work without a valid permit in hands."²⁵⁰

²⁴⁸ **Ex. C-0234**, Sarama Resources Limited, Summary of Steps Taken to Resolve Sarama's Permit Issues, dated 30 November 2022, p. 1 (emphasis added). The summary refers to an "attached summary table" of the permits and to an "attached" draft letter to the Ministry, neither of which were included in the exhibit.

²⁴⁹ **Ex. C-0234**, Sarama Resources Limited, Summary of Steps Taken to Resolve Sarama's Permit Issues, dated 30 November 2022, p. 1.

²⁵⁰ **Ex. C-0237**, Email from A. Dinning (Sarama) to J. Hamilton (Sarama) 21 December 2022, p. 2 (emphasis added).

159. Respondent does not know when Sarama began to prepare for a treaty arbitration, but it is interesting to see how its description of the permitting status began to change by early 2023, which was likely due to how the Minister appointed in October 2022, Minister Boussim, had advised Sarama that no “Tankoro 2 Permit” had been issued to Sarama and that the Ministry would be assessing whether and how to grant a new exploration permit for the Tankoro area.

160. A February 2023 Sarama report, which was issued after Sarama received the new exploration permit for the Djarkadougou permit area (*i.e.*, the “Djarkadougou 2 Permit”), included similar fine-print language making clear that the “Tankoro 2 Permit” had not been issued.²⁵¹ However, in the table in the report reviewing the status of the company’s permits, Sarama’s description reflects a shift towards their current formulation, albeit only partial as it still recognised the importance of an *arrêté* rather than describing it as a mere “receipt”:

The Sanutura Project (the “Project”) is comprised of 11 exploration properties for which Exploration Permits have been issued by the Government of Burkina Faso:

. . .

- Tankoro 2 - N/A, pending issuance of new *arrêté* for re-issued Exploration Permit (previously *Arrêté* 2019-150/MMC/SG/DGCM).²⁵²

161. Sarama’s 14 June 2023 news release reflected a further shift toward its current narrative. It largely repeated the above-quoted language from the May 2022 news

²⁵¹ **Ex. R-0016**, Sarama Resources Limited, *Sarama Resources Intersects 23m @ 4.26g/T Gold At Sanutura Project*, dated 27 February 2023, p. 10.

²⁵² *Id.*, p. 33 of the pdf.

release but added more aggressively misleading language (underlined below) in discussing the permitting status:

The Government of Burkina Faso has processed the requisite documents to facilitate the grant of the new, full-term Tankoro 2 and Djarkadougou 2 Exploration Permit (the “Permit”) and subsequently issued the invitation to pay the permit issuance fee (the “Fee”) and the Fee was paid within the requisite 10-day timeline. Following the payment of the Fee, the issuance of the Permit’s arrêté and related paperwork becomes an administrative process The company . . . anticipates the issuance of the arrêté for the Tankoro 2 Exploration Permit in due course given the successful granting of this permit as per statutory government process.²⁵³

162. In an apparent attempt to give itself legal cover for the addition of that misleading language, Sarama also added the following sentence to the fine-print “caution” later in the news release:

The Company’s full suite of exploration permits are at varying stages in their life cycles and at any one time, the Company has exploration permits either in renewal or re-issue phase and although the Company follows due government process and anticipates new exploration permits will be granted in due course, it cannot guarantee this will be done in a timely manner or at all.²⁵⁴

163. After engaging arbitration counsel, Sarama apparently determined that the foregoing descriptions of the permitting status, while perhaps sufficiently artful to mislead investors, were inadequate for its treaty claims. In its 30 November 2023 news release announcing its issuance of the Notice of Intent to Burkina Faso, Sarama advanced the

²⁵³ **Ex. R-0017**, Sarama Resources Limited, *Sarama Completes Second Tranche of Placement to Advance PEA*, 14 June 2023, p. 5, n. 4 (emphasis added).

²⁵⁴ *Id.*, p. 5 (emphasis added).

following more fully fictionalised account, although it still had not reached the point of defining “*arrêté*” as a mere “receipt”:

The Original Permit expired in December 2020, after which time it underwent a full re-issue process. On 24 November 2021 the Minister granted Sarama the Tankoro 2 Permit, which substantially covered the same area as the Original Permit and invited the Company to pay the grant fee. The Company paid the grant fee within the requisite timeframe and was issued a receipt for payment. The Company expected to receive the arrêté (or title certificate) from the Minister in due course, as was customary following payment of the grant fees.²⁵⁵

164. Sarama’s 30 November 2023 Notice of Intent likewise does not advance the “receipt” definition and instead defines “*arrêté*” as “the formal title paperwork for the permit.”²⁵⁶

165. There is no dispute that an *arrêté* was never issued. It is also clear that the Ministry never believed that the Minister’s 24 November 2021 letter granted the permit, or that Sarama received the permit after paying the processing fee on 29 November 2021. The Mining Cadastre General Directorate (“DGCM”) maintains a database of all permits—which is regularly updated and publicly available through its website, which was maintained in 2021 and 2022—and it never recorded the award of a permit to Sarama.²⁵⁷

²⁵⁵ **Ex. R-0018**, Sarama Resources Limited, *Sarama Resources Issues Notice of Intent to Submit Claims to Arbitration*, 30 November 2023, p. 1 (emphasis added).

²⁵⁶ **Ex. C-0067**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries, dated 29 November 2023, ¶ 3.5(d).

²⁵⁷ **Ex. R-0019**, Mining Cadastre General Directorate, Attestation No. 2026-02, dated 27 March 2026 (confirming that no surface rent (*redevance superficière*) was ever paid for “Tankoro 2”); **Ex. R-0020**, Mining Cadastre General Directorate, Attestation No. 2026-01, dated 27 March 2026 (confirming no “Tankoro 2” permit recorded ever paid); **Ex. R-0021**, Secretariat General of the Council of Ministers, Attestation, dated 25 March 2026 (confirming that no “Tankoro 2” permit was ever published in the Official Journal).

Notably, Mr Dinning and Mr Hamilton and their Sarama colleagues understood that the DGCM maintained such records and would have regularly checked either its website or directly with the DGCM to confirm in late 2021, and in 2022 and 2023, whether it had obtained permit rights in Tankoro given the importance of the matter to them.²⁵⁸

166. Moreover, as noted above, in its 15 March 2022 letter that rejected Sarama's 18 December 2020 application for a new exploration permit for Tankoro, the Ministry explained that the application was rejected because it was invalid when submitted as the permit area had been reserved to the State.²⁵⁹ Had the Ministry believed that Minister Ouedraogo's 24 November 2021 letter had granted the "Tankoro 2 Permit" to Sarama, it obviously would have explained that the 18 December 2020 application was being rejected for that reason. Indeed, that is why Claimant and Mr Hamilton have falsely claimed that the Ministry's 15 March 2022 letter rejected the 18 December 2020 "merely as a formality" because it had already granted the "Tankoro 2 Permit" in response to the 6 August 2021 application.

167. As discussed above, Burkina Faso's mining practices, including its handling of permits, have been closely monitored by the Extractive Industries Transparency Initiative ("EITI"). In its annual reports for Burkina Faso, EITI included a precise review of the status of all mining rights in the country. For the Tankoro permit area, that review identified only the Tankoro Permit for Sarama and specified that the permit had been held

²⁵⁸ Claimant is plainly familiar with the DGCM's online database as it exhibited a screenshot from the website in its Memorial to show that Soleil received an exploration permit for Tankoro in May 2025. Memorial, ¶ 230, n. 560 (citing to **Ex. C-0066**, eMC+, "Tankoro details", dated 10 December 2024).

²⁵⁹ **Ex. C-0213**, Letter from Direction Générale du Cadastre Minier to Sarama, dated 15 March 2022.

by Sarama and had expired on 17 December 2020.²⁶⁰ The annual report for the 2024 fiscal year then recognised that an exploration permit for Tankoro had been granted to Soleil.²⁶¹ Neither report noted any unusual practices relating to the Tankoro permit area or Sarama.

168. In sum, as Sarama and its witnesses have always understood, the Ministry did not grant Sarama the “Tankoro 2 Permit” in November 2021. Minister Ouedraogo’s 24 November 2021 letter did not purport to grant the permit and made clear that further processing was required, including to identify the “special conditions” for the grant of a decree that would be required.²⁶² Further, as a matter of law, the permit could only be granted through the issuance of the *arrêté*.

8. The Ministry Was Not Required to Grant Sarama’s August 2021 Application

169. While Sarama’s primary argument in this arbitration is that the Ministry unlawfully revoked the “Tankoro 2 Permit” that it supposedly granted to Sarama in November 2021, it has also asserted that the Ministry would have acted wrongfully had it not granted the permit because it had “no discretion” to not proceed with the issuance or to impose additional conditions on it. Sarama does that in a careful manner, as it understands that its case does not work if its claim is that Burkina Faso acted improperly by not allowing it to make an investment rather than by expropriating one. As such, rather than directly claiming that the Ministry acted improperly by not granting the permit,

²⁶⁰ **Ex. R-0022**, Extractive Industries Transparency Initiative, *Burkina Faso 2023 EITI Report: Annual Report on Burkina Faso’s Extractive Sector*, at <https://eiti.org/document/22960>, Annex 8.

²⁶¹ **Ex. R-0023**, Extractive Industries Transparency Initiative, *Burkina Faso 2024 EITI Report: Annual Report on Burkina Faso’s Extractive Sector*, at <https://eiti.org/documents/burkina-faso-2024-eiti-report>, Annex 24.

²⁶² See Kéré WS1, ¶¶ 20-22.

Sarama raises the issue in connection with its allegation that the “Tankoro 2 Permit” had been granted by the Minister’s 24 November 2021 letter such that the remaining process, including the issuance of the *arrêté*, was a mere formality that the Ministry was required to complete without imposing any additional conditions.

170. Respondent has already shown that the assertion that the Minister’s November 2021 letter granted the “Tankoro 2 Permit” is baseless as it did not purport to do so and expressly stated that further processing was required, which was needed to determine the “special conditions” that would be required for the grant of the permit. The point to note here is that the assertion that the Minister was obligated to issue the *arrêté* and had “no discretion” to not do so or to impose further conditions is also wrong because it ignores how the permit area was not being processed in the normal manner as it was being handled as a reallocation of a permit area that had been reserved for possible development by the State. As noted above, it makes no sense for Sarama to complain that the permitting was not handled in the normal manner because Sarama would have been prohibited from applying for or receiving a new exploration permit had the normal process applied.

171. In the Memorial, Sarama asserts that the Minister was required to grant the permit because “Sarama had fulfilled all the conditions under Article 31 of Decree No. 2017-0036 dated 26 January 2017 concerning the management of mining rights and authorisations to be issued the *arrêté* for the Tankoro 2 Permit.”²⁶³ Mr Hamilton provides the support for that assertion in his witness statement by asserting: “From the moment the Ministry approved Sarama’s application and Sarama made payment to the Ministry,

²⁶³ Memorial, ¶ 219(d).

my understanding was that Burkinabe law provided the Ministry no discretion to deny the issuance of the *arrêté* for the Tankoro 2 Permit.”²⁶⁴

172. Article 31 of Decree No. 2017-0036 does indicate that the normal process is that after “[a]cceptance of the request is notified to the applicant” and subject to the condition precedent of paying the specified fee, the Minister can issue the *arrêté* granting the permit.²⁶⁵ However, it is untrue that, even under the normal procedure, the issuance of the *arrêté* is mandatory after acceptance of the request. More importantly, as already discussed above, the process of reserving permit areas covered by expiring permits results in them being subject to a different permitting process in the case that they are reallocated rather than being developed by the State.²⁶⁶

173. As already noted, this special process was entirely proper and did not conflict with Decree No. 2017-0036 because it was established pursuant to the same decree, which specified, in Article 1, that the “procedures for creating and managing these areas are defined by order of the Minister responsible for mines.”²⁶⁷ Pursuant to Article 1 of Decree No. 2017-0036, Order No. 2018-024 was issued to set forth those procedures. Amongst other things, it provided that, the case that the Ministry decided to not pursue development of the permit area through the State, the permit area is to be reallocated through a competitive bidding process.²⁶⁸

²⁶⁴ Hamilton WS1, ¶ 88.

²⁶⁵ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 31.

²⁶⁶ *Supra*, ¶¶ 85-90.

²⁶⁷ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 1(4). See also *id.*, Article 1(1) (“The management of mining titles and authorisations provided for in the Mining Code shall be governed by the provisions of this decree.”).

²⁶⁸ **Ex. R-0005**, Order No. 2018-024 of 9 February 2018, Article 7.

174. The October 2020 Information Note then confirmed that Tankoro and the other reserved permit areas would be treated differently pursuant to that decree, stating:

The procedures for creating and managing these zones are defined by Decree No. 2018-024 of 09 February 2018.²⁶⁹

175. Thereafter, the June 2021 Information Note explained that it had proven not possible to conduct the envisioned competitive bidding processes for reallocating reserved permit areas.²⁷⁰ It also specified that “given the interest of the mining titles concerned, the reallocation of said titles is subject to special conditions which will be set out in the granting orders.”²⁷¹ As Sarama and its witnesses acknowledge, in conjunction with the issuance of that Information Note, the Ministry advised that, rather than following a “first come, first served” approach, it would be inviting companies to apply as an alternative to the competitive bidding process that was not possible to undertake.²⁷² Accordingly, the Ministry made it entirely clear that the handling of the permit areas that had been reserved to the State and were being reallocated would depart from the normal process in multiple ways.

176. Given the foregoing, there was nothing improper about Minister Ouedraogo’s 24 November 2021 letter indicating that further processing would be required, or with the Ministry not proceeding with granting the permit through the issuance of an *arrêté* after Sarama submitted the specified processing fee.

²⁶⁹ **Ex. C-0053**, Information Notice issued by the Ministry of Energy, Mines and Quarries, dated 12 October 2020.

²⁷⁰ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021.

²⁷¹ **Ex. C-0057**, Ministry of Energy, Mines and Quarries, Information Note, dated 1 June 2021. See also Kéré WS1, ¶¶ 20-22, 32.

²⁷² Memorial, ¶ 214; Dinning WS1, ¶ 153.

177. As the Ministry was departing from the normal process, including in assessing what special conditions to impose, it was also free to not adhere to the time periods for processing normal permit applications. Thus, even if Minister Ouedraogo's 24 November 2021 letter could be considered an approval of the 6 August 2021 application despite absence of language indicating such an approval, the Ministry would not have been required to issue the *arrêté* within the 60 days normally required after approving an application and receiving the payment.

178. Sarama's only real complaint is that the processing of its application did not advance after it paid the fee on 29 November 2021. As noted above, there was a coup in Burkina Faso in January 2022, which was followed by another coup in September 2022. That political turbulence disrupted the normal operation of the Government, including the Ministry. The fact that Sarama had submitted an earlier application in December 2020 for the same permit area may have also complicated the processing, particularly as the Ministry did not reject the December 2020 application until after Sarama submitted the second application in August 2021.

179. The stalled reallocation process did not resume until Sarama pressed for it to continue following the appointment of a new Minister, Minister Boussim, in October 2022. Respondent reviews Sarama's discussion with that Minister in later 2022 and 2023 further below. The point to note here is that the delay in the progress of the reallocation process provides no basis for a claim of a breach of Burkina Faso's BIT obligations. It affected the admission of investment rather than the treatment of existing investments. In any case, the delay was not arbitrary, expropriatory, or otherwise improper, and would not provide a basis for damages.

9. The Minister Did Not “Concede” in 2023 That the “Tankoro 2 Permit” Had Already Been Granted

180. Sarama’s claim that the Minister “conceded” that the “Tankoro 2 Permit” had been granted in November 2021 again relies on the witness testimony of Mr Dinning and Mr Hamilton. Based on their account of their discussions with Minister Boussim following his appointment in October 2022, Sarama claims that Mr Dinning, Mr Hamilton, and their colleagues in Sarama were “shocked” when the Minister told Mr Dinning in February 2023 that “he considered the Tankoro Deposit to be owned by the State of Burkina Faso,”²⁷³ but were then pleased when the Minister “verbally” agreed in an April 2023 meeting with Mr Dinning that the Ministry had granted the permit to Sarama in November 2021,²⁷⁴ and “again conceded that the Ministry had previously granted the Tankoro 2 Permit to Sarama” in a 10 May 2023 letter.²⁷⁵

181. As discussed in detail below, Sarama’s account is baseless. While Sarama attempted to mislead Minister Boussim into believing that the “Tankoro 2 Permit” had already been granted, he repeatedly and correctly confirmed that no such grant had occurred, while also explaining that, as the October 2020 and June 2021 Information Notes had indicated, the Ministry would be assessing whether and how to reallocate the Tankoro permit area, including by determining the “special conditions” that would be required.

182. Before reviewing the details of the foregoing matters, it bears noting that Sarama’s communications in this time period became even more heavy-handed and

²⁷³ Memorial, ¶¶ 216-217; Hamilton WS1, ¶ 96; Dinning WS1, ¶ 142.

²⁷⁴ Memorial, ¶ 209.

²⁷⁵ Memorial, ¶ 214.

aggressive in attempting to “memorialise” desired facts such as the Minister “conceding” that the “Tankoro 2 Permit” had already been granted and advancing convoluted explanations for how the permitting status had developed. It appears that, after Minister Boussim made clear in late 2022 and early 2023 that he was not accepting Sarama’s assertion that it had already received the “Tankoro 2 Permit”, Sarama shifted to focusing on manufacturing a record for a treaty arbitration even as it still sought to persuade the Minister to change his position or agree to grant it a new permit on more favourable terms. While Sarama did not transmit its Notice of Intent to Burkina Faso until November 2023, the change in the way it described the permitting status for Tankoro in its public communications also became significantly more aggressive in early 2023, and Sarama no doubt began preparing its arbitration case well before issuing the Notice of Intent.²⁷⁶

183. Turning to the details, Mr Hamilton provides the basis for Minister Boussim’s allegedly shocking statement in the 3 February 2023 meeting as to how the Tankoro permit area was an asset of the State. In his witness statement, he states:

In February 2023, Minister Boussim told Mr Dinning at a Canadian government function in Cape Town, South Africa, during Mining Indaba 2023, that he considered the Tankoro Deposit to be owned by the State of Burkina Faso. I did not attend this particular event, but my Sarama colleagues told me about it afterwards. This, of course, was troubling news. We were shocked and disappointed ²⁷⁷

²⁷⁶ An email from Mr Dinning dated 6 September 2023 that Claimant has exhibited includes an unexplained redaction. From the context, it appears that the redacted text could be Mr Dinning referring to the possibility of initiating a treaty arbitration. **Ex. C-0316**, Email from A. Dinning to L. Herman, dated 6 September 2023.

²⁷⁷ Hamilton WS1, ¶ 96. See *also* Dinning WS1, ¶ 142 (“On 3 February 2023, I attended a Canadian government function hosted by the Canada-Africa Chamber of Business in Cape Town, South Africa I organised a private meeting with Minister Boussim At that meeting, Minister Boussim continued to say that he was entertaining other offers for the Tankoro 2 Permit, whilst I continued to repeat that the Ministry had already granted the Tankoro 2 Permit to Sarama in November 2021 and so the Ministry could not consider another application.”).

184. This is yet another example of Mr Hamilton's disregard for the accuracy or honesty of his testimony. As shown above, Mr Hamilton was already aware that the Tankoro permit area was not being handled in the same manner as a new permit area because it was covered by an expiring permit and had been reserved to the State.²⁷⁸ He also knew that the Ministry had not completed the processing of Sarama's 6 August 2021 application for a new permit, and would need to decide what "special conditions" to impose on the grant of the permit.²⁷⁹ If that were not enough, Mr Hamilton had also already received an email from the Canadian embassy in December 2022 that explained that Minister Boussim had told the Ambassador of Canada that he considered the Tankoro permit area to be the property of the State. The email, which was personally addressed to Mr Hamilton, read:

Hi Jack,

I am pleased to inform you that Ambassador Hermann met with the Minister of mines this morning. . . . One burning issues [sic] discussed during the meeting was Sarama's permitting. The Minister seems well aware of the problem. He said they are working on finding a solution. Basically, the idea is to grant Sarama the permit, given all the investments already made on the property. But he did said that it will probably not be under normal conditions. We understood he was referring to the amount you will have to pay to get your permit reissued. He mentioned that the payment noticed already received, will certainly not applied. Fro [sic] him, regarding the law, the your [sic] property is back in the state assets. Therefore, it should be revaluated before being transferred to a company and the same applied to other assets. They fear to set a precedent.²⁸⁰

²⁷⁸ *Supra*, ¶¶ 85-93.

²⁷⁹ *Supra*, ¶¶ 126-138.

²⁸⁰ **Ex. C-0238**, Email from A. Dinning (Sarama) to J. Hamilton (Sarama), dated 21 December 2022.

185. Needless to say, Mr Hamilton could not have forgotten that the embassy had advised him that the Minister considered the Tankoro permit area to be the property of the State in late December 2022 such that he was “shocked” when he learned that the Minister made the same point to Mr Dinning in early March 2023.

186. Mr Dinning’s account of the 20 April 2023 meeting in which Minister Boussim allegedly “acknowledged” that the “Tankoro 2 Permit” had been granted to Sarama is just as suspect. He asserts:

On 20 April 2023, I met Minister Boussim at his office in Ouagadougou At that meeting, Minister Boussim declared that the area comprising the Tankoro 2 Permit was a “State-owned asset”. This was an abrupt and alarming shift in the Ministry’s position since our meeting in Cape Town in February 2023, when Minister Boussim told us he was entertaining other permit applications for the Tankoro 2 Permit despite having already granted the Tankoro 2 Permit to Sarama. He seemed to have abandoned that point. I continued to explain that the Tankoro 2 Permit had already been granted to Sarama in November 2021. Minister Boussim eventually acknowledged to me that the Ministry had indeed granted the Tankoro 2 Permit to Sarama, but he continued to insist that it was nevertheless a “State-owned asset”.²⁸¹

187. It is not clear how the Minister stating in April 2023 that the Tankoro permit area was a “State-owned asset” could be an “abrupt and alarming shift in the Ministry’s position” from the February 2023 meeting that resulted in Mr Hamilton and his Sarama colleagues being “shocked” by how “Minister Boussim told Mr Dinning . . . that he considered the Tankoro Deposit to be owned by the State of Burkina Faso.”²⁸² Nor is it

²⁸¹ Dinning WS1, ¶ 145.

²⁸² Hamilton WS1, ¶ 96.

clear how Mr Dinning can claim that it was an “abrupt and alarming shift” when he had also received the 21 December 2022 email from the Canadian embassy explaining how the Minister had told the Ambassador that the Tankoro permit area was an asset of the State.²⁸³

188. Mr Dinning also claims that, in the 20 April 2023 meeting, “Minister Boussim eventually acknowledged to me that the Ministry had indeed granted the Tankoro 2 Permit to Sarama.”²⁸⁴ Such plainly self-serving testimony from a witness with no credibility has no evidentiary value on its face. Further, the alleged “acknowledgment” by the Minister does not fit with his prior assertions that the Tankoro permit area remained a State asset. Permit areas were reserved to the State following the expiration of an existing permit, and once they were reserved, the area was unavailable for further permitting. The Minister would never have acknowledged to Sarama that the “Tankoro 2 Permit” had been granted to it in November 2021 while simultaneously maintaining that the Tankoro permit area remained an asset reserved to the State. As discussed further below, Minister Boussim’s subsequent conduct further confirms that he would not have acknowledged that the permit had been granted as he was consistent and firm in explaining in his May and July 2023 communications to Sarama that no such grant had ever occurred.

189. Mr Dinning’s claim that “Minister Boussim admitted that the Ministry had granted the Tankoro 2 Permit” in a 10 May 2023 letter” is even more egregious.²⁸⁵ To make that claim, which Sarama repeats in its Memorial,²⁸⁶ Mr Dinning has badly

²⁸³ **Ex. C-0237**, Email from A. Dinning (Sarama) to J. Hamilton (Sarama), dated 21 December 2022.

²⁸⁴ Dinning WS1, ¶ 145.

²⁸⁵ Dinning WS1, ¶ 152.

²⁸⁶ Memorial, ¶ 214 (“In this letter, Minister Boussim again conceded that the Ministry had previously granted the Tankoro 2 Permit to Sarama.”).

misrepresented the Minister's letter. The letter was a response to a 3 May 2023 letter from Mr Dinning that continued Sarama's practice of "memorialising" facts in a self-serving way. Mr Dinning's letter stated: "What I did retain from our conversation and provides me with reassurance, is your confirmation of the grant of the Tankoro 2 Permit to Sarama Mining" ²⁸⁷ In his 10 May 2023 reply letter, Minister Boussim responded to Sarama's assertion that the "Tankoro 2 Permit" had already been granted by explaining the history and status of the Tankoro permit area in terms that were consistent with the applicable laws and regulations and the October 2020 and June 2021 Information Notes. The only complicating factor, which provides the basis for Sarama's mischaracterisations, is that the Minister adopted Sarama's practice of referring to the Tankoro permit area as the "Tankoro 2" permit area.

190. As noted above, in its December 2020 and August 2021 applications for a new exploration permit for Tankoro, Sarama proposed that the name for the requested permit be "Tankoro 2". ²⁸⁸ Sarama began to also refer to the Tankoro permit area as the "Tankoro 2 permit area" thereafter. In its 1 December 2021 news release discussed above, Sarama stated: "The Properties were formerly known as Tankoro and Djarkadougou respectively, but have been renamed as part of the process of re-issuing the respective Permits." ²⁸⁹

²⁸⁷ **Ex. C-0062**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries, dated 3 May 2022.

²⁸⁸ **Ex. C-0054**, Permit Application Form No. 4045 for Tankoro 2 permit by Sarama Mining Burkina SARL, dated 18 December 2020; **Ex. C-0058**, Permit Application Form No. 4272 for Tankoro 2 Permit by Sarama Mining Burkina SARL, dated 6 August 2021.

²⁸⁹ **Ex. R-0024**, Sarama Resources Limited, *Sarama Resources Granted New Exploration Permit for Tankoro Deposit in Burkina Faso, Set to List On ASX*, dated 1 December 2021 (reproduced in Junior Mining Network, dated 1 December 2021).

191. In actuality, the formal name of the permit area did not change. Despite Sarama's December 2020 application, the Ministry's June 2021 Information Note, like the October 2020 Information Note, continued to refer to the permit area as the "Tankoro" area. The DGCM also maintained the "Tankoro" name in its database,²⁹⁰ as did EITI, including in referencing the exploration permit later granted to Soleil in May 2024.²⁹¹ To be certain, the Ministry does sometimes use a numeric designator in naming permit areas, but that has been done for parallel permit areas. For example, there are separate Fobiri 1, Fobiri 2, and Fobiri 3 permit areas.²⁹²

192. As Sarama had been using the "Tankoro 2" description, the Minister mistakenly described the Tankoro permit area as the "Tankoro 2 permit area", which led him to also refer to the Tankoro Permit that expired in December 2020 as the "Tankoro 2 permit". When that is understood, the text of his letter, which Sarama has avoided quoting, accurately describes how the Tankoro Permit had expired and become the property of the State. The letter states:

With regard to the Tankoro 2 permit, I would like to point out that under the terms of Article 33 paragraph 1 of [Decree No. 2017-036], the research permit is awarded for a period of three (03) years and is renewable by right, two (02) times for consecutive periods of three (03) years. Paragraph 2 of the said article authorizes a single exceptional renewal. The mining regulations therefore do not provide for renewal after the expiry of the exceptional renewal period. However, the Tankoro 2 permit granted to your company has already benefited from an exceptional renewal. The said permit can

²⁹⁰ **Ex. R-0025**, Directorate of the Mining Cadastre of Burkina Faso, Map of active mineral licences and permits at <https://www.cadastreminier.bf/emc#>, p. 1.

²⁹¹ **Ex. R-0023**, Extractive Industries Transparency Initiative, *Burkina Faso 2024 EITI Report: Annual Report on Burkina Faso's Extractive Sector*, at <https://eiti.org/documents/burkina-faso-2024-eiti-report>, Annex 24.

²⁹² **Ex. R-0025**, Directorate of the Mining Cadastre of Burkina Faso, Map of active mineral licences and permits at <https://www.cadastreminier.bf/emc#>, p. 2.

therefore no longer be subject to exceptional renewal if an application for an exploitation permit has not been submitted.

Your company did not apply for an operating permit before the expiration of the exceptional renewal period. In-principle and in application of article 67 of the aforementioned decree, the Tankoro 2 research permit had to be withdrawn. It is in view of the consequences of the withdrawal on the activities of your company as provided for in article 68 of the aforementioned decree, that such a decision was not taken. However, in the absence of an application for an exploitation permit, the area covered by the Tankoro 2 permit is free of all rights and obligations as of the day following the expiration of the exceptional validity period. The Tankoro 2 permit has therefore become an active mining title of the State.

The area released by the Tankoro 2 permit, being free of all rights and obligations, may be reallocated through a competitive bidding process and the investments made on the Tankoro 2 perimeter, being mining assets, may be transferred to the investor who is selected.

The strategic nature of the state's mining assets means that the state is not obliged to sell these assets to former owners. However, it favors former owners who have made investments and who are aligned with the government's policy visions.

Therefore, the State could propose to transfer this mining asset to you, with a view to reallocating the freed-up area to you, without going through the competitive bidding procedure. It could possibly turn to another investor.

The conditions of the disposal of this mining asset, if any, will be communicated to you if your company is still willing to continue the exploration work in the Tankoro 2 perimeter.²⁹³

²⁹³ **Ex. C-0302**, Letter from the Minister of Mines to Sarama Resources Ltd., dated 10 May 2023, pp. 1-2.

193. As such, the Minister was plainly not admitting that Sarama had received a new exploration permit for the Tankoro area as Sarama and Mr Dinning allege. In explaining, for example, how the “Tankoro 2 permit granted to your company has already benefited from an exceptional renewal,” he could only have been referring to the original Tankoro Permit as there would have been no possibility of an exceptional renewal being requested or received for a second exploration permit granted in November 2021.

194. Apart from using the inaccurate “Tankoro 2” name for the permit area, Minister Boussim’s 10 May 2023 letter correctly described how the Tankoro Permit had received the maximum allowed renewals and expired such that the permit area had become the State’s property given that Sarama had not applied for an operating permit prior to the expiration of the Tankoro Permit on 17 December 2020. In doing that, the Minister, who was supposedly “hostile” to Sarama,²⁹⁴ made the important point, noted above, that the normal effect of the expiration would have been for a withdrawal notice to be issued pursuant to Article 67 of Decree No. 2017-036, but the Ministry had opted not to issue a withdrawal notification because the Ministry was open to considering former holders when reallocating reserved permit areas and was cognisant of the restrictions on Sarama that would result pursuant to Article 68 of the decree.

195. As the Minister described that history in such clear terms, Sarama and Mr Dinning have been forced to advance an extremely strained alternative reading of his 10 May 2023 letter to maintain their claim that he conceded that the “Tankoro 2 Permit” had been granted. They argue that the Minister was, indeed, referring to the second

²⁹⁴ See, e.g., Hamilton WS1, ¶ 91 (“It soon became apparent to me that Minister Boussim’s approach to the management of the Tankoro 2 Permit would be significantly different and more hostile than that of Minister Ouedraogo.”).

“Tankoro 2 Permit” granted in November 2021, and rather than providing an accurate account of how the original Tankoro Permit expired, was advancing a sloppy “excuse” for why the new “Tankoro 2 Permit” had been withdrawn. As Sarama states in the Memorial:

Minister Boussim now proffered a new excuse for why he would not issue the arrêté: Minister Ouedraogo apparently had issued the Tankoro 2 Permit to Sarama “in error” because Sarama had not submitted an application for an exploitation permit. This was false: the 2015 Mining Code and applicable Burkinabe regulations did not require Sarama to submit an application for an exploitation permit as opposed to a second exploration permit for the Tankoro Property.²⁹⁵

196. As noted, Sarama fully understands that the Minister was referring to the original Tankoro Permit in discussing how it had expired such that Sarama lost all rights in the permit area as it had not submitted an application for an operating permit prior to the deadline, which was 90 days prior to the expiration date (*i.e.*, 17 September 2020). Further, Sarama’s account does not make sense by its terms. If the Minister was claiming that the “Tankoro 2 Permit” had to be withdrawn because it was wrongly granted in November 2021 because Sarama had been required to apply for an operating permit rather than a new exploration permit, he would not simultaneously have indicated openness to granting Sarama a new exploration permit. Further, Sarama is simply ignoring how the Minister explained that the Ministry had decided to not issue a withdrawal notification pursuant to Articles 67 and 68 following the expiration of the Tankoro Permit because of its awareness of the prohibitions that Sarama would face if that were done.²⁹⁶

²⁹⁵ Memorial, ¶ 214. Mr Dinning similarly misrepresents the letter in his statement by pretending to believe that the Minister was referring to a “Tankoro 2 Permit” granted in November 2021 rather than to the original Tankoro Permit. Dinning WS1, ¶¶ 152-154.

²⁹⁶ Sarama’s artful argument on this point wrongly describes the Minister’s correct explanation of how a holder loses rights in a permit area if its exploration permit expires and the holder has not applied for an

197. Sarama's intent to mislead on this point is further confirmed by a closer examination of its claim that Minister Boussim admitted that the prior Minister "had issued the Tankoro 2 Permit to Sarama 'in error'."²⁹⁷ Sarama cites to the Minister's letter in making that claim to lead the Tribunal to believe that the Minister said that the permit had been granted "in error". Nowhere in the Minister's letter does he say "in error" or use similar terms. Rather, it is Mr Dinning who uses the terms "in error" in his witness statement in alleging: "In that letter, Minister Boussim admitted that the Ministry had granted the Tankoro 2 Permit but asserted that Minister Ouédraogo had granted the permit in error as Sarama had not submitted an exploitation permit application."²⁹⁸

198. Sarama's 15 May 2023 letter sent by Mr Dinning to the Minister provides further evidence that it understood that the Minister's discussion of the "Tankoro 2 permit" in his 10 May 2023 letter had merely mistakenly adopted Sarama's practice of referring to "Tankoro 2" as the name of the permit area. In the letter, Mr Dinning referred to the "investment Sarama has made in the Tankoro 2 permit," knowing that the Minister would see that as a reference to the exploration works that Sarama had done in the permit area under the original Tankoro Permit.²⁹⁹

199. In sum, Minister Boussim did not "concede" or "admit" in 2023 that Sarama had been granted the "Tankoro 2 Permit" by the prior Minister's 24 November 2021 letter.

operating permit as an assertion that a holder that does not apply for an operating permit is prohibited from ever applying for a new exploration permit. As discussed above, the prior holder would normally be subject to a one-year prohibition on submitting an application for a new exploration permit if the Ministry issued a withdrawal notification in response to the expiration. The prior holder would be entitled to apply after the one-year prohibition ended. Further, the Ministry could elect to not issue a withdrawal notification, which was a necessary part of its decision to allow for the possibility of reallocating reserved permit areas to prior holders.

²⁹⁷ Memorial, ¶ 214.

²⁹⁸ Dinning WS1, ¶ 152.

²⁹⁹ **Ex. C-0303**, Letter from Sarama Resources Ltd. to the Minister of Mines, dated 15 May 2023.

Rather, he correctly explained that Sarama held no rights in the Tankoro permit area following the expiration of the Tankoro Permit.

10. The Minister Did Not Impose Improper Conditions on the Grant of a New Exploration Permit

200. Following its unsuccessful attempt to mislead Minister Boussim into believing that Sarama had already been granted the “Tankoro 2 Permit” in November 2021, Sarama discussed the potential issuance of a new exploration permit to it in mid-2023. According to Sarama, the Ministry informed it that a new permit could be granted to Sarama, but only if Sarama satisfied two allegedly unreasonable and unlawful conditions, which were: (i) persuading Canada to “agree to licence certain military drone surveillance software to Burkina Faso”;³⁰⁰ and (ii) paying the Ministry an “irregular” and “extortionate” payment,³⁰¹ which Mr Hamilton characterises as a “bribe”.³⁰² As with the rest of Sarama’s account, these allegations do not withstand scrutiny.

201. Sarama’s allegations begin with Mr Dinning’s claim that Minister Boussim informed him in their 20 April 2023 meeting that Sarama needed to satisfy the two aforementioned conditions to receive a new exploration permit.³⁰³ As is already clear, Mr Dinning’s testimony, like his contemporaneous attempts to “memorialise” discussions with the Government, is contrived and self-serving.³⁰⁴

202. On the drone technology point, Mr Dinning has misrepresented the Minister’s statements in claiming that he demanded that Sarama persuade Canada to

³⁰⁰ Memorial, ¶ 209.

³⁰¹ Memorial, ¶¶ 23, 216.

³⁰² Hamilton WS1, ¶ 107.

³⁰³ Dinning WS1, ¶¶ 145-150.

³⁰⁴ Dinning WS1, ¶ 151.

agree to provide to Turkey “software that Burkina Faso had requested for drones” as a condition of receiving the new permit.³⁰⁵ The evidence shows that Sarama raised the possibility of it influencing Canada’s policy as a way of gaining the support of the Ministry.³⁰⁶ The Government’s concern with its surveillance capacity given the security situation was well known at the time, and there is no reason to think that the Minister would have independently decided that Sarama, a company controlled by Australians, should be required to change Canada’s policy.³⁰⁷

203. In his 3 May 2023 letter to the Minister, which was the same letter that attempted to “memorialise” the Minister’s “confirmation of the grant of the Tankoro 2 Permit,”³⁰⁸ Mr Dinning discussed Sarama’s attempt to meet the purported requirement regarding the release of drone technology to Turkey. He explained that Sarama had reached out to the Canadian and Australian governments to assist with that effort, but could not deliver any results because Sarama “is a small company” and the governments considered the drone technology issue a sensitive matter between the relevant States.³⁰⁹

204. In his 10 May 2023 reply letter, Minister Boussim began by briefly thanking Mr Dinning for “the steps taken with the Canadian and Australian Embassies to facilitate the use by Burkina Faso of the surveillance software for the drones supplied by Turkey.”³¹⁰ The Minister then turned to the reallocation of the Tankoro permit and, in doing so,

³⁰⁵ Dinning WS1, ¶ 146.

³⁰⁶ *Supra*, ¶¶ 60, 158.

³⁰⁷ *Id.*

³⁰⁸ *Supra*, ¶ 189.

³⁰⁹ **Ex. C-0062**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries, dated 3 May 2023, pp. 1-2.

³¹⁰ **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023, p. 1 (“I would like to thank you for the steps taken with the Canadian and Australian Embassies to facilitate the use by Burkina Faso of the surveillance software for the drones supplied by Turkey.”).

expressed no concern with Sarama’s inability to influence the drone technology matter.³¹¹ Instead, he indicated that the Ministry was open to the possibility of granting the permit to Sarama or “another investor”, but that it would be subject to “special conditions” that would need to be determined as had been indicated in the June 2021 Information Note.³¹²

205. In the subsequent communications, which are discussed in more detail below, the Minister did not raise the drone technology issue and instead continued to explain that the grant of a new exploration permit was conditioned only on the payment of the indicated price.³¹³ As such, it is clear that the Minister did not make the drone technology issue a condition of the grant of the permit as Mr Dinning alleges.

206. Aside from being meritless, the drone technology argument is pointless given that Sarama accepts that the Minister offered to provide it with a new permit if it could meet the acquisition price requirement for the reallocation of the reserved permit area. Sarama now characterises that requirement as “unlawful” and “extortionate”,³¹⁴ with Mr Hamilton describing it as a suspected request for a “bribe”.³¹⁵ These allegations are also untrue.

207. In his 10 May 2023 letter, the Minister described how the Tankoro permit area would be handled in a manner consistent with the approach that was discussed in Decree No. 2017-0036, Order No. 2018-024, and the October 2020 and June 2021

³¹¹ **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023, p. 1 (“I would like to thank you for the steps taken with the Canadian and Australian Embassies to facilitate the use by Burkina Faso of the surveillance software for the drones supplied by Turkey.”).

³¹² **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023.

³¹³ **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023.

³¹⁴ Memorial, ¶ 219.

³¹⁵ Hamilton WS1, ¶ 107.

Information Notes. He explained that the permit area had “become an active mining title of the State” following the expiration of the Tankoro Permit and that it could be “reallocated through a competitive bidding process.”³¹⁶ He then affirmed how the Ministry would give “special consideration” to the prior holders in noting that the State “favors former owners who have made investments,” while making clear that the State “is not obligated to sell these assets to former owners.”³¹⁷ The Minister next explained that reallocation would be subject to special conditions given that it was a case of reallocating a permit area that had reverted to the State following the expiration of an exploration permit by inviting Sarama to work with his office to “discuss the conditions” for the issuance of a new permit such that Sarama would be able to resume exploration work in the Tankoro area.³¹⁸

208. As Sarama had received the October 2020 and June 2021 Information Notes and was undoubtedly familiar with Decree No. 2017-0036 and Order No. 2018-024, it could not have been surprised by the Minister’s description of how the permit area would be handled. Rather, it would have understood that the Ministry had determined that it was not possible to follow the original plan of reallocating reserved areas through competitive bidding processes, and so had instead adopted a process of inviting companies to apply for the permit areas subject to imposing “special conditions” on the grant of a new exploration permit. It also would have appreciated that setting a targeted sale price as one of the special conditions was a reasonable and unsurprising means of

³¹⁶ **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023, p. 2.

³¹⁷ **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023, p. 2.

³¹⁸ **Ex. C-0302**, Letter from Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 10 May 2023, p. 2.

maximising revenue from the reallocation of reserved areas in the absence of a competitive bidding process, particularly as the permitting fee under the rules for handling permit areas in the normal way was negligible.

209. After Sarama confirmed to the Ministry in its 15 May 2023 letter that it wished to pursue a new exploration permit, the Ministry specified that the special condition imposed on the reallocation would be payment of FCFA 6 billion (approximately USD 10 million at the time) as the price for acquiring the State asset. According to Sarama and Mr Hamilton, this requirement was first communicated to it in a 14 June 2023 meeting between its local employees and an advisor to the Minister, Mr Kéré, with an explanation that the amount “was calculated based on the amounts Sarama had originally invested.”³¹⁹

210. On 19 June 2023, Mr Hamilton and two of Sarama’s local employees, Mr [REDACTED] and Mr [REDACTED], met with Minister Boussim and other members of the Ministry to follow up on the acquisition price issue. According to Mr Hamilton:

At this meeting, Minister Boussim verbally informed me of the 6 billion CFA francs demand and asked for Sarama’s “proposition”. Minister Boussim gave no legal justification for this new monetary demand, and I understand there was none to be found in the 2015 Mining Code and applicable regulations at the time. Minister Boussim did not share how he or presumably the Ministry’s technicians had calculated the 6 billion CFA francs figure, and I assumed it was simply made up.³²⁰

211. Mr Hamilton is, yet again, not credible. It does not make sense for him to say that he assumed the identified price “was simply made up” when he had been told by

³¹⁹ Memorial, ¶ 216.

³²⁰ Hamilton WS1, ¶ 98.

Sarama's local employees that the Ministry had indicated just a few days earlier that the amount was determined based on assessment of the expenditures of the prior holder.³²¹

212. Mr Hamilton's claim that there was no "legal justification for this new monetary demand" is an extension of his feigned ignorance of the legal framework established by Decree No. 2017-0036 and Order No. 2018-024, under which permit areas covered by expiring permits were reserved to the State and handled differently than new permit areas, and with the June 2021 Information Note, which explained that the Ministry did not have the capacity to conduct competitive bidding processes.

213. As discussed in more detail below, Sarama sent Minister Boussim a letter on 22 June 2023 that further pushed its false claim that the "Tankoro 2 Permit" had already granted, while pressing the Minister to drop the acquisition price condition for the reallocation of a permit area that had been reserved to the State.³²² According to Mr Hamilton, in a 27 June 2023 meeting, Minister Boussim "said that since he was a 'kind person', he would reduce the amount Sarama had to pay to 4.5 billion CFA francs instead of 6 billion CFA francs."³²³ Mr Hamilton further claims that the Minister told him "that the instructions were from Capitaine Traoré himself" and "gave no legal justification for his demand for 4.5 billion CFA francs." For Mr Hamilton, "Minister Boussim's moving goal post for the monetary demand also convinced me that the Ministry had done no rigorous calculation based on any Burkinabe law or regulation nor explained to me how he had come to that figure.

³²¹ *Supra*, ¶¶ 184-188.

³²² **Ex. C-0308**, Letter from Sarama to Ministry of Mines 22 June 2023, p. 1.

³²³ Hamilton WS1, ¶ 102.

214. Mr Hamilton's attempt to portray the Ministry's reduction of the required acquisition price as proof that it was acting arbitrarily and unlawfully is yet another mischaracterisation. As noted, the Ministry had a clear legal basis for handling the Tankoro permit area in a different manner, including to generate revenue through the reallocation process as it was dealing with a permit area that had become a State asset after the exploration permit expired and showed some potential for development. The Ministry was free to reduce the amount it had initially requested, particularly in dealing with the prior holder, and Sarama cannot fault the Ministry for lowering the price after hearing Sarama's pleas about its limited resources and purported ability to soon make significant royalty payments to the State if it received a new exploration permit.

215. Putting aside the issue of Mr Hamilton's lack of credibility, it bears emphasising that his testimony does not fit with Claimant's overall narrative that the new Government that took power in late 2022 was hostile and sought to unlawfully expropriate the Tankoro Deposit. If that were true, there is no reason that the Minister would have offered such a reduction in the required acquisition price, particularly if it were also true that the exploration works done by Sarama under the original permit showed that the Tankoro Deposit was immensely valuable.

216. As Sarama understands that the applicable laws and regulations provided for the imposition of the acquisition price requirement for the reallocation of reserved areas, and that the Minister's offer to reduce the price does not fit with its allegations of hostility and expropriatory intent, it has gone further than merely alleging that the price was unfounded and asserts that it was likely a demand for a bribe. Mr Hamilton again does the heavy lifting for Sarama on this point, stating:

[M]y feeling was that something was not quite right about Minister Boussim's monetary demand to Sarama. Paying anything to Minister Boussim outside the boundaries of the 2015 Mining Code and applicable regulations would have placed Sarama in a difficult legal and commercial position whereby the company could have been accused of paying a bribe to obtain something, the *arrêté*, that was ordinarily normal administrative practice. I also had no idea where any sum of money paid to the Ministry or Minister Boussim would have ended up.³²⁴

217. Sarama knows that any international arbitral tribunal will, quite understandably, look very negatively on a respondent State that pressures an investor to pay a bribe and then takes retaliatory action if does not do so. That corruption is such a serious matter makes Mr Hamilton's allegation even more troubling, especially as it is a key part of Sarama's attempt to obtain hundreds of millions of dollars in damages from Burkina Faso.

218. While Mr Hamilton's allegation is extremely serious, it can be quickly disposed of. Respondent has already shown above that the established legal framework for permit areas that had been reserved to the State called for the Ministry to reallocate the permit areas through a competitive bidding process, which could generate revenue with respect to permit areas that showed some potential for development based on the prior exploration works. When the Ministry determined that it did not have the capacity to conduct competitive bidding processes, it elected to instead invite companies to apply and set "special conditions" on the grant of a new permit, rather than following the normal "first come, first served" process, which required payment of effectively nominal

³²⁴ Hamilton WS1, ¶ 107.

processing fees. Indeed, as Sarama itself asserts, the required processing fee for its 6 August 2021 application “was only 2 million CFA francs or approximately US\$ 3,200.”³²⁵

219. Just as importantly, as the Tribunal no doubt understands, government officials that seek to extract bribes do not openly record their illicit demands. The Minister repeatedly discussed the additional payment requirement in official Ministerial correspondence with Sarama. Further, Sarama’s own documents show that Minister Boussim explained to the Ambassador of Canada in their December 2022 meeting that an additional payment would be required beyond the processing fee because the Tankoro permit area had been reserved to the State and was being reallocated subject to special conditions.³²⁶ Notably, the embassy’s report of the Ambassador’s discussion with the Minister emphasised that one of the reasons that the Ministry was reallocating the Tankoro permit area subject to special conditions including the payment of an acquisition price for the asset is that it “feared to set a precedent” by departing from the established framework and providing more favourable treatment to Sarama. Thus, the Minister was expecting that the reallocation of the Tankoro permit area would be monitored and considered it important that the Ministry impose the acquisition price requirement so as to not be seen as according special treatment to Sarama.

³²⁵ Memorial, ¶ 217, n. 527.

³²⁶ **Ex. C-0238**, Email from A. Dinning (Sarama) to J. Hamilton (Sarama), dated 21 December 2022 (“The Minister seems well aware of the problem. He said they are working on finding a solution. Basically, the idea is to grant Sarama the permit, given all the investments already made on the property. But he did said that it will probably not be under normal conditions. We understood he was referring to the amount you will have to pay to get your permit reissued. He mentioned that the payment noticed already received, will certainly not [*sic*] applied. Fro [*sic*] him, regarding the law, the your [*sic*] property is back in the state assets. Therefore, it should be revaluated before being transferred to a company and the same applied to other assets. They fear to set a precedent.”).

220. Notably, if Mr Hamilton is to be believed in asserting that the Minister was seeking a bribe in requiring an additional payment as a condition of a new permit, that would mean that Mr Dinning's witness statement constitutes an admission to criminal conduct. In discussing Mr [REDACTED]'s August 2023 meeting with Minister Boussim, he asserts:

On or about 2 August 2023, Mr [REDACTED] met with Minister Boussim at his offices in Ouagadougou. By this stage, I was deeply concerned that the Ministry would follow through on its threat to "operationalise" the Tankoro 2 Permit unless we could reach a mutually beneficial settlement. I had given Mr [REDACTED] instructions to offer Burkina Faso a series of payments totalling 1.5 billion CFA francs (approximately US\$ 2.5 million) linked to Project milestones to settle the dispute over the Tankoro 2 Permit.³²⁷

221. While assessing the relative credibility of Mr Dinning and Mr Hamilton is a difficult endeavour, Mr Dinning's testimony on this point is more reliable. Rather than agreeing to pay a portion of an alleged bribe request, Mr Dinning must be explaining that he understood that the Minister was seeking a legitimate payment to the State as a condition of the grant of a new permit and had authorised Mr [REDACTED] to offer a lower amount in response.

11. The Minister Did Not Revoke the Purported "Tankoro 2 Permit", Which Never Existed

222. Sarama asserts that, because it was unable and unwilling to meet the "extortionate" demands, the Ministry "unlawfully revoked the Tankoro 2 Permit in

³²⁷ Dinning WS1, ¶ 162.

August 2023,” thereby destroying the value of all of Sarama’s investment in Burkina Faso, as they all depended on the company having that permit.³²⁸

223. As it is so readily apparent that there is no merit to Sarama’s claim that Minister Ouedraogo’s 24 November 2021 letter granted it the “Tankoro 2 Permit”, its claim that the Ministry revoked that permit does not merit serious consideration. In any case, for the sake of thoroughness, it is worth reviewing the relevant documents to show that Sarama’s allegation of a revocation is baseless.

224. On 22 June 2023, Sarama sent a letter to Minister Boussim that Mr Hamilton says he and Mr Dinning drafted together.³²⁹ The letter took advantage of how the Minister had adopted Sarama’s terminology to mistakenly refer to the Tankoro permit area as the “Tankoro 2 permit area” in his 10 May 2023 letter to claim that he had incorrectly asserted that Sarama had requested an additional exceptional renewal of the second permit purportedly granted in November 2021.³³⁰ Sarama’s 22 June 2023 letter then claimed that, because its August 2021 application had been accepted by the prior Minister’s “[g]rant letter of 24 November 2021,” Sarama was entitled to receive the new permit “in accordance with the provisions of Article 31 of Decree 2017-36.”³³¹

225. Sarama’s 22 June 2023 letter was plainly misleading. As discussed above, the 24 November 2021 letter did not purport to grant the permit and made clear additional processing would be required, including to determine the “special conditions” that could be required. Further, Mr Dinning and Mr Hamilton were well aware that the Tankoro

³²⁸ Memorial, ¶ 219.

³²⁹ Hamilton WS1, ¶ 100.

³³⁰ **Ex. C-0308**, Letter from Sarama to Ministry of Mines 22 June 2023, p. 2.

³³¹ **Ex. C-0308**, Letter from Sarama to Ministry of Mines 22 June 2023, p. 2.

permit area was not being handled in the same manner as a new permit area and was instead subject to the procedure applied for the reallocation of permit areas that had been covered by expired permits.

226. On 6 July 2023, Minister Boussim replied to Sarama's 22 June 2023 letter. The letter began by addressing Sarama's assertion that it had already been granted a new exploration permit for the Tankoro permit area on the basis of the 24 November 2021 letter from the prior Minister. It stated:

In the above-mentioned letter, you informed me that SARAMA had applied for the Tankoro 2 exploration permit following the expiry of the said permit: that it had received a letter of acceptance of its application on November 24, 2021 and that it had paid the fixed fee on November 29, 2021.

You concluded that, in accordance with article 31 of decree no. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVC C/MCIA of January 26, 2017 on the management of mining titles and authorizations, you meet the conditions for granting the Tankoro 2 research permit. Better still, you assert that you have legal rights to the Tankoro 2 permit.³³²

227. After summarising Sarama's arguments, the Minister affirmed that his 10 May 2023 letter had correctly explained that the original permit had expired, stating: "As I pointed out in my letter of May 10, 2023, you have not applied for an operating permit following the expiry of the exceptional renewal."³³³

228. The Minister then again explained that the Ministry had not issued a withdrawal notification in order to avoid the prohibition that would result and maintain the

³³² **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023, p. 1.

³³³ **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023, p. 3.

possibility of Sarama obtaining a new exploration permit.³³⁴ He also specified that not issuing the withdrawal notification did not mean that Sarama retained rights in the permit area. His explanation was correct except that he again mistakenly referred to the Tankoro area as “Tankoro 2” such that he described the original Tankoro Permit as “the Tankoro 2 permit”:

This in no way means that you retain rights to the area formerly covered.

Notwithstanding the absence of a withdrawal of the Tankoro 2 permit. The fact remains that, in the absence of an application for a mining permit, the area it covered is released from all rights and obligations as of the day following the expiry of the exceptional validity period. The Tankoro 2 permit has since become an active State mining title.³³⁵

229. Rather than meaningfully engage with the Minister’s 6 July 2023 letter, Sarama and its witnesses claim the Minister’s account of the permitting status was “nonsensical, lacked any basis in Burkinabe law, and contradicted prior Ministry practice.”³³⁶ They can only do that by taking advantage of the Minister’s incorrect naming of the permit area to claim, as they did with his 10 May 2023 letter, that his accurate account of how the Tankoro permit area was handled following the expiration of the Tankoro Permit is a confused description of why the “Tankoro 2 Permit” that Sarama allegedly received in November 2021 was being withdrawn.

³³⁴ **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023 (“It is in view of the consequences of the withdrawal of the permit as provided for in article 68 of the said decree on the activities of your company, which holds other research permits, that the withdrawal decision has not been taken.”).

³³⁵ **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023, p. 3.

³³⁶ Memorial, ¶ 222.

230. After describing how the Tankoro permit area had been handled in his 6 July 2023 letter, Minister Boussim addressed Sarama's claim that it had been granted the "Tankoro 2 Permit" by the prior Minister's 24 November 2021 letter:

You enclosed with your letter a letter in which the mining administration notified you of the acceptance of your request. While it is true that administration is a continuity, I cannot give effect to a decision taken in violation of the law.³³⁷

231. Sarama and its witnesses focus on this passage, with Mr Dinning asserting: "Minister Boussim sent a letter to Sarama alleging that Minister Ouedraogo had granted the Tankoro 2 Permit illegally and that he could not give effect to the Tankoro 2 Permit, this time because the area was reserved for an exploitation permit and therefore reverted to the State."³³⁸ Minister Boussim was plainly not saying that Minister Ouedraogo had granted the permit or that he could not give effect to it. He understood that a permit could only be granted through the issuance of an *arrêté*, and that an *arrêté* for the Tankoro area had not been issued. His comment merely reflects a decision to reject Sarama's allegation on the basis that the 24 November 2021 letter could not have granted the permit without going to the trouble of parsing the terms of the letter.

232. To advance its allegation of a wrongful revocation of the "Tankoro 2 Permit", Sarama puts a heavy spin on a meeting that Mr Dinning, Mr Hamilton, and other Sarama colleagues had with Minister Boussim on 7 July 2023.

At that meeting, I presented a hard copy of the Ministry's letter to Sarama accepting the Tankoro 2 Permit application and inviting Sarama to pay the required fee dated 24 November

³³⁷ **Ex. C-0063**, Letter from the Minister of Energy, Mines and Quarries to Sarama Resources Ltd, dated 6 July 2023, p. 4.

³³⁸ Dinning WS1, ¶ 159. See also Hamilton WS1, ¶ 103 ("On 6 July 2023, Minister Boussim sent a letter to Sarama contending that Minister Ouedraogo had granted the Tankoro 2 Permit illegally and that, accordingly, Minister Boussim could not issue the *arrêté* for the Tankoro 2 Permit.").

2021, and Sarama's receipt of payment presented and stamped by the Ministry on 29 November 2021. Minister Boussim and Mr Kéré smirked at the paperwork and at me. Minister Boussim then proceeded to demand 4.5 billion CFA francs (approximately US\$ 7.5 million) for the Tankoro 2 Permit. The Ministry's message was clear: it was not a payment for the release of the arrêté, but to repurchase the Tankoro 2 Permit itself.³³⁹

233. This is yet another heavy-handed attempt to disparage the Ministry. There is no reason to give any credit to Mr Dinning's suggestion that the Minister derisively "smirked" at him. Nor is there any reason to accept his assertion that the Ministry was taking the position that the payment was required for Sarama "to repurchase the Tankoro 2 Permit itself." As discussed above, the "Tankoro 2 Permit" had never been granted and it had always been understood that the grant of a new permit for the Tankoro area would be subject to special conditions, which include payment of an acquisition price given that it had proven not possible to capture value for the disposal of a State asset through a competitive bidding process.

234. In his witness statement, Mr Kéré confirms that, at all meetings with Sarama, the Ministry staff explained clearly that the process was not akin to repurchasing the Tankoro permit. Rather, it was made clear to Sarama that the subject of the acquisition would be the mining asset, the acquisition of which constituted the special condition set forth in the June 2021 Information Note.³⁴⁰

³³⁹ Dinning WS1, ¶ 160. See Kéré WS1, ¶¶ 20-22, 32.

³⁴⁰ Kéré WS1, ¶ 32. See also *id.*, ¶¶ 33-35.

235. On 13 July 2023, Mr Dinning sent a reply to the Minister’s 6 July 2023 letter. By this point, Sarama was clearly planning on a treaty arbitration and Mr Dinning was unabashed in using his letter to “memorialise” its narrative. He began by stating:

We acknowledge receipt of your correspondence of July 06, 2023, in which you inform us that if we do not purchase our Tankoro 2 exploration permit, you will instruct your departments to return the permit fees we have paid since November 29, 2021 and return the exploration permit to the BUMIGEB portfolio.³⁴¹

236. The Minister had not, of course, informed Mr Dinning that the “Tankoro 2 Permit” had been granted such that it would need to be returned to the State. Rather, he had explained that no such permit had been granted and that one of the conditions on the grant of a new permit was payment of the specified price to acquire the State’s asset.

237. Mr Dinning goes on to describe the alleged discussion between Mr [REDACTED] and the Minister “[o]n or about 2 August 2023.”³⁴² Mr Dinning explains that he had authorised Mr [REDACTED] to offer “a series of payments totalling 1.5 billion CFA francs (approximately US\$ 2.5 million)” —which, as noted above—would equate to an offer of a bribe if Mr Hamilton’s characterisation of the payment condition is accepted (which it should not be). Mr Dinning further alleges that, according to Mr [REDACTED], Minister Boussim rejected the offer and also said that President Traoré became angry and had told him to raise the required acquisition price for the asset back to the original amount of FCFA 6 billion because the President was upset that the Ambassador of Canada had told Minister Boussim that Sarama planned to “destroy all the data” it held on Tankoro.³⁴³

³⁴¹ **Ex. C-0311**, Letter from Sarama to Minister of Mines 13 July 2023, p. 4.

³⁴² Dinning WS1, ¶ 132.

³⁴³ Dinning WS1, ¶ 162.

238. There is no reason to accord any evidentiary value to Mr Dinning's testimony as to what Mr ██████ told him about what Minister Boussim said he told the President about what the Ambassador of Canada had told him. After describing Mr ██████'s report of the meeting, Mr Dinning claims: "In September 2023, I asked Mr ██████ for a reminder of what happened at the meeting, and Mr ██████ sent me message on Signal confirming the above."³⁴⁴ It is difficult to make sense of the exhibit that Mr Dinning cites as the Signal message sent by Mr ██████ and Respondent will need to obtain the full exchange in a more clear and organised format to assess it. For now, the discussion appears to be between Mr Hamilton and another Sarama employee, ██████. ³⁴⁵ While Mr ██████ asserts that Minister Boussim told him about the discussion with the Ambassador, there is no reason to consider it accurate. It does bear noting that Mr ██████'s message does not assert that President Traoré became angry and indicates that he directed Minister Boussim to return the price to the original amount of FCFA 6 billion because the Minister had not been authorised to reduce it.

239. Sarama claims that the Minister's 25 August 2023 letter is the instrument that revoked the "Tankoro 2 Permit" and expropriated its investments. The letter bears quoting at length as the explanation given by the Minister

I have the honour of responding to your application registered on 06 August 2021 to the Directorate General of the Mining Cadastre (DGCM), under code no. 4272 by which you requested the granting of the exploration permit called "TANKORO 2" located in the provinces of Bougouriba, Poni and Comoé for the search for gold.

³⁴⁴ Dinning WS1, ¶ 163.

³⁴⁵ **Ex. C-0313**, Signal Thread (discussing meeting with Chief of Staff for Ministry of Mines), dated 2-4 August 2023.

From the examination of the application, it emerges that the scope requested covers that of the former TANKORO exploration permit which arrived at the end of the renewal period on 17 December 2020 and therefore systematically transferred to the mining assets of the State.

In order to allow the continuation of the research work on the basis of the results obtained as a former holder, SARAMA MINING BURKINA SARL was authorised to file a new application whose investigation resulted in the payment of the granting fees pending the definition of special conditions for the preparation of the granting order. Among these special conditions is the principle of the transfer of mining assets that have become the property of the State of Burkina Faso.

However, following our exchanges and following your correspondence no. 2023-02/CEO/SM of 27 July 2023 and no. 2023-03/CEO/SM of 3 August 2023 clearly supporting your inability to pay the sale price of the mining assets of the State, I note with regret that we have not reached an agreement on the said special conditions.

Consequently, your application for grant cannot be approved.³⁴⁶

240. That explanation provided a clear and accurate account of how the Tankoro permit area had been handled in a manner that was entirely fair and reasonable, and consistent with the approach for permit areas that had been reserved to the State pursuant to Decree No. 2017-0036, Order No. 2018-024, and the October 2020 and June 2021 Information Notes.

241. Rather than meaningfully engage with the Minister's 25 August 2023 letter, Mr Dinning states:

The letter made no sense, as the application for the Tankoro 2 Permit had already been granted two years earlier and if any

³⁴⁶ **Ex. C-0064**, Letter from the Minister of Mines to Sarama (Expropriation letter), dated 25 August 2023. See also Kéré WS1, ¶¶ 20-22, 32-35.

special condition were to be applied, the government had 60 days to apply them and record them on the *arreté*, so there was no basis for the Minister's position on the Tankoro 2 Permit.³⁴⁷

242. This response encapsulates the fundamental unseriousness of Sarama's allegation that the Ministry revoked the "Tankoro 2 Permit". They have pretended to have no awareness of the relevant provisions of Decree No. 2017-0036 and Order No. 2018-024, even though the supposedly "shocking" October 2020 Information Note referenced those instruments, because if they engaged with those provisions, it would be obvious that the 24 November 2021 letter was not purporting to grant the permit and was inviting the processing fee to complete the processing of Sarama's application, which required determining the special conditions that would apply to the grant of a permit. As the Tankoro permit area was being processed subject to the special procedures established for reallocating reserved areas, the normal procedures did not apply, and the Ministry was under no strict timeline by which it needed to identify those special conditions. To be certain, the fact that the processing of the 6 August 2021 application remained outstanding for a longer than normal period after Sarama paid the processing fee on 29 November 2021 is understandable given the turbulence in Burkina Faso in 2022, and the lengthy discussions between Sarama and Minister Boussim regarding the special conditions following his appointment in October 2022. In any case, a complaint about the time that it took for the Ministry to identify the special conditions is a matter regarding the admission of an investment and provides no basis for Sarama's BIT claims.

³⁴⁷ Dinning WS1, ¶ 165.

12. The Ministry Did Not Improperly Grant a New Exploration Permit for Tankoro to Soleil in 2024

243. To add substance to its manifestly deficient account of an improper and expropriatory taking of its investment in Tankoro, Sarama suggests that the Minister's August 2023 letter purportedly revoking the "Tankoro 2 Permit" was linked to a plan to transfer Sarama's valuable mining to a politically connected company:

Burkina Faso has implemented a *de facto* policy of anti-Western resource nationalism designed to reassert State control over the country's mining sector and to eliminate Western commercial participation in favour of Burkinabe and strategically aligned non-Western interests. In direct furtherance of this policy, the Respondent revoked arbitrarily the Claimant's Tankoro 2 Permit and transferred it to Soleil, a Burkinabe company with close political ties to the Traoré administration.³⁴⁸

244. The Tribunal would be rightly concerned if it were true that Burkina Faso expropriated Sarama's mining rights in Tankoro for the purpose of transferring them to a company with close political ties to the Government. Sarama's claim is not, however, true for a number of reasons.

245. First, as already established, the "Tankoro 2 Permit" was never granted to Sarama, and the Ministry instead afforded Sarama the opportunity to obtain a new exploration permit for Tankoro by satisfying the reasonable condition of paying the price specified by the Ministry given that the Tankoro permit area had reverted to it.

246. Second, as no "Tankoro 2 Permit" had been granted, it could not be "transferred" to Soleil. Rather, following Sarama's affirmation that it would not pay the

³⁴⁸ Memorial, ¶ 349.

specified price, the Ministry was in the position of continuing to hold the Tankoro permit area as a State asset.

247. Third, there is no evidence that the Ministry's 25 August 2023 letter rejecting Sarama's 6 August 2023 application had anything to do with an intent to "transfer" the permit to Soleil. Indeed, Soleil did not acquire an exploration permit for Tankoro until 20 May 2024, which was approximately nine months later.

248. Fourth, Sarama has not bothered coordinating its allegation of a coordinated expropriation and transfer with the testimony of its own witnesses. Mr Hamilton asserts: "[W]e heard that on 6 September 2023 Minister Boussim advertised the Tankoro 2 Permit as available for purchase at the Africa Down Under Mining Conference in Perth, Australia."³⁴⁹ Needless to say, if the Ministry was attempting to expropriate Sarama to assist Soleil, it does not make sense for the Minister to have advertised the Tankoro permit area at an international conference.

249. Fifth, Soleil is a recognised mining company³⁵⁰ that has significant mining assets in Burkina Faso. That includes assets that it has acquired on commercial grounds with no allegations of undue influence from the Government. For example, in 2025, Soleil acquired Canadian Fortuna Mining Corp's ("Fortuna") Burkina Faso mining assets and Fortuna's CEO described the purchase price as "attractive" and "optimiz[ing] value".³⁵¹

250. The final reason that bears noting is Soleil's payment of a purchase price for its exploration permit rather than just the normal processing fee. Mr Hamilton asserts that Soleil paid the same price the Minister had requested from Sarama. He states:

³⁴⁹ Hamilton WS1, ¶ 109.

³⁵⁰ **Ex. R-0026**, Soleil Resources website, at <https://soleilresources.com/>.

³⁵¹ **Ex. R-0027**, *Fortuna Mining Exits Burkina Faso for \$130M*, Mining.com, 11 April 2025.

“[F]rom my local contacts on the ground in Ouagadougou, I came to understand that Soleil paid the approximately 6 billion CFA francs or US\$ 10 million that Minister Boussim had tried unsuccessfully to extract from Sarama.”³⁵² It is not clear how the FCFA 6 billion price condition was “extortionate” as imposed on Sarama and designed to expropriate the “Tankoro 2 Permit” so that it could be transferred to Soleil if the Ministry imposed the same “extortionate” price on Soleil.

251. In any case, Mr Hamilton’s testimony is, again, incorrect, and seems designed to cover another flaw in Sarama’s case. Soleil actually paid a significantly lower price of FCFA 800 million to acquire its exploration permit in Tankoro in May 2024.³⁵³ The reason it paid less is not that the Ministry was seeking to advantage Soleil. As noted, after rejecting Sarama’s application after it said that it would not pay the specified price, the Ministry continued marketing the Tankoro area. The problem it faced was that Sarama refused to comply with its obligation under the 2015 Mining Code and regulations to provide the Government with the data from its exploration activities. As Claimant itself has emphasised, it is that data that added value to the permit area. In addition to showing that there was potential for development, the data was valuable in that it was essentially the proof of past exploration works and also guided what further exploration works to be carried out and, eventually, the development of a plan for operationalising the area. Without the data, potential buyers would essentially need to “start over” with exploration works. While they might have reason to think that there was potential for development based on the information that Sarama had made available without the required data, they

³⁵² Hamilton WS1, ¶ 110.

³⁵³ Kéré WS1, ¶¶ 35-36.

could have much less confidence in the permit area's prospects and would need to largely repeat the exploration works that had been done.

252. As Mr Hamilton knows that Sarama did not provide the Ministry with the data that was required under the 2015 Mining Code and regulations, it is incongruous for him to claim that "Soleil stands to benefit from the previous work that Sarama did on the Tankoro Property."³⁵⁴ In reality, Sarama's violation of its obligations under the law, which it expressly agreed to comply with as a condition of obtaining the Tankoro Permit, cost Burkina Faso a significant amount. While there is no question that mining rights in the Tankoro area were not nearly as valuable as Claimant now alleges, the Ministry certainly could have received a higher purchase price for the permit area had it been able to provide the data from Sarama's past works to the buyer. While it is not certain that a company would have paid the FCFA 6 billion price that the Ministry set as the target based on the information available to it, there was certainly significant value that was not captured because of Sarama's refusal to comply with its obligations. Based on the purchase prices paid by other companies for other reallocated areas for which data was provided, he believes it is likely that Sarama's refusal to comply with its obligations cost Burkina Faso at least a few million US dollars.³⁵⁵

³⁵⁴ Hamilton WS1, ¶ 110.

³⁵⁵ **Ex. R-0028**, Contract No. 2023-002 with Afro Turk dated 25 April 2023 (providing for a payment of FCFA 4 billion for acquisition of gold exploitation permit); **Ex. R-0029**, Contract No. 2023-003 with Ali Konate dated 16 May 2023 (providing for a payment of FCFA 1.5 billion for acquisition of exploration permit); **Ex. R-0030**, Contract No. 2023-001 with Afro Turk dated 25 April 2023 (providing for a payment of FCFA 28 billion for acquisition of Manganese exploitation permit). See Kéré WS1, ¶ 26 ("*l'actif minier TAMBAO a été cédé au prix de 28 milliards de francs CFA suivant contrat de cession d'actif entre l'État burkinabé et la société AFROTURK en date du 25 avril 2023.*")

C. The Bondi Deposit is a Smaller and Poorly Explored Area That Was Never Subject to Regulation by Burkina Faso

253. Sarama's claims in this arbitration are also premised on the allegation that, following the alleged "*retroactive withdrawal*" of the "Tankoro 2 Permit", it was "*thereby*" deprived of the use and enjoyment of other permits and assets. Among these is the permit over the Bondi Deposit known as the Djarkadougou permit (the "Djarkadougou Permit"), which allegedly formed part of the "Sanutura Project" that was made up of the Tankoro Deposit and the Bondi Deposit.³⁵⁶

1. The Bondi Deposit Is a Smaller Deposit That Sarama Purchased from Orezone in 2017

254. The Bondi Deposit is smaller than Tankoro,³⁵⁷ and is located North-East to the latter.³⁵⁸ Sarama did not discover the Bondi deposit; it purchased rights over it from Orezone.³⁵⁹ Orezone had been the owner of exploration rights over parts of the Bondi deposit since 1998,³⁶⁰ and first identified potential gold mineralisation in this area, as shown by the following statement in an SEC document filed by Orezone in 2003: "Bondi was essentially a grassroots exploration project that had not been the subject of previous exploration programs by other companies."³⁶¹

³⁵⁶ Memorial, ¶ 316 ("Burkina Faso arbitrarily and retroactively revoked the Claimant's Tankoro 2 Permit, thereby depriving the Claimant of the use, enjoyment, and economic benefit of its protected investments in the Sanutura Project and, consequently, the Additional Projects.").

³⁵⁷ Memorial, ¶ 4.

³⁵⁸ **Ex. C-0029**, Fifth Cube Report of 2022, p. 33.

³⁵⁹ **Ex. C-0142**, Sarama Resources Ltd, Press Release, 'Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso from Orezone Gold' dated 24 May 2016.

³⁶⁰ **Ex. C-0142**, Sarama Resources Ltd, Press Release, 'Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso from Orezone Gold' dated 24 May 2016, p. 2; **Ex. R-0031**, Orezone Annual Information Form for year ended 31 December 2006, dated 30 March 2007, p. 20.

³⁶¹ **Ex. R-0031**, Orezone Annual Information Form for year ended 31 December 2006, dated 30 March 2007, p. 20.

255. After conducting exploration activities over the Bondi area, Orezone published in 2009 a maiden resource estimate of 0.28 moz Measured and Indicated resources and 0.15 moz of Inferred resources.³⁶² It continued work on the project, including metallurgic testwork in 2013.³⁶³

256. Claimant alleges that it had been interested in obtaining rights over the Bondi deposit since the very beginning of its involvement in the exploration of gold in Burkina Faso,³⁶⁴ and even from the “inception” of the company according to Mr Schmiede.³⁶⁵

257. It is unclear whether Claimant first approached Orezone’s CEO in 2015 or early 2016.³⁶⁶ Nevertheless, Sarama sent a heads of agreement to Orezone’s CEO in May 2016 in order to transfer the Djarkadougou permit.³⁶⁷ This document was considered as a “Binding Memorandum of Understanding,” or “*protocole d’accord*” in French, in the subsequent sale.³⁶⁸ Orezone agreed to sell to Sarama the Djarkadougou permit in exchange for a package of shares in Sarama and warrants exercisable over the following three years, as well as a production royalty of USD 20 per oz for the first 200,000 ounces

³⁶² **Ex. C-0079**, Orezone Gold Corporation, Annual Report 2009, dated 31 March 2010, p. 6; **Ex. R-0032**, *Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso From Orezone Gold*, Junior Mining Network, 24 May 2016; Memorial, ¶ 124.

³⁶³ Schmiede WS1, ¶ 52; **Ex. C-0142**, Sarama Resources Ltd, Press Release, ‘Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso from Orezone Gold’ dated 24 May 2016.

³⁶⁴ Memorial, ¶ 118 (“Since the outset of Sarama’s investment in the Tankoro Property, Sarama’s leadership also held a keen interest in a neighbouring deposit known as the ‘Bondi Deposit’.”).

³⁶⁵ Schmiede WS1, ¶ 47 (Bondi was on the team’s radar “from the very beginning of its establishment in Burkina Faso if not the Company’s inception.”).

³⁶⁶ Dinning WS1, ¶ 71.

³⁶⁷ **Ex. C-0141**, Letter from Sarama Resources Ltd to Orezone (containing HOTs for Djarkadougou acquisition) dated 23 May 2016; Memorial, ¶ 121.

³⁶⁸ **Ex. C-0152**, Deed of Transfer between Orezone Inc. and SWA dated 25 April 2017 (English version), p. 1; **Ex. C-0152**, Acte de Cession de Permis de Recherche entre Orezone Inc. et SWA, 25 April 2017 (French version), p. 1.

produced from the Bondi deposit (meaning that Orezone could have received in total USD 4 million).³⁶⁹ The shares received by Orezone were valued at approximately CAD 1.44 million.³⁷⁰

258. The actual sale took place in April 2017 when the parties signed the deed of transfer.³⁷¹

259. By selling its rights over the Bondi deposit Orezone became a very significant shareholder in Sarama, with the option to increase its shareholding over the following years. Orezone indeed obtained more than 9% of common shares in Sarama and more than 13% of Sarama's partially diluted shares, as reported online at the time of the deal announcement:

At the closing of the transaction, Orezone will have actual beneficial ownership and control over 9,600,000 common shares representing 9.1% of the then issued and outstanding common shares of Sarama, and will be deemed to beneficially own 5,000,000 common shares issuable upon the exercise of the warrants, representing approximately 13.2% of Sarama's then issued and outstanding common shares on a partially diluted basis. All of these securities are beneficially owned and controlled by Orezone. Depending on economic or market conditions or matters relating to Sarama and the terms

³⁶⁹ **Ex. C-0141**, Letter from Sarama Resources Ltd to Orezone (containing HOTs for Djarkadougou acquisition) dated 23 May 2016, pp. 1-2.

³⁷⁰ **Ex. C-0141**, Letter from Sarama Resources Ltd to Orezone (containing HOTs for Djarkadougou acquisition) dated 23 May 2016; **Ex. AC-0032**, Sarama Resources Ltd, 'Sarama Resources acquires the Bondi Gold deposit in Burkina Faso from Orezone Gold' (News Release) dated 24 May 2016, p. 1; Dinning Statement, ¶ 73; Accuracy Report, ¶ 3.33 ("Upon completion of the transaction and in consideration of the acquisition, Sarama was to transfer to Orezone: (i) 9.6m shares valued at CAD 1.4m; (ii) 5 million warrants, exercisable for 2-3 years at a price of around CAD 0.20 per share; and, lastly, (ii) a production royalty of USD 20/oz. on the first 200koz. of gold sold.").

³⁷¹ **Ex. C-0152**, Deed of Transfer between Orezone Inc. and SWA dated 25 April 2017 (English version); **Ex. C-0152**, Acte de Cession de Permis de Recherche entre Orezone Inc. et SWA, 25 April 2017 (French version).

of the Heads of Agreement, Orezone may choose to dispose of these common shares of Sarama.³⁷²

260. One important aspect of its submission is that according to Claimant and its witnesses, the Bondi Deposit is economically non-viable as a standalone project:

- “the Bondi deposit was too small to mine economically on its own;”³⁷³
- “It was too small to mine economically on its own as the net revenue would have been insufficient to generate a sufficient supply profit or Internal Rate of Return to warrant the capital outlay of establishing a mine and processing facility.”³⁷⁴

261. In relation to the purchase price in the deal with Orezone, Sarama further submits that the Bondi permit was sold at a “heavily discounted” price,³⁷⁵ because of the allegedly “stranded asset” nature of Bondi for Orezone.³⁷⁶ It is worth noting, however, that Sarama itself sold the asset almost a decade later, in 2025, for a slightly higher price of USD 1.5 million.³⁷⁷

262. These “non-viable” and “stranded asset” characterisations as well as the “discounted” price narrative advanced by Claimant in this arbitration are unsupported and contradict contemporary statements found online and in Claimant’s own documents.

263. First, Claimant has not put forward any technical justification for the allegation that Bondi would not have been economically minable on its own. In fact, it

³⁷² **Ex. R-0033**, *Orezone Sells Bondi Gold Project to Sarama*, Marketwired, 24 May 2016.

³⁷³ Memorial, ¶¶ 5, 120.

³⁷⁴ Dinning WS1, ¶ 72. See also *id.*, ¶ 172.

³⁷⁵ Dinning WS1, ¶ 120.

³⁷⁶ Memorial, ¶ 120; Dinning WS1, ¶ 72; Schmiede WS1, ¶ 49.

³⁷⁷ **Ex. C-0261**, Share Sale and Purchase agreement between Sarama and Beoogo dated 18 August 2025, Clause 3.1, p. 5.

has not produced any economic assessment of its alleged combination plans, much less of its overall project, as seen below.³⁷⁸

264. Moreover, this allegation is directly at odds with Mr Dinning's own contemporaneous belief. In 2019, an article published on The Assay, an online mining and investment website, reported that Mr Dinning considered the Bondi Deposit to be the most promising of all Sarama's projects:

According to my conversation with Sarama's CEO Andrew Dinning in 2019, Dinning thinks the Bondi deposit has the highest exploration potential within the company's pipeline.³⁷⁹

265. Orezone also recognised the potential of the Bondi Deposit, as it had plans to extend the Bondi deposit structure, as reflected in its annual reports prior to the transfer deal.³⁸⁰

266. The deal between Orezone and Sarama was widely regarded as mutually beneficial. An *African Mining Network* online post published in 2016, commenting on the agreement to transfer the Bondi deposit, rights includes a statement from Sarama saying that the transaction is "very positive for both Orezone and Sarama."³⁸¹ Sarama's announcement on 13 December 2016 similarly included the following statement:

Orezone and Sarama consider Bondi to be a strategic permit within the package of land currently being explored by Sarama and its partners.³⁸²

³⁷⁸ See *infra*, ¶¶ 352-387.

³⁷⁹ **Ex. R-0034**, *In Burkina Faso, Rewards Come With Risks*, The Assay.

³⁸⁰ **Ex. C-0079**, Orezone Gold Corporation, Annual Report 2009, dated 31 March 2010, p. 7 (p. 8 of the pdf) ("Orezone will be exploring the possible extensions of the Bondi structure in 2010.").

³⁸¹ **Ex. R-0035**, *Burkina Faso: Sarama to acquire Bondi gold deposit*, African Mining Network.

³⁸² **Ex. C-0147**, Sarama Resources Ltd, Press Release, 'Sarama Announces Update on Bondi Transaction', 13 December 2016.

267. Orezone replicated this statement in an online post in *Mining Review Africa*, stating that “[t]he company [Orezone] and Sarama consider Bondi to be a strategic permit within the package of land currently being explored by Sarama – including Sarama’s joint venture with Acacia Mining and Savory Gold.”³⁸³

268. The agreement was thus a strategic decision for both parties. Sarama acquired a new permit, while Orezone remained involved in the project by retaining an interest in the production prospects of Bondi. Orezone also became a very significant shareholder in Sarama, thereby retaining access to technical data and project information. Notably, Orezone still holds 2% of Claimant’s shares, which is twice the shareholding of Mr Schmiede, one of the founders of Sarama and a witness in this arbitration.³⁸⁴

269. Orezone was also, and remains, an important and successful player in the gold mining industry in Burkina Faso, as recognized by Claimant itself. Mr Dinning several times stated that Orezone is a “successful industry player,”³⁸⁵ and a “successful and seasoned industry player.”³⁸⁶ Orezone is listed on the ASX, and is one of the few companies that successfully brought into production a gold mine, the Bomboré mine, which reached production status in late 2022.³⁸⁷ Mr Dinning himself refers to Orezone’s

³⁸³ **Ex. R-0036**, *Orezone Gold updates sale of Bondi gold project to Sarama Resources*, Mining Review Africa, 20 July 2017.

³⁸⁴ **Ex. C-0314**, Sarama Register as at 25 August 2023, rows 50 and 51 (showing the 2% figure next to Orezone).

³⁸⁵ **Ex. C-0147**, Sarama Resources Ltd, Press Release, ‘Sarama Announces Update on Bondi Transaction’, 13 December 2016, p. 1 (“Sarama looks forward to completing the process of acquiring the Bondi deposit, and we are pleased that a successful industry player like Orezone recognises the value of combining the project with others in the belt.”).

³⁸⁶ **Ex. R-0035**, *Burkina Faso: Sarama to acquire Bondi gold deposit*, African Mining Network.

³⁸⁷ **Ex. R-0037**, Bomboré Royalty Detail Table, at <https://www.summit-royalties.com/portfolio/key-assets/bombore> (“The Bomboré mine is located 85 km from the capital of Ouagadougou and is easily

successful focus on its Bomboré project at the time of the agreement.³⁸⁸ A mining company like Orezone would not have sold at a discounted price a mining asset it had spent several years exploring.³⁸⁹

270. Other companies were active in the region, meaning that the price for the Bondi project was not constrained by a limited pool of potential buyers. As indicated by Mr Schmiede, Endeavour Mining was the owner of “the Bantou and Bantou Nord deposits, immediately west of the Tankoro Property.”³⁹⁰ Endeavour also reached production at the Houndé mine,³⁹¹ and has been producing gold from the Mana mine for over a decade.³⁹² The Bantou deposits, the Houndé mine as well as the Mana mine are all located near the Tankoro and Bondi deposits. Endeavour could have bought the Bondi deposit and the associated Djarkadougou permit to strengthen its position in the region.

271. Orezone had thus several potential buyers for its Bondi asset, meaning it was not in a particularly weak bargaining position prior to the Bondi transfer agreement in 2016. The price at which Sarama acquired the Bondi deposit rights must have reflected the true value of the subject matter of the agreement.

accessible via paved roads and national highways. Operated by Orezone Gold, commercial production was declared at Bomboré in December 2022 after being constructed on time and under budget.”).

³⁸⁸ Dinning WS1, ¶ 72.

³⁸⁹ **Ex. C-0142**, Sarama Resources Ltd, Press Release, ‘Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso from Orezone Gold’ dated 24 May 2016, p. 2; **Ex. R-0031**, Orezone Annual Information Form for year ended 31 December 2006, dated 30 March 2007, p. 20.

³⁹⁰ Schmiede WS1, ¶ 47.

³⁹¹ See **Ex. R-0038**, Houndé mine, Endeavour Mining Portfolio at <https://www.endeavourmining.com/our-portfolio/hounde-mine/>.

³⁹² See **Ex. R-0038**, Houndé mine, Endeavour Mining Portfolio at <https://www.endeavourmining.com/our-portfolio/hounde-mine/>.

272. The discounted price narrative put forward by Claimant is therefore misleading, as is Claimant's attempt to justify its decision to retain the grossly exaggerated value of more than USD 16 million for the Bondi Deposit.³⁹³

2. Sarama Was Granted the Djarkadougou Permit When the *Arrêté* Was Issued

273. As a matter of law, the actual transfer of the Djarkadougou permit occurred when Minister Idani issued the *arrêté* that granted the Djarkadougou permit to SWA SARL, one of Sarama's subsidiaries on 18 August 2017.³⁹⁴ Claimant states that "Minister Idani issued the *arrêté* recording the transfer of the Djarkadougou Permit to SWA,"³⁹⁵ evidencing that Claimant is fully aware that the *arrêté* is the title that grants a permit to a mining company.

274. Claimant's allegation that "Minister Idani . . . approved the transfer of the Djarkadougou Permit to SWA in April 2017,"³⁹⁶ and Mr Dinning's allegation that Minister Idani approved the transfer "on or about 25 April 2017,"³⁹⁷ are unsupported. Claimant is unable to support these allegations with any form of evidence. In fact, the only event related to the Bondi deposit that took place in April 2017 is the already cited deed of transfer of the permit between Orezone and Sarama dated 25 April 2017. The Minister

³⁹³ Accuracy Report, ¶ 5.29.

³⁹⁴ **Ex. C-0157**, *Arrêté* dated 18 August 2017.

³⁹⁵ Memorial, ¶ 123.

³⁹⁶ Memorial, ¶ 123.

³⁹⁷ Dinning WS1, ¶ 75.

was not involved in this deed and no document shows that he approved the transfer in April 2017. He only issued the *Arrêté* in August 2017.³⁹⁸

275. Orezone too understood that the transfer of title only occurs when the *arrêté* is issued in Sarama's name, as evidenced by one of its announcements regarding the Bondi permit sale on EINpresswire on July 19, 2017:

Orezone Gold Corporation (TSX-V:ORE) is pleased to advise that the Ministry of Mines and Quarries in Burkina Faso, West Africa has issued and Sarama has paid the invoice for the transfer of the Bondi Gold Project (Djarkadougou exploration permit) from Orezone's subsidiary company to Sarama Resources subsidiary company. This is the last step of the approval process before the official transfer that will be effective when the Ministry of Mines will deliver the new Djarkadougou Order ("Arrêté") in Sarama's name, at which point Sarama Resources shares and warrants issued to Orezone as part of the transaction will be released from escrow.³⁹⁹

276. Unless and until the *arrêté* was issued in the name of Sarama, Sarama's shares were held in escrow. In other words, the consideration paid in exchange for the permit transfer, *i.e.*, shares and warrants, would only be released from escrow and transferred to Orezone once the permit was effectively transferred. By structuring the

³⁹⁸ **Ex. C-0157**, *Arrêté* dated 18 August 2017. The stamps on the document are tax-related, as is clear from the seal of the "DGI", which stands for Direction Générale des Impôts, and do not relate to Minister Idani or his ministry of mines.

³⁹⁹ **Ex. R-0039**, *Orezone Announces Update on the Sale of the Bondi Gold Project to Sarama*, EinPressWire, 19 July 2017 (emphasis added); **Ex. R-0036**, *Orezone Gold updates sale of Bondi gold project to Sarama Resources*, Mining Review Africa, 20 July 2017 ("This is the last step of the approval process before the official transfer that will be effective when the Ministry of Mines will deliver the new Djarkadougou Order (Arrêté) in Sarama's name, at which point Sarama Resources shares and warrants issued to Orezone Gold as part of the transaction will be released from escrow."). See also **Ex. C-0153**, Sarama Resources Ltd, Audited financial statement for year ended 2016, p. 18 ("The shares will remain in escrow until related approvals and opinions from the government of Burkina Faso have been received and the transfer of the underlying Djarkadougou exploration permit from Orezone to Sarama has been completed.").

deal that way, Sarama clearly understood that the title transfer only occurs when the *arrêté* is issued. This point is particularly relevant to the Tankoro Permit, which lies at the heart of Claimant's allegations in the present dispute.

277. Further evidence of Claimant's own understanding of the permitting process may be found in other documents on the record. As part of the gold sale royalty agreement between Sarama and Orezone, the parties included an introductory representation that the Djarkadougou permit had been granted to Orezone in 2015 upon the issuance of the *Arrêté* No. 2015 000316/MME/SG/DGCM dated 5 November 2015 (produced by Claimant as **Exhibit C-0049**). Indeed, the royalty agreement explicitly states on page 1:

WHEREAS, on May 23, 2016, Orezone Gold Corporation ("Orezone"), the Royalty Holder, and Sarama entered into a binding Heads of Agreement ("HOA") providing for the sale to the Royalty Payor of the Djarkadougou exploration permit granted by Order No. 2015/000316/MME/SG/DGCM dated November 5, 2015 (the "Permit").⁴⁰⁰

278. In the Deed of transfer of the Djarkadougou Permit ("*Acte de cession de permis de recherche*") dated 25 April 2017, it is also clearly stated that Orezone's Djarkadougou permit was granted by the 2015 *Arrêté* issued to Orezone Inc:

La société Orezone Inc. (« Orezone ») est titulaire du permis de recherche Djarkadougou, octroyé par l'arrêté n°2015-000316/MME/SG/DGCM du 5 novembre 2015 (le « permis »).⁴⁰¹

⁴⁰⁰ **Ex. C-0159**, Gold Sale Royalty Agreement between Orezone Gold Corporation and SWA SARL 22 August 2017, p. 1 (citing to **Ex. C-0049**, *Arrêté* No. 2015 000316/MME/SG/DGCM in relation to the exceptional renewal of the DJARKADOUGOU permit of OREZONE INC, dated 5 November 2015) (emphasis added).

⁴⁰¹ **Ex. C-0152**, *Acte de Cession de Permis de Recherche entre Orezone Inc. et SWA*, 25 April 2017 (French version). The English version submitted by Claimant equally provides that "Orezone Inc. ('Orezone') is the

3. Orezone's Poor Quality Exploration Work and Sarama's Downgrading of the Resource Estimate

279. Claimant alleges that following its acquisition in 2016 and the 2017 issuance of the Djarkadougou permit, it “invested in exploration works at the Bondi Deposit.”⁴⁰² Mr Dinning, in particular, states that Sarama’s initial testing at the Bondi Deposit “yielded impressive results” and “showed that there was scope for the gold mineralisation to continue deeper than what we had drilled.”⁴⁰³ Claimant also states that it took over from Orezone in order to continue exploration work on the Bondi deposit. Mr Schmiede states that Sarama “stood on the shoulders of the work Orezone had done.”⁴⁰⁴

280. However, these statements contrast sharply with the findings of the Cube Report authored by qualified persons and Mr Schmiede himself. The Cube Report states that the work performed by Orezone is of poor quality in several respects. First, the Cube Report identifies serious shortcomings in the analysis techniques used and the work completed by Orezone, including the Quality Assurance and Quality Control (QAQC) protocols it set up during its ownership of the Djarkadougou permit:

The sample collection and preparation, analytical techniques, security and QAQC protocols implemented by Orezone during its ownership of the Djarkadougou 2 Property are broadly considered to be of a poor standard.⁴⁰⁵

281. The Cube Report further concludes that:

holder of the [sic] Djorkodougou exploration permit, granted by Decree No. 2015-000316/MME/SG/DGCM of November 5, 2015 (the ‘Permit’).” See **Ex. C-0152**, Deed of Transfer between Orezone Inc. and SWA dated 25 April 2017 (English version).

⁴⁰² Dinning WS1, ¶ 76.

⁴⁰³ Dinning WS1, ¶ 77.

⁴⁰⁴ Schmiede WS1, ¶ 53.

⁴⁰⁵ **Ex. C-0029**, Fifth Cube Report of 2022, p. 52.

The use of partial dissolution analytical methods, with associated highly variable dissolution rates, to determine head gold content is a key shortcoming which erodes the effectiveness of the whole analytical program. With inaccurate and low-confidence determination of gold content of the head samples, all subsequent usage of the data is compromised – this includes QAQC monitoring, analytical method selection and suitability for Mineral Resource estimation.⁴⁰⁶

282. The report adds that due to Orezone’s use of in-house reference materials, some reference samples were “completely ineffective”.⁴⁰⁷

283. The Cube Report contains more damning comments in the following terms:

While the overall dataset generated during Orezone’s ownership is considered poor quality, certain portions appear to be of acceptable standard – namely field sample preparation. It is unfortunate that analytical operations were designed and executed so poorly as the field sample preparation cannot carry the program alone.⁴⁰⁸

284. Because of these issues, Sarama had to undertake rebuilding and verification of the drill database compiled by Orezone.⁴⁰⁹ Cube identified several shortcomings in the Orezone dataset, which is said in the report to be “unable to support an unbiased and reliable estimate of Mineral Resources for the Bondi Deposit to a moderate-high level of confidence.”⁴¹⁰ Cube also states that “significant re-collection of data will be required prior to the higher- confidence estimates of Mineral Resources.”⁴¹¹

⁴⁰⁶ **Ex. C-0029**, Fifth Cube Report of 2022, p. 52.

⁴⁰⁷ **Ex. C-0029**, Fifth Cube Report of 2022, p. 52 (“Orezone’s use of in-house reference materials as part of the QAQC program saw the introduction of highly variable, non-homogeneous reference samples which for a large part for the analytical program are completely ineffective in monitoring sample preparation and laboratory analytical performance as designed.”).

⁴⁰⁸ **Ex. C-0029**, Fifth Cube Report of 2022, p. 53.

⁴⁰⁹ **Ex. C-0029**, Fifth Cube Report of 2022, p. 53.

⁴¹⁰ **Ex. C-0029**, Fifth Cube Report of 2022, p. 54.

⁴¹¹ **Ex. C-0029**, Fifth Cube Report of 2022, p. 54.

285. The Cube Report underlines further issues that the authors identified in reviewing the data provided by Orezone, in particular in relation to reference materials used in sample analysis:

During the period 2003-2007, Orezone used a range of URMs and typical examples of analytical results for the insertion of these reference material into production and secondary assay streams are presented in Figure 11-31 to Figure 11-33.

In general, the performance of this element of the QAQC system is poor, with very high variability evident in the assays groups all reference materials over the entire time period, with the exception of those representing blank material.⁴¹²

286. The data provided by Orezone seems to have been difficult to understand and interpret for Sarama. This was apparently due to several significant issues with the techniques used and the decisions made by Orezone in relation to sample analysis, a key aspect of mining exploration:

It is likely that the partial dissolutions and poor reference material preparation and grade homogeneity combine to yield the overall highly variable results. The situation is further complicated by Orezone's unclear and ambiguous records of expected values for several of the reference materials used in this period. These issues significantly erode the effectiveness of this part of the QAQC system to the extent that little can be concluded from the results. As such, there is no ability to externally monitor laboratory analytical accuracy and sample handling performance. Unfortunately, the bulk of the drilling for the Bondi Deposit is affected by this external QAQC regime.⁴¹³

287. More problems were identified in relation to analytical method checks:

⁴¹² **Ex. C-0029**, Fifth Cube Report of 2022, p. 212.

⁴¹³ **Ex. C-0029**, Fifth Cube Report of 2022, p. 212.

Almost invariably, the duplicate pair assay data for method checks (head fire assay vs head BLEG + tail fire assay) showed poor precision and high bias over the period 2006-2007. This was a consistent theme across all laboratories and showed the head fire assays to have a consistent large negative bias.⁴¹⁴

288. The conclusions reached by Mr Schmiede and his co-authors are very critical of the work completed by Orezone and the usefulness of the dataset it obtained:

In general, the drill assay dataset generated in the Orezone era (2003-2016) lacks confidence that it represents the drilled grade of the mineralisation. The dataset suffers from partial leach issues, poor external QAQC monitoring from reference materials and variable duplicate pair performance. Certain portions of the dataset show acceptable performance, but as a whole, the data lacks reliability and only provides an inference of gold grades for the samples.⁴¹⁵

289. The statements regarding Sarama's work on the deposit indicate that Sarama has had to rerun certain assessments due to the problems identified in Orezone's data:

Given the issues identified in the QAQC review of Orezone's historical drilling data at the Bondi Deposit (and surrounds) (refer Sections 11.4.4 and 11.5.2), a second pass usability assessment was conducted by Sarama (Schmiede, April 2021 and Schmiede, October 2021).⁴¹⁶

290. Mr Schmiede admits in his statement that Orezone's work had shortcomings, in particular with respect to the modelling of many intersections that lay

⁴¹⁴ **Ex. C-0029**, Fifth Cube Report of 2022, p. 230.

⁴¹⁵ **Ex. C-0029**, Fifth Cube Report of 2022, p. 230.

⁴¹⁶ **Ex. C-0029**, Fifth Cube Report of 2022, p. 328.

near the main parts of the mineralisation (lodes).⁴¹⁷ Claimant also refers to the issue in its submission:

Sarama's review confirmed that Orezone had completed extensive and dense drilling However, during his analysis, Mr Schmiede identified several unmodelled intersections adjacent to the identified mineralised lodes of the Bondi Deposit.⁴¹⁸

291. The witness statement of Mr Dinning contains a more general and straightforward admission with respect to Orezone's work on the Bondi deposit:

Orezone had not adequately explored the Bondi Deposit and the surrounding permit area.⁴¹⁹

292. Despite these shortcomings, Orezone had issued a resource estimate that included, *inter alia*, hundreds of thousands of ounces of gold at a Measured and Indicated levels of confidence (282,000 ounces), the two highest degrees of geological confidence for resources.⁴²⁰

293. Claimant attempts to allay these concerns regarding the exploration of Bondi by referring to a passage in Mr Schmiede's statement in which he states that "there is a degree of subjectivity to resource classifications."⁴²¹ However, although Mr Schmiede makes a similar statement in his testimony, he does so in much more general terms, and not specifically in relation to Orezone's work on Bondi.⁴²²

⁴¹⁷ Schmiede WS1, ¶ 54.

⁴¹⁸ Memorial, ¶ 125.

⁴¹⁹ Dinning WS1, ¶ 76 (emphasis added).

⁴²⁰ Schmiede WS1, ¶ 51; **Ex. C-0079**, Orezone Gold Corporation, Annual Report 2009, dated 31 March 2010, pp. 6-7 (pp. 8-9 of the pdf).

⁴²¹ Memorial, ¶ 125.

⁴²² Schmiede WS1, ¶ 27 ("However, because there is no industry-wide standard for converting Inferred resources to Indicated resources, there is a degree of subjectivity and professional judgment involved.").

294. Unsurprisingly, Sarama first disclosed the Bondi Deposit estimate as a “historical estimate”, meaning that Sarama did not consider it possible to disclose resources based on the data they had received and pending their full review of Orezone’s work, not even on an Inferred basis.⁴²³

295. What followed was even more damning for Orezone’s work. Upon further review of Orezone’s dataset, Sarama downgraded the resource estimate from a mineral resource estimate that included Measured and Indicated resources to a fully Inferred resource estimate.⁴²⁴

296. The above demonstrates that Orezone’s work on the Bondi Deposit was of poor quality in many regards and that the deposit was at an early stage of exploration.

297. This further shows that the price paid by Sarama for the Djarkadougou permit was not a discounted one, contrary to what Claimant would have the Tribunal believe. The value in excess of USD 15 million that Claimant allocates to the Bondi Deposit in its claims for damages is therefore manifestly wrong and grossly exaggerated. In any event, the Bondi Deposit was never affected by any kind of measure taken by the Government, as shown below.

4. The Expiration of the Djarkadougou Permit and the Issuance of a New Djarkadougou 2 Permit

298. The August 2017 *arrêté* that granted the Djarkadougou permit following its transfer from Orezone to Sarama, sets out the characteristics of the permit, including the

⁴²³ Schmiede WS1, ¶ 56; **Ex. C-0017**, Sarama Resources Ltd, ‘Sarama Resources Acquires the Bondi Gold Deposit in Burkina Faso from Orezone Gold’ (News Release), 24 May 2016.

⁴²⁴ Schmiede WS1, ¶ 61.

legal obligations of the permit holder, as well as its term.⁴²⁵ It specifies under Article 3 that its validity ends on 18 August 2018 and that it cannot be renewed.⁴²⁶

299. Yet, it was only in January 2019, some five months after the permit term had lapsed, that SWA SARL filed an application to be granted a new permit on the Bondi deposit.⁴²⁷ The Minister sent a letter dated 30 July 2021 to SWA SARL inviting it to continue the application process by paying the requisite permit fees.⁴²⁸ Importantly, Article 3 of the *arrêté* expressly prohibited renewal of Sarama’s permit. Nevertheless, the Minister made no reference to this restriction and continued to process the application, thereby providing a benefit to Sarama.

300. Contrary to Mr Dinning’s evidence, the Minister did not approve the permit application in this 30 July 2021 letter. There is no language in this letter that would purport to show that the permit had effectively been granted to Sarama.

301. Claimant’s allegation that upon paying the fees on 2 August 2021 it had become “the legal owner of the Djarkadougou 2 Permit” is also misleading. Sarama effectively and legally became the owner of the new Djarkadougou 2 Permit on 6 January 2023. On that date, the Minister issued the *arrêté*, in which he granted the permit and set out the legal bases for his decision, including by referring to the permit application and the payment of the transfer price as the last steps of the permitting process.⁴²⁹

⁴²⁵ **Ex. C-0157**, *Arrêté* dated 18 August 2017.

⁴²⁶ **Ex. C-0157**, *Arrêté* dated 18 August 2017, Article 2, p. 2.

⁴²⁷ **Ex. C-0050**, Permit application form No. 3393 for Djarkadougou 2; Dinning WS1, ¶ 86.

⁴²⁸ **Ex. C-0051**, Letter from Minister of Energy, Mines and Quarries to SWA SARL dated 30 July 2021.

⁴²⁹ **Ex. C-0052**, *Arrêté* No. 2023-028/MEMC/SG/DGCM in relation to the grant of permit n°3393 named “DJARKADOUGOU II” dated 6 January 2023.

5. The Djarkadougou Permit Was Not Affected by any Measure or Act by Burkina Faso

(a) The Bondi Deposit Was Never Subject to Any Legislation or Regulation by Burkina Faso

302. Burkina Faso never enacted any legislation, decree, order, notice, or decision that would have deprived or limited Sarama's enjoyment or ownership of the Djarkadougou 2 Permit. Unlike the Tankoro permit the Bondi deposit was not included in the Information Notice.⁴³⁰ In addition, it was never put up for sale, and never included in the list of state-reserved assets.

(b) Sarama Remains to Date the Owner of the Djarkadougou 2 Permit

303. As a matter of fact, Sarama remains to this date the owner of the Djarkadougou 2 Permit. Claimant does not allege otherwise. Claimant submits in this respect that it was forced to liquidate its assets in order to "mitigate the severe losses"⁴³¹ and to enter into distressed sale agreements, in particular with respect to the Djarkadougou permit.

304. While Claimant may have entered into an agreement to sell its subsidiary holding the Djarkadougou permit, SWA BF No. 3, to Beoogo Investment Limited ("Beoogo"),⁴³² ministerial approval remains pending, as acknowledged by Claimant.⁴³³ The shares and the permit have therefore not yet been transferred to Beoogo.

⁴³⁰ **Ex. C-0053**, Information Notice issued by the Ministry of Energy, Mines and Quarries, dated 12 October 2020.

⁴³¹ Memorial, ¶ 240.

⁴³² **Ex. C-0261**, Share Sale and Purchase agreement between Sarama and Beoogo dated 18 August 2025.

⁴³³ Memorial, ¶ 241.

305. As already noted, the agreement for the sale and purchase of SWA BF No. 3, which holds the Djarkadougou permit, provides for consideration of USD 1,500,000, as well as a royalty of USD 35 per ounce for each of the first 200,000 ounces of gold produced in the permit area, subject to a maximum royalty of USD 7 million.⁴³⁴ The record therefore includes two contemporaneous transactions regarding the Bondi permit and/or the shares of the subsidiary that held the permit: the Orezone/Sarama agreement in 2016 and the Sarama-Beoogo agreement in 2025. As indicated above, the 2016 transaction provided for a consideration valued at around CAD 1.44 million plus a royalty of up to USD 4 million. The second transaction, in 2025, included a price of USD 1.5 million and a royalty of up to USD 7 million,⁴³⁵ a price slightly higher than nine years prior.

306. These contemporaneous, real-life prices or valuations fall within the same range and contrast sharply with the amounts considered by Claimant in valuing the Bondi project.⁴³⁶ These transactions must be held as reflective of the FMV of the Bondi project. Claimant's decision to disregard these contemporaneous transactions, and conversely, its assumption that Orezone's exploration expenditures should be taken into consideration, are incorrect and should be rejected.

⁴³⁴ **Ex. C-0261**, Share Sale and Purchase agreement between Sarama and Beoogo dated 18 August 2025, p. 5. The provision refers to the Gold Mine Property, this defined term referring to the area covered by the Djarkadougou Permit 2. See *id.*, p. 3.

⁴³⁵ **Ex. C-0141**, Letter from Sarama Resources Ltd to Orezone (containing HOTs for Djarkadougou acquisition) dated 23 May 2016; **Ex. C-0261**, Share Sale and Purchase agreement between Sarama and Beoogo dated 18 August 2025.

⁴³⁶ Accuracy Report, ¶ 5.29.

D. The “Additional Projects” Were Minor Assets That Either Sarama Did Not Control and Operate or Had Not Been Explored

307. In addition to the loss of the Bondi project, Claimant’s position is that because of the alleged “retroactive revocation” of the “Tankoro 2 Permit”, it also lost the so-called “Additional Projects”, *i.e.*, the Karankasso and Koumandara projects.

1. The Karankasso Project Was Not Controlled or Operated by Sarama

308. Claimant alleges that, in addition to the Tankoro and Bondi projects, it “acquired” and “developed” the Karankasso project,⁴³⁷ and that it performed exploration work on the permit area—located near the Tankoro area⁴³⁸—and intended to carry out further work there.⁴³⁹

309. With regard to the “acquisition” allegation, it must first be noted that the Karankasso project was a joint venture with another entity, Savary Gold Corp. (“Savary”), whose significant shareholder included SEMAFO Inc. (“SEMAFO”).⁴⁴⁰ Sarama did not “acquire” anything. As indicated in Sarama’s press release, it “signed a heads of agreement with Savary Gold Corp. (‘Savary’) to enter into a joint venture to develop Sarama’s Sérakoro 1 and Savary’s Houndé South properties in Burkina Faso.”⁴⁴¹

⁴³⁷ Memorial, ¶ 173.

⁴³⁸ Memorial, ¶¶ 173, 178.

⁴³⁹ Memorial, ¶ 173.

⁴⁴⁰ **Ex. C-0026**, Sarama Resources Ltd, ‘Sarama announces heads of agreement to create a joint venture with Savary Gold Corp.’ (News Release), dated 11 March 2014, p. 1.

⁴⁴¹ **Ex. C-0026**, Sarama Resources Ltd, ‘Sarama announces heads of agreement to create a joint venture with Savary Gold Corp.’ (News Release), dated 11 March 2014, p. 1 (emphasis omitted).

310. Claimant does not specify the permitting situation in the Karankasso area, but the same press release indicates that Sarama held the “Sérakoro 1” permit and that Savary owned several distinct and much larger permits within the Karankasso area.⁴⁴²

311. Claimant also alleges that it had plans to “consolidate” the deposit with the Tankoro and Bondi deposits.⁴⁴³ Yet, as is the case for the Tankoro and Bondi deposits, the record contains no technical or economic evidence—or even a preliminary assessment—addressing the possibility of consolidating the Karankasso Project with other permit areas, much less any evaluation of the technical conditions required for such a combination. The project was at such an early stage that any plan to combine it with other projects was purely speculative.

312. Also, the reality is that Sarama was not in control of the project, was not the operator of the project, and was not the company that directly incurred exploration expenses. In its Memorial, Claimant admits that it was not the operator of the Karankasso project, instead identifying “Savary, as operator of the project,” as the entity in charge.⁴⁴⁴ Furthermore, Claimant also indicates that it was a minority shareholder in the JV-based project and that its interest in the project had consistently decreased, from 35% down to 18%.⁴⁴⁵

⁴⁴² **Ex. C-0026**, Sarama Resources Ltd, ‘Sarama announces heads of agreement to create a joint venture with Savary Gold Corp.’ (News Release), dated 11 March 2014, p. 1.

⁴⁴³ Memorial, ¶¶ 173, 178.

⁴⁴⁴ Memorial, ¶ 174.

⁴⁴⁵ Memorial, ¶ 174 (“As of its incorporation, Sarama held a 35% interest in the Karankasso JV, while Savary, as operator of the project, owned the remaining 65%.”), ¶ 177 (“By that point, Sarama’s ownership had diluted to approximately 18%.”). See also **Ex. C-0203**, Sarama Resources Ltd, Press Release, ‘Sarama Resources Issued Djarkadougou II Permit Hosting Bondi Deposit’ 12 August 2021, p. 6.

313. In a 2 February 2018 presentation Sarama indicated that it did not verify Savary's resource estimate work on Karankasso and took no responsibility for its accuracy, for the reason that Savary was the operator:

Sarama has not independently verified Savary's mineral resource estimate and takes no responsibility for its accuracy. Savary is the operator of the Karankasso Project JV and Sarama is relying on their Qualified Persons' assurance of the validity of the mineral resource estimate.⁴⁴⁶

314. A February 2020 presentation similarly indicates in the fine-print section that:

For further information regarding the mineral resource estimate please refer to the technical report titled "Technical Report and Resource Estimate on the Karankasso Project, Burkina Faso", dated October 7, 2015. The technical report is available under SEMAFO Inc's profile on SEDAR at www.sedar.com. Sarama has not independently verified SEMAFO's mineral resource estimate and takes no responsibility for its accuracy. SEMAFO is the operator of the Karankasso Project JV and Sarama is relying on their Qualified Persons' assurance of the validity of the mineral resource estimate. Additional technical work has been undertaken on the Karankasso Project since the Effective Date, including but not limited to, metallurgical testwork, exploration drilling and mineral resource estimation, but Sarama is not in a position to quantify the impact of this additional work on the mineral resource estimate referred to above.⁴⁴⁷

⁴⁴⁶ **Ex. C-0025**, Sarama Resources Ltd, 'Sarama Resources establishes new 100% owned 600km² exploration position at its Koumandara project in Burkina Faso' (News Release) dated 2 February 2018, p. 7.

⁴⁴⁷ **Ex. C-0183**, Sarama Resources Ltd, Corporate Presentation - February 2020 (Presentation), p. 17 (emphasis added).

315. The statement by Accuracy, Claimant's expert, that in "October 2015, Sarama and Savary announced an initial MRE" is misleading in this respect.⁴⁴⁸ The press release that Accuracy relies on clearly indicates that Savary is the entity that prepared and declared a resource estimate in 2015:

Sarama Resources Ltd. ("**Sarama**" or the "**Company**") is pleased to advise that Savary Gold Corp. ("**Savary**"), the operator of the Karankasso Project Joint Venture ("**JV**") between Sarama and Savary, has declared a maiden Inferred Mineral Resource estimate.⁴⁴⁹

316. Mr Dinning's statement in this press release evidences that Savary only conducted drilling works at Karankasso: "We [Sarama] are pleased that Savary has had a successful drilling season that has culminated in a Maiden Mineral Resource estimate."⁴⁵⁰ The MD&A documents also show that Savary declared the resource estimate, not Sarama.⁴⁵¹

317. Mr Dinning's statements in this arbitration that "[i]n October 2015, Sarama and Savary announced a maiden Inferred mineral resource estimate"⁴⁵² and that "Sarama and Savary continued to carry out systematic drill campaigns to expand the known

⁴⁴⁸ Accuracy Report, ¶ 3.42.

⁴⁴⁹ **Ex. AC-0066**, Sarama Resources, Press Release, Maiden Inferred Mineral Resource of 671,000 Ounces Gold Announced at the Karankasso JV in Burkina Faso dated 8 October 2015, p. 1 (emphasis in original).

⁴⁵⁰ **Ex. C-0135**, Sarama Resources Ltd, Press Release, 'Maiden Inferred Mineral Resource of 671,000 Ounces Gold Announced at the Karankasso JV in Burkina Faso' dated 8 October 2015, p. 1; **Ex. AC-0066**, Sarama Resources, Press Release, Maiden Inferred Mineral Resource of 671,000 Ounces Gold Announced at the Karankasso JV in Burkina Faso dated 8 October 2015, p. 1.

⁴⁵¹ See **Ex. C-0015**, MD&A 2015 dated 30 April 2016, p. 2 ("Savary Gold Corp. ('Savary'), the operator of the Karankasso Project Joint Venture ('JV') between Sarama and Savary, declared a maiden Inferred Mineral Resource estimate of 671,000 ounces of contained gold.") (emphasis added).

⁴⁵² Dinning WS1, ¶ 186.

mineralised zones of the resource”⁴⁵³ are therefore misleading.⁴⁵⁴ Savary only conducted these drilling campaigns, and Savary only was responsible for the issuance of the mineral resource estimates.

318. The earlier August 2015 announcement regarding the Karankasso project that provides highlights of the drilling campaign confirms that Savary only conducted these exploration works.⁴⁵⁵ Similarly, Savary updated its MRE in 2017,⁴⁵⁶ and SEMAFO, which had acquired Savary in April 2019,⁴⁵⁷ published an updated estimate in 2020. As stated by Sarama in the 26 February 2020 announcement, the work was fully compiled by SEMAFO:

The updated mineral resource estimate of 12.74Mt @ 1.73g/t for 709koz Au(4) (reported using a US\$1,500/oz gold price assumption) was fully compiled by, or under the supervision of, Semafo in its capacity as operator of the joint venture.⁴⁵⁸

319. The announcement goes on to recall that Savary, the previous operator, was the entity that collected, issued and published the previous estimate in 2017.⁴⁵⁹ In

⁴⁵³ Dinning WS1, ¶ 187.

⁴⁵⁴ Dinning WS1, ¶ 187.

⁴⁵⁵ **Ex. C-0134**, Sarama Resources Ltd, Press Release, ‘Sarama Provides Second Update on Karankasso JV Drilling Campaign in Burkina Faso’ dated 21 August 2015. *See, in particular, id.*, p. 2 (“During the period April 21, 2015 to June 30, 2015, Savary completed 15,515 metres of drilling in 115 RC holes across the Karankasso Project.”).

⁴⁵⁶ **Ex. C-0013**, Sarama Resources Ltd, ‘Sarama Resources announces updated mineral resource estimate for the Karankasso Joint Venture Project, South-West Burkina Faso’ (News Release) dated 26 February 2020, p. 1; Schmiede WS1, ¶ 137.

⁴⁵⁷ **Ex. C-0024**, MD&A 2019, dated 21 April 2020, p. 6 (p. 8 of the PDF) (“On April 30, 2019, Semafo announced it had completed the acquisition of Savary.”).

⁴⁵⁸ **Ex. C-0013**, Sarama Resources Ltd, ‘Sarama Resources announces updated mineral resource estimate for the Karankasso Joint Venture Project, South-West Burkina Faso’ (News Release) dated 26 February 2020, p. 1.

⁴⁵⁹ **Ex. C-0013**, Sarama Resources Ltd, ‘Sarama Resources announces updated mineral resource estimate for the Karankasso Joint Venture Project, South-West Burkina Faso’ (News Release) dated 26 February 2020, p. 1 (“The previous mineral resource estimate of 12.3Mt @ 2.03g/t Au for 805koz Au(3) was compiled by Savary Gold Corp (‘Savary’) and published in November 2017.”).

addition, in the cost spreadsheet prepared by Accuracy and produced by Claimant as **Exhibit C-0351**, Accuracy indicates in relation to the Karankasso JV that:

Sarama's corporate involvement was limited to participation in JV meetings and providing funding as required.⁴⁶⁰

320. The foregoing shows that: (i) Savary, the initial JV partner, and subsequently SEMAFO and Endeavour, were the operators of the project and the ones who issued reports, which were published under their respective profiles on online technical registries such as SEDAR; and (ii) Sarama was not involved in technical work on the deposit, including the preparation of resource estimates, test work and exploration drilling. Sarama did not directly incur costs in relation to Karankasso.

321. In addition to the fact that Sarama was not the operator of the Karankasso project, the actual operator itself did not conduct much work on the ground, meaning that the Karankasso project has not undergone much exploration work.

322. In Sarama's 2017 MD&A, it is stated that "Minimal work occurred at the Karankasso Project in Q4 2017, as pursuant to the JV agreement between Sarama and Savary, the \$2 million expenditure cap for the current calendar year had been attained during the quarter. Several of the key exploration permits had also expired which precluded further exploration work of significance."⁴⁶¹

323. In the 2018 MD&A, no significant work is mentioned or planned, and the few items listed mostly concern extensions of past work. For instance, by the end of 2018, Savary had prepared for "a modest drilling campaign" in parts of the area.⁴⁶²

⁴⁶⁰ **Ex. C-0351**, Sarama Resources Ltd, Sunk Costs (Excel) dated 25 October 2025, row 78.

⁴⁶¹ **Ex. C-0166**, 2017 MD&A dated 27 April 2018, p. 6 (p. 8 of the pdf).

⁴⁶² **Ex. C-0016**, 2018 MD&A dated 30 April 2019, p. 7.

324. In the 2019 MD&A, it is indicated that “Semafo suspended all exploration activities including at the Karankasso Project” following a security event in November 2019.⁴⁶³ In the 2021 MD&A, it is indicated that Endeavour, following the acquisition of SEMAFO in 2019, became the new operator of the Karankasso project.⁴⁶⁴

2. The Koumandara Project Had Barely Been Explored and No Resource Had Been Estimated

325. Claimant alleges that it also acquired rights to five additional properties in Burkina Faso that made up the Koumandara project, located 80 km west of the Tankoro area.⁴⁶⁵ However Claimant omits to provide basic information and supporting evidence regarding the permitting and rights over the project. The reality is that the Koumandara project had barely been explored and most importantly, no resource estimate had been issued.

326. First, Claimant is silent about the permitting history in the Koumandara area. The Koumandara area covers various distinct permits, as shown in the map included in the press release by Sarama dated 16 December 2020.⁴⁶⁶ It includes the Dabokuy, Noumousso, Kapoguan, Kongoroba, and Nya-Nou areas, the permitting history and status of which are not specified in Claimant’s submission.

327. The same 16 December 2020 online announcement indicates that “exploration permits for the Kapoguan and Noumousso Properties, which form part of the Koumandara Project, have expired terms and are going through a process with the

⁴⁶³ **Ex. C-0024**, 2019 MD&A dated 21 April 2020, p. 7 (p. 9 of the pdf).

⁴⁶⁴ **Ex. C-0215**, 2021 MD&A dated 22 April 2022, p. 8 (p. 10 of the pdf).

⁴⁶⁵ Memorial, ¶ 179.

⁴⁶⁶ **Ex. R-0040**, *Sarama Resources Re-Issued the Prospective Dabokuy 2 Exploration Permit in Burkina Faso*, Junior Mining Network, 16 December 2020, p. 2.

Government of Burkina Faso where they are required to be re-issued as new full-term exploration permits.”⁴⁶⁷ The fate of these expired permits that form part of the Koumandara project is not indicated in Claimant’s submission.

328. Second, documents produced by Claimant or found online show that the Koumandara Project was at a very early stage, almost in its infancy, and that it was even considered by Sarama as a mere “optional” project. The area in which is located the Koumandara project is indeed an “underexplored” one.⁴⁶⁸ A corporate presentation dated February 2020 presents Koumandara as a “growth project”,⁴⁶⁹ and merely dedicates one slide to Koumandara and presents it as part of the “Exploration Optionality” of Sarama’s project.⁴⁷⁰

329. The “optional” nature of the Koumandara project was also stressed in the 25 November 2019 announcement by Sarama:

Sarama has built further optionality into its portfolio including a 600km² exploration position in the highly prospective Banfora Belt in south-western Burkina Faso. The Koumandara Project hosts several regional-scale structural

⁴⁶⁷ **Ex. R-0040**, *Sarama Resources Re-Issued the Prospective Dabokuy 2 Exploration Permit in Burkina Faso*, Junior Mining Network, 16 December 2020, p. 4.

⁴⁶⁸ **Ex. C-0025**, Sarama Resources Ltd, ‘Sarama Resources establishes new 100% owned 600km² exploration position at its Koumandara project in Burkina Faso’ (News Release) dated 2 February 2018, p. 1 (“Sarama considers the Banfora Belt to be highly prospective for gold, yet relatively underexplored.”), p. 2 (“This is a large 100%(5) owned position situated in a prospective, yet underexplored gold belt.”). See also *id.*, p. 3, in which Sarama describes the lack of technical work and testing in the region (“Much of the Banfora East Shear Zone lacks coverage by base-level, detailed soil geochemistry surveys, and significant areas of the anomalous gold-in-soil trends identified remain untested by reconnaissance drilling.”).

⁴⁶⁹ **Ex. C-0183**, Sarama Resources Ltd, Corporate Presentation - February 2020 (Presentation), p. 5 (p. 6 of the pdf).

⁴⁷⁰ **Ex. C-0183**, Sarama Resources Ltd, Corporate Presentation - February 2020 (Presentation), p. 13 (p. 14 of the pdf).

features and trends of gold-in-soil anomalism extending for over 40km along strike.⁴⁷¹

330. Claimant did not conduct much exploration work in the area. In its submissions it merely reuses the term “growth project”, without this term being defined, and indicates that the area “benefitted from good access to infrastructure.”⁴⁷²

331. Online announcements by Sarama show that exploration work on the Koumandara deposit had in fact been very limited. In November 2021, Sarama presented the Koumandara project as an “exciting early stage exploration project.”⁴⁷³ Most importantly, there was never a resource estimate issued for the Koumandara project, as explicitly admitted by Claimant:

[F]or the Koumandara Project (US\$ 3.8 million) as Sarama had yet to define any mineral resources.⁴⁷⁴

332. The company’s MD&A demonstrate that very limited work was carried out at Koumandara and that the project remained in its infancy. The 2017 MD&A indicates that Sarama intended to conduct “prospecting” and “mapping” at Koumandara “with a view to generating and fine-tuning drill targets.”⁴⁷⁵ The 2018 MD&A similarly refers to the identification of drill targets, this being the only item in the “Outlook” subsection.⁴⁷⁶ The 2019 MD&A indicates that in 2019 “[n]o fieldwork was undertaken in Q4 2019.”⁴⁷⁷ The

⁴⁷¹ **Ex. R-0041**, *Sarama Resources Commences Drilling at the Prospective Bamako 2 Exploration Property in South-West Burkina Faso*, 25 November 2019, p. 6.

⁴⁷² Memorial, ¶ 180.

⁴⁷³ **Ex. R-0042**, *Sarama Resources: Gold Exploration in World-Class Burkina Faso*, INN, 17 November 2021, p. 3.

⁴⁷⁴ Memorial, ¶ 469(c) (emphasis added).

⁴⁷⁵ **Ex. C-0166**, 2017 MD&A dated 27 April 2018, p. 8 (p. 10 of the pdf).

⁴⁷⁶ **Ex. C-0016**, 2018 MD&A dated 30 April 2019, p. 6 (p. 8 of the pdf).

⁴⁷⁷ **Ex. C-0024**, 2019 MD&A dated 21 April 2020, p. 6 (p. 8 of the pdf).

2020 MD&A indicates that “[n]o fieldwork or desktop work was undertaken in Q4.”⁴⁷⁸ The 2021 MD&A mentions that “field visits” had been undertaken to meet with local stakeholders.⁴⁷⁹

333. The reason why Koumandara remained a very early stage project with no resource estimate is that “limited funding constrained the pace of exploration at the Koumandara Project,” and this was the status of the project prior to the alleged wrongful act of the Government.⁴⁸⁰ Without funding, no meaningful work was ever carried out and limited costs were incurred.

3. The Additional Projects Were Not Affected by Any Government Measure

334. While Claimant asserts that the Tankoro asset was subject to a “retroactive revocation,”⁴⁸¹ it makes no such claim regarding the Additional Projects, which were never directly affected by any action of Burkina Faso. Claimant does not suggest otherwise.

(a) Sarama’s Rights in the Karankasso Project Did Not Expire

335. As with the Djarkadougou permit, Sarama’s rights in the Karankasso project did not expire. Sarama remains a partner in the Karankasso JV and, despite the absence of any information regarding the permitting status of the Karankasso project, it is undisputed that Burkina Faso has not issued any regulation concerning this project. Claimant does not allege otherwise.

336. As a matter of fact, the only consequence that Claimant points to is the dilution of Sarama’s interest in the Karankasso JV due to its failure to meet its minimum

⁴⁷⁸ **Ex. C-0197**, 2020 MD&A dated 30 March 2021, p. 7 (p. 9 of the pdf).

⁴⁷⁹ **Ex. C-0215**, 2021 MD&A dated 22 April 2022, p. 8 (p. 10 of the pdf).

⁴⁸⁰ Schmiede WS1, ¶ 132.

⁴⁸¹ Memorial, ¶¶ 53, 185-186, 231-241, 306.

expenditure requirements.⁴⁸² However, this progressive dilution was well underway prior to the alleged wrongful acts, as shown in Sarama's MD&As. Sarama's interest was of:

- 35% in 2015;⁴⁸³
- 31% by the end of 2016;⁴⁸⁴
- 30% by the end of 2017;⁴⁸⁵
- 25% by the end of 2018;⁴⁸⁶
- 19.91% by the end of 2019;⁴⁸⁷
- 19% by the end of 2020;⁴⁸⁸
- 18% by the end of 2021;⁴⁸⁹
- 17.6% by the end of 2022;⁴⁹⁰ and
- 17.5% by the end of 2023.⁴⁹¹

⁴⁸² Dinning WS1, ¶ 190 ("Sarama's interest in the Karankasso Project will continue to dilute until it reaches a point where it reverts to a 1% smelter returns royalty, as without the ability to raise funds following Burkina Faso's actions, Sarama is unable to meet minimum expenditure requirements under the joint venture agreement to maintain or increase its interest.").

⁴⁸³ Ex. C-0015, 2015 MD&A dated 30 April 2016, p. 3 (p. 4 of the pdf).

⁴⁸⁴ Ex. C-0023, 2016 MD&A dated 28 April 2017, p. 7 (p. 8 of the pdf).

⁴⁸⁵ Ex. C-0166, 2017 MD&A dated 27 April 2018, p. 6 (p. 8 of the pdf).

⁴⁸⁶ Ex. C-0016, 2018 MD&A dated 30 April 2019, p. 7 (p. 8 of the pdf).

⁴⁸⁷ Ex. C-0024, 2019 MD&A dated 21 April 2020, p. 6 (p. 8 of the pdf).

⁴⁸⁸ Ex. C-0197, 2020 MD&A dated 30 March 2021, p. 8 (p. 10 of the pdf).

⁴⁸⁹ Ex. C-0215, 2021 MD&A dated 22 April 2022, p. 8 (p. 10 of the pdf), penultimate paragraph.

⁴⁹⁰ Ex. C-0257, 2022 MD&A dated 30 March 2023, p. 16 (p. 18 of the pdf).

⁴⁹¹ Ex. C-0325, 2023 MD&A dated 28 March 2024, p. 8 (p. 10 of the pdf) penultimate paragraph of the "Property Information" section. In 2024, Sarama indicates that it held "an approximate 18% interest" in the JV. See Ex. C-0333, 2024 MD&A dated 28 March 2025, p. 2 (p. 5 of the pdf).

337. Sarama's funding problems and inability to meet its expenditure requirements were therefore already affecting its project prior to the alleged wrongful acts of the government.⁴⁹²

(b) The Koumandara Project Was Not Subject to Any Regulation Either

338. As regards the Koumandara project, the situation is similar: it was not subject to any regulation, and Claimant does not suggest otherwise.

339. Claimant's submission is that because of the impossibility of progressing Tankoro and generating revenue with it, it is impossible for it to explore and develop Koumandara.⁴⁹³

340. It bears noting that Sarama decided to sell in 2024 its subsidiary Burkina Faso Holdings Ltd and the rights to the Koumandara permit to BIC West Africa Limited for USD 160,000,⁴⁹⁴ which constitutes a valuable contemporary transaction.

4. The Additional Projects Lacked Funding Prior to the Rejection of Sarama's "Tankoro 2 Permit" Application

341. Claimant's submissions and the documents it has produced show that the Additional Projects suffered from the same persistent lack of funding both prior to and after the rejection of Sarama's Tankoro permit application.

⁴⁹² Mr Schmiede attributes the dilution over time to Sarama's decision to allocate funds to the Sanutura project. See Schmiede WS1, ¶ 135. This underscores the low priority and value that Sarama assigned to Karankasso.

⁴⁹³ Memorial, ¶ 328 ("In the present case, Burkina Faso's unlawful measures not only deprived the Claimant of its rights to the Tankoro Deposit, they also destroyed the value that the Claimant had cultivated in the entire Sanutura Project, including the Tankoro and Bondi Deposits, as well as the Additional Projects, the funding and development of which was only possible in conjunction with the Sanutura Project.") (emphasis added).

⁴⁹⁴ Memorial, ¶ 240; Dinning ¶ 189; **Ex. C-0333**, 2024 MD&A dated 28 March 2025, p. 13; Accuracy Report, ¶ 3.39.

342. Claimant's plan would have allegedly been to fund the Additional Projects using cash generated by the sale of gold from the Tankoro and Bondi project, in a sequential "multi-stage" project. It states that:

- [acts of the government] "not only deprived the claimant of its rights to the Tankoro deposit they also destroyed the value that the claimant had cultivated in the entire Sanutura project including Tankoro and Bondi deposits as well as the Additional projects, the funding and development of which was only possible in conjunction with the Sanutura project";⁴⁹⁵
- "Sarama intended to use funds generated from production at the Sanutura project to fund further exploration works at the Koumandara project";⁴⁹⁶
- "Sarama intended to use cash flow generated by the Sanutura Project to fund further exploration works at its 100% owned Koumandara Project";⁴⁹⁷ and
- [Burkina Faso's actions] "denied Sarama the ability to utilize the Sanutura Project to generate cash necessary to develop the Additional Projects."⁴⁹⁸

343. Because Claimant failed to bring the Tankoro Project to an operational stage, it was unable to generate cash to fund the Additional Projects. This consequence is unrelated to any acts by Burkina Faso and would have arisen regardless of the rejection of the "Tankoro 2 Permit".

⁴⁹⁵ Memorial, ¶ 328.

⁴⁹⁶ Memorial, ¶ 330(c).

⁴⁹⁷ Dinning WS1, ¶ 189.

⁴⁹⁸ Memorial, ¶ 14.

344. There is thus no material difference between the situation prior to the 2023 rejection and the situation thereafter. The rejection of Claimant's Tankoro application therefore had no impact on the Additional Projects.

E. Sarama's Liability Theory Based on the Nesting Nature of Its Deposits Is Flawed and in Any Event Irrelevant

345. Claimant attempts to hold Burkina Faso responsible for the alleged loss of the Bondi and Additional Projects as a consequence of the alleged withdrawal of the "Tankoro 2 Permit".⁴⁹⁹ It notably states that Burkina Faso's withdrew the "Tankoro 2 Permit":

- "[i]nvariably destroying the value of Sarama's other projects in the country"⁵⁰⁰;
- "thereby depriving Claimant of the use, enjoyment, and economic benefit of its protected investments in the Sanutura and, consequently, the Additional Projects"⁵⁰¹

346. It states that Tankoro was the "marquee mining asset"⁵⁰² at the "foundation of Sarama's commercial activities in Burkina Faso,"⁵⁰³ and was the "cornerstone of Sarama's investments."⁵⁰⁴ Mr Dinning also states that "without rights to the Tankoro Deposit the Company's value plummeted."⁵⁰⁵

347. As part of this theory Claimant states numerous times in its submissions that it had a plan to combine several of the deposits it owned in an attempt to "benefit

⁴⁹⁹ Request for Arbitration, ¶ 65.

⁵⁰⁰ Memorial, ¶ 2.

⁵⁰¹ Memorial, ¶ 316.

⁵⁰² Memorial, ¶ 2.

⁵⁰³ Memorial, ¶ 231.

⁵⁰⁴ Memorial, ¶ 231.

⁵⁰⁵ Dinning WS1, ¶ 170.

from economies of scale.”⁵⁰⁶ It states that it envisioned a “highly synergistic” combination between Tankoro and Bondi,⁵⁰⁷ since according to Sarama Bondi would have been economically non-viable as a standalone asset.⁵⁰⁸

348. However, as already noted in relation to the Bondi project, these allegations are not borne out by the evidence on the record. Apart from the self-serving statements of company founders acting as witnesses in this arbitration, Claimant has failed to produce any form of evidence of an actual plan to combine the Bondi deposit with the Tankoro deposit.

349. The alleged idea of consolidating the area thus remained purely hypothetical and speculative. The rebranding of the Tankoro and Bondi deposits as the “Sanutura” project (or under the “umbrella” of the Sanutura project as stated by Mr Schmiede⁵⁰⁹) was a mere accounting concept, without any practical consequence for the underlying projects—a labelling exercise at best. Tellingly, Claimant even needs to amend the quote it inserts in its Memorial by artificially adding the term “Sanutura”.⁵¹⁰

350. Quite apart from the fact that Claimant has failed to produce any evidence of its alleged combination plan, it is important to note that Claimant knew from the outset that the Bondi deposit and the Additional Projects would be entirely dependent on the success of Tankoro. Sarama structured this early-stage project in sequential phases, rendering the Bondi Project and the Additional Projects entirely at the mercy of Tankoro’s

⁵⁰⁶ Memorial, ¶ 119.

⁵⁰⁷ Memorial, ¶ 119.

⁵⁰⁸ Memorial, ¶ 120; Dinning WS1, ¶ 70; Schmiede WS1, ¶ 49.

⁵⁰⁹ Schmiede WS1, ¶ 60.

⁵¹⁰ Memorial, ¶ 135.

success. The embedded risk that the “nesting” projects would collapse if the main project did not materialise was a risk of which Claimant was fully aware. Such risks are inherent in a multi-deposit strategy and must be assumed by investors; no guarantee against their materialisation can be expected, particularly not from the host State.

351. Burkina Faso, as a sovereign State responsible for monetising its natural resources, cannot be required to bear the burden of a risk created by Claimant itself when devising preliminary strategies for its project.

F. Sarama’s Presentation of the Progress and Status of the Project Is Unsupported, Contradictory and Misleading

352. Throughout its submission, Sarama attempts to demonstrate that some study work had been carried out on Tankoro and that typical mining project deliverables, such as a PEA and a mine plan, had been prepared or were complete. It also seeks to show that funding opportunities had been identified and that extensive discussions as well as technical due diligence were taking place.⁵¹¹

1. Claimant Alleges That a PEA and a Mine Plan Had Been Prepared or Almost Complete but Fails to Produce These Documents

353. The PEA was purportedly an important milestone for Sarama. As Mr Dinning describes, “Sarama was going to use the results of the PEA to raise further proceeds for advancement of the project.”⁵¹² The PEA was thus the basis upon which funding for the broader development of the project would have been sought from the market.

⁵¹¹ Memorial, ¶ 7; Dinning WS1, ¶ 112.

⁵¹² Dinning WS1, ¶ 107.

354. Yet Claimant is unable to produce any of these documents. Moreover, Claimant's narrative with respect to these technical documents is contradictory, inconsistent, and misleading.

355. Mr Dinning states that Sarama had "decid[ed] to advance PEA workstreams" following its reacquiring of 100% of the Tankoro deposit from Acacia (Barrick Gold) in September 2019.⁵¹³ Claimant further states that the following year, in 2020, "the preparation of a PEA was in the pipeline."⁵¹⁴ He also states that "[b]y 2022, the PEA workstreams were in progress with a plan to deliver the PEA before the end of 2023."⁵¹⁵ Claimant's Memorial includes the similar allegation that "[b]y 2022, with its new permit in hand, Sarama began to prepare a preliminary economic assessment ('PEA') and was in advanced negotiations with prefabricated plant manufacturers and specialist mining lenders."⁵¹⁶

356. Funds were evidently required for the preparation of the PEA, given that Sarama had little cash itself.⁵¹⁷ Some funds came through following Sarama's 2022 ASX listing, which according to Mr Dinning, enabled them to raise AUD 8 million. He further states that in June 2023 Sarama had secured AUD 2 million, which was also intended to support completion of the PEA.⁵¹⁸ A June 2023 press release indicates that "[t]he net

⁵¹³ Dinning WS1, ¶ 82.

⁵¹⁴ Memorial, ¶ 131.

⁵¹⁵ Dinning WS1, ¶ 90.

⁵¹⁶ Memorial, ¶ 7.

⁵¹⁷ Dinning WS1, ¶ 29 ("[I]t does not maintain substantial cash reserves . . . as at 30 September 2021, when Sarama announced its intention to pursue a second listing on the ASX, the Company held cash and cash equivalents of US\$ 1,616,889.").

⁵¹⁸ Dinning WS1, ¶ 107; **Ex. C-0307**, Sarama Resources Ltd, Press Release, 'Sarama Completes Second and Final Tranche of Placement to Advance PEA' June 2023, p. 1; **Ex. C-0033**, Sarama Resources Ltd, 'Sarama undertakes A\$2M placement to advance Sanutura Project' (News Release) April 2023, p. 1 (this document announced the binding placement commitment).

proceeds from the Placement are intended to be used to complete a PEA to evaluate an accelerated multi-stage development at the Sanutura Project and to fund administration and general working capital costs.”⁵¹⁹

357. However, it is unclear from Claimant’s submission how far advanced the PEA actually was. Sarama alleges that by 2022, “Sarama was poised to prepare a PEA for the Sanutura Project,” and goes so far as to assert that this would have been “the next step toward mine construction.”⁵²⁰

358. Mr Schmiede, who had primary responsibility for the PEA,⁵²¹ states that “[b]y August 2023, we had commenced work on nearly all PEA workstreams,”⁵²² and that the “open pit and underground mining workstream of the PEA was still in progress as at 25 August 2023.”⁵²³

359. Yet, in a May 2023 corporate presentation designed to attract funding from investors, Sarama indicated that the PEA was “nearing completion.”⁵²⁴ Mr Dinning also states that “[b]y 25 August 2023, Sarama had substantially completed all necessary workstreams for the PEA.”⁵²⁵

360. Claimant’s position is thus contradictory, and its narrative regarding the PEA amounts to a mere smokescreen. The bottom line is that no PEA is on the record. One

⁵¹⁹ **Ex. C-0307**, Sarama Resources Ltd, Press Release, ‘Sarama Completes Second and Final Tranche of Placement to Advance PEA’ June 2023, p. 1.

⁵²⁰ Memorial, ¶ 155.

⁵²¹ Dinning WS1, ¶ 108.

⁵²² Schmiede WS1, ¶ 68 (emphasis added).

⁵²³ Schmiede WS1, ¶ 91 (emphasis added).

⁵²⁴ **Ex. C-0021**, Sarama Resources Ltd, ‘Capitalising on a world-class West African gold belt’ (Corporate Presentation) May 2023, slide 15 (p. 16 of the PDF) (emphasis added).

⁵²⁵ Dinning WS1, ¶ 108 (emphasis added).

of two conclusions may therefore be drawn: either no PEA exists and Claimant is unable to produce one, or Claimant is withholding the document because it is adverse to its position—for example, because the study had barely commenced, no meaningful work had been carried out, the document contains information adverse to Claimant’s position, or it concludes that the project was not economically viable.

361. Claimant employs similar tactics with respect to the alleged “mine plan”. Claimant asserts that in “collaboration” with consultants “Sarama developed a mine plan,”⁵²⁶ but fails to produce any such document or study. Instead, Claimant merely refers to another company’s capability statement available on its website,⁵²⁷ and to an email exchange between Mr Schmiede and a consultant, in which Mr Schmiede provides technical information and indicates that he attached an executed proposal.⁵²⁸ This proposal has not been produced by Claimant and it is therefore unclear what kind of “collaboration” was contemplated. Claimant also states that they had chosen a specific design for the processing plant “following extensive industry study,”⁵²⁹ yet no documents are produced to support his allegation.

362. Mr Schmiede in his statement alleges that Sarama had “started to develop a mine plan,”⁵³⁰ and “conceptualised a mine plan.”⁵³¹ He goes on to describe this plan and indicates the location of “starter pits” and the kind of truck they would have used,⁵³² and

⁵²⁶ Memorial, ¶ 161.

⁵²⁷ Memorial, n. 374.

⁵²⁸ Memorial, ¶ 161 (citing to **Ex. C-0223**, Email chain between P. Schmiede (Sarama) and I. Daggers, 15-16 August 2022); Schmiede WS1, ¶ 76.

⁵²⁹ Memorial, ¶ 166.

⁵³⁰ Schmiede WS1, ¶ 77.

⁵³¹ Schmiede WS1, ¶ 78.

⁵³² Schmiede WS1, ¶ 78.

even suggests that a “model of the proposed open pits” at Tankoro had been developed.⁵³³ Mr Schmiede dedicates the next six or seven pages of his statement to the description of some technical features of the project.⁵³⁴ However he is unable to point or cite to an actual document that would resemble a “mine plan”; he refers to two PowerPoint decks of slides that are corporate presentations designed to raise money from investors: a company presentation dated November 2022,⁵³⁵ and a March 2022 corporate presentation.⁵³⁶

363. As regards the November 2022 presentation, Mr Schmiede described this document in an email sent out to potential investors as a “summary presentation,”⁵³⁷ and in his witness statement, he refers to this document as “the late 2022 Project configuration plan to guide the PEA.”⁵³⁸

364. These documents are not mine plans. Once again, Claimant’s position is contradictory, and its narrative concerning a “mine plan” appears to be no more than a façade. The simple fact remains that no mine plan has been submitted.

⁵³³ Schmiede WS1, ¶ 79.

⁵³⁴ Schmiede WS1, ¶¶ 76-92 (pp. 31-38). In its Memorial, Claimant provides a similar description of its alleged plan, a description largely based on Mr Schmiede’s statement and the same two PowerPoint slide decks. Memorial, ¶¶ 161-172.

⁵³⁵ **Ex. C-0229**, Sarama Resources Ltd, ‘Company Overview & Project Outlook’ (Presentation) dated 17 November 2022.

⁵³⁶ **Ex. C-0212**, Sarama Resources Ltd, ‘ASX IPO - March 2022’ (Corporate Presentation) dated 12 March 2022.

⁵³⁷ **Ex. C-0304**, Email from P. Schmiede (Sarama) to A. Hudston-Kirkham (Taurus), cc. N. Farr-Jones and A. Dinning, 17 May 2023, attaching **Ex. C-0229**, Sarama Resources Ltd, ‘Company Overview & Project Outlook’ (Presentation) dated 17 November 2022.

⁵³⁸ Schmiede WS1, ¶ 88.

2. Claimant's Narrative on Funding Opportunities Is Also Misleading

365. Claimant's narrative on funding is also misleading and contradicted by Claimants' own documents.

366. Sarama was nowhere near reaching the development stage, let alone production, at any of its sites. Claimant admits that it had limited cash resources,⁵³⁹ and that it "faced increasing difficulties obtaining sufficient funding," in particular because its typical investors were shifting their focus to the cryptocurrency and cannabis markets.⁵⁴⁰

367. Yet, Claimant does not hesitate to present the project as having promising prospects in terms of funding and project development opportunities, alleging that it had had "extensive discussions" with potential funders,⁵⁴¹ and had even reached "technical due diligence" with one such funder.⁵⁴²

368. Upon even basic scrutiny, Claimant's allegations prove to be misleading and unfounded. The evidence does not support Sarama's position; on the contrary, it shows that no advanced funding opportunities were on the table. The communications produced by Claimant, are, for the most part, superficial—at times consisting merely of introductions from one firm to another, effectively passing on the proverbial hot potato. The documents relied upon neither include nor even refer to typical financial materials such as financial models, information memoranda, term sheets, heads of terms, or

⁵³⁹ Memorial, ¶ 159 ("Sarama does not maintain substantial cash reserves and, therefore, had to raise funds at each stage of exploration and development.").

⁵⁴⁰ Memorial, ¶ 159 ("Sarama faced increasing difficulties obtaining sufficient funding through the Canadian market alone due to, among other things, the significant drop in gold price during the 2010s which caused Canadian investors to cool on investing in the mineral resource industry and instead focus on investing in cryptocurrency and cannabis markets.").

⁵⁴¹ Dinning WS1, ¶ 112; Memorial, ¶ 172. *See, more generally*, Dinning WS1, ¶¶ 107-124.

⁵⁴² Dinning WS1, ¶ 120.

mandate letters—let alone any formal proposals. Moreover, whenever Sarama did receive responses, it did not even follow up to pursue those opportunities.

369. Mr Dinning states that Sarama needed short term funds in Q4 2023 to finance further drilling and permitting work, among other things,⁵⁴³ and “approximately US\$ 90 million by Q4 2024” to fund development work.⁵⁴⁴

370. He then alleges that “Sarama had conducted extensive discussions with Taurus.”⁵⁴⁵ The purported support to these allegations consists of a set of emails from late 2022 with a former rugby player, Nick Farr-Jones.⁵⁴⁶ These emails do not demonstrate that “extensive discussions” took place—quite the opposite. First, these communications to which Mr Dinning refers to are all dated 2022 and 2023, *i.e.*, years after Sarama had knowingly let its Tankoro permit lapse in late 2020. The initial communication (dated 10 November 2022) produced by Claimant shows that Mr Dinning had to prompt a response after someone from Taurus named “Seb” had given him “radio silence”.⁵⁴⁷ The subject line of the email is “Edv”, which appears to refer to “Endeavour”, the company that operates the Karankasso project through a JV in which Sarama owned a constantly decreasing minority interest. The “RE:” prefix indicates that prior emails were exchanged, but these have not been produced by Claimant.

⁵⁴³ Dinning WS1, ¶ 9.

⁵⁴⁴ Dinning WS1, ¶ 111.

⁵⁴⁵ Dinning WS1, ¶ 112.

⁵⁴⁶ Dinning WS1, ¶¶ 113-117; **Ex. C-0227**, Email from A. Dinning (Sarama) to N. Farr-Jones (Taurus) dated 10 November 2022; **Ex. C-0228**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 15 November 2022; **Ex. C-0318**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 6 January 2023 (Claimant wrongly refers to C-0367), **Ex. C-0368**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 17 January 2023; **Ex. C-0248**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama), dated 10 February 2023.

⁵⁴⁷ **Ex. C-0227**, Email from A. Dinning (Sarama) to N. Farr-Jones (Taurus) dated 10 November 2022, p. 1.

371. Second, the information that Mr Dinning provides in this email only underscores how little progress Sarama’s project had made as of late 2022, just months before the alleged breach. Mr Dinning merely refers to a plan to build a plant, and mentions the figure of USD 50 million, specifying that this estimate was based on “notional economics” and that the information should remain confidential.⁵⁴⁸

372. Mr Farr-Jones, of Taurus, responded nearly a week later, which—together with the radio silence Mr Dinning initially received—is indicative of Taurus’s limited level of interest in Sarama’s project. The response to Mr Dinning’s email consisted of a suggestion that Sarama might piggyback on another project that Mr Farr-Jones was attempting to fund.⁵⁴⁹ Mr Farr-Jones asked Mr Dinning questions regarding overall capex and other financial metrics.⁵⁵⁰ However, it appears that Mr Dinning did not reply.

373. Mr Dinning’s further assertion that Mr Farr-Jones emailed him seeking additional information in January 2023 regarding modular construction is misleading.⁵⁵¹ The first message in the relevant email thread is an invitation to a social event sent by a member of Taurus, Mrs Yvette Tosio. Mr Farr-Jones merely took advantage of an email bounce-back from Mr Dinning’s email address, and as is clear from the exchange, simply asked Mr Dinning to remind him of the name of one of his colleagues at Sarama:

Andrew can you remind me of the name of your colleague who sent me an email last year with a little detail of the Jo’burg

⁵⁴⁸ **Ex. C-0227**, Email from A. Dinning (Sarama) to N. Farr-Jones (Taurus) dated 10 November 2022, p. 1.

⁵⁴⁹ **Ex. C-0228**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 15 November 2022.

⁵⁵⁰ **Ex. C-0228**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 15 November 2022.

⁵⁵¹ Dinning WS1, ¶ 114 (citing to **Ex. C-0318**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 6 January 2023 (not **Ex. C-0367**)).

based Group who you are in discussions with about the modular processing plants?⁵⁵²

374. There is no mention of a company named APT in the email, contrary to what Mr Dinning alleges, and it is unclear how this message could support the notion that extensive discussions were taking place between Sarama and Taurus. Notably, Mr Dinning once again did not reply.

375. The next communication cited to is a message from Mr Farr-Jones on 17 January 2023, in which he refers to a Sunday social event and asks Mr Dinning for information on the level of work on capital forecasts undertaken by Sarama, among other things:

Hi Andrew, We will be inviting Paul to our Sunday function. In getting ready for the meeting Tuesday morning what level of work have you done on capital forecasts, mine plan based on reserves (probably some infilling required), met work utilising the proposed modular plants and have you the level of work to develop a Financial Model? Regards Nick.⁵⁵³

376. Once again, Mr Dinning does not seem to have responded.

377. The next email cited by Mr Dinning is an email sent by Nick Farr-Jones on 10 February 2023.⁵⁵⁴ In it, Mr Farr Jones follows up on alleged prior meetings (no evidence of which has been produced) and notes that his colleague Craig had a “good chat” with Paul. He further suggests to “[g]et on with NDAs with EDV.” Once again, the subject matter of these emails appears to relate to Endeavour, the JV partner on the Karankasso project, which acquired SEMAFO in 2020. Mr Farr-Jones also proposes that

⁵⁵² **Ex. C-0318**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 6 January 2023, p. 1.

⁵⁵³ **Ex. C-0368**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama) dated 17 January 2023.

⁵⁵⁴ **Ex. C-0248**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama), dated 10 February 2023.

the parties “get into each other’s data room.”⁵⁵⁵ This suggests that any discussions involving Sarama and Taurus were, in fact, centred on a potential agreement with Endeavour. It must be noted again that, by February 2023, Sarama’s interest in the Karankasso JV with Endeavour had declined significantly, to below 18%.⁵⁵⁶

378. The 13 February 2023 email sent by Mr Schmiede and quoted by Mr Dinning does not evidence any substantive discussions regarding the project either.⁵⁵⁷ Rather, it merely follows up on meetings held in South Africa on the sidelines of a mining conference. Mr Schmiede indicates that he and Mr Dinning “have a good understanding of the way APT works” and expresses satisfaction that Taurus appears to have an “open mind” toward a “project development option that doesn’t follow the normal pathway.” He also acknowledges that Taurus’s potential involvement would require more time and more technical due diligence because of this unusual project development option.⁵⁵⁸ The email contains no figures, no technical information, and no supporting attachments.

379. Mr Dinning goes so far as to allege that “[b]y May 2023 [Sarama] had advanced to technical due diligence with Taurus,”⁵⁵⁹ yet he fails to produce or refer to any documentation or communications to substantiate this allegation. The only apparent step taken was the transmission of a 2022 “summary presentation” to a geologist at Taurus.⁵⁶⁰

⁵⁵⁵ **Ex. C-0248**, Email from N. Farr-Jones (Taurus) to A. Dinning (Sarama), dated 10 February 2023.

⁵⁵⁶ **Ex. C-0020**, Sarama Resources Ltd, Management’s Discussion and Analysis of Financial Results (MD&A) 2023, p. 10 (“[B]ased on Sarama’s approximate 17.5% project interest as at December 31, 2023.”).

⁵⁵⁷ Dinning WS1, ¶ 118; **Ex. C-0249**, Email from P. Schmiede (Sarama) to K. Peacocke and M. Conibear (APT), cc. A Dinning, dated 13 February 2023.

⁵⁵⁸ **Ex. C-0249**, Email from P. Schmiede (Sarama) to K. Peacocke and M. Conibear (APT), cc. A Dinning, dated 13 February 2023.

⁵⁵⁹ Dinning WS1, ¶ 120.

⁵⁶⁰ **Ex. C-0304**, Email from P. Schmiede (Sarama) to A. Hudston-Kirkham (Taurus), cc. N. Farr-Jones and A. Dinning, 17 May 2023, attaching **Ex. C-0229**, Sarama Resources Ltd, ‘Company Overview & Project Outlook’ (Presentation) dated 17 November 2022.

There is no mention of any reaction or comment made by Taurus or any discussions—whether technical or financial—between Sarama and Taurus regarding the project following this transmission.

380. Mr Dinning further asserts that “discussions with Taurus were progressing smoothly,”⁵⁶¹ but again provides no evidence of any such discussions. He then mentions that he and Mr Schmiede “had breakfast” with someone who worked at Amed Funds, Mr Twist, in Cape Town in February 2023. Mr Twist, visibly not interested in funding the project with his company Amed Funds, instead sent an email to introduce Mr Dinning and Mr Schmiede to representatives of another company named NRG. As is clear from the initial email of the chain, Mr Twist refers to their conversation they had over breakfast regarding the challenges of conducting business in Burkina Faso, the growing interest of Turkish companies in African projects, and he essentially takes a shot in the dark to see whether anyone other than him might be interested in Sarama's funding needs.⁵⁶²

381. In the same email chain, someone from NRG, Mr Tepperman, mentions that royalty financing could be an option for Sarama: “In this case we believe the alternatives could be royalty/stream financing or possibly a mezzanine structure like a convertible.”⁵⁶³ Notably, however, royalty financing was, by Mr Dinning's own admission, a last-resort option: “[i]f required, royalty financing also could have been pursued.”⁵⁶⁴ Mr Dinning

⁵⁶¹ Dinning WS1, ¶ 121.

⁵⁶² **Ex. C-0247**, Email from D. Twist (AMED Funds) to J. Vickers and A. Tepperman (NRG Capital), cc. A. Dinning and P. Schmiede, 7 February 2023. See also **Ex. C-0252**, Email chain between A. Tepperman, J. Vickers (NRG) and A. Dinning (Sarama), cc. P. Schmiede, dated 7 February-24 March 2023, p. 4.

⁵⁶³ **Ex. C-0252**, Email chain between A. Tepperman, J. Vickers (NRG) and A. Dinning (Sarama), cc. P. Schmiede, dated 7 February-24 March 2023, p. 1 (24 March email).

⁵⁶⁴ Dinning WS1, ¶ 111.

himself admits “that royalty financing was not Sarama’s preference.”⁵⁶⁵ In his reply to Mr Tepperman, dated 24 March 2023, Mr Dinning provided comments in red directly in Mr Tepperman’s email of the same day. He conceded that royalty financing may not be feasible: “[n]ot sure the project can handle a royalty,”⁵⁶⁶ and indicated that USD 2.5 million was required in the “immediate term” “to complete drilling and PEA [that] was due mid-end 2023.”⁵⁶⁷ Thus, Sarama were not receiving positive feedback from the market, and Sarama was short of several millions to complete the PEA.

382. On 28 March 2023, Mr Tepperman replied to Mr Dinning informing him that they had received “some interest from a royalty financier,”⁵⁶⁸ the form of funding that Sarama itself regarded as a last resort and one that in any event would have been unsuitable for the project.⁵⁶⁹

383. Following this market feedback (albeit weak and inappropriate), Mr Tepperman sent several follow-up messages to Mr Dinning before eventually receiving a brief holding message stating: “[s]orry for the delay . . . I will get to this in the next couple of days.”⁵⁷⁰

⁵⁶⁵ Dinning WS1, ¶ 123.

⁵⁶⁶ **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 3.

⁵⁶⁷ **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 3.

⁵⁶⁸ **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 2.

⁵⁶⁹ **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 3 (“Not sure the project can handle a royalty.”).

⁵⁷⁰ **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 1.

384. Mr Dinning tries to spin these repeated follow-ups as evidence of NRG's "keen interest".⁵⁷¹ In reality, correspondence suggests the opposite: a lack of engagement on Mr Dinning's part and NRG's intention to discontinue its efforts. This is evident from Mr Tepperman's 18 April 2023 email, in which he states: "Hi Andrew - sorry to chase but wanted to close the loop on this as we have put the finder into a holding pattern."⁵⁷²

385. Mr Dinning did not reply to that final email. The record thus demonstrates that the market showed little receptiveness to Sarama's project and that Mr Dinning himself was not inclined to pursue the matter further or to explore the purported interest from the royalty financier—consistent with his own position that royalty financing was not a viable option.

386. Mr Dinning also refers to emails with Mr Berman of another firm named Autonomi Capital.⁵⁷³ Mrs Srivastava, of Amed Funds, where Mr Twist works, introduced Sarama to individuals at Autonomi Capital.⁵⁷⁴ It appears that the people at Amed Funds, after their first *bouteille à la mer* with NRG failed to generate results, tried their luck with another speculative introduction, this time to Autonomi Capital, in the hope that a different funder might express interest.

387. Amed Funds, through Mrs Srivastava, introduced Sarama to Mr Berman on 7 February 2023.⁵⁷⁵ Mr Dinning produces an email in which he says he was running late

⁵⁷¹ Dinning WS1, ¶ 123 ("Mr Tepperman followed up with me twice in April 2023 asking if it was ok to proceed, which to me showed NRG's keen interest.").

⁵⁷² **Ex. C-0272**, Email chain between from A Tepperman, J Vickers (NRG) and A Dinning (Sarama), cc. P Schmiede, dated 24 March-18 April 2023, p. 1.

⁵⁷³ Dinning WS1, ¶ 124.

⁵⁷⁴ **Ex. C-0274**, Email from J. Berman (Autonomi) to A. Dinning and P. Schmiede (Sarama) (responding to introduction by M. Srivastava), 8 February 2023.

⁵⁷⁵ **Ex. C-0274**, Email from J. Berman (Autonomi) to A. Dinning and P. Schmiede (Sarama) (responding to introduction by M. Srivastava), 8 February 2023.

for his meeting with Mr Berman of Autonomi, and that he was waiting for an “uber.”⁵⁷⁶ However, the only follow-up Sarama received from Mr Berman after this introduction came on 8 March, when he indicated that two potential lenders might be interested, “namely ECIC . . . and Afreximbank.”⁵⁷⁷ Yet, Sarama, whether through Mr Dinning or Mr Schmiede, did not respond, just as it had failed to respond to NRG. This exchange is the final one cited by Mr Dinning in support of the alleged funding opportunities. As the foregoing demonstrates, virtually no discussions ever took place, let alone any due diligence or formal negotiations, and in several instances, Mr Dinning did not reply to the responses he received.

III. JURISDICTION AND ADMISSIBILITY

388. Respondent shows below that: (i) the Tribunal does not have jurisdiction *ratione materiae* with respect to some of Claimant’s purported investments as they do not fall within the definition of “investment” under the Treaty and/or appear to have not been made in accordance with the law; (ii) the Tribunal lacks jurisdiction *ratione personae* because Claimant does not qualify as an “investor of a Party” under the Treaty; and (iii) Claimant’s claims are subject to the time limitation in the Treaty.

389. As discussed further below, Claimant’s case is also flawed in that its claims are concerned with the admission of an investment and not the treatment of a covered investment given that its rights in the Tankoro area were fully extinguished when the Tankoro Permit expired in December 2020 and its complaints relate to the Ministry’s

⁵⁷⁶ **Ex. C-0273**, Email chain between J. Berman (Autonomi) and A. Dinning and P. Schmiede (Sarama), 9 February 2023.

⁵⁷⁷ **Ex. C-0253**, Email from J. Berman (Autonomi Capital) to A. Dinning and P. Schmiede (Sarama), 8 March 2023.

handling of its application for a new exploration permit for the Tankoro area.⁵⁷⁸ While this flaw could arguably be considered jurisdictional in the sense that Claimant's claims are outside the scope of the Treaty given its overall scope as defined in Article 2 and the scope of the standards of treatment,⁵⁷⁹ Respondent submits that it is better viewed as a merits issue in that Claimant's claims do not, by their terms, establish a breach of the invoked standards of treatment as they do not involve the treatment of a covered investment. The same analysis also leads to the conclusion that Claimant's claims are outside the scope of Article 25(1) of the ICSID Convention,⁵⁸⁰ which also enables the matter to be viewed as jurisdictional. However, it can again be said that it is better viewed as a merits issue in the sense that Claimant's claims, once assessed on the merits, can be found to not establish any treatment of an existing investment. To be certain, Respondent objects to Claimant's claims as being outside the scope of the Tribunal's jurisdiction because they are outside the scope of the Treaty and the ICSID Convention should the Tribunal consider it more appropriate to address the issue as one of jurisdiction.

A. The Tribunal Lacks Jurisdiction *Ratione Materiae*

1. The Tribunal Lacks Jurisdiction *Ratione Materiae* With Respect to Some of Claimant's Purported Investments

390. Claimant asserts that the definition of investment in Article 1 of the Treaty "is broad and encompasses 'any kind of assets'" and then identifies a number of its

⁵⁷⁸ *Infra*, ¶¶ 457-463.

⁵⁷⁹ **Ex. CL-0003**, Treaty, Article 2(1) ("This Agreement shall apply to measures adopted or maintained by a Party relating to: (a) an investor of the other Party; and (b) a covered investment.").

⁵⁸⁰ **Ex. CL-0001**, ICSID Convention, Article 25(1).

purported assets as covered investments under the Treaty.⁵⁸¹ Claimant's characterisation of the scope of Article 1 is incorrect and several of the purported assets it lists do not qualify as investments under the Treaty. While Claimant does not appear to be basing claims on the treatment of these purported assets, Respondent believes it is nonetheless important to briefly address why they are not covered.

391. Claimant has ignored how the definition of "investment" in Article 1 of the Treaty differs from that in most investment treaties. Rather than setting forth a definition with a merely illustrative list of the types of assets that can constitute an investment, Article 1 specifies that "[a]n investment must be in one of the following forms" and then lists assets such as shares, bonds, loans, and certain types of contract interests.⁵⁸²

392. Several of the items that Claimant cites as its covered investments do not qualify as investments under the Treaty because they do not meet the first part of the definition of being "assets that an investor of a Party owns or controls in the territory of the other Party that involves the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" and/or not do not fall within in one of the specified forms of assets that can constitute an investment. These include:

[T]he expenses incurred by the Claimant for the Sanutura Project and Additional Projects in relation to exploration drilling, assaying, metallurgical tests, and mineral resource estimates, as well as engaging third-party consultants for technical and development studies; [and]

administrative, utility, corporate and other overhead costs incurred in the set-up and day to day running of the Sanutura Project and the Additional Projects, as well as investor

⁵⁸¹ Memorial, ¶¶ 264-265.

⁵⁸² **Ex. CL-0003**, Treaty, Article 1 (definition of "investment").

marketing, stock exchange listing, and fundraising costs for the Sanutura Project and the Additional Projects[.]⁵⁸³

393. These expenditures and costs are not assets of Claimant, much less an investment. While the funds used for the expenditures constituted an asset prior to being spent, the completed expenditures themselves are not. They may be something that Claimant records in its accounting records and references as part of its valuation methodology, but they are not an asset that is owned and can be alienated. While an investor's expenditures can certainly lead to an investment, they do not themselves constitute an investment. Thus, if an investor used its funds to build a factory in the host State, the factory could well be a covered investment. It makes no sense, however, for that investor to also claim that the expenditures themselves constitute a covered investment. The expenditures listed by Claimant also do not qualify as an investment under the Treaty because they do not fall within in any of the specified forms of assets.

394. Claimant asserts that its “attendant equipment and infrastructure”, associated with its mining works in Burkina Faso constitute a covered investment.⁵⁸⁴ While Claimant has submitted a spreadsheet showing the purported expenditures relating to such equipment and infrastructure, it has not identified the actual assets that it claims are investments or provided any details about them. As such, it is not possible for Respondent to assess whether any such equipment or infrastructure constitutes a covered investment under the Treaty. In any case, Claimant has also not explained how any such assets were subject to improper treatment by Burkina Faso.

⁵⁸³ Memorial, ¶ 266.

⁵⁸⁴ Memorial, ¶ 265.

395. Claimant asserts that the “physical samples from exploration drilling and other exploration activities” constitutes a covered investment.⁵⁸⁵ Claimant has not indicated whether these samples are located in the territory of Burkina Faso and has not, in any case, explained how they were subject to improper treatment by Burkina Faso.

396. Claimant asserts that the “electronic databases of survey, assay, geological, metallurgical, and financial results and environmental baseline data stored outside of Burkina Faso” constitute a covered investment.⁵⁸⁶ While Claimant’s handling of the data from its exploration activities is an issue in this case, Article 1 of the Treaty covers only “assets that an investor of a Party owns or controls in the territory of the other Party.”⁵⁸⁷

397. Respondent also submits that Claimant’s alleged investment cannot be protected under the BIT insofar as it is tainted by illegality. Indeed, several of its permits

2. The Tribunal Lacks Jurisdiction *Ratione Materiae* With Respect to Investments Not Made in Accordance With the Law

398. Under international law, investments must be made in full compliance with domestic laws of the host State in order to benefit from protection under bilateral investment agreements. International investment arbitral tribunals have regularly required investments to comply with local law, failing which no protection may be afforded.⁵⁸⁸ This “clean hands” doctrine must be given application regardless of whether

⁵⁸⁵ Memorial, ¶ 265.

⁵⁸⁶ Memorial, ¶ 265.

⁵⁸⁷ **Ex. CL-0003**, Treaty, Article 1 (definition of “investment”).

⁵⁸⁸ **Ex. RL-0003**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009, ¶ 101; **Ex. RL-0004**, *SAUR International SA v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012, ¶ 308; **Ex. RL-0005**, *Worley International Services Inc. v. Republic of Ecuador*, PCA Case No. 2019-15, Final Award dated 22 December 2023, ¶ 304; **Ex. RL-0006**, *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 August 2006, ¶¶ 187,

a specific legality clause exist in the applicable treaty or not,⁵⁸⁹ and here, Article 3.1 of the Treaty specifies:

Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party. Each Party shall admit those investments in accordance with its laws and regulations otherwise consistent with this Agreement.⁵⁹⁰

399. As noted above, although Sarama was not eligible to receive a second renewal of the Tankoro Permit, the then Minister, Boubacar Ba, issued Decree No. 2015-000283 on 16 September 2015, granting it in violation of the applicable mining regulations.⁵⁹¹ Respondent was unaware of this improper grant of the renewal until examining Claimant's Memorial. It is currently investigating the matter and reserves all rights in that regard. For now, it appears that, whatever the reasons for the permit being renewed might have been, it was not done in accordance with the law.

B. The Tribunal Lacks Jurisdiction *Ratione Personae* as Claimant Is Not an "Investor of a Party"

400. The Tribunal lacks jurisdiction over Claimant's claims in circumstances where Claimant has failed to establish that it qualifies as a protected "investor of a Party" within the meaning of the Treaty.

234-239, 257; **Ex. RL-0007**, *Fraport v. Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 December 2014, ¶¶ 332, 467.

⁵⁸⁹ **Ex. RL-0004**, *SAUR International SA v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012, ¶ 308.

⁵⁹⁰ **Ex. CL-0003**, Treaty, Article 3.1.

⁵⁹¹ **Ex. C-0045**, Decree No. 2015 000283/MME/SG/DGCM in relation to the second renewal of the TANKORO permit of Sarama Mining Burkina SARL (renewing the Tankoro Permit for the second time).

401. Article 2(1) of the Treaty limits its scope to measures adopted or maintained by a Party relating to “an investor of the other Party” and “a covered investment”.⁵⁹²

402. Article 1 of the Treaty defines an “investor of a Party” as:

[A] Party, or a national or an enterprise of a Party, that seeks to make, is making or has made an investment, but exclud[ing] an enterprise of a Party if investors of a non-Party or of the other Party own or control that enterprise and the enterprise does not have substantial business activity in the territory of the Party under whose domestic law it is constituted or organized at the time of the events giving rise to the claim.⁵⁹³

403. Article 1 thus expressly carves out from the Treaty’s protection any enterprise of a Party that (i) is owned or controlled by investors of a non-Party or the other Party; and (ii) lacks substantial business activity in Canada at the time of the events giving rise to the claim. Claimant does not qualify as an “investor of a Party” where both elements of the exclusion are satisfied.

404. As demonstrated below, Claimant is not a genuinely Canadian enterprise. It is owned or controlled by investors of a non-Party and lacks substantial business activity in Canada at the time of the events giving rise to the claim. It therefore falls squarely within the Treaty’s exclusion and the Tribunal consequently lacks jurisdiction *ratione personae*.

405. Unable to establish that it qualifies as a protected investor, and seemingly aware of the jurisdictional consequences that follow, Claimant seeks to recast Article 1 as a discretionary “denial of benefits” provision in an attempt to shift onto Respondent the

⁵⁹² **Ex. CL-0003**, Treaty, Article 2(1), Scope.

⁵⁹³ **Ex. CL-0003**, Treaty, Article 1, Definition of “Investor of a Party” (emphasis added).

burden of proving it applies.⁵⁹⁴ However when Article 1 is properly interpreted pursuant to Article 31 of the Vienna Convention on the Law of Treaties, Claimant's position is untenable in light of its clear terms, read in their context and in light of the Treaty's object and purpose.⁵⁹⁵

406. First, the language at issue is not framed as a discretionary right of a State Party to deny benefits upon notice. The Treaty contains a separate denial-of-benefits clause in Article 19, which expressly provides that "[a] Party may deny the benefits of this Agreement to an investor of the other Party."⁵⁹⁶ No comparable language appears in Article 1. The exclusionary language is embedded directly within the Treaty's definition of "investor of a Party" in Article 1. This definition provides the relevant criteria for an enterprise to qualify as an "investor of a Party" and benefit from the protections afforded by the Treaty. The exclusionary language operates as a limitation on consent such that an enterprise that falls within the carve-out is, as a matter of treaty interpretation, never a protected investor to begin with. The Contracting States have decided that treaty protection cannot accrue to enterprises that are owned or controlled by any investors of a non-Party State or the host State and have no substantial business activity in the territory of the Party under whose law it was constituted or organised, and have crafted the definition of investor of a Party accordingly. It is well established that contracting States have discretion, in their treaties, to define the requirements for a qualifying investor of another contracting State. This includes determining the relevant nationality criteria for an enterprise, whether by reference to the seat of incorporation or to ownership and

⁵⁹⁴ Memorial, ¶¶ 247-260.

⁵⁹⁵ **Ex. CL-0007**, Vienna Convention on the Law of Treaties, dated 23 May 1969, Article 31.

⁵⁹⁶ **Ex. CL-0003**, Treaty, Article 19, Denial of Benefits.

control, and excluding from that definition those investors to whom they do not wish to extend treaty protection or consent to arbitration.⁵⁹⁷

407. Second, when read in its proper context and in light of the other provisions in the Treaty, this language simply cannot be construed as a denial of benefits. If that had been the Contracting Parties' intention, it would have been reflected in the provision specifically addressing denial of benefits. Article 19 does not replicate the requirements of the definitional limitation and is only engaged in circumstances where the enterprise has already satisfied the definition of "investor of a Party" and thus qualifies, in principle, for treaty protection. Therefore, only where that enterprise is owned or controlled by investors of a non-Party (but has substantial business activity in the territory of the Party under whose domestic law it is constituted) and where the denying state has adopted measures *vis-à-vis* that non-Party prohibiting transactions with the enterprise or measures that would be violated or circumvented if treaty benefits were granted to that enterprise, could the denying state exercise its discretion to deny the benefits of the Treaty.⁵⁹⁸ This article operates as a subsequent, discretionary mechanism, distinct from the definitional criteria that must first be satisfied in order to qualify as an "investor of a Party".

408. Third, this interpretation accords with the Treaty's object and purpose. Article 1 contains the relevant definitions of "investor" and "investment". The cross-reference to "investor of a Party" within the definition of "investment" further confirms that

⁵⁹⁷ See, e.g., **Ex. RL-0008**, *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010, ¶¶ 44-45 ("For the Tribunal to have jurisdiction in this case, each of the Claimants, under Article XII(2) has the burden to demonstrate, inter alia, that he or she is "an investor" as defined under Article 1(h) of the BIT. . . in addition to their nationality, the Canadian Claimants must demonstrate that the own or control an "investment," as that term is defined in the BIT.").

⁵⁹⁸ **Ex. CL-0003**, Treaty, Article 19, Denial of Benefits.

both provisions establish cumulative requirements for a qualifying investor and a qualifying investment to benefit from protection under the Treaty. In particular, the definition of “investment” encompasses “any kind of asset that an investor of a Party owns or controls in the territory of the other Party,” thereby expressly linking the two concepts.⁵⁹⁹ It follows that only an investor meeting the Treaty’s definitional criteria, and owning or controlling an investment in the host State, may benefit from its protections. The Treaty does not extend protection indiscriminately to any investor or any asset; rather, it conditions such protection on the fulfilment of specific requirements. This is consistent with the Treaty’s object and purpose, as reflected in its preamble, which emphasises the promotion of investments by investors of one Party in the territory of the other Party, with a view to stimulating mutually beneficial business activity and fostering economic cooperation between the two States.⁶⁰⁰

409. As the above demonstrates, in the usual way, the Tribunal’s jurisdiction depends upon Claimant satisfying the Treaty definition in full, including demonstrating that it does not fall within the express exclusion.⁶⁰¹ It is well established that the burden rests on Claimant to prove the facts necessary to establish jurisdiction.⁶⁰² Where a Treaty excludes from treaty protection categories of investment or investor, it is for Claimant to demonstrate that the conditions for exclusion are not met.⁶⁰³

⁵⁹⁹ **Ex. CL-0003**, Treaty, Article 1, Definition of “Investment” (emphasis added).

⁶⁰⁰ **Ex. CL-0003**, Treaty, Preamble.

⁶⁰¹ See, e.g., **Ex. RL-0003**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009, ¶¶ 60-61, 67.

⁶⁰² See, e.g., **Ex. RL-0003**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 April 2009, ¶¶ 60-61, 67.

⁶⁰³ See, e.g., **Ex. RL-0009**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award dated 2 November 2012, ¶¶ 262-265 (“Having failed to demonstrate its control over the transactions relating to the Loans, Claimant has not established an investment in the territory of

410. In addition, Claimant's reliance in its Memorial on the tribunal's statement in *Generation Ukraine* is misplaced.⁶⁰⁴ That case is distinguishable, as Respondent here has not invoked the denial of benefits clause.⁶⁰⁵ Rather, the issue here is whether Claimant falls within the definition of a qualifying investor entitled to treaty protection.

411. In any event, even if—*quod non*—the provision were to be characterised as a denial of benefits clause, the burden of proof would remain with Claimant. As confirmed by the tribunal in *Plama v. Bulgaria*, even in the context of such a clause, it was for the claimant to establish that it satisfies the relevant ownership or control requirements to qualify for treaty protection.⁶⁰⁶

412. Respondent accordingly puts Claimant to strict proof on this issue. What follows are limited observations on Claimant's cursory and unsupported assertions in this regard.

1. Claimant Is Owned or Controlled by Investors of a Non-Party

413. While Respondent does not have independent access to detailed information concerning the ownership or control of Sarama—matters squarely within Claimant's knowledge and evidentiary burden—Claimant's own Memorial and supporting documents confirm that Sarama is neither owned nor controlled by Canadian investors, but by investors of non-Parties to the Treaty. Before turning to these issues, it is

Tanzania that would justify a finding of jurisdiction by this Tribunal.”). See also **Ex. RL-0010**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award dated 5 June 2012, ¶ 401.

⁶⁰⁴ Memorial, ¶ 249.

⁶⁰⁵ See, e.g., **Ex. CL-0021**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, ¶ 15.1 (“The Respondent has invoked Article I(2) of the BIT to prevent the Claimant from deriving benefit from the investment protection standards conferred by the BIT.”).

⁶⁰⁶ **Ex. RL-0011**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 August 2008 (“*Plama v. Bulgaria*”), ¶ 82.

necessary to address two threshold issues that permeate Claimant's argument on this point, namely the definition of "investors of a Non-Party" under the Treaty and the relevant temporal framework for assessing whether Claimant is Owned or Controlled by investors of a non-Party.

(a) The Meaning of "Investors of a Non-Party"

414. Claimant contends that the exclusion does not apply because ownership by investors from non-Parties is dispersed across multiple non-Party states, rather than concentrated in a majority held by investors from a single non-Party state.⁶⁰⁷ Specifically, it argues that "[t]he singular wording 'a non-Party' in its ordinary meaning requires the analysis of control to focus on investors from the same non-Party. Respondent cannot combine the interests of investors from several different non-Parties to establish control."⁶⁰⁸

415. That interpretation cannot withstand scrutiny. Article 1 refers to "investors of a non-Party" in the plural and without qualification.⁶⁰⁹ It does not require majority ownership, nationality aggregation, or concentration in a single foreign State. Nor does it limit the exclusion to circumstances where a single non-Party investor exercises dominant control. Claimant's construction reads into the Treaty words that simply are not there.

416. Properly understood, the term "non-Party" operates as a categorical distinction by differentiating between (a) Canada and Burkina Faso—the Parties to the Treaty—and (b) all other States. The reference to investors "of a non-Party or of the other

⁶⁰⁷ Memorial, ¶¶ 254-255.

⁶⁰⁸ Memorial, ¶ 254 (emphasis in original).

⁶⁰⁹ **Ex. CL-0003**, Treaty, Article 1, Definition of "Investor of a Party" (emphasis added).

Party” does not denote a specific country by name, but rather identifies a category of investors that falls outside the protected class.

417. Claimant’s reading would produce arbitrary results inconsistent with the clause’s function. On this approach, if the threshold for non-Party ownership or control was 80% held by investors of a single nationality, an enterprise 80% owned by Australian investors would fall within the exclusion as a majority of the investors share a single nationality, but would escape exclusion if ownership were divided 79% Australian and 1% French. Nothing in the Treaty text supports such nationality-specific aggregation. Had the Parties intended to impose a majority or single-State threshold, they would have said so expressly.

418. The correct interpretation accords with the object and purpose of Article 1. Provisions of this kind are designed to prevent treaty shopping and to ensure that treaty protection is reserved for enterprises maintaining a genuine economic nexus with the Contracting Party whose nationality they invoke. They exclude protection for enterprises owned or controlled by investors from States unrelated to the Treaty, and prevent round-tripping by investors of the other Party. Claimant’s construction would undermine that purpose.

(b) The Relevant Temporal Framework

419. Claimant contends that the assessment of whether Claimant is an investor under the Treaty should be conducted solely as at the date of the alleged wrongful act—namely, the purported expropriation on 25 August 2023—and applies that temporal lens to the entirety of the Article 1 test.⁶¹⁰

⁶¹⁰ Memorial, ¶ 252.

420. That approach is inconsistent with the text of the Treaty. Article 1 attaches the temporal qualifier—“at the time of the events giving rise to the claim”—specifically to the requirement of “substantial business activity.”⁶¹¹ It is therefore simply incorrect for Claimant to assert that “the investors of a non-Party or of Burkina Faso did not control Sarama at the time of the events giving rise to the claim” and therefore this “fact alone confirms that the Claimant falls outside of the scope of the denial of benefits and therefore enjoys the protections of the BIT.”⁶¹² As can be easily observed, Claimant’s position relies on a misreading of the Treaty and cannot sustain itself.

421. In any event, and as shown next, even if the Tribunal were to adopt Claimant’s preferred temporal reference point, Claimant has failed to establish Canadian ownership or control as at August 2023. Its argument therefore fails on its own case.

(c) Claimant Is Owned by Investors of a Non-Party

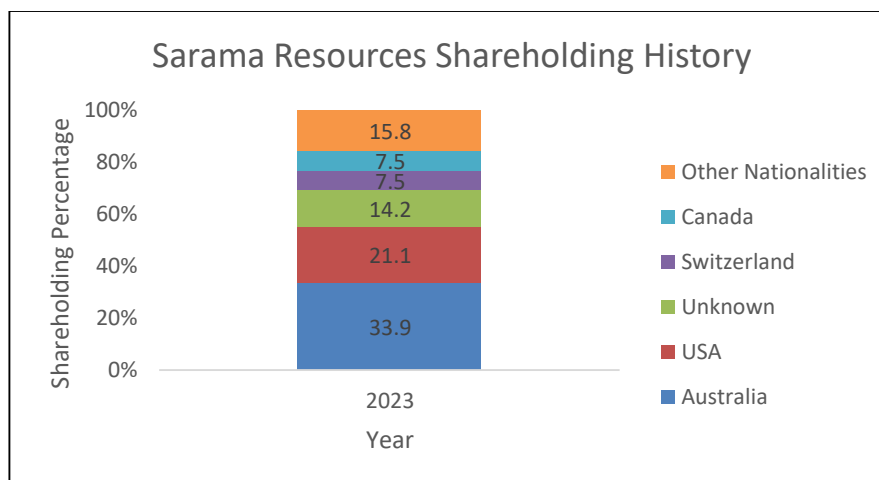
422. Based on the information that Claimant has thus far submitted, it appears that, at all material times, Claimant has been largely owned by investors from multiple non-Party States. Investors who are nationals of the enterprise’s State of incorporation, Canada, represent only a very small fraction of its owners.

423. For example, the table below reproduces the information contained in Claimant’s **Exhibit C-314**, which shows that, as at 2023, only 7.5% of Sarama’s shareholders were Canadian.⁶¹³ All other investors, at least 78.3% and up to 92.5% (depending on the nationalities of the unknown investors), are investors from a non-Party State.

⁶¹¹ **Ex. CL-0003**, Treaty, Article 1, Definition of “Investor of a Party”.

⁶¹² Memorial, ¶ 251.

⁶¹³ **Ex. C-0314**, Sarama Register as at 25 August 2023.



424. As noted above, it is Claimant’s burden of proof to demonstrate that it is not owned by investors of a Non-Party. And yet, Claimant fails to address the ownership requirement under the exclusion. Nowhere in its Memorial does it articulate a definition or threshold for ownership, nor does it attempt any application of that limb. Instead, Claimant confines its analysis solely to the issue of control.⁶¹⁴ This is despite the provision making clear that the exclusion is engaged where investors of a non-Party own or control the enterprise. The existence of either ownership or control is sufficient to satisfy the first limb of the exclusion. Consequently, even if Claimant is not controlled by investors of a Non-Party, which Respondent denies, ownership by investors of a Non-Party alone would suffice to satisfy the first limb of the exclusion.

425. In the absence of any specific definition of “own” or “ownership” in the Treaty, its meaning must be ascertained by reference to Article 31 of the Vienna Convention on the Law of Treaties. The ordinary meaning of “investors [that] own that enterprise,”⁶¹⁵ absent any specific qualification with respect to the extent of ownership,

⁶¹⁴ Memorial, ¶¶ 248, 251-255.

⁶¹⁵ Ex. CL-0003, Treaty, Article 1, Definition of “Investor of a Party” (emphasis added).

such as “majority”, “minority”, or “entire” ownership, must therefore refer to any form of shareholding.

426. Pursuant to Article 31, this interpretation must also be informed by the context and the object and purpose of the provision, and of the Treaty. The relevant definition is intended to delineate the category of investors entitled to benefit from treaty protection and to exclude investors lacking a genuine link with the relevant Contracting State: namely, enterprises that are merely shell companies with no substantial business activities in that State and with Investors from other States owning or controlling it.

427. Accordingly, where investors of a Non-Party or of the host State hold a substantial ownership interest in the enterprise, the exclusion is engaged. In the present case, investors of a Non-Party hold up to 92.5% of Claimant. Accordingly, Claimant is plainly owned by investors of a Non-Party. This satisfies, on its own, the first limb of the exclusion.

(d) Claimant is Controlled by Investors of a Non-Party

428. Contrary to Claimant's assumption in its Memorial, control does not necessarily equate to majority ownership.⁶¹⁶ Claimant contends that its investors from Australia do not meet the relevant shareholding threshold to exercise control over it, as their combined ownership amounts, at most, to 48.08%.⁶¹⁷

⁶¹⁶ Memorial, ¶ 253; See, e.g., **Ex. RL-0012**, C. Schreuer, *Shareholder Protection in International Investment Law*, TDM 3 (2005), p. 1 (“A shareholder may own the company entirely, may own a majority of its shares or may just own a minority of shares. A shareholder may or may not control the company, which is not necessarily the same as majority ownership.”).

⁶¹⁷ Memorial, ¶ 255.

429. However, it is entirely possible for a minority shareholder to exercise control. Indeed, in *Aguas del Tunari v. Bolivia*, this was a scenario envisaged by both the claimant and the tribunal when interpreting the term “controlled.” Indeed, the tribunal noted that “[i]n the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders’ agreements, or a combination of these.”⁶¹⁸

430. In addition, as the tribunal in *Caratube* recognised, control is not confined to the legal capacity to exercise control, but requires evidence of its actual exercise.⁶¹⁹

431. Derived from Claimant’s own documents, the evidence demonstrates that Sarama’s effective control did not reside in Canada, as the vast majority of Claimant’s executive management team was neither Canadian nor based in Canada.⁶²⁰ Instead, Sarama’s central management and strategic direction appears to have been based in Australia, as confirmed by the correspondence and press releases issued from its Perth

⁶¹⁸ See, e.g., **Ex. RL-0013**, *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction dated 21 October 2005.

⁶¹⁹ See, e.g., **Ex. RL-0010**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award dated 5 June 2012.

⁶²⁰ See, e.g., **Ex. C-0020**, Sarama Resources Ltd, Management’s Discussion and Analysis of Financial Results (MD&A) 2023 dated 28 March 2024, p.4 (“the Company’s primary office is located in Perth, Western Australia.”); **Ex. C-0011**, Sarama Resources Ltd, Consolidated Financial Statements 2023, dated 28 March 2024; **Ex. C-0359**, Sarama Resources Ltd, Management (Web Page), dated 21 October 2025. See also Dinning WS1, ¶ 2.

office.⁶²¹ The latter being referred to as the head office of Claimant in its corporate profile details as well as its website.⁶²²

432. Claimant does not seriously address that: (a) Claimant is listed on the Australian Securities Exchange; (b) less than 10% of its shares are known to be held by Canadian nationals or entities; (c) the overwhelming majority of its shareholding is dispersed among non-Canadian investors; and (d) its strategic decision-making and operational direction occur outside Canada.

433. Under established arbitral jurisprudence, tribunals do not confine themselves to formal incorporation. Where a treaty requires analysis of “ownership” or “control”, tribunals examine the substance of shareholding and effective control.⁶²³

434. In *TSA Spectrum v. Argentina*, the tribunal declined jurisdiction where a company incorporated in the Netherlands was ultimately controlled by Argentine nationals. The tribunal examined beneficial ownership and effective control, concluding that the claimant did not qualify as a protected investor despite formal incorporation.⁶²⁴

⁶²¹ See, e.g., **Ex. C-0062**, Letter from Sarama Resources Ltd to the Minister of Energy, Mines and Quarries dated 3 May 2023. See also **Ex. C-0371**, Mining.com ‘Sarama Resources Completes IPO to Raise \$16.7 million for Burkina Faso Gold Exploration, dated 2 November 2011; **Ex. C-0307**, Sarama Resources Ltd, Press Release ‘Sarama Completes Second and Final Tranche of Placement to Advance PEA’ dated 21 June 2023; **Ex. C-0364**, Sarama Resources Ltd, Press Release, ‘Sarama Resources Provides Update on Status of Exploration Permit’, dated 6 September 2023.

⁶²² See, e.g., **Ex. C-0003**, British Columbia Securities Commission ‘Sarama Resources Ltd (000032281)-Company Details’, System for Electronic Document Analysis and Retrieval (SEDAR +), Sarama Resources Ltd ‘Company Details’, dated 10 December 2024; **Ex. CL-0359**, Sarama Resources Ltd, Management (Web Page), dated 21 October 2025.

⁶²³ See, e.g., **Ex. RL-0008**, *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award dated 19 May 2010, ¶¶ 51-53. See also **Ex. RL-0010**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award dated 5 June 2012, ¶ 380.

⁶²⁴ **Ex. RL-0014**, *TSA Spectrum de Argentina SA v. Argentine Republic*, ICSID Case No. ARB/05/5, Award on Jurisdiction dated 19 December 2008.

435. Similarly, in *ST-AD v. Bulgaria*, the tribunal closely scrutinised ownership percentages and voting control in determining whether the claimant met the treaty's nationality requirements.⁶²⁵

436. By contrast, the well-known decision in *Tokios Tokelés v. Ukraine* accepted jurisdiction over a Lithuanian-incorporated entity largely owned by Ukrainian nationals.⁶²⁶ However, that decision turned on the absence of any treaty language as to control and the treaty's exclusive reliance on place of incorporation.⁶²⁷ It expressly excludes enterprises owned or controlled by non-qualifying investors and lacking substantial business activity. The reasoning in *Tokios Tokelés* is therefore inapposite.

437. In the present case, Claimant's minimal Canadian shareholding (less than 10%) precludes any serious contention that it is a Canadian enterprise. Its ownership is held by nationals of non-Parties, and it is ultimately controlled by investors of a non-Party, Australia. The first limb of the exclusion is therefore satisfied.

2. Claimant Lacks Substantial Business Activity in Canada

438. Claimant has also failed to establish that it had "substantial business activity" in Canada at the time of the events giving rise to the claim.

439. Again, as to the relevant time-frame, Claimant says this is 23 August 2023. However, this is a snapshot in time argument and does not work. That would defeat the purpose and object of Treaty, by allowing an entity to establish a business operation in

⁶²⁵ **Ex. RL-0015**, *ST-AD GmbH v. Republic of Bulgaria*, ICSID Case No. ARB/11/06, Award on Jurisdiction dated 18 July 2013.

⁶²⁶ **Ex. RL-0016**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 April 2004.

⁶²⁷ **Ex. RL-0016**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 April 2004, ¶¶ 38-39, 52.

Canada temporarily and then discontinue it once it is no longer needed. A temporary business activity cannot amount to “substantial” business activity.

440. When interpreted in accordance with their ordinary meaning, the phrase “substantial business activity” necessarily requires more than the mere legal registration of an enterprise in the territory of the relevant Contracting Party. The term “activity” clearly connotes conduct that is active rather than passive in nature; “business” qualifies that conduct by requiring it to be commercial, as opposed to purely administrative; and “substantial” introduces a threshold of significance or materiality.

441. Therefore, “substantial business activity” must require more than: (a) a registered office, (b) a mailing address, or (c) passive holding functions.

442. This is also supported by the object and purpose of the provision, and of the Treaty. Its rationale is to ensure that the protection afforded under the Treaty is confined to enterprises with a genuine economic and commercial presence in the Contracting Party in which they are constituted. It thereby seeks to prevent “treaty shopping”, under which shell companies might otherwise obtain protections intended only for genuinely established and actively operating enterprises within the territory of the Contracting State.

443. This interpretation is consistent with how tribunals have interpreted this phrase. In *Pac Rim v. El Salvador*, the tribunal upheld a denial-of-benefits objection where the claimant lacked substantial business activities in its place of incorporation, emphasising that such clauses prevent shell companies from invoking treaty protection.⁶²⁸ The tribunal examined the existence of employees, premises, management functions, and operational activity, concluding that the claimant was effectively a shell entity.

⁶²⁸ **Ex. RL-0017**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction dated 1 June 2012, ¶¶ 4.70-4.78.

Likewise, in *Ulysseas v. Ecuador*, jurisdiction was declined where the claimant was a vehicle lacking meaningful operations in its State of incorporation and functioned merely as a vehicle for foreign interests.⁶²⁹ These decisions confirm that incorporation alone does not suffice where the treaty expressly requires a genuine economic connection.

444. Here, Claimant: (a) has not demonstrated operational presence in Canada; (b) has no meaningful workforce or revenue-generating activities in Canada; (c) conducts its core management and strategic operations outside Canada; and (d) is listed and capitalised primarily through the Australian market.

445. On any objective assessment, Claimant is not a Canadian enterprise engaged in substantial business activity in Canada. It is, at most, a foreign-controlled holding vehicle.

446. The second limb of the Treaty exclusion is therefore satisfied.

3. The Treaty's Object and Purpose Confirm the Exclusion

447. The Canada–Burkina Faso BIT is intended to protect genuine cross-border investment between Canada and Burkina Faso. It is not designed to afford protection to:

- a) enterprises owned or controlled by investors of third States;
- b) entities with no substantial economic nexus to the purported home State; or
- c) vehicles engaged in treaty shopping through nominal incorporation.

448. As tribunals have recognised, State parties can include in their treaty specific language, carve-outs or provisions to prevent such abuses, and those express inclusions must be given effect by tribunals. In *Pac Rim*, the tribunal acknowledged that

⁶²⁹ **Ex. RL-0018**, *Ulysseas, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/09/19, Award dated 12 June 2012, ¶¶ 160-175.

such provisions are designed to ensure that only enterprises with a real economic link to the Contracting Party may invoke treaty protection.⁶³⁰

449. Allowing a publicly listed Australian-centred company with negligible Canadian ownership and no substantial Canadian operations to proceed under this Treaty would defeat the clear textual limitation negotiated by the Parties.

4. Conclusion

450. Claimant has failed to discharge its burden of proving that it meets the definition of “investor of a Party” under Article 2.1 of the BIT. Instead, because Claimant is (a) owned or controlled by investors of a non-Party; and (b) lacks substantial business activity in Canada, it falls squarely within the BIT’s exclusion.

451. Accordingly, the Tribunal lacks jurisdiction *ratione personae*, and the claims must be dismissed in their entirety.

C. Claimant’s Claims Are Subject to the Time Limitation in the Treaty

452. Article 22 of the Treaty provides that an investor may submit a claim to arbitration only if, *inter alia*, “not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby”.⁶³¹

453. Claimant has framed its case as based on the alleged unlawful revocation of the “Tankoro 2 Permit” in August 2023. However, by its own account, the “harm” that it suffered derives from the Ministry’s October 2020 decision to reserve the Tankoro permit area to the State such that it became subject to the separate process that provided

⁶³⁰ **Ex. RL-0017**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction dated 1 June 2012, ¶¶ 4.70-4.83.

⁶³¹ **Ex. CL-0003**, Treaty, Article 22.

for it to be reviewed for possible development by the State and reallocation through a tender process if that did not occur. To the extent that Claimant faults the Ministry for not honouring the alleged oral assurance given by Minister Idani that Claimant did not need to worry about the Tankoro Permit expiring, the matter is likewise subject to the time limitation. Also inadmissible are Claimant's complaints about how the Ministry elected to reallocate Tankoro and other permit areas subject to the imposition of special conditions on the grant of a new permit, as Claimant became aware of that decision through the issuance of the Ministry's 1 June 2021 Information Note. While the Tribunal can consider events outside of the limitation period as part of the factual matrix that informs its assessment of Claimant's claims, it cannot base a finding of a breach on the basis that any of the State's conduct outside of the limitation period. As such, Claimant cannot, for example, base a claim on the alleged impropriety of the Ministry not applying the normal permitting procedure, including the "first come, first served" approach, and imposing special conditions on the grant of a permit.

IV. LIABILITY

A. General Considerations

454. Before addressing Claimant's claims of breaches of the standards of treatment in the Treaty, Respondent reviews below a few preliminary issues that inform the assessment of those claims.

1. Claimant's Treaty Claims Are Entirely Dependent on Its Fictional Account of the Facts

455. In many treaty arbitration cases, the result can turn, at least in part, on how the tribunal interprets the standards of treatment in the applicable treaty. That is not the case here. Claimant has been so aggressive in manufacturing an alternative reality,

including with respect to the conduct of the Ministry and the content of Burkina Faso's laws and regulations, that its claims turn almost entirely on whether the Tribunal believes Claimant's account of how it was subject to a hostile campaign to unlawfully expropriate its clear ownership rights in the Tankoro permit area to benefit a politically connected company. Respondent believes that the Tribunal will readily see that Claimant's account of the facts is contrived and contrary to reality and the evidence. However, given the immense amount of damages sought by Claimant relative to Burkina Faso's public finances, Respondent has, nonetheless, thoroughly responded to Claimant's legal arguments.

456. While addressing Claimant's interpretation of the Treaty standards is reasonably straightforward, dealing with Claimant's arguments regarding the application of those standards to the facts is more challenging. There is little point engaging in detail with a fictional narrative that has no evidentiary basis and is not even internally consistent. As such, Respondent has found its response somewhat repetitive in referring to how Claimant's claims fail because they are dependent on its baseless account of the facts. Respondent has, however, also sought to address where Claimant's factual account is legally insufficient even if accepted as true, and has addressed aspects of the Ministry's conduct that have at least some grounding in reality, such as how administrative functions were delayed by the political turbulence in the country, to show how they would also not provide a basis for finding a breach of the Treaty even if Claimant had advanced claims based on such arguments.

2. The Standards of Treatment Invoked by Claimant Apply Only to Covered Investments and Not to Attempts to Make Investments

457. By its own account, Claimant's entire case depends on its allegation that the manner in which the Ministry handled Claimant's August 2021 application for a new exploration permit for the Tankoro permit area violated the Treaty's standards of treatment and the expropriation standard in particular.⁶³² As part of this allegation, Claimant has gone to great lengths to claim that Minister Ouedraogo's 24 November 2021 letter was the key legal instrument that granted the so-called "Tankoro 2 Permit" in November 2021, such that, upon the payment of the permitting fee on 29 November 2021, Claimant's legal rights in the Tankoro area were "perfected" with Claimant becoming the "legal owner of the Tankoro 2 Permit."⁶³³

458. As shown above, Claimant's claim that it received legal rights in the Tankoro area in November 2021 via the Minister's letter is manifestly false. The letter did not purport to grant the permit or legal rights and instead said that further processing was required.⁶³⁴ Claimant also knew that the reallocation of reserved areas would involve the Ministry identifying special conditions that would need to be accepted as that had been explained several months earlier in the June 2021 Information Note issued under the same Minister.⁶³⁵ Further, as a matter of Burkinabe law, the letter could not have granted Claimant a permit or mining rights.⁶³⁶ If that were not enough, Claimant's claim is inconsistent with its repeated statements to investors and others after November 2021

⁶³² Memorial, ¶¶ 11-13.

⁶³³ Memorial, ¶¶ 6, 319.

⁶³⁴ *Supra*, ¶¶ 132-168.

⁶³⁵ *Supra*, ¶¶ 126-131.

⁶³⁶ *Supra*, ¶¶ 137-168.

and into early 2023, in which it recognised that it had not been granted the permit and only “anticipated” that the grant was forthcoming. Claimant only shifted to alleging that it had obtained the permit and legal and ownership rights in the Tankoro area and deposit when it began preparing for this arbitration.

459. The reason for that change in Claimant’s position is no mystery. Claimant engaged sophisticated investment arbitration counsel that understands that a case based on the host State’s allegedly improper refusal to admit an investment does not work as a matter of liability or damages. Investment treaties are concerned with providing protections with respect to covered investments and allowing for the possibility of compensation for the harm caused to such investments. Here, that scope is made explicitly clear. Article 2 of the Treaty (“Scope”) states:

1. This Agreement shall apply to measures adopted or maintained by a Party relating to:
 - (a) an investor of the other Party; and
 - (b) a covered investment.⁶³⁷

460. The expropriation provision of the Treaty, Article 10, reflects that limited scope as it specifies that it is concerned with the expropriation of “investments”, and provides for compensation based on the value of “the expropriated investment”. The FET standard in Article 6 of the Treaty has the same scope in being concerned only with the treatment of covered investments,⁶³⁸ as does the FET standard that Claimant hopes to

⁶³⁷ **Ex. CL-0003**, Treaty, Article 2(1).

⁶³⁸ **Ex. CL-0003**, Treaty, Article 6(1) (referring to treatment “accord[ed] to a covered investment treatment.”).

“import” from the Korea-Burkina Faso BIT.⁶³⁹ As these standards provide no protection or benefit with respect to attempts to make an investment, Claimant’s claims under them, which are concerned solely with its attempt to obtain new mining rights in the Tankoro area, must be dismissed on that basis.

461. While the National Treatment standard in Article 4 and MFN Treatment standard Article 5 refer to providing no less favourable treatment with respect to the “establishment” and “acquisition” of an investment,⁶⁴⁰ that language concerns treatment accorded with respect to an investment that was actually established and acquired and is not meant to provide an exception to the limited scope of the Treaty defined in Article 2. Further, Article 21 of the Treaty specifies that investors may not arbitrate claims “with respect to the establishment and acquisition of an investment” under Article 4.⁶⁴¹ While Article 21 does not include a similar exception for Article 5, Claimant never actually established or acquired a new investment through its application for a new exploration permit for Tankoro, and does not, in any case, have a claim that its attempt to make a new investment involved it receiving treatment less favourable than that provided to the national of a third State. Claimant knows that Tankoro was one of many permit areas covered by expiring permits that was reserved to the State, and that the Ministry made clear in its 1 June 2021 Information Note that the reallocation of all of those permit areas would involve the identification of special conditions. This was a case of the Ministry applying the same laws and regulations to Claimant’s attempt to obtain new mining rights

⁶³⁹ **Ex. CL-0071**, Agreement Between the Government of the Republic of Korea and the Government of Burkina Faso for the Promotion and Protection of Investments (2004), Article 2(2).

⁶⁴⁰ **Ex. CL-0003**, Treaty, Articles 4, 5.

⁶⁴¹ **Ex. CL-0003**, Treaty, Article 21(1).

as it applied to other companies interested in acquiring reallocated permit areas. The only way that Claimant was treated differently than other companies was beneficial, in that the prior holders were given special consideration in the reallocation process.

462. In addition to falling outside the scope of the Treaty and its standard of treatment, Claimant's claims fall outside the scope of the ICSID Convention, which provides, in Article 25(1) that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".⁶⁴² As such, an investment must exist at the time of the dispute for the Centre's jurisdiction to be established. Here, the rights invoked by Claimant had been legally extinguished such that it had no investment in Tankoro when its dispute regarding the handling of its application to make a new investment in Tankoro arose. While Claimant ignores the issue, it cannot deny that the law provided that all of its right in Tankoro were extinguished with the expiration of the Tankoro Permit. Nor can it deny that it was made aware of that fact as the Order granting the final renewal of the Tankoro Permit stated: "The permit is valid from 18 December 2017 to 17 December 2020. It cannot be renewed in accordance with the legislative and regulatory provisions in force."⁶⁴³

463. In sum, while Respondent still thoroughly reviews them below, all of Claimant's claims can be quickly dismissed once the Tribunal confirms that Claimant lost all of its legal rights in the Tankoro permit area and deposit upon the expiration of the Tankoro Permit on 17 December 2020. As a matter of law and fact, it had no investment in the Tankoro permit area and deposit once that occurred. Its complaints about the

⁶⁴² **Ex. CL-0001**, ICSID Convention, Article 25(1).

⁶⁴³ **Ex. C-0046**, Order No. 2019-150/MMC/SG/DGCM of 17 July 2019 renewing exploration permit No. 284, known as "Tankoro".

Ministry's conduct after 17 December 2020 therefore do not concern the treatment of an investment under the Treaty and are invalid for that reason.⁶⁴⁴

3. Claimant Is Not Entitled to Base Claims on “Imported” Standards From the Korea-Burkina Faso BIT

464. Claimant wants to avoid having its FET claims assessed under Article 6 of the Treaty, which expressly provides that the FET protection does not “require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”⁶⁴⁵ As such, Claimant asserts that the MFN clause of the Treaty entitles it to make claims under the FET standard of the Korea-Burkina Faso BIT.

It states:

If the Tribunal finds that the FET standard under Article 6 of the BIT provides a lower level of obligation towards the Claimant's investments than an autonomous FET standard (which it does not), the Claimant may invoke the FET standard from Article 2(2) of the Burkina Faso-Korea BIT by virtue of the MFN clause set out in Article 5 of the BIT.

Article 5 of the BIT provides that Burkina Faso is obliged to provide “treatment no less favourable than that it accords, in like circumstances” to other foreign investors and their investments. This obligation entitles the Claimant to rely on more favourable treaty standards from Burkina Faso's other investment treaties that address the same subject matter.⁶⁴⁶

465. Claimant argues that the Treaty's MFN clause allows for this “importation” of the FET standard because it “provides that Burkina Faso is obliged to provide

⁶⁴⁴ While dismissing Claimant's claims on this basis resembles a jurisdictional holding in that the claims could be said to fall outside the scope of the standards of treatment, Respondent submits that it is better viewed as a merits finding in that Claimant has failed to articulate, much less establish, that Respondent has engaged in conduct that violated the standards' obligations regarding the treatment of investments.

⁶⁴⁵ **Ex. CL-0003**, Treaty, Article 6(2).

⁶⁴⁶ Memorial, ¶¶ 361-362.

‘treatment no less favourable than that it accords, in like circumstances’ to other foreign investors and their investments,” and other tribunals have found that such language has the purpose of requiring a “level playing field” when it comes to the treaty protections offered to investors.⁶⁴⁷

466. Claimant’s argument is incorrect because it fails to address the actual terms of the clause, which require that the investor show that it or its investment has been accorded treatment less favourable than that accorded to investors or investments of another State “in like circumstances”. Such language indicates that the investor must establish, *inter alia*, that there is an investor or investment of the relevant third State, in this case Korea, which is in like circumstances and has been accorded the more favourable treatment.

467. Respondent could provide a more detailed explanation of why that conclusion is required as a matter of treaty interpretation and fits with the decisions of other tribunals. However, there is no need to do so as Claimant has ignored Annex III of the Treaty (“Exceptions from Most-Favoured-Nation Treatment”), which specifies:

Article 5 (Most-Favoured-Nation Treatment) does not apply to treatment accorded by a Party under a bilateral or multilateral international agreement in force on or signed prior to the date on which this Agreement came into effect.⁶⁴⁸

⁶⁴⁷ Memorial, ¶¶ 362-363.

⁶⁴⁸ Treaty, Annex III, ¶ 1.

468. The Korea-Burkina Faso BIT was signed on 26 October 2004 and came into effect on 14 April 2010.⁶⁴⁹ The Canada-Burkina Faso BIT came into effect on 11 October 2017.⁶⁵⁰

469. Article 34(2) of the Treaty provides:

When the respondent Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception set out in Article 17(1) (Reservations and Exceptions), or Annexe II (Reservations for Future Measures) or III (Exceptions from Most-Favoured-Nation Treatment), the Tribunal shall, at the request of that Party, request the joint interpretation of the Parties on the issue. Within 60 days of the delivery of the request, the Parties shall submit in writing their joint interpretation to the Tribunal. If the Parties fail to submit their joint interpretation within 60 days of the Tribunal's request, the Tribunal shall decide the issue. The joint interpretation is binding on the Tribunal.⁶⁵¹

470. Respondent trusts that Claimant will acknowledge in its Reply memorial that the exception in Annex III applies and withdraw its attempt to use Article 5 of the Treaty to claim that it was not accorded the treatment accorded to Korean investors under the Korea-Burkina Faso BIT. If, for some reason, Claimant does not do so, Respondent reserves the right to request a joint interpretation of the Contracting Parties.

B. Article 10 – Expropriation

471. Respondent begins its review of Claimant's claims with its expropriation claim under Article 10 of the Treaty because Claimant has made the claim the centrepiece of its case in manufacturing a narrative in which Burkina Faso expropriated all of its

⁶⁴⁹ See **Ex. R-0043**, UNCTAD, *International Investment Agreements Navigator: Burkina Faso*, at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/31/burkina-faso>.

⁶⁵⁰ **Ex. R-0043**, UNCTAD, *International Investment Agreements Navigator: Burkina Faso*, at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/31/burkina-faso>.

⁶⁵¹ **Ex. CL-0003**, Treaty, Article 34(2).

investments by unlawfully revoking the so-called “Tankoro 2 Permit”. Before reviewing the merits of the claim, it is first helpful to note the reasons that Claimant has made such an effort to create an expropriation claim.

472. First, as noted above, Claimant knows that its complaints relate to its attempt to make an investment through its application for a new exploration permit after the expiration of the Tankoro Permit extinguished all of Claimant’s rights in the Tankoro area.⁶⁵² As a dispute about the admission of an investment, rather than the treatment of one, provides no basis for Claimant to establish a breach of the Treaty’s standards of treatment or a right to damages, it had to manufacture the claim that the Minister’s 24 November 2021 letter made it “the legal owner of the Tankoro 2 Permit” so it could claim that the permit was its investment and was expropriated.

473. Second, Claimant also knows that the Treaty’s other standards of treatment are of little assistance to it because a breach of those standards results in the right to compensation being assessed on the basis of the “but for” standard of reparation that requires Claimant to establish with reasonable certainty the profits that it would have enjoyed had the breach not occurred. Because Claimant was in such an early exploration stage and operating in a high-risk environment with few resources of its own, it has no chance of establishing with reasonable certainty that it would have proceeded to production and enjoyed profits that justify compensation. It is only in the case of an expropriation that Claimant is entitled to the fair market value of the expropriated investment at the time of the taking such that it can advance its MEE valuation method. Claimant’s assertion that the “but for” standard of reparation that applies with respect to

⁶⁵² *Supra*, ¶¶ 72-82.

the other treaty standards also requires compensation based on the fair market value of the investment at the time of breach is plainly wrong.⁶⁵³

474. While basing its case on an expropriation claim helps Claimant address those issues, it is ultimately self-defeating because the narrative quickly collapses upon examination. As discussed below, the expropriation provision of the Treaty, Article 10, provides protection only with respect to government measures that have an expropriatory character and an expropriatory effect on the investor's investment. The Ministry's handling of Claimant's application for a new exploration permit for the Tankoro area did not have: (i) an expropriatory character, as it was a normal and legitimate administrative process concerning the State's allocation of one of its unencumbered assets that involved no taking or interference with property rights; or (ii) an expropriatory effect on Claimant's investment because Claimant had no investment in the Tankoro permit area or deposit following the expiration of the Tankoro Permit, and its application itself does not constitute an investment that could be said to have been expropriated.

1. The Expropriation Standard Applies Only to Measures That Have an Expropriatory Character and Expropriatory Effect on an Investment

475. Article 10 of the Treaty provides investors protections with respect to expropriations of their investments and similar measures. Article 10(1) sets forth the primary rule, stating:

A Party may not nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalization or expropriation ("expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation in accordance with

⁶⁵³ *Infra*, ¶¶ 590-598.

paragraphs 2 and 3. For greater certainty, this paragraph shall be interpreted in accordance with Annex I (Expropriation).⁶⁵⁴

476. Here, the key question is whether Burkina Faso committed an indirect expropriation of any of Claimant's investments such that compensation is required. Annex I of the Treaty provides further guidance on how the Tribunal is to make that determination. It states:

[T]he determination of whether a measure or a series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,

(ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and

(iii) the character of the measure or the series of measures ⁶⁵⁵

477. While there is no longer significant support for the "sole effects" doctrine as the test for determining whether an indirect expropriation has occurred, Annex I is helpful in avoiding any doubt in that regard. It requires, very understandably, that the Tribunal also consider the character of the measure and not just its effects. It is not uncommon

⁶⁵⁴ **Ex. CL-0003**, Treaty, Article 10(1).

⁶⁵⁵ **Ex. CL-0003**, Treaty, Annex I.

for legitimate governmental measures to result in a complete or near complete loss in the value of an investment in circumstances in which compensation should not be required.

478. Article 10(1) of the Treaty and Annex I also confirm that the expropriation protection applies only with respect to measures that have an expropriatory effect on the investment. The expropriation standards of all or nearly all investment treaties follow this approach of being concerned only with the taking of a covered investment under the treaty. They do not protect the investor from economic losses resulting from measures that do not involve a taking or substantial deprivation of the value of an investment, and therefore do not cover, *inter alia*, the denial of an attempt to make an investment even if the investor believes that it would have been able to generate profits by making the investment.

2. The Ministry's Handling of Claimant's Tankoro Permit Application Did Not Have an Expropriatory Character

479. Claimant's expropriation claim fails in the first instance because the Ministry's handling of Claimant's application for a new exploration permit for the Tankoro area did not have an expropriatory character and so cannot be considered an indirect expropriation for that reason.

480. As Respondent has shown, upon the expiration of the Tankoro Permit in December 2020, all of Claimant's rights in the Tankoro permit area and deposit were extinguished and the State regained full unencumbered ownership rights in the area.⁶⁵⁶ Under the established legal framework, the Ministry reviewed the now unencumbered permit area to assess whether it should be developed by the State or reallocated. After

⁶⁵⁶ *Supra*, ¶¶ 72-82.

determining that Tankoro and other reserved permit areas should be reallocated, the Ministry announced on 1 June 2021 that, rather than making the permit areas available for permitting in the normal “first come, first served” manner, it would invite applications from companies, and would give special consideration to the prior holders if they wished to apply and impose special conditions on the grant of the permits.⁶⁵⁷ To enable that policy of allowing prior holders to apply and potentially obtain new exploration permits for reallocated permit areas, the Ministry decided to not enforce the prohibitions that normally apply on prior holders applying for and receiving new permits in the same permit area.

481. As part of that reallocation process, the Ministry decided to impose an acquisition price requirement as a routine special condition of the reallocation of the permit to the former holder.⁶⁵⁸ That was entirely reasonable as the permit area had become a State asset. The Ministry was free to dispose of the asset as it wished, and it was reasonable to attempt to obtain value for the asset in doing so because of the possibility that the prior exploration works had increased the value of the permit area by providing indications of development potential and data on the past exploration work that also became an asset of the State and could potentially be used by the acquiring company so that it would not need to repeat the same works.⁶⁵⁹ In normal circumstances, if a company agreed to pay the acquisition price to acquire a reallocated permit area, the Ministry would grant it a new exploration permit and conclude an asset transfer agreement that would, *inter alia*, convey the data from the prior exploration works to the company.⁶⁶⁰

⁶⁵⁷ *Supra*, ¶¶ 126-131.

⁶⁵⁸ *Supra*, ¶¶ 200-219. See also Kéré WS1, ¶¶ 20-25.

⁶⁵⁹ *Supra*, ¶¶ 126-131.

⁶⁶⁰ *Id.*

That would be done even in the case of reallocation to the prior holder because the data was to be transferred to the Ministry upon the expiration of the exploration permit.

482. As Claimant advised that it would not pay the acquisition price, the Ministry rejected its application in August 2023.⁶⁶¹ The Ministry then kept the permit area available for applications and eventually granted an exploration permit to another company, Soleil, in May 2024.⁶⁶² As discussed above, the Ministry was unable to obtain the targeted purchase price it has set with Claimant because Claimant had refused to comply with its obligation to transfer the data from its exploration activities to the Ministry. Without that data, the Ministry was able to obtain the increased value in the permit area that was expected to exist because of the prior exploration works.⁶⁶³

483. In some cases, it is necessary for the parties to engage in a detailed discussion of legal authorities addressing the fine and much-debated line between non-expropriatory regulatory measures and actions that are tantamount to an expropriation. That is not the case here. The Ministry's conduct does not come close to having an expropriatory character. Rather than involving a taking of property or interference with property, the Ministry's actions related to the potential disposal of its own property pursuant to an established regulatory framework. Ultimately, this case simply involves a government offering to sell one of its assets and a company not acquiring the asset because it chose to not pay the price set by the government. Claimant's complaints about the precise manner in which the process was conducted as regards, *e.g.*, the alleged lack of transparency regarding the legal basis for the process and arbitrariness of the

⁶⁶¹ *Supra*, ¶¶ 222-242.

⁶⁶² *Supra*, ¶¶ 243-252.

⁶⁶³ Kéré WS1, ¶¶ 35-36.

determination of the acquisition price, are meritless. However, even assuming, *arguendo*, that they were valid, such complaints are incapable of converting the Ministry's legitimate administrative process regarding the disposal of a State asset into an expropriation requiring compensation.⁶⁶⁴

484. While the foregoing assessment of the character of the Ministry's actions is sufficient to dispose of Claimant's expropriation claim, it is worth also noting that the conclusion that no indirect expropriation occurred is further supported by an examination of the additional factor in Annex I regarding "the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations."⁶⁶⁵

485. As shown above, the applicable laws and regulations clearly established that Claimant would lose all of its rights in the Tankoro permit area upon the expiration of the Tankoro Permit and would be subject to prohibitions on applying for or receiving rights in the same permit area thereafter.⁶⁶⁶ They also established that the Ministry could allocate permit areas through a tender rather than in the normal process of issuing them on a "first come, first served" process subject to a minimal application fee,⁶⁶⁷ and could reserve the permit area to the State following the expiration of the permit for the purpose of deciding whether to develop it through the State or reallocate it.⁶⁶⁸ Further, in reserving the Tankoro permit area along with other areas covered by expired permits, the Ministry

⁶⁶⁴ See, e.g., **Ex. CL-0021**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, ¶ 20.33 (in the context of expropriation, stating: "This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently.").

⁶⁶⁵ **Ex. CL-0003**, Treaty, Annex I.

⁶⁶⁶ *Supra*, ¶¶ 72-82.

⁶⁶⁷ *Supra*, ¶¶ 83-101.

⁶⁶⁸ *Id.*

clearly explained the legal basis for the action and the review process. Likewise, in announcing that the Tankoro permit area would be reallocated, the Ministry clearly explained that the grant of a permit would be subject to the imposition of special conditions.⁶⁶⁹

486. If that were not enough, Claimant accepted that it had no right to compensation in connection with decision regarding the allocation or renewal of a mining permit. In obtaining and renewing the Tankoro Permit, Claimant agreed to the application of the relevant mining laws and regulations,⁶⁷⁰ which were effective in any case. That includes Decree No. 2017-036, which provides in Article 19: “The rejection of requests for allocation, renewal, assignment, amodiation, transmission of mining titles or authorisations does not entitle the holder to any compensation or compensation whatsoever.”⁶⁷¹

487. Given the foregoing, Claimant could not reasonably have expected that it was entitled to a new exploration permit free of any additional conditions, which means that the Ministry’s conduct cannot be considered an interference with an investor’s reasonable expectations.

488. It is because Claimant understands that the Ministry’s actual conduct cannot be seriously described as expropriatory that it has gone to such lengths to construct its narrative that it received the “Tankoro 2 Permit” and was then subject to an unlawful and hostile campaign designed to expropriate that permit and its rights in the Tankoro permit

⁶⁶⁹ *Supra*, ¶¶ 126-131.

⁶⁷⁰ *See, e.g., supra*, ¶¶ 63-71.

⁶⁷¹ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 275.

area for the purpose of transferring them to another company with political ties to the Government. As established above, this narrative relies on blatant misrepresentations of the documentary evidence and applicable laws and regulations, and the self-serving, unreliable, and unpersuasive testimony of Claimant's witnesses. Respondent does not repeat here its full rebuttal to Claimant's narrative and only highlights some of the points established above that are of particular relevance to Claimant's claim that the Ministry's handling of its permit application was expropriatory.

- a. Claimant and its witnesses have entirely ignored the prohibitions under the 2015 Mining Code and its implementing regulations that apply to prior holders applying for and receiving new permits, and has flatly misrepresented the law to the Tribunal in claiming that it imposed no such restrictions.⁶⁷²
- b. Claimant and its witnesses have feigned ignorance of the regulatory framework that was established for permit areas that were covered by exploration permits that expired and became unencumbered State assets. It provided that such areas could be reserved by the State for review to determine whether they should be developed by the State or reallocated.⁶⁷³ Their stance is not credible as the Ministry's communications to Claimant explained the legal basis for the handling of such areas, and because Claimant's witnesses elsewhere profess knowledge and reliance on the same laws and regulations that provided that legal basis.
- c. The allegation by Claimant and its witnesses that Minister Idani told them in August 2020 "not to worry" about needing a new permit because Claimant could continue its exploration works without one is unserious. It depends solely on the self-serving testimony of Mr Hamilton, who has zero credibility, and is unrealistic and does not fit with the Minister's other actions.⁶⁷⁴ It is also pointless as such a comment could not override the laws and regulations that prohibit exploration activities without a valid permit and

⁶⁷² *Supra*, ¶¶ 102-111.

⁶⁷³ *Supra*, ¶¶ 83-101.

⁶⁷⁴ *Supra*, ¶¶ 77-82.

establish that mining rights can only be granted by an *arrêté* issued by the Minister.

- d. Claimant and its witnesses have ignored how Claimant's 6 August 2021 application for a new permit would have been prohibited under the normal permitting procedures and was allowed (to be submitted and to proceed) by the Ministry only because it was following the special process for reallocating permit areas that had been reserved by the State.
- e. The allegation by Claimant and its witnesses that the 24 November 2021 letter from Minister Ouedraogo granted it the "Tankoro 2 Permit" ignores the text of the letter, which says nothing about granting the permit and states that further processing is required, and the 1 June 2021 Information Note issued under the same Minister that explained that the grant of reallocated permits would be subject to special conditions identified by the Ministry. It also relies on the absurd claim that an *arrêté* is a mere "receipt" of no legal significance.
- f. The allegation by Claimant and its witnesses that the Ministry made changing Canada's policy relating to the release of drone technology a condition is not credible as the documentary evidence shows that it was never a condition and that Claimant itself raised the possibility of it attempting to influence the matter.⁶⁷⁵
- g. The acquisition price requirement, which Claimant acknowledges was the only condition it needed to satisfy to obtain a new permit, was entirely reasonable. Indeed, it would have been irresponsible and contrary to the public interest for the Ministry to reallocate the Tankoro permit area without obtaining value for it.
- h. Claimant's suggestion that the acquisition price requirement was an extortionate demand for a bribe is baseless. It relies solely on Mr Hamilton's testimony and does not fit with the contemporaneous documents showing that the Ministry openly identified the requirement in official communications and in discussions with the Ambassador of Canada.

⁶⁷⁵ *Supra*, ¶¶ 60, 158, 200-206.

- i. The allegation by Claimant and its witnesses that the Ministry unlawfully revoked the “Tankoro 2 Permit” for the purpose of transferring it to a politically connected company, Soleil, is unsubstantiated and does not make sense by its terms as the Ministry continued to market the permit area after rejecting Claimant’s application in August 2023 and only granted it to Soleil in May 2024—and did so subject to an acquisition price requirement, which was lower than the price the Ministry sought to receive in large part because of Claimant’s refusal to comply with its obligation to transfer the data from its exploration activities to the Ministry.

489. In sum, Claimant has failed to show that the Ministry’s conduct had an expropriatory character or interfered with its reasonable expectations such that it could be considered an expropriation. All Claimant can really say about the handling of its 6 August 2021 application is that it proceeded slowly following Minister Ouedraogo’s 24 November 2021 indicating that the processing would continue. A delay in processing an application does not, of course, constitute an expropriation, particularly when the application seeks to acquire an asset of the State. Further, even putting aside how Claimant’s submission of the invalid December 2020 application for a new permit for the Tankoro area complicated matters, reality cannot be ignored. There was a *coup d’état* in Burkina Faso in January 2022 and another in September 2022, and the country was subject to high levels of political turbulence that severely affected the function of public administration throughout that time period. After being appointed in October 2022, Minister Boussim engaged with Claimant on its application in a responsive manner, including through meetings and correspondence, and promptly identified the acquisition price that would be required as special condition on the grant of the permit. Holding Burkina Faso liable for an expropriation on the basis of such a delay would be an outrage.

3. The Ministry's Handling of Claimant's Tankoro Permit Application Did Not Have an Expropriatory Effect on an Investment

490. Even assuming, *arguendo*, that the Ministry's handling of Claimant's application for a new permit could be considered to have an expropriatory character, Claimant's claim would still fail because the Ministry's conduct did not have an expropriatory effect on Claimant's investment.

491. As noted, the text of Article 10 of the Treaty makes clear that the protection applies only respect to measures that have an expropriatory effect on the investor's investments. It does not require compensation in connection with measures that do not constitute a taking of an investment, including the handling of an investor's attempt to make an investment.

492. As established above, upon the expiration of the Tankoro Permit on 17 December 2020, all of Claimant's rights in the Tankoro permit area and deposit were extinguished and the State regained full unencumbered ownership rights over the area and deposit. Claimant was additionally required to transfer the data from its exploration activities to the Ministry. To the extent that Claimant had its equipment or other assets in the permit area, it was responsible for removing them. As such, as a matter of fact and law, Claimant had no property rights or investment in the Tankoro permit area and deposit. Indeed, it is hard to see how Claimant could argue otherwise when it has so vociferously insisted that the alleged revocation of the "Tankoro 2 Permit" "permanently extinguished its rights with respect to that deposit, rendering the Claimant's investment therein valueless."⁶⁷⁶ If a revocation of a permit results in such a permanent loss of rights,

⁶⁷⁶ Memorial, ¶ 330(a).

the expiration of the Tankoro Permit, which actually occurred, must have had the same effect.

493. While Claimant has not advanced the argument,⁶⁷⁷ Claimant's 6 August 2021 application for a new permit does not constitute an investment in its own right. Unlike many investment treaties, the Treaty does not include a merely illustrative list of the type of assets that can constitute an investment entitled to protection. Rather, it specifies that "[a]n investment must be in one of the following forms" and then lists assets such as shares, bonds, loans, and certain types of contract interests.⁶⁷⁸ The list does not refer to anything like an application for an exploration permit. Further, the application cannot be considered an "asset,"⁶⁷⁹ which is a requirement to being an "investment" under Article 1 of the Treaty.⁶⁸⁰ Claimant did not have any ownership interest in the application after submitting it to the Ministry and could not alienate or assign the application.⁶⁸¹

494. While Respondent has already shown that Claimant's allegation that it received the "Tankoro 2 Permit" is baseless, it bears emphasising that it does not work for Claimant to portray Minister Ouedraogo's 24 November 2021 letter as a grant of mining rights that was expropriated. Even putting aside the lack of any indication in the letter that it was granting such rights, it is the applicable national law that determines

⁶⁷⁷ See Memorial, ¶ 265 (not listing the permit application as one of Claimant's purported investments).

⁶⁷⁸ **Ex. CL-0003**, Treaty, Article 1 (definition of "investment").

⁶⁷⁹ **Ex. RL-0001**, Bryan A. Garner, BLACK'S LAW DICTIONARY, 9th ed. (Thomson Reuters, 2009), Definition of "asset".

⁶⁸⁰ **Ex. CL-0003**, Treaty, Article 1 ("investment" means any kind of assets that an investor of a Party owns or controls in the territory of the other Party that involves the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.).

⁶⁸¹ **Ex. RL-0019**, Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations* in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE (Oxford, 1 May 2014), 363-406, p. 375 ("A defining characteristic of property is that it is capable of alienation or assignment.").

whether a property right exists that can constitute an “asset” capable of being an “investment”.⁶⁸² As discussed above, the 2015 Mining Code made clear that mining rights are granted only through the issuance of an *arrêté* from the Minister. Accordingly, even if Claimant and its witnesses genuinely believed that the Minister’s letter constituted a legal grant of mining rights while an *arrêté* is a meaningless “receipt,” their views are irrelevant when it comes to assessing whether there was a taking of property rights requiring compensation.

495. As with the issue of whether the Ministry’s handling of the permit application had an expropriatory character, Claimant’s claim of expropriatory effect does not fit with Article 19 of Decree No. 2017-036, which provides: “The rejection of requests for allocation, renewal, assignment, amodiation, transmission of mining titles or authorisations does not entitle the holder to any compensation or compensation whatsoever.”⁶⁸³ As this prohibition on an entitlement to compensation was explicitly established in the law, it constitutes a limitation on the scope of any rights that could be said to have been granted by either the submission of an application or a letter from the Ministry confirming the receipt of the application and requesting payment of a fee to proceed with the processing of the application.

⁶⁸² See, e.g., **Ex. RL-0020**, *Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, dated 9 March 2017, ¶¶ 168, 170, 173; **Ex. RL-0021**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, ¶ 162; **Ex. RL-0022**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, dated 27 December 2010, ¶ 39; **Ex. CL-0089**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 September 2015 (“*Quiborax v. Bolivia*”), ¶ 135.

⁶⁸³ **Ex. C-0275**, Decree No. 2017-0036/PRES/PM/MEMC/MATDSI/MINEFID/MEEVCC/MCIA on the Management of Mining Titles and Authorisations, dated 26 January 2017, Article 19.

496. As noted, as Claimant's legal claims rely so heavily on its false account of the facts, there is generally little need to review legal authorities in assessing them. On this point, however, the decision of the tribunal in *Apotex v. United States* bears reviewing. The claimant argued that it had covered investments because it had applied for and received abbreviated new drug applications ("ANDAs"), which are applications for regulatory authorisation to sell pharmaceutical products in the United States. According to the claimant, "[t]hese ANDAs (and everything that went into their development and submission) were and are manifestly a United States investment—that is, 'property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes'."⁶⁸⁴ The tribunal rejected that argument, stating: "[E]ven if Apotex had incurred these regulatory costs in the United States, the expenditures incurred in the preparation and filing of an ANDA submission, being no more than an exercise in securing regulatory clearance, do not fall within the scope of NAFTA Article 1139."⁶⁸⁵

497. The tribunal also rejected the claimant's assertion that the ANDAs were investments because they constituted property in their own right, including because they could be "bought and sold like all other property."⁶⁸⁶ Its holding is instructive because even though the tribunal accepted that the ANDAs were alienable and had been tentatively approved, that was still not sufficient to make them investments:

⁶⁸⁴ **Ex. RL-0023**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated 25 August 2014 ("*Apotex v. United States*"), ¶ 148(d). See also *id.*, ¶ 183 ("On the basis of all these points, it is Apotex's case that the costs it has incurred in meeting the specific FDA requirements for approval of its sertraline and pravastatin ANDAs are 'investments' under Article 1139. Apotex would never have incurred these expenses if it had not been required to do so under U.S. statutory and federal regulatory requirements.").

⁶⁸⁵ **Ex. RL-0023**, *Apotex v. United States*, ¶ 193.

⁶⁸⁶ **Ex. RL-0023**, *Apotex v. United States*, ¶ 199.

First, whilst an ANDA may be characterised for certain purposes as “property”, the Tribunal does not consider that the nature of an ANDA is such as to fall within the contemplated scope of NAFTA Article 1139(g), as that provision must be understood as a whole, by reference to the objects and purposes of NAFTA Chapter Eleven. . . .

[T]his is all the more so here because (as the Respondent has emphasised) on the date of the alleged NAFTA breaches, the sertraline and pravastatin ANDAs were only tentatively approved by the FDA. It follows that at the relevant time, (a) Apotex’s ANDAs could not (yet) be characterised as “property” for the purposes of NAFTA Article 1139(g), and (b), even if they did constitute “property”, Apotex’s ANDAs were not yet “acquired in the expectation or used for the purpose of economic benefit or other business purposes,”. . . .

The FDA grants “tentative approval” to an ANDA when all scientific and procedural conditions for approval have been met. But the FDA does not finally approve an ANDA until various other barriers to approval no longer apply, and an application with a tentative approval will not become finally approved until the FDA issues a final approval letter. . . .

. . . Apotex’s [*sic*] asserts that ANDAs “can be bought and sold like all other property”, but it remains entirely unclear whether a tentatively-approved ANDA (i.e. as distinct from (i) a finally-approved ANDA, and (ii) a finally-approved ANDA plus associated products) has value. It is to be recalled that a tentatively-approved ANDA provides no permission to export generic drugs into the United States for sale. Further, as Apotex itself made clear: “[i]f an ANDA is never approved and the product can never be sold, such ANDA is essentially worthless.”⁶⁸⁷

498. In conclusion, Claimant’s expropriation claim fails for the additional reason that the Ministry’s handling of Claimant’s application for a new exploration permit

⁶⁸⁷ **Ex. RL-0023**, *Apotex v. United States*, ¶¶ 209-210.

concerned an attempt to make a new investment and not the treatment of an existing investment. As such, it did not have an expropriatory effect on Claimant's investment.

4. There Was No Direct Expropriation of Claimant's Investments

499. Claimant has argued, quite frivolously, that Burkina Faso is guilty of a direct expropriation. As this argument fails for the same reasons as Claimant's allegation of an indirect investment, only a couple additional points bear noting.

500. First, as noted above, it is Burkina Faso law that defines whether and how property rights exist for the purpose of an expropriation claim. Under Burkina Faso law, mining rights do not exist unless they are granted through the issuance of an *arrêté* by the Minister. As such, it is pointless for Claimant to argue that it believes that the Minister's 24 November 2021 letter should be viewed as the key instrument granting it legal rights while the *arrêté* is a mere "receipt" so that it can claim that the Ministry revoked the "Tankoro 2 Permit" and thereby expropriated it by not issuing the *arrêté*.

501. Second, Claimant's assertion that "[t]he facts of *Quiborax* parallel those of this case" is incorrect.⁶⁸⁸ In that case, putting aside the details of how the investors acquired and held the mining rights, there was no dispute between the parties that mining rights had been granted under Bolivian law and that the subsequent "Revocation Decree" annulled those rights thereby transferring all of the rights granted by the concessions back to the State.⁶⁸⁹ Indeed, the "Revocation Decree" was quite clear in describing its nature and purpose, stating: "The Executive Power is authorized, after the evaluation of audits, technical, legal, economic and financial, tax, social and labor legislation and

⁶⁸⁸ Memorial, ¶ 319.

⁶⁸⁹ Ex. CL-0089, *Quiborax v. Bolivia*, ¶¶ 9-22.

environmental and ecological preservation, to declare null the concessionaires' mining rights that are liable to sanctions provided by the Laws and regulations in force . . . with the consequent recovery of such concessions and non-metallic resources originally belonging to the State.”⁶⁹⁰ As that language indicates, the issue was whether the annulment was a justified exercise of police powers such that it was not expropriatory.

502. To sustain its claim of a parallel with the *Quiborax* case, Claimant asserts that its “title to the Tankoro 2 Permit perfected on 29 November 2021.”⁶⁹¹ As just noted, this assertion is manifestly false as a matter of fact and law, and inconsistent with Claimant’s own public statements prior to manufacturing the allegation for arbitration purposes.

503. Likewise not credible is Claimant’s attempt to equate the Ministry’s handling of its application with Bolivia’s “Revocation Decree”. Claimant asserts: “By letter dated 25 August 2023, however, nearly two years after the Claimant’s title to the Tankoro 2 Permit had perfected, the Minister revoked retroactively the Claimant’s Tankoro 2 Permit without any valid legal reason.”⁶⁹² As shown above, the Minister plainly did not retroactively revoke the permit. Rather, from November 2022 onwards, he correctly maintained that no permit had been granted to Sarama as the *arrêté* had not been issued, and that it remained for the Ministry to identify the special conditions on the grant of the new permit. His “revocation” letter merely indicated that Claimant’s application was rejected as Claimant had made clear that it would not pay the specified acquisition price set as the special condition for the acquisition of the asset. Rather than revoking the

⁶⁹⁰ **Ex. CL-0089**, *Quiborax v. Bolivia*, ¶ 21.

⁶⁹¹ Memorial, ¶ 319.

⁶⁹² Memorial, ¶ 319.

“Tankoro 2 Permit” for the purpose of transferring it to Soleil as Claimant alleges, the Ministry merely retained its full unencumbered ownership of the Tankoro permit area and then continued to openly market it before accepting the application of Soleil many months later.

504. While misguided, Claimant’s reference to the *Quiborax* decision is helpful because the tribunal recognised that it is well-established that States are expected and allowed to handle permits and concessions according to their laws and regulations, including so as to cancel them if the investor has not satisfied the requirements, and that it is only if the State acts in an illegitimate manner that an expropriation can be found. It explained:

[T]he tribunal in *CME v. Czech Republic* noted that “deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State”.

This is particularly true in the case of rights of exploitation (such as licenses or concessions) that depend on the fulfillment of certain requirements by the foreign investor. If a State cancels a license or a concession because the investor has not fulfilled the necessary legal requirements to maintain that license or concession, or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, such cancellation cannot be considered to be a taking by the State.⁶⁹³

505. In sum, there was no direct expropriation just as there was no indirect expropriation.

⁶⁹³ **Ex. CL-0089**, *Quiborax v. Bolivia*, ¶¶ 205-206.

5. The Requirements of an Expropriation Are Irrelevant as No Expropriation Occurred

506. Under Article 10 of the Treaty, if the host State expropriates or nationalises an investment, it must do so subject to certain conditions, including that it be “for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation.”⁶⁹⁴ As Claimant’s investments were not expropriated, nationalised, or subjected to equivalent measures, Burkina Faso’s compliance with these conditions is not an issue. Indeed, it is not possible to even intelligibly discuss whether they were satisfied. Given the ink that Claimant has spilled alleging such non-compliance, a few points bear noting, however.

Public purpose

507. With respect to the public purpose condition, Claimant argues:

As set forth above, Burkina Faso’s actions were taken in retaliation for the Claimant’s refusal to accede to Burkina Faso’s arbitrary and extortionate demands for a baseless multi-million dollar payment and the reversal of Canada’s drone surveillance software export ban. These demands were wholly unrelated to any lawful public interest and demonstrate that Burkina Faso’s revocation of the Tankoro 2 Permit was not motivated by any bona fide public purpose, but rather by extraneous and improper considerations.⁶⁹⁵

508. As discussed above, Claimant’s allegation that the acquisition price condition was an extortionate request for a bribe does is unsubstantiated, contrary to documentary evidence, and illogical by its terms. To the extent that Claimant is arguing that the price condition did not have a public purpose even if it was not a bribe request,

⁶⁹⁴ **Ex. CL-0003**, Treaty, Article 10(1).

⁶⁹⁵ Memorial, ¶ 340.

the argument is helpful for showing the absurdity of Claimant's case. There can be no serious question that the Tankoro permit area reverted to the State following the expiration of the Tankoro Permit such that the State held full unencumbered ownership rights in the area. Under the established legal framework for handling permit areas that had been covered by expired permits and showed some potential for development, the Ministry conducted a review to assess whether to develop the permit area through the State or reallocate it. The original intention was to conduct reallocations through a competitive bidding process so as to obtain value for the assets and increase the chances of proceeding to operationalisation of the permit areas. When the Ministry decided to reallocate the Tankoro permit area in June 2021, it explained that it did not have the capacity to conduct a competitive bidding process. As such, it instead invited applications from companies and took the approach of setting a targeted acquisition price as a condition for the grant of a permit.⁶⁹⁶

509. The notion that the Ministry acted without a public purpose by imposing the acquisition price condition is nonsensical. According to Claimant, its exploration works significantly increased the value of the Tankoro permit area by showing that it had the potential for development and generating valuable data that would guide further exploration works and the strategy for development. As the permit area had become an asset of the State, it would have been irresponsible and contrary to the public interest for the State to dispose of it without attempting to obtain value for it beyond the *de minimis* application fee required under the normal procedures for new permit areas or permit areas that had not shown potential.

⁶⁹⁶ *Supra*, ¶¶ 208-209.

510. Claimant's allegation regarding the “extortionate demands for . . . the reversal of Canada’s drone surveillance software export ban” is likewise meritless. Given its security challenges, Burkina Faso had a legitimate public interest in obtaining surveillance drones. That is not the issue, however. As shown above, the Ministry plainly did not make a reversal of Canada’s policy a condition of the grant of a new permit. The issue was discussed because Claimant raised the possibility of it assisting, and when Claimant explained that it could not impact Canada’s policy, the Ministry was unconcerned and made clear that Claimant could still obtain the new permit if it satisfied the acquisition price condition.

Due process of law

511. Claimant's assertion that the alleged expropriation was done without due process of law is a microcosm of its overall expropriation claim. In short, Claimant says that because the handling of the Tankoro permit application, including the imposition of special conditions, “did not accord with any ‘lawful procedure’ under the 2015 Mining Code and applicable Burkinabe regulations,” there was no due process of law.⁶⁹⁷ As established above, Claimant and its witnesses are feigning ignorance of the provisions of the applicable laws and regulations that established the legal basis for all of the Ministry’s conduct, and are badly misrepresenting those laws and regulations and the contemporaneous communications to claim that the Ministry did not act in accordance with the law.

512. Claimant additionally argues that there was no due process of law because it did not have access to a viable remedy in the courts of Burkina Faso, stating:

⁶⁹⁷ Memorial, ¶ 343.

Claimant did not have any rights under Burkinabe law to the fair review of its case. Burkina Faso's revocation of the Tankoro 2 Permit did not accord with any established statute or regulation pursuant to which the Claimant could have sought redress and, given Minister Boussim and Capitaine Traore's prior conduct, Sarama considered it all-but futile to bring a claim before Burkinabe administrative tribunal for *recours pour excès de pouvoir*.⁶⁹⁸

513. Claimant did not challenge the "revocation of the Tankoro 2 Permit" in the courts because it knows that no such permit existed and that no revocation occurred. It also knows that its entire account of an expropriation of its rights in the Tankoro relies on extraordinarily brazen misrepresentations of the law and facts. For whatever reason, Claimant thought it was appropriate to advance those misrepresentations in this arbitration in the hope that Burkina Faso would settle or that the case would be decided on a default basis. It did not make the same attempt in the courts of Burkina Faso because it knows that the courts would assess its claims against the true content of the applicable laws and regulations and make clear that the expropriation claim is contrived and frivolous, which would undermine Claimant's attempt to obtain a wholly unjustified windfall in this arbitration.

In a non-discriminatory manner

514. Claimant's assertion that the alleged expropriation of the "Tankoro 2 Permit" was discriminatory is based on its hollow claim that it was a victim of a "policy of anti-Western resource nationalism" and misguided assertions that it was treated less favourably than Soleil and Nordgold. Respondent addresses Claimant's arguments regarding Soleil and Nordgold further below in connection with Claimant's allegations of

⁶⁹⁸ Memorial, ¶ 344.

discrimination under the FET standard and less favourable treatment under the National Treatment and MFN treatment standards. In short, the arguments make little sense by their terms. Claimant was treated the same as all other holders of exploration permits that expired. As part of that, it was treated more favourably than other companies as part of the policy of giving special condition to prior holders. After Claimant declined to pay the acquisition price set by the Ministry for the sale of its asset, the Ministry continued to market that asset. The fact that it eventually sold the asset for less than the original target price is not evidence of discrimination, particularly as one of the key reasons for the lower price is Claimant's refusal to comply with its obligation to transfer the data from its exploration activities to the Ministry.

515. As for Nordgold, Claimant's claim that the company was exempted from the equity stake requirements imposed on other companies is simply false, and even if that were not the case, it ignores how the alleged treatment says nothing about the fairness of the treatment of Claimant as it concerns the application of a different mining law to a company in different circumstances.

Adequate compensation

516. As Claimant had no property rights in the Tankoro permit area and no expropriation occurred, it does not make sense to discuss whether Burkina Faso breached the compensation requirement in Article 6 of the Treaty. The only point to note here is that if the alleged "Tankoro 2 Permit" was worth USD 242 million in August 2023 in conjunction with Claimant's other mining rights in Burkina Faso, which were otherwise valueless, it is hard to see how Claimant could not have raised funds to pay the approximately USD 6 million acquisition price that the Ministry set for the sale of its asset.

If Claimant wants its MEE methodology to be considered an accurate and accepted means of determining that very high fair market value of its investments in August 2023 for the purposes of its damages claim, that same methodology should have been available to Claimant in August 2023 and sufficient to persuade a lender or investor to provide the USD 6 million that is a small fraction of that alleged market value. Claimant's discussions with the Ministry regarding its Tankoro application lasted for many months in 2023, and there was more than adequate time for Claimant to make such arrangements.

6. The Ministry's Handling of Claimant's Tankoro Permit Application Did Not Constitute an Expropriation of Claimant's Other Investments

517. Claimant's assertion that the Ministry's handling of its application for a new exploration permit for the Tankoro area constituted an expropriation of its other investments in Burkina Faso must be rejected because: (i) the handling of the Tankoro application was not expropriatory, and even if it were, that action would not constitute an expropriatory measure with respect to Claimant's other investments; and (ii) Claimant has not established that the handling of the Tankoro application resulted in a substantial deprivation of the value of its other investments.

518. Claimant asserts:

Burkina Faso's unlawful revocation of the Tankoro 2 Permit destroyed not just Sarama's investment in developing the Tankoro Deposit, but the value of the entire Sanutura Project, including the Bondi Deposit. Because the Bondi Deposit was too small to mine economically on its own, divorced from the Tankoro Deposit it lost substantially all of its value.⁶⁹⁹

⁶⁹⁹ Memorial, ¶ 13. See also *id.*, ¶ 328 ("In the present case, Burkina Faso's unlawful measures not only deprived the Claimant of its rights to the Tankoro Deposit, they also destroyed the value that the Claimant had cultivated in the entire Sanutura Project, including the Tankoro and Bondi Deposits, as well as the Additional Projects, the funding and development of which was only possible in conjunction with the Sanutura Project.").

519. Claimant's attempt to expand the scope and value of its expropriation claim in this manner can be quickly dismissed because there was no "unlawful revocation of the Tankoro 2 Permit." As show above, no such permit existed. Claimant had no property rights in the Tankoro permit area, including the Tankoro Deposit, following the expiration of the Tankoro Permit on 17 December 2020. Its claim of an expropriation and "unlawful revocation" is based on an unsustainable fiction advanced through blatant misrepresentations of the law and facts. In reality, Claimant's only complaint is that the Ministry, acting pursuant to the established legal framework and in the public interest, sought to obtain value for the reallocation of an asset that had become the unencumbered property of the State, and Claimant was unable or unwilling to pay the price to acquire that asset.

520. As the handling of Claimant's application for a new exploration permit for Tankoro was in no way expropriatory or otherwise unlawful or contrary to the Treaty, and did not involve the treatment of an investment under the Treaty, Claimant cannot claim that its other investments are covered by the expropriation of the "Tankoro 2 Permit". Nor can it claim that the lawful and reasonable handling of the Tankoro application constituted an expropriation of its other investments in its own right. If the handling of the permit did not have an expropriatory character or effect with respect to the Tankoro permit area, it plainly cannot be said to have an expropriatory character or effect with respect to Claimant's other investments. Further, even assuming, *arguendo*, that the Ministry's handling of Claimant's Tankoro permit application constituted an expropriation of the alleged "Tankoro 2 Permit", which is obviously not the case, the Ministry still could not be said to have expropriated the other investments. The alleged indirect effect of the permit

handling on the other investments is far too attenuated to justify treating the permit handling as an expropriatory measure applied to the other investments.

521. Claimant's attempt to expand its expropriation claim must also be rejected because it has failed to establish that the Ministry's handling of the application for a new permit for Tankoro resulted in a substantial deprivation of the value of the other investments. As Respondent discusses in more detail below, Claimant has not substantiated its assertion that its mining rights in the Bondi area and elsewhere were highly valuable for Claimant because of its alleged mining rights in the Tankoro. Claimant's assertion of the "highly synergistic" character of Bondi and other permit areas is speculative,⁷⁰⁰ as there is no evidence that such "synergies" would exist given, *e.g.*, the uncertain viability of mining the areas even if that could be done through a single processing facility and other infrastructure shared with a Tankoro mine, and the uncertainty of being able to use the same facility given potential differences in the deposit qualities. Further, even if Claimant could establish that such synergies were reasonably certain such that production of the other areas would be viable and profitable, its claim that those synergies could exist only with respect to a Tankoro mine is also speculative and unproven. Other companies were active or planning to become active in mining other permit areas in comparable proximity to the Bondi area and would have been willing to acquire Claimant's mining rights in those areas for appropriate value if it was so certain that they could be profitably developed because of their "highly synergistic" qualities.

⁷⁰⁰ Memorial, ¶ 119.

C. Article 6 – Fair and Equitable Treatment

522. Claimant's claims that Respondent violated the FET standard in Article 6 of the Treaty misconstrue the standard and are, in any case, based on factual allegations that are wholly without merit, such that the claims must also be rejected even if Claimant is allowed to "import" the FET standard from the Korea-Burkina Faso BIT, which should not be the case as the Treaty expressly precludes it from doing so. As noted above, all of Claimant's FET claims should additionally be dismissed because they relate only to Claimant's attempt to make a new investment and to the treatment of an existing investment.

1. The Treaty's FET Standard Requires an Investor to Establish a High Level of Wrongfulness in the State's Conduct

523. As discussed below, Article 6 of the Treaty includes an FET standard that is expressly limited to the customary international law minimum standard of treatment of aliens (the "MST"). As such, the Treaty imposes a relatively limited FET obligation on the Contracting States that requires them to not treat investments in a manner that is contrary to established customary international law standards. Claimant attempts to sidestep this express limitation by arguing that the MST and the autonomous FET standard are equivalent such that any and all arbitral decisions construing and applying an autonomous FET standard are authority for the interpretation of Article 6. While somewhat clever, this argument is not tenable.

524. Article 6 of the Treaty sets forth the FET obligation as follows:

Article 6. Minimum Standard of Treatment

1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum

standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.⁷⁰¹

525. As such, Article 6 eliminates any doubt that the FET standard equates to the MST and does not require treatment beyond what is required by the MST. As Claimant cannot argue otherwise, it has taken the approach of arguing that there is an “emerging consensus” that the “autonomous FET standard” and the MST are equivalent, and then relying on any authorities interpreting the FET standard, whether autonomous or otherwise, as instructive to the interpretation of Article 6.

526. Respondent partially agrees with the first part of Claimant’s argument. There is an emerging, if not fully developed, consensus that the FET standard was meant to be equivalent to the MST and should be construed as such. As discussed below, numerous States have affirmed that view of the standard, which also finds support in its historical origins.

527. The second part of Claimant’s argument misses the point of that consensus, however. To support its attempt to interpret Article 6 as imposing demanding obligations on Burkina Faso, Claimant relies on the same arbitral decisions that prompted States—and Canada, in particular—to take steps to confirm that the FET standard is limited to the MST because they believed that the tribunals had interpreted the standard far too expansively. As an example, Claimant cites *Metalclad v. Mexico* for the proposition that

⁷⁰¹ **Ex. CL-0003**, Treaty, Article 6.

the FET standard imposes an obligation of transparency that “requires not only that the State make known to the potential investor the relevant legal requirements that apply to its investment, but also that it resolves any misunderstanding or scope for confusion.”⁷⁰²

528. Aside from irresponsibly failing to mention that the cited portion of the *Metalclad* decision recognising a transparency obligation was annulled by the overseeing Canadian court,⁷⁰³ Claimant has ignored how *Metalclad* was one of the key decisions that prompted States to confirm that the FET standard is limited to the MST to avoid such overbroad interpretations of the standard. It is one of the decisions that led Canada, Mexico, and the United States to conclude the interpretive note through the NAFTA Free Trade Commission that confirmed that the FET standard in Article 1105 of NAFTA equates to the MST.⁷⁰⁴ It is also one of the cases that prompted Canada to revise its model BIT in 2004 to articulate the FET standard in the following manner, which mirrors the formulation in the Canada-Burkina Faso BIT that was concluded in 2015:

Article 5. Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by

⁷⁰² Memorial, ¶ 384 (quoting **Ex. CL-0011**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000 (“*Metalclad v. Mexico*”), ¶ 76).

⁷⁰³ **Ex. RL-0055**, *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, 2001 BCSC 664, Judgment, dated 2 May 2001, ¶ 68.

⁷⁰⁴ **Ex. RL-0024**, Ian Laird, *Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105*, ASPER REVIEW OF INTERNATIONAL BUSINESS AND TRADE LAW, VOL. 3, No. 1 (2003), p. 192.

the customary international law minimum standard of treatment of aliens.⁷⁰⁵

529. The United States similarly revised the FET standard in its 2004 model BIT in response to decisions like *Metalclad* so as to read:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.⁷⁰⁶

530. Also notable is the approach of the European Union, including because its reaction came later and was a response to a wider range of arbitral decisions that had continued to interpret the FET standard as an overly broad autonomous standard. In 2011, the European Parliament adopted a resolution on investment policy that restricted the FET standard to the MST.⁷⁰⁷ The report setting forth the resolution explains the motivation for the clarification as follows:

The USA and Canada, which were among the first states to suffer as a result of excessively vague wording in the NAFTA agreement, have adapted their BIT model in order to restrict the breadth of interpretation by the judiciary and ensure better protection of their public intervention domain. The EU should

⁷⁰⁵ **Ex. RL-0025**, 2004 Canada Model BIT, Article 5.

⁷⁰⁶ **Ex. RL-0026**, 2004 U.S. Model BIT, Article 5.

⁷⁰⁷ **Ex. RL-0027**, European Parliament, *Resolution on the Future European International Investment Policy (2010/2203(INI))*, adopted on 6 April 2011, ¶ 19 (“[F]uture investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences and include the following standards: . . . fair and equitable treatment, defined on the basis of the level of treatment established by international customary law.”).

therefore include in all its future agreements a specific clause laying down the right of the EU and [Member States] to regulate Moreover, standards of protection should be strictly defined, in order to avoid abusive interpretations by international investors. In particular . . . fair and equitable treatment must be defined on the basis of the level of treatment established by international customary law.⁷⁰⁸

531. Many other States from around the world have similarly adjusted their BIT programs, including their Model BITs, in response to unduly expansive interpretations of FET clauses by some arbitral tribunals. These adjustments are aimed at clarifying that the FET provisions in their BITs afford a level of protection that is circumscribed by the parameters of customary international law.⁷⁰⁹

532. It also bears noting that this widespread State practice reflected an effort to return the FET standard to its original design prior to being interpreted in an overly broad manner by some tribunals. The United States was the first State to promote the FET standard in its treaties, beginning with its friendship, commerce, and navigation (“FCN”) treaties, which makes its position on the equivalence between the FET standard and MST

⁷⁰⁸ **Ex. RL-0028**, European Parliament, Committee on International Trade, *Report on the Future European International Investment Policy (2010/2203(INI))*, Report No. A7-0070/2011, dated 22 March 2011, p. 5.

⁷⁰⁹ See, e.g., **Ex. RL-0029**, Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership (2007), Article 75; **Ex. RL-0030**, Australia-Chile Free Trade Agreement (2009), Chapter 10, Article 10(5); **Ex. RL-0031**, Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership (2009), Chapter 9, Article 9(7); **Ex. RL-0032**, Costa Rica-Singapore Free Trade Agreement (2013), Chapter 11, Article 11(6); **Ex. RL-0033**, Trans-Pacific Partnership Agreement (2016), Chapter 9, Article 9(6); **Ex. RL-0034**, Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (2014), Article 7(2)(c); **Ex. RL-0035**, Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India (2011), Chapter 10, Article 10(5); **Ex. RL-0036**, Free Trade Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China (2010), Chapter 10, Article 132; **Ex. RL-0037**, Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (2016), Article 5.

particularly significant.⁷¹⁰ The United States' agreement to the NAFTA Free Trade Commission interpretive note and the revision to its 2004 Model BIT noted above made explicit what its intention was all along with the FET standard. The U.S. State Department's description of the 1994 U.S. Model BIT stated that the "fair and equitable treatment" provision was intended as the "minimum standard of treatment based on customary international law," and there is other historical evidence that the United States always held that view.⁷¹¹

533. In sum, Claimant's approach, which equates to asserting that the MST is equivalent to the autonomous FET standard as interpreted by any and all tribunals, is plainly wrong. It does not make sense for Claimant to assert that cases like *Metalclad* and the similar *TECMED v. Mexico* decision are proper authority for interpreting Article 6 of the Treaty, when those decisions prompted States to confirm that the FET standard equates to the MST to prevent such overbroad interpretations.

⁷¹⁰ **Ex. RL-0038**, United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements (1999), pp. 7-8; **Ex. RL-0039**, M. Sornarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3rd ed., Cambridge University Press 2010), pp. 356-357 ("Now that Canada and the United States have retreated on assertions of new and expansive standards, the area may return to the quiescence of the past. Their attitude, as the principal backers of both the international minimum standard and the fair and equitable standard in treaty practice, will deprive the latter standard of any content, if it indeed did have any. In light of these developments, it would be difficult to view the fair and equitable standard as distinct from the international minimum standard which was created in customary international law largely on the basis of US practice in Latin America. The NAFTA cases also reiterate the idea that the practice that they apply is confined to the region, leaving the old conflicts on the subject alive in the rest of the world.").

⁷¹¹ **Ex. RL-0040**, Description of the United States Model Bilateral Investment Treaty (BIT) – February 1992, submitted by the State Department, 30 July 1992, Hearing before the Committee on Foreign Relations, United States Senate, 102nd Congress, 2nd Session, 4 August 1992 (US Government Printing Office 1992), p. 62 ("This paragraph [on fair and equitable treatment] sets out a minimum standard of treatment based on customary international law."); **Ex. RL-0041**, 1994 U.S. Model BIT, in *INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM*, VOL. III REGIONAL INTEGRATION, BILATERAL AND NON-GOVERNMENTAL INSTRUMENTS 195 (United Nations 1996), Article II(3)(a); **Ex. RL-0042**, J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17(1) ICSID Review 21 (2002), pp. 49-50 and n. 78 (noting that both before and after the entry into force of NAFTA, the US Department of State transmitted a series of bilateral investment treaties to the Senate for approval in which it stated that the obligation to provide "fair and equitable treatment" set out "a minimum standard of treatment based on customary international law.").

534. For the foregoing reasons, even assuming, *arguendo*, that Claimant is entitled to make claims on the basis of the FET standard from the Korea-Burkina Faso BIT by “importing” that standard through the Treaty’s MFN standard, the imported FET obligation should be read as equivalent to the MST. State practice shows that States, including Canada, believe that references to FET were always intended to equate to a reference to the MST.

535. The key effect of confirming that the FET standard is limited to the MST is that it establishes that the State is liable for a breach only if the investor can prove that the State violated customary international law. That means that the investor must show that there is general, consistent State practice and *opinio juris* establishing that the treatment in question is unlawful under customary international law.⁷¹² As there has traditionally been significant resistance from many States to accepting the existence in customary international law of significant obligations regarding the treatment of foreign investors, the MST is understood to provide protection only with respect to egregious conduct that would be universally or nearly universally accepted to be below international standards.

536. In that regard, the content of the MST was expressed in *Neer v. Mexico*, where the US-Mexico Claims Commission held that in order to violate the standard, the treatment of an alien “should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that

⁷¹² See **Ex. RL-0043**, ICJ Statute, Article 38.

every reasonable and impartial man would readily recognize its insufficiency.”⁷¹³ There is ample support for the proposition that, despite the passage of time since the *Neer v. Mexico* decision, the threshold to find a violation of the MST is still very high.

537. As the *Thunderbird v. Mexico* tribunal observed:

Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.⁷¹⁴

538. The *Cargill v. Mexico* similarly confirmed that the MST still requires the same high level of “severity” as identified in *Neer* to establish a breach:

The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the *Neer* arbitration more exacting, but rather to adapt the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained.⁷¹⁵

⁷¹³ **Ex. RL-0044**, *L.F.H. Neer and Pauline E. Neer (U.S.A.) v. Mexico*, General Claims Commission – United States and Mexico, Docket No. 136, Opinion, dated 15 October 1926, 21 AMERICAN JOURNAL OF INTERNATIONAL LAW 555 (1927), p. 556.

⁷¹⁴ **Ex. RL-0045**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award dated 26 January 2006 (“*International Thunderbird v. Mexico*”), ¶ 194.

⁷¹⁵ **Ex. CL-0062**, *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009 (“*Cargill v. Mexico*”), ¶ 284. See also **Ex. RL-0046**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award dated 25 June 2001, ¶ 367 (“While the exact content of this [FET] standard is not clear, the Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a *minimum* standard. Acts that would

539. Claimant endorses some of the same cases as Respondent as being accurate descriptions of the FET standard as construed as the MST. However, it essentially pays lip service to them at the outset of its discussion of the standard and thereafter ignores the holdings and reverts to relying on overly broad interpretations by tribunals that did not restrict the FET standard to the MST. As an example, Claimant highlights the decision of the *Waste Management v. Mexico* tribunal, which found that the FET standard, as clarified by the NAFTA Free Trade Commission interpretive note as equivalent to the MST, requires showing “a complete lack of transparency” to establish a breach.⁷¹⁶ But after doing so, Claimant invokes cases like *Metalclad* and *TECMED* that interpreted the FET standard as imposing a highly demanding obligation of complete transparency.

540. Respondent further reviews how Article 6 of the Treaty applies with respect to the particular types of conduct alleged by Claimant—namely arbitrariness and transparency—further below. The point to conclude on here is that the express restriction of the FET standard in Article 6 as providing no protections beyond those provided by customary international law significantly restricts the scope of the standard and makes many of the authorities relied on by Claimant inapposite.

violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”) (emphasis in original); **Ex. CL-0022**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004 (“*Waste Management v. Mexico*”), ¶ 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”).

⁷¹⁶ Memorial, ¶ 357.

2. The Ministry's Conduct Was Not Manifestly Arbitrary

541. The FET standard in Article 6 of the Treaty provides investors with a protection against manifestly arbitrary conduct. That protection does not allow the investor to receive compensation on the basis that the State's conduct was misguided, unreasonable, mistaken, or similarly flawed.⁷¹⁷ Rather, it requires the investor to establish that it is manifestly apparent that the host State acted without any legitimate purpose. Claimant has not established that Burkina Faso acted in such a manner. Its claim to that effect is based primarily on its bad faith fictional account of a retaliatory, unlawful, and discriminatory revocation of the "Tankoro 2 Permit". Without that fiction, Claimant's complaints amount to quibbles with the precise manner in which the Ministry handled the Tankoro permit area and Claimant's application for a new permit that do not come close to justifying a breach under Article 6 of the Treaty.

542. It is widely accepted that one of the core functions of the FET standard is to provide protection against manifestly arbitrary conduct by the State. As UNCTAD put it (with respect to the FET standard generally and not to a standard confirmed to be based on the MST), the FET standard provides a "[p]rohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation."⁷¹⁸ As that description indicates, the

⁷¹⁷ The same would be true under the FET standard from the Burkina-Faso BIT that Claimant seeks to invoke. While Article 6 of the Treaty expressly states that the investor must establish that the treatment is "manifestly" arbitrary, the same requirement should be found under an autonomous FET standard, and even if the standard were viewed as providing protection only against "arbitrary" conduct, that would not provide for a breach to be found on the basis that the State's conduct was misguided, unreasonable, mistaken, or similarly flawed.

⁷¹⁸ **Ex. RL-0047**, United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012) ("UNCTAD, *Fair and Equitable Treatment: A Sequel*"), p. xvi. See also **Ex. RL-0048**, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, dated 20 July 1989, I.C.J.

threshold for finding that a measure is arbitrary is high.⁷¹⁹ For a measure to constitute arbitrary conduct, it must lack any rational basis or legitimate justification.⁷²⁰ Claimant must demonstrate the existence of measures that “move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.”⁷²¹

543. The question of whether a State measure is arbitrary does not depend on whether the host State chose the correct or best policy approach. This Tribunal may not act as a substitute for Burkina Faso’s legislative, administrative, or judicial bodies, and therefore cannot second-guess its policy, regulatory, or judicial decisions.⁷²² Further,

REPORTS 15 (1989) (“*ELSI*”), ¶ 128 (defining the standard of arbitrariness under international law as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”); **Ex. CL-0022**, *Waste Management v. Mexico*, ¶ 98.

⁷¹⁹ See, e.g., **Ex. RL-0049**, *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award dated 12 March 2021, ¶¶ 343, 347 (“In the Tribunal’s view, there is little support for the assertion that international jurisprudence has moved away from, let alone abandoned, the *ELSI* definition of arbitrariness. . . . In the Tribunal’s view, the threshold described in *ELSI* remains relevant. In essence, arbitrariness refers to State conduct that is incompatible with the rule of law. Furthermore, a finding of arbitrariness carries with it a certain degree of impropriety.”); **Ex. RL-0045**, *International Thunderbird v. Mexico*, ¶ 194; **Ex. CL-0012**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award dated 13 November 2000 (“*S.D. Myers v. Canada*”), ¶ 263 (“The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”).

⁷²⁰ **Ex. RL-0011**, *Plama v. Bulgaria*, ¶ 184 (noting that arbitrary measures “are those which are not founded in reason or fact but on caprice, prejudice or personal preference.”). See also **Ex. RL-0050**, *National Grid plc v. Argentine Republic*, UNCITRAL, Award dated 3 November 2008, ¶ 197 (“It is the view of the Tribunal that the plain meaning of the terms ‘unreasonable’ and ‘arbitrary’ is substantially the same in the sense of something done capriciously, without reason”); **Ex. RL-0051**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016 (“*Philip Morris v. Uruguay*”), ¶ 353 (“For regulatory measures to be deemed arbitrary, ‘some important measure of impropriety [must] be manifest,’ reflecting ‘the absence of legitimate purpose, capriciousness, bad faith, or a serious lack of due process.’ Consequently, measures undertaken in good faith cannot be considered arbitrary unless there is a manifest lack of rational relationship between the measure and its objective, i.e., unless there is no logical connection between them.”).

⁷²¹ **Ex. CL-0062**, *Cargill v. Mexico*, ¶ 293.

⁷²² **Ex. CL-0064**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010 (“*Lemire v. Ukraine*”), ¶ 283 (“The arbitrators are not superior

States, as regulators, are owed significant deference when regulating sovereign matters within their territory. As explained by the tribunal in *S.D. Myers v. Canada*:

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.⁷²³

544. Claimant's claims fall far short of the high standard required to establish that Burkina Faso's conduct was arbitrary. As discussed, Claimant manufactured its fictional account of receiving the "Tankoro 2 Permit" in late 2021 and then being a victim of a hostile new Government that subjected it to extortionate and impossible demands for the

regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way."); **Ex. RL-0052**, *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award dated 8 November 2022, ¶ 471 ("The Arbitral Tribunal . . . is not a contentious-administrative court of appeal; it cannot be expected to verify whether the Superintendency scrupulously applied the administrative regulations to which its activity is subject — the Arbitral Tribunal will only assess significant deviations from the process that could cause such a lack of defence of the administered party that it exceeds the threshold of international illegality.") (translation from Spanish).

⁷²³ **Ex. CL-0012**, *S.D. Myers v. Canada*, ¶ 263. See also **Ex. RL-0053**, *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award dated 16 May 2012 ("*Unglaube v. Costa Rica*"), ¶ 246 ("Where, however, a valid public policy *does* exist, and especially where the action or decision taken relates to the State's responsibility 'for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,' such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders.") (emphasis in original); **Ex. RL-0054**, *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Dissenting Opinion of Brigitte Stern, dated 22 August 2022, ¶ 68 ("Further, invariably, a regulator must discharge its task with a measure of discretion. . . . The majority of the Tribunal therefore should have attached significance to the discretion exercised by the FSC. It is not the Tribunal's function here simply to substitute its own decisions for the decisions of the FSC taken at the time in the exercise of its powers. In other words, as regards a regulator, it is well-established under international law that even a claim that a regulatory decision is materially wrong or did not make the best decision in the eyes of an international tribunal, will not, by itself, suffice to establish a treaty violation; whether the disputed measure might have been good or bad at the time is not a matter for decision by an investment arbitration tribunal; and such tribunals do not have an open-ended mandate to second-guess a regulator's decision-making.") (emphasis omitted).

purpose of expropriating the permit and transferring it to a politically connected company precisely because Claimant knows that the facts that actually occurred provide no basis for establishing a breach of the Treaty.

545. Respondent does not repeat here the reasons why Claimant's fictional account must be rejected, which were detailed above in the Facts section and summarised in connection with Claimant's expropriation claim that relies on the same fiction. In short, the account is manifestly false.

546. Without that account, which provides the basis for Claimant's overall allegation of arbitrariness and "bad faith,"⁷²⁴ little remains to Claimant's FET arbitrariness claim, even putting aside how the claim fails in its entirety because the impugned conduct of the Ministry relates to the admission of an investment and not the treatment of one and so does not even fall within the scope of Article 6.

547. Claimant's primary "distinct" arbitrariness claim, which cannot be fully separated from its overall fictional account is that the Ministry acted in an arbitrary manner by imposing improper conditions on the grant of a new permit. It states:

Burkina Faso began its pattern of conduct in breach of FET with the imposition of two arbitrary demands on the Claimant: (i) that the Claimant, as a Canadian company, should convince the Government of Canada to reverse a NATO ban on the sale of drone surveillance software to Burkina Faso; and (ii) that the Claimant make an arbitrary payment unanchored to any rule in the 2015 Mining Code or applicable regulations in return for Burkina Faso's release of the Tankoro 2 Permit's *arrêté*.⁷²⁵

⁷²⁴ Memorial, ¶¶ 378-383.

⁷²⁵ Memorial, ¶ 378.

548. As noted above, by the time that Claimant was engaged in discussions with Minister Boussim, it was anticipating an investment treaty arbitration and attempting to manufacture a record that could support its claims. The allegation that the Ministry made changing Canada's policy relating to the release of drone technology is not credible as the evidence shows that it was never a condition and that Claimant itself raised the possibility of it attempting to influence the matter.⁷²⁶ As the Ministry exhibited no concern with the issue after Claimant advised that it could not influence Canada's policy and offered the grant of the permit on the basis of the specified purchase price, the allegation is also pointless, which further shows that it has been manufactured because Claimant believes it adds helpful colour to its case.

549. The acquisition price condition was not "unanchored to any rule in the 2015 Mining Code or applicable regulations." As shown above, Claimant and its witnesses have feigned ignorance of the law, including how the 2015 Mining Code expressly provided for the Ministry to allocate permit areas through a tender rather than the normal "first come, first served" procedure, and how its implementing regulations and the Ministry's decrees provided a clear legal basis for the practice of reviewing permit areas covered by expired permits where the past exploration works showed some potential development for the purpose of determining whether to develop them through the State or reallocate. As such permit areas were considered potentially valuable because of the prior exploration works, and had become fully unencumbered State assets upon the expiration of the prior permits, it would have been irresponsible and contrary to the public interest if the State did not attempt to obtain some value for them as part of the

⁷²⁶ *Supra*, ¶¶ 60, 158, 200-206.

reallocation process. It should be unnecessary to say, but a State does not act arbitrarily because it decides to not give assets away for free to foreign investors as much as some investors, like Claimant, would like that to be the case.

550. The fact that the Ministry had to set a target price for reallocated areas because it had not developed the capacity to conduct competitive bidding processes likewise falls far short of justifying a finding of arbitrariness. Burkina Faso is a low-income country that was facing serious security risks and high levels of political turbulence. It cannot possibly be said have breached its international obligations because it had not developed that capacity and so sought to obtain value for the reallocated permit areas by setting a target price and marketing them. Further, Minister Ouedraogo's 1 June 2021 Information Note that announced that a number of permit areas, including Tankoro, were being reallocated, explained that the competitive bidding process would not be possible and that companies would be invited to apply with the grant of a permit subject to the imposition of special conditions. Again, Burkina Faso cannot be said to have acted arbitrarily because the Ministry elected to attempt to obtain value by setting a target price as a special condition in the absence of a competitive bidding process instead of reallocating it for essentially free (given the minimal cost of the normal application fee) or, alternatively, deferring the reallocation until a competitive bidding process could be conducted.

551. Claimant's narrow complaint about how the acquisition price was calculated is also insufficient to establish a breach. As discussed above, the FET standard, whether construed as the MST or as an autonomous standard, does not call for tribunals to put themselves in the shoes of regulators and second-guess their decisions to determine

whether they should have acted differently in some way. Further, Claimant's complaint makes little sense by its terms. It argues that the Ministry acted arbitrarily because it advised that the price had been set with consideration to the exploration expenditures of the prior permit holder (*i.e.*, Claimant), even as Claimant has made that the basis of its grossly inflated request for damages in this case. Indeed, by Claimant's account, the Ministry should be faulted by setting the target price far too low given that Claimant's valuation for the Tankoro permit area is based on the exploration works that were done under the Tankoro Permit that expired in December 2020 (with there being relatively little change in gold prices from then until August 2023). As such, this complaint is also of no potential significance given that Claimant plainly would not have paid the price had the Ministry set it at the far higher value that Claimant asserts was appropriate. Nor would it have paid the price had the Ministry provided it with a more detailed explanation how the price was determined.⁷²⁷

552. Likewise unavailing is Claimant's further complaint about how Minister Boussim allegedly offered to reduce the price from FCFA 6 billion to FCFA 4.5 billion because he was a "kind person" and then restored the price to FCFA 6 billion at the instructions of President Traoré because he was upset about "comments made by the Canadian ambassador that Sarama would destroy project data if the Ministry continued to claim that the Tankoro 2 Permit was a State asset."⁷²⁸ As discussed above, this claim relies on the unsubstantiated testimony of Claimant's witnesses and their efforts to

⁷²⁷ Memorial, ¶ 10.

⁷²⁸ Memorial, ¶ 379.

“memorialise” facts in connection with their preparation of a treaty arbitration.⁷²⁹ Further, there was nothing improper with the Ministry considering lowering the price. In the absence of a competitive tender process, it set a price that it consider achievable and then sought to obtain it as any seller of an asset does. The Ministry was free to consider a lower price for Claimant in response to its insistence that it was best placed to proceed to quickly operationalising the permit area but did not have the resources to pay the target price.

553. Claimant’s other distinct arbitrariness claim is based on the allegation that Burkina Faso treated in a discriminatory manner. It argues:

Burkina Faso’s actions discriminated against the Claimant in favour of a domestic gold mining company, Soleil, and a Russian gold mining company, Nordgold, based on “political predisposition rather than considerations of public or regulatory policy”. Specifically, the publicly available evidence indicates that Burkina Faso favoured Soleil by granting it the Tankoro 2 Permit it had revoked from the Claimant because Soleil is beneficially owned by a political ally of Capitaine Traoré and the junta, Mr Inoussa Kanazoé.⁷³⁰

554. As discussed above, the claim regarding Soleil is meritless. The Ministry, as part of the policy of giving special consideration to prior holders when reallocating permits, first engaged with lengthy discussions with Claimant on whether to grant it a new exploration permit for Tankoro. After Claimant confirmed that it would not pay the specified acquisition price, the Ministry rejected its application in August 2023 and openly

⁷²⁹ While the account is confused, the only “evidence” that Claimant has submitted is a Signal text exchange between Mr Hamilton and a local Sarama employee, [REDACTED] and that exchange only indicates that the President said that the price should remain FCFA 6 billion because there was no authorisation to reduce it and not because the President was upset with Sarama. See **Ex. C-0313**, Signal Thread (discussing meeting with Chief of Staff for Ministry of Mines), dated 2-4 August 2023.

⁷³⁰ Memorial, ¶ 380.

marketed the Tankoro permit area thereafter. It only granted an exploration permit to Soleil in May 2024. The Ministry did not act arbitrarily by lowering the price to be able to conclude a transaction, particularly given the public interest in seeing the permit area developed, and it would be incongruous for Claimant to fault the Ministry when it was Claimant's refusal to comply with its obligation to transfer the data from its exploration works to the Ministry that was a large cause of the Ministry's inability to sell the asset for its original target price.

555. Claimant more fully articulated its allegation regarding Nordgold earlier in the Memorial, stating:

In contrast to the measures the State has taken against the Claimant, WAF, Endeavour and other Canadian, Australian and UK companies, Burkina Faso recently granted Nordgold, a Russian-owned mining company, a mining licence for the Niou gold mine. The Claimant understands that Burkina Faso has also not sought to apply the 2024 Mining Code revisions—including the allegedly “mandatory” 15% free carried interest due to the State—to Nordgold's Bissa and Bouly gold mines, over which Nordgold continues to hold a 90% equity share.⁷³¹

556. As discussed in more detail below in connection with Claimant's MFN treatment claim, it makes little sense for Claimant to argue that it has been treated in a less favourable manner than a purported comparator company that applied for a permit under a new Mining Code (2024) years after Claimant submitted its application under the old Mining Code. Claimant's attempt to sidestep this problem with its complaint—which is advanced in connection with the non-discriminatory basis condition of the Treaty's

⁷³¹ Memorial, ¶ 199.

expropriation standard—is that there is allegedly an Australian company, WAF, that was in similar circumstances to Nordgold and was required to grant Burkina Faso a 15% equity stake in its projects, whereas Nordgold was not required to grant more than a 10% equity interest in two of its mines.⁷³² According to Claimant, this different treatment of WAF constitutes discrimination against Western companies, which therefore somehow means that Claimant has proven that the Ministry's handling of its permit application was also discriminatory.⁷³³ This is not a serious legal argument. An investor does not meet the burden of establishing the elements of its claim by alleging a breach against another investor and claiming that there is some transference of the liability to it.

557. Further, Claimant's complaint is factually untrue. For Nordgold's Niou mine, which was permitted under the 2024 Mining Code, the company was required to grant the State the same 15% equity interest as required from WAF.⁷³⁴ Nordgold was also required to provide the State with a 15% equity interest in its Bissa and Bouly mines.⁷³⁵

558. In sum, Claimant has failed to establish that Burkina Faso has breached the FET standard in the Treaty (or the imported standard, if that is allowed) by acting in an arbitrary manner. Its fictionalised account of a retaliatory and expropriatory revocation of the permit is plainly unsustainable, and it has failed to establish that any aspects of the Ministry's actual conduct come close to constituting measures that meet the standard of

⁷³² Memorial, ¶ 350.

⁷³³ Memorial, ¶ 350.

⁷³⁴ Claimant cites a press report making this point, but characterises it as a matter of Burkina Faso granting the company an 85% interest as if that does not equate to the State receiving a 15% interest. Memorial, ¶ 350 (citing to **Ex. C-0336**, Reuters, Burkina Faso grants mining lease to Russia's Nordgold for gold project, dated 25 April 2025, *available at* www.reuters.com/world/africa/burkina-faso-grants-mining-lease-russias-nordgold-gold-project-2025-04-25/).

⁷³⁵ See, e.g., **Ex. R-0044**, Nordgold, By-laws of Bissa Gold, dated 22 December 2025 (confirming that Nordgold had increased the State's equity stake to 15%).

arbitrariness articulated by UNCTAD, in being taken “purely on the basis of prejudice or bias without a legitimate purpose or rational explanation.”⁷³⁶

3. The Ministry Did Not Breach a Transparency or Due Process Obligation

559. Claimant's second set of FET claims is based on the allegation that Burkina Faso failed to comply with its obligations of transparency and due process under Article 6 of the Treaty. These claims must be dismissed. The transparency claims depend on a highly demanding transparency obligation that does not exist under the MST or an autonomous FET standard, and are, in any case, factually meritless as they rely on Claimant's misrepresentation of the applicable laws and regulations and communications from the Ministry. The due process claims are not actual claims for lack of due process, in the sense of being subject to legal actions without notification or access to a legal remedy. Rather, they are just a repackaged version of the transparency claims that involve Claimant falsely claiming that there was no legal basis for the Ministry's conduct such that a due process violation occurred.

560. As already noted above, Claimant's transparency claims rely on the very decisions that prompted Canada and other States to affirm that the FET standard equates to MST because the decisions interpreted the FET standard in an overbroad manner, including by imposing a demanding transparency obligation. Its discussion begins by highlight the *Metalclad* tribunal's decision as instructive authority:

The FET standard under MST requires a host State to act in a transparent manner and with due process of law. As the tribunal in *Metalclad v. Mexico* observed, transparency

⁷³⁶ **Ex. RL-0047**, UNCTAD, *Fair and Equitable Treatment: A Sequel*, p. xvi. See also **Ex. RL-0048**, *ELSI*, ¶ 128 (defining the standard of arbitrariness under international law as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”); **Ex. CL-0022**, *Waste Management v. Mexico*, ¶ 98.

requires not only that the State make known to the potential investor the relevant legal requirements that apply to its investment, but also that it resolves any misunderstanding or scope for confusion:

The Tribunal understands [the requirement for transparency] to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.⁷³⁷

561. *Metalclad* was one of the key decisions that led Canada and many other States to confirm that the FET standard equates to the MST.⁷³⁸ As such, it does not make sense for Claimant to advance *Metalclad* as authority for the MST imposing a demanding transparency obligation. Doing that also does not make sense because the Supreme Court of British Columbia, which was responsible for hearing the set-aside challenge, annulled the portion of the decision finding that NAFTA's FET standard, Article 1105, imposed a transparency obligation. In doing so, the court explained:

On my reading of the Award, the Tribunal did not simply interpret Article 1105 to include a minimum standard of transparency. No authority was cited or evidence introduced

⁷³⁷ **Ex. CL-0011**, *Metalclad v. Mexico*, ¶ 76.

⁷³⁸ *Supra*, ¶¶ 528-529.

to establish that transparency has become part of customary international law.⁷³⁹

Notably, the court reached that decision prior to the NAFTA States' conclusion of the interpretive note confirming that the FET obligation in Article 1105 is limited to the MST.

562. Claimant has also relied on the similar *TECMED* decision for its assertion that the FET standard imposes a demanding transparency obligation. It highlights how that tribunal found that “[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.”⁷⁴⁰ As the *TECMED* award was not annulled, it received more attention than *Metalclad* and has been widely criticised for articulating a far too demanding transparency obligation. As one tribunal put it, the *TECMED* tribunal interpreted the FET standard as requiring “perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.”⁷⁴¹

563. It also bears noting that Claimant refers to *Metalclad* and *TECMED* for its assertion of a strong transparency obligation even though it began its FET discussion by

⁷³⁹ **Ex. RL-0055**, *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, 2001 BCSC 664, Judgment, dated 2 May 2001, ¶ 68.

⁷⁴⁰ Memorial, ¶ 384 (quoting **Ex. CL-0019**, *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003, ¶ 154).

⁷⁴¹ **Ex. RL-0056**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, dated 21 March 2007, ¶ 67; **Ex. RL-0057**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 October 2011 (“*El Paso v. Argentina*”), ¶ 342 (noting that the decision in *Tecmed* “of what FET implies looks like a programme of good governance that no State in the world is capable of guaranteeing at all times”) (emphasis omitted); **Ex. RL-0058**, Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureka and Methanex*, 22(1) *ARBITRATION INTERNATIONAL* 27 (2006), p. 28 (“The *Tecmed* ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.”); **Ex. RL-0047**, UNCTAD, *Fair and Equitable Treatment: A Sequel*, p. 65 (stating that the *Tecmed* ‘standard’ is “nearly impossible to achieve”); **Ex. RL-0059**, Borzu Sabahi, Noah Rubins and Don Wallace Jr., *INVESTOR-STATE ARBITRATION* (2nd ed., Oxford University Press 2019), pp. 645-646 (noting that the standard in *Tecmed* has been “criticized by some commentators as unrealistically stringent”).

asserting that the following description of the FET standard by the *Waste Management v. Mexico* tribunal is correct for both the MST and an autonomous FET standard:⁷⁴²

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁷⁴³

564. Claimant's assertion that Article 6 of the Treaty imposes a highly demanding transparency obligation also ignores how the Treaty: (i) includes a separate provision in Article 12 ("Transparency") that is much more limited, e.g., in providing that "[t]he Parties shall progressively endeavour to improve the transparency of their legislative, regulatory, administrative, and judicial processes in compliance with their respective domestic acts and regulations";⁷⁴⁴ and (ii) expressly prohibits arbitration of alleged breaches of the Article 12 transparency obligations.⁷⁴⁵

565. However the FET standard is interpreted, Claimant's transparency claims fail because they are factually baseless. Claimant's overall transparency claim, which is premised on the lack of a legal basis for the alleged "revocation" of the "Tankoro 2 Permit," must be rejected because each aspect of Claimant's revocation narrative is based on misrepresentations of the law and facts. As established above, Claimant has been

⁷⁴² Memorial, ¶ 357.

⁷⁴³ **Ex. CL-0022**, *Waste Management v. Mexico*, ¶ 98 (emphasis added).

⁷⁴⁴ **Ex. CL-0003**, Treaty, Article 12.

⁷⁴⁵ **Ex. CL-0003**, Treaty, Article 21(a).

extraordinarily misleading in claiming, *inter alia*, that: (i) the 2015 Mining Code and regulations imposed no restrictions on Claimant immediately obtaining a new exploration permit following the expiration of the Tankoro Permit in December 2020; (ii) the Ministry failed to explain the legal basis for reserving Tankoro and other permit areas to the State and reviewing and reallocating them, and had no legal basis for such actions; (iii) the Ministry had no legal basis for not honouring the alleged 24 November 2021 grant of the “Tankoro 2 Permit”; and (iv) the Ministry had no legal basis for imposing an acquisition price as a condition for the sale of its asset. In reality, the Ministry had a clear legal basis for all of those actions, and Claimant was aware of that legal basis. Where it suits them for other purposes, Claimant’s witnesses emphasise how they relied on their strong knowledge of the same laws and regulations that provided the basis for the foregoing aspects of the Ministry’s conduct. Further, Claimant has simply ignored the content of the relevant communications, such as the Ministry’s Information Notes and the Minister’s correspondence with Claimant, which explained the legal bases for the Ministry’s actions and the procedures that were being followed. For example, with respect to the reservation of permit areas, even if it were true that Claimant and its witnesses were somehow not already aware of the relevant provisions of the 2015 Mining Code and its implementing regulations, the Minister’s 12 October 2020 Information Note informing them that the Tankoro permit area would be reserved to the State specified the legal bases for that action.

566. Claimant’s more narrow complaints of insufficient transparency should not even be entertained given that its overall argument on this issue is so contrived. To be certain though, they are also not sustainable.

567. Claimant's first more narrow argument is that "Burkina Faso repeatedly requested the Claimant to make an additional payment to the Ministry which lacked any basis in the 2015 Mining Code and applicable Burkinabe regulations."⁷⁴⁶ As discussed above, the 2015 Mining Code and Decree No. 2017-0036, which was one its implementing regulations, provided for reserved areas to be reallocated if they were not developed through the State. Order No. 2018-024 of 9 February 2018, which was issued pursuant to Decree No. 2017-0036, then further identified the procedures for reserving and reviewing permit areas. Article 10 of that order specified that, for the reallocation of permits following the review by BUMIGEB, "[m]ining titles or permits may be awarded through a competitive bidding process." As such, there was a clear legal basis for not allocating the permits on a "first come, first served" basis subject only to the normal effectively *de minimis* application fee. The Ministry was then transparent in explaining in its 1 June 2021 Information Note that, because the State had not developed the capacity to conduct competitive bidding processes, it would be inviting companies to apply for the permit areas being reallocated and would be imposing special conditions on the grant of new permits. There was no question that there was a legal basis for it to do that. Decree No. 2019-12 established a Working Group within the Ministry that was tasked with, *inter alia*, "propos[ing] the procedures for reallocating the permits."

568. Claimant's second more narrow transparency claim concerns the Ministry's determination of the amount of the acquisition price for the reallocation of the Tankoro permit area. Claimant states:

When the Claimant and its executive team asked for a justification for this sum, Ministry officials merely responded

⁷⁴⁶ Memorial, ¶ 391.

that the amount had been “calculated” based on amounts Sarama had originally invested. As Mr Hamilton explains, however, Minister Boussim “gave no legal justification” for this monetary demand and “did not share how he or presumably the Ministry’s technicians had calculated the 6 billion CFA francs figure”, leading Mr Hamilton to conclude that it was “simply made up.”⁷⁴⁷

Claimant then goes on to repeat its allegation regarding Minister’s Boussim’s alleged offer to reduce the price.⁷⁴⁸

569. Respondent addressed the defects in these allegations above in connection with Claimant’s arbitrariness claim. Only two additional points noting here. First, Claimant is asking the Tribunal to go further than the *Metalclad* and *TECMED* tribunals by finding that the FET standard imposes a transparency obligation that requires States to provide precise explanations for all of their administrative decisions. It is not reasonable to think that the FET standard, whether construed as the MST or an autonomous standard, imposes such a requirement, particularly in the context of an asset disposal in which the State is entitled to set a target price without disclosing all the reasons why it set that price. Second, as noted above, it is not clear why Mr Hamilton claims in his witness statement that he concluded that the amount was “simply made up” when he has also testified that Sarama’s local employees told him that the Ministry had indicated that the amount accounted for Sarama’s past expenditures in the permit area.⁷⁴⁹

570. In sum, Claimant’s claims that Burkina Faso breached its obligation of transparency under Article 6 of the Treaty, or the FET standard that Claimant hopes to

⁷⁴⁷ Memorial, ¶ 391.

⁷⁴⁸ Memorial, ¶ 392.

⁷⁴⁹ Hamilton WS1, ¶ 97.

“import” from the Korea-Burkina Faso BIT, must be rejected. Claimant has failed to meet its burden with respect to both the legal and factual elements of its claim.

571. Claimant’s presentation of the same transparency claims as lack of due process claims fails for the same reasons, and because Claimant is not actually alleging due process violations and is pretending that it was unaware of the applicable laws and regulations and ignoring the content of the communications from the Ministry so that it can claim that it was the victim of shocking actions that were not notified to it. There is no actual claim of being denied an administrative or judicial process where one should have been available.

D. Article 4 – National Treatment

572. Claimant’s claim that Burkina Faso breached the National Treatment obligation in Article 4 of the Treaty does not merit serious consideration. As noted above, Article 21 of the Treaty specifies that investors may not arbitrate claims “with respect to the establishment and acquisition of an investment” under Article 4,⁷⁵⁰ and that is plainly what Claimant is attempting to do in complaining that its application for a new exploration permit for the Tankoro area was treated less favourably. Even putting that defect aside, Claimant’s claim must be dismissed. While Claimant begins its discussion of Article 4 with a lengthy and generally reasonable description of how national treatment standards have been interpreted, Claimant then ignores both the text of Article 4 and the lessons from the authorities it cites in an unsuccessful attempt to manufacture a colourable National Treatment claim.

⁷⁵⁰ **Ex. CL-0003**, Treaty, Article 21(1).

573. Claimant first asserts that all that is required to establish a breach is proving that a State measure had a discriminatory intent.⁷⁵¹ It has no doubt focused on establishing an Article 4 breach in this manner because it knows that it cannot show that it received less favourable treatment than an investor or investment of Burkina Faso in like circumstances. Unfortunately for Claimant, this attempt to sidestep that obstacle is unavailing.

574. While some tribunals have taken the view that discriminatory intent is sufficient to establish a breach of the national treatment standard, others have correctly recognised that establishing intent does not dispel of the need to prove that the State breached the actual obligation by according treatment less favourable than that accorded to an investment or investor in like circumstances. As the *S.D. Myers v. Canada* tribunal explained:

The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.⁷⁵²

575. There is no need to debate that issue, however, as Claimant’s allegation of discriminatory intent is hollow. As discussed above with respect to Claimant’s FET claim based on discriminatory intent, its allegations of hostility are based on the self-serving testimony of its witnesses and misrepresentations of the evidence, and do not fact with the actual facts of its treatment. If anything, Claimant received more favourable than that

⁷⁵¹ Memorial, ¶¶ 431-432.

⁷⁵² **Ex. CL-0012**, *S.D. Myers v. Canada*, ¶ 254.

accorded to other companies (of any State) because the Ministry decided to not enforce the normal prohibitions on prior holders of exploration permits so as to give Claimant the opportunity to apply for a new exploration permit, and then gave it and other prior holders special consideration in the reallocation process.

576. Rather than attempting to prove that it was actually subject to any treatment that has a discriminatory intent, Claimant merely discusses how other foreign companies such as Endeavor and WAF were allegedly treated unfairly in the years following the denial of Claimant's application for a new exploration permit for the Tankoro area.⁷⁵³ There is no need for Respondent to address Claimant's allegations regarding the treatment of those companies. If Claimant could prove that Burkina Faso breached its obligations with respect to another company's investments, *quod non*, that does not equate to substantiating a breach with respect to Claimant. There is no transference of liability and Claimant's allegation of a broader policy of "anti-Western" hostility does not substitute for its inability to prove that it was a victim of discriminatory intent.

577. Claimant's attempt to establish that Burkina Faso did not comply with the actual terms of Article 4 in that it accorded treatment less favourable to Claimant than to an investor or investment of Burkina Faso shows why it focused on the discriminatory intent allegation. The only comparator that Claimant can identify is Soleil, and Claimant merely repeats its allegation that Minister Boussim expropriated the "Tankoro 2 Permit" for the purpose of transferring it to Soleil because it is a politically connected company. As shown above, this allegation is meritless. The Ministry handled Claimant's Tankoro application in a fair and reasonable manner in accordance with the established legal

⁷⁵³ Memorial, ¶ 432.

framework. The evidence shows that it was willing and ready to grant a new permit had Claimant been willing or able to pay the acquisition price that the Ministry imposed as a special condition in line with the responsible policy of obtaining to receive value when reallocating permit areas that had become assets of the State. After Claimant made clear that it would not pay the requested purchase price, the Ministry returned to marketing the permit area and eventually granted an exploration permit to Soleil approximately eight months later. As noted, that the Ministry had to lower the price was largely due to Claimant's refusal to comply with its obligation to transfer the data from its exploration activities, as the availability of that data is one of the primary bases for charging a higher price for reallocated permit areas.

578. Claimant has resorted to such arguments because an objective assessment of its treatment shows that Article 4 is irrelevant to its case. Claimant enjoyed the full term of the Tankoro Permit in the same manner as nationals of Burkina Faso or any other State that held exploration permits in that period. With the expiration of the Tankoro Permit, Claimant lost all its rights in the permit area, just as holders of expiring permits always did under the 2015 Mining Code regardless of their nationality. The Tankoro permit area was then reserved to the State for review along with fifteen other permit areas that had been covered by permits that expired, again with no concern of the nationality of the prior holder. The only manner in which Claimant was subject to treatment that was at all different was in benefitting from the Ministry's decision announced in 1 June 2020 Information Note to give special consideration to prior holders in connection with the reallocation of reserved permit areas, which indicated that the Ministry was also not enforcing the prohibitions that would normally apply to prior holders. To be certain, while

Claimant cannot complain about that treatment because it was the only basis on which Claimant was allowed to avoid the normal prohibitions and apply for a new permit, the treatment was not nationality-based.

E. Article 5 – Most-Favoured Nation Treatment

579. Claimant's claim that Burkina Faso breached the MFN treatment obligation in Article 5 of the Treaty fails for the same reasons as its National Treatment claim under Article 4. The only additional point to note is that Claimant's attempt to identify an MFN treatment in like circumstances is even more attenuated than its attempt to make Soleil the comparator for its National Treatment claim. Claimant bases the MFN treatment claim on treatment accorded to Nordgold under a different legal regime, the 2024 Mining Code, long after the allegedly improper treatment of Claimant occurred.⁷⁵⁴ And rather than alleging that Claimant itself received less favourable treatment than Nordgold, Claimant argues that other "Western companies" such as WAF, an Australian company, were treated less favourably as if that somehow establishes a breach with respect to Claimant.⁷⁵⁵ In any case, as discussed above with respect to Claimant's parallel discrimination claim regarding Nordgold under the FET standard, its allegations are untrue as a matter of fact as Nordgold was required to provide the same 15% equity stake to the State as WAF.

V. DAMAGES

580. In the event that the Tribunal were to find that Sarama is a protected investor, *quod non*, and that—despite the overwhelming evidence that no unlawful

⁷⁵⁴ Memorial, ¶ 434.

⁷⁵⁵ Memorial, ¶ 434.

“retroactive withdrawal” of the Tankoro permit occurred—Burkina Faso should nonetheless be found liable for treaty breaches, Respondent submits that Claimant is not entitled to the damages it claims.

581. Claimant advances an aggressively inflated and fundamentally speculative damages case, asserting that Burkina Faso’s measures “destroy[ed] the value of Sarama’s other projects” and that of the “entire Sanutura Project.”⁷⁵⁶

582. On that basis, Claimant seeks to recover the purported fair market value (“FMV”) of its entire investment portfolio, notwithstanding the absence of any credible market evidence supporting such a valuation.⁷⁵⁷

583. Claimant’s valuation rests on a contrived dual methodology combining a cost-based approach and a market approach. The centrepiece of Claimant’s case is the Multiple of Exploration Expenditure (“MEE”) method, under which alleged historical sunk costs are artificially transformed into value through the application of a “Prospectivity Enhancement Multiplier (‘PEM’).”⁷⁵⁸ This approach effectively converts past expenditures into a speculative future upside untethered from real-life transactions or market behaviour.

584. Applying this methodology, Claimant’s expert Accuracy arrives at an inflated valuation of approximately USD 290 million, before deduction of Respondent’s 10% carried interest, which yields a figure of USD 260.8 million.⁷⁵⁹

⁷⁵⁶ Memorial, ¶¶ 2, 13.

⁷⁵⁷ Memorial, ¶¶ 16, 160.

⁷⁵⁸ Memorial, ¶¶ 461-463.

⁷⁵⁹ Memorial, ¶¶ 467-470.

585. In parallel, Accuracy applies a market approach, which yields a lower figure of approximately USD 215 million, and USD 223.1 million when the alleged value of Koumandara is added.⁷⁶⁰ It then averages the two values of USD 260.8 million and USD 223.1 million it obtained, thereby reaching a figure of approximately **USD 242 million**.⁷⁶¹ Claimant ultimately seeks monetary relief in that amount,⁷⁶² notwithstanding that it bears no discernible relationship to actual market transactions, investor behaviour, or observable transactions in the underlying assets.

586. In addition to this inflated principal sum, Claimant seeks compound interest and full recovery of its costs.⁷⁶³

587. As seen below, Claimant's damages case is predicated on a deeply flawed and opportunistic methodology: it inflates sunk costs through a speculative PEM, tempers the result with a lower, but still overstated, market figure only to average the two, and thereby produces a valuation that is neither grounded in economic reality nor supported by arbitral practice.

588. By using as its primary valuation method a cost-based approach, which is most often used as a fallback where DCF models are considered too uncertain or speculative, Sarama seeks to cloak its monetary claims in a veneer of conservatism.⁷⁶⁴ Unlike in most mining cases, Sarama does not rely on a forward-looking valuation method

⁷⁶⁰ Memorial, ¶¶ 471-476. Respondent notes that this is a 100% value for the asset. Net of Respondent's 10% carried interest, the figure is approximately USD 193 million.

⁷⁶¹ Memorial, ¶ 477. Respondent notes that this figure is not the average of the two values insofar as it uses the figure of USD 215 million, not USD 193 million, to run the average. Averaging two figures that are significantly different, USD 193 million and USD 260 million, makes limited sense.

⁷⁶² Memorial, ¶ 488(d).

⁷⁶³ Memorial, ¶¶ 482-487, 488(e)-(f).

⁷⁶⁴ Sarama admits in passing that DCF valuation would not be appropriate in the present case because of the preponderance of "inferred resources" in Sarama's projects. Memorial, ¶ 460.

such as the discounted cash flow (DCF) methodology to estimate future profits. The Tribunal, however, will not be misled by this tactic. The value Claimant seeks to establish using the cost approach is so disproportionately disconnected from the real-world transactions that occurred throughout Sarama's attempt to monetize the Tankoro deposit that it is just as uncertain and speculative as a DCF-based claim would have been (given the project's very early stage). While speculation may have been reduced through the rejection of income-based methods, it has nonetheless re-entered through the back door with the use of an artificially inflated and subjective cost approach.

589. Respondent sets out below the applicable standard for the award of damages under international law and demonstrates that the appropriate valuation methods yield figures far below those advanced by Claimant, in some cases—limited to the single-digit millions. For a comprehensive analysis of the valuation of damages sought by Claimant, Respondent respectfully refers the Tribunal to the expert report prepared by Mr James Searby, a quantum expert, with the assistance of Mr Thierry Rousseau, a geologist and mining specialist at Technip Energies (TEN).⁷⁶⁵

A. Under International Law Only Certain and Non-Speculative Damages May Be Awarded

590. Under international law, damages may be awarded only where they are established with sufficient and reasonable certainty and are not speculative. The principle of reasonable certainty and of the non-speculative nature of damages has been acknowledged by multiple tribunals. In *Chorzów Factory*, the court held that, while a

⁷⁶⁵ Searby Report; and Searby Report, Appendix 3, Rousseau Opinion.

harmed claimant is entitled to full reparation, claims that are insufficiently substantiated or indeterminate cannot be taken into account:

In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved.

Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.⁷⁶⁶

591. The *Amoco* award acknowledged the rule as follows:

One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.⁷⁶⁷

592. In *BG Group v. Argentina*, the tribunal held that damages “that are ‘too indirect, remote, and uncertain to be appraised’ are to be excluded,” and further noted that “an award for damages which are speculative would equally run afoul of ‘full reparation’ under the ILC Draft Articles.”⁷⁶⁸

593. In *Gemplus/Talsud v. Mexico*, the tribunal concluded that:

Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject

⁷⁶⁶ **Ex. CL-0006**, *Case Concerning Factory at Chorzów (Germany v. Poland)*, Permanent Court of International Justice, Judgment No. 13 dated 13 September 1928, at 56-57.

⁷⁶⁷ **Ex. RL-0060**, *Amoco Int'l Finance Corporation v. The Government of the Islamic Republic of Iran et al.*, Case No. 56, Chamber Three, Partial Award dated 14 July 1987, ¶ 238 (emphasis added).

⁷⁶⁸ **Ex. RL-0061**, *BG Group v. Argentina*, UNCITRAL, Final Award dated 24 December 2007, ¶ 428 (emphasis omitted).

these claims, even if liability is established against the Respondent.⁷⁶⁹

594. Without accepting Claimant's choice of valuation method—let alone the quantum of damages it seeks in this arbitration—Respondent does not object to the application of the FMV standard for Claimant's expropriation claim under Article 10 of the Treaty. While Claimant's position on the standard of reparation for its other treaty claims is somewhat unclear, it seems to suggest that compensation for the FMV of the investment affected by the breach is the appropriate standard of reparation.⁷⁷⁰ To the extent that Claimant is saying that FMV compensation is appropriate because the other alleged breaches should be found on the basis that an uncompensated expropriation of its investments occurred, the point is moot. If however, Claimant, is asserting that FMV compensation is appropriate for the other alleged breaches independent of a finding that an expropriation occurred, that is not correct. Claimant itself begins its discussion of the applicable reparation standard by referring to the oft-quoted observation from the Permanent Court of International Justice *Chorzów Factory*, as to how reparation should “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁷⁷¹ For the Treaty's standards of treatment other than expropriation, that “but for” reparation standard requires Claimant to establish the counterfactual scenario that is the basis for compensation. As

⁷⁶⁹ **Ex. CL-0069**, *Gemplus v. Mexico*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, ¶ 12-56. See also **Ex. CL-0129**, *Odyssey v. Mexico*, ICSID Case No. UNCT/20/1, Award dated 17 September 2024, ¶ 628 (“The Tribunal emphasizes that the governing standard of proof is that the damages to be compensated, or the FMV to be estimated, must be sufficiently or reasonably certain as already defined.”).

⁷⁷⁰ Memorial, ¶¶ 443-452.

⁷⁷¹ Memorial, ¶ 444 (quoting **Ex. CL-0006**, *Case Concerning the Factory at Chorzow (Germany v. Poland)*, PCIJ Series A, No. 17, Judgment No. 13 (Merits), dated 13 September 1928, p. 47).

Claimant notes: “The ILC Articles confirm the approach of the PCIJ in *Chorzów* that compensation should cover all ‘financially assessable damages including loss of profits insofar as it is established.’”⁷⁷²

595. Claimant has made no effort to establish the counterfactual scenarios that would have existed “but for” the alleged breaches. It has not, for example, tried to show that, had Burkina Faso not breached the FET and National Treatment standards of the Treaty through the alleged discriminatory treatment of imposing “extortionate” conditions on the grant of a new exploration permit for the Tankoro area to Sarama and not imposing them on Soleil, that Sarama would have obtained the permit, proceeded to development, and enjoyed substantial profits for which it is now entitled to damages. The reason that Claimant has not tried to do that for other breaches and claimed that FMV compensation is the appropriate reparation standard for all of them is that Claimant knows that it cannot come close to meeting the accepted threshold of proving, with reasonable certainty, that such a counterfactual scenario would have arisen but for the other breaches. Claimant was still in the exploration stage of the project and had not even begun the PEA much less established the economic viability of the project and a business plan for proceeding, had very modest resources, and was operating in a challenging high-risk environment that would have hindered its operations and ability to obtain financing.

596. Given Claimant’s failure to attempt to establish a right to damages with respect to its other breach allegations—if they are to be considered separate from an upheld expropriation claim—they are ultimately irrelevant even if the Tribunal were, *arguendo*, to find that a breach occurred.

⁷⁷² Memorial, ¶ 444 (quoting **Ex. CL-0015**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 36(2)).

597. The FMV compensation standard is appropriate for expropriation claims because Article 10 of the Treaty explicitly states that the required compensation “must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.”⁷⁷³ However, the FMV standard does not grant a licence to claim any and all categories of alleged damages, using approaches that rely on subjectivity and speculation to an inappropriate and excessive degree.

598. In addition, Respondent emphasises that Claimant bears the burden of proving its damages and establishing causation. These principles are well established and repeatedly affirmed by investment tribunals, including the tribunal in *Rompetrol*:

To the extent, however, that a claimant chooses to put its claim (as in the present Arbitration) in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach.⁷⁷⁴

B. Claimant’s Outlandish and Exaggerated Damages Claim Must Be Rejected as Entirely Speculative

599. Claimant advances a figure of USD 242 million, calculated as the average of the valuations determined by Accuracy following a sunk costs analysis that applied a PEM to costs (yielding figures of USD 290 million or USD 260.8 million), and a market-based analysis using the comparable transactions method (yielding figures of USD 215 million or USD 233 million).⁷⁷⁵

⁷⁷³ **Ex. CL-0003**, Treaty, Article 10(2).

⁷⁷⁴ **Ex. RL-0062**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, ¶ 190. See also **Ex. CL-0015**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 31, p. 62 of the pdf.

⁷⁷⁵ Memorial, ¶ 476.

600. Both the choice of methods and, *a fortiori*, the figures arrived at are flawed and deeply disconnected from the real-life market value of Sarama's assets, and should be disregarded altogether.

1. The USD 290 million Claim Based on Multiplied Sunk Costs Is Highly Speculative

601. The USD 242 million claim, based on multiplied sunk costs, is highly speculative and does not reflect the fair market value of Sarama's assets, even if the Tribunal were to decide to award compensation.

(a) Only Relevant and Reasonable Sunk Costs May Be Compensated

602. Arbitral tribunals commonly rely on the sunk costs method as a proxy for FMV, particularly where forward-looking methodologies are considered too uncertain or speculative. The tribunal in *Metalclad* stated as follows in its award:

The award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in [*Chorzów*] *Factory* ⁷⁷⁶

603. Several other tribunals have applied the wasted costs method as the appropriate method of valuation.⁷⁷⁷ As observed by Professor Marboe, “[i]n a number of cases, the award of the amount of investments actually undertaken was regarded as the

⁷⁷⁶ **Ex. CL-0011**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, ¶ 122. See also **Ex. CL-0023**, *MTD Equity v. Chile*, Award dated 25 May 2004, ¶ 238.

⁷⁷⁷ See **Ex. RL-0063**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, Award dated 27 September 2017, ¶¶ 1087, 1166; **Ex. CL-0098**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 November 2017, ¶ 604; **Ex. CL-0129**, *Odyssey v. Mexico*, ICSID Case No. UNCT/20/1, Award dated 17 September 2024, ¶¶ 733-734.

best way of achieving full reparation based on the notion of *restitutio in integrum*.”⁷⁷⁸ The same author further states that:

The valuation of damages on the basis of past costs and expenses . . . seems to be a “solid” valuation approach that has been applied in numerous cases where other items of damages were considered to be too speculative or were not supported by sufficient evidence.⁷⁷⁹

604. However, not all expenditures may be taken into account in determining the amount of compensation to be awarded to a claimant. Only relevant and reasonable expenditures are compensable. In *Mesa Copper v. Ecuador*, the tribunal held that, in the case of mining concessions withdrawn by the host State, only “proven expenditure incurred in relation to the . . . concessions” is compensable. It stated as follows:

Expenditure: In the Tribunal’s view, the most reliable, objective and fair method in this case for valuing the Claimant’s investments in November 2008 and June 2009 is to take the Claimant’s proven expenditure incurred in relation to its Junín and Chaucha concessions.⁷⁸⁰

605. The applicable test is threefold. First, the expenditure must be “proven”. Second, it must have been “incurred”, that is, incurred by the claimant. Third, it must have been incurred “in relation” to the projects at issue, meaning that the costs advanced must relate exclusively to the concessions or projects withdrawn by the host State. In other words, the costs must be relevant.

⁷⁷⁸ **Ex. RL-0064**, I. Marboe, *Valuation Standards and Criteria*, in *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2nd ed. Oxford University Press, 2017), 43-162, ¶ 3.141.

⁷⁷⁹ **Ex. RL-0065**, I. Marboe, *The Limits of “Fair Market Value”*, in *COMPENSATION AND DAMAGES IN INTERNATIONAL LAW*, TDM 4(6) (November 2007), at. 745.

⁷⁸⁰ **Ex. RL-0066**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award dated 15 March 2016, ¶ 7.27 (emphasis in original).

606. In one of Accuracy's exhibits (AC-48), a mining industry expert explains that only relevant and reasonable costs may be used in an expenditure analysis:

- "establish a Cost Base of reasonable and relevant exploration expenditure;"⁷⁸¹
- "Which expenditures should be included or excluded, i.e. what are reasonable and relevant expenditures?"⁷⁸²
- "Relevance: for expenditure to be relevant, it must be directly applicable and specific to the mineral asset as well as the commodity"⁷⁸³
- "Reasonableness: for expenditure to be reasonable, the type of exploration, the amount of exploration and the cost of the exploration must be appropriate to the nature and exploration status of the mineral asset itself."⁷⁸⁴

607. It is further stated that, where a historical purchase price is available, that price should be preferred to any third-party expenditure incurred by a previous holder of the asset:

If an historical purchase price of the asset is available, it is better to include this as an historic cost. In such a case, all historic exploration predating the purchase is presumed to reflect in the acquisition price and hence of no further relevance.⁷⁸⁵

608. In an article dedicated to the MEE methodology, renowned mining expert Peter Onley articulates the same principles for determining which costs may be included in the cost base. He states that:

⁷⁸¹ **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 2.

⁷⁸² **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3.

⁷⁸³ **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3.

⁷⁸⁴ **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3.

⁷⁸⁵ **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3.

In deriving the base value for exploration expenditure it is important that only relevant and effective past exploration be included.⁷⁸⁶

609. Mr Searby cites to a paper by W.E. Roscoe in which “only those past expenditures which are considered reasonable and productive are retained as value.”⁷⁸⁷

610. It follows that only expenditures that are directly incurred, proven, relevant, and reasonable may be included in a sunk costs analysis.

(b) Claimant’s Cost Base Is Unreliable and Artificially Inflated as It Includes Costs That Are Irrelevant and Unreasonable

611. In its sunk costs analysis, or cost base, Claimant and its expert, Accuracy, have included nearly all costs and expenses identified in Sarama’s annual reports (as well as those of other companies), without applying the relevance and reasonableness criteria set out above.

612. Accuracy arrives at a total of USD 64.8 million, to which it applies an inflation adjustment, yielding USD 81.8 million. Accuracy then adds inflation-adjusted exploration costs attributed to Orezone in the amount of USD 16.4 million, resulting in an inflated figure of USD 98.2 million as the purported “inflation-adjusted cost base as at the Valuation Date.”⁷⁸⁸

613. Mr Searby and Mr Rousseau have reviewed Accuracy’s proposed cost base and conclude that substantial deductions are required for it to be considered reliable. In any event, the significant discrepancy between the figures advanced by the parties’

⁷⁸⁶ **Ex. R-0045**, Peter Onley, *Multiples of Exploration Expenditure as a Basis for Mineral Valuation*, in Mineral Valuation Methodologies Conference, 27-28 October 1994, p. 194 (p. 4 of the pdf).

⁷⁸⁷ Searby Report, ¶ 4.9(b) (citing to **Ex. JS-0003**, Bill Roscoe, Valuation of mineral exploration properties, p. 3).

⁷⁸⁸ Memorial, ¶ 467; Accuracy Report, ¶¶ 5.19, 5.29.

experts further demonstrates that sunk costs cannot be relied upon to determine Sarama's FMV.

614. By way of illustration of the inflated nature of Accuracy's cost base, it is sufficient to consider the treatment of costs attributed to the Bondi deposit. Relying on Mr Schmiede's witness statement, Accuracy chose not to retain the acquisition cost paid by Sarama to Orezone for the Djarkadougou permit (which covers the Bondi area and deposit), but instead to adopt the exploration expenditures incurred by Orezone prior to Sarama's acquisition. Accuracy acknowledges that two approaches were available with respect to the Bondi deposit: either (i) to retain the 2016 acquisition cost of USD 1.5 million,⁷⁸⁹ or (ii) to rely on Orezone's historical expenditures of USD 10.9 million.⁷⁹⁰ It elected the latter on the basis of the alleged non-representativeness of the acquisition price.⁷⁹¹

615. This conclusion is flawed for several reasons. First, it contradicts Accuracy's own supporting industry literature, which, as noted above, provides that acquisition costs should be preferred to prior third-party exploration expenditures.⁷⁹² That same literature explains that this preference is warranted because all pre-acquisition exploration is "presumed to reflect in the acquisition price and hence of no further relevance."⁷⁹³

⁷⁸⁹ Accuracy Report, ¶ 5.21.a). The shares transferred to Orezone in 2016 were valued at CAD 1.44 million, but the total acquisition price paid by Sarama was approximately USD 1.5 million (which includes the 5 million warrants included in the share-based deal), the same price it sold the Bondi asset in 2025 to Beoogo.

⁷⁹⁰ Accuracy Report, ¶ 5.21.b).

⁷⁹¹ Accuracy Report, ¶¶ 5.22-5.28.

⁷⁹² **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3 ("If an historical purchase price of the asset is available, it is better to include this as an historic cost.").

⁷⁹³ **Ex. AC-0048**, Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets, 2017, p. 3.

616. Second, retaining the exploration costs of Orezone is inconsistent with Claimant's own admission that:

We wanted to conduct our own works to verify the resource estimate and confirm our thinking that the Bondi Deposit remained open along strike and at depth, i.e. that significant resource upside remained and that Orezone had not adequately explored the Bondi Deposit and the surrounding permit area.⁷⁹⁴

617. To recall, Sarama had to first treat the resource estimate issued by Orezone as a "historic estimate".⁷⁹⁵ Upon further analysis of Orezone's data, Sarama even had to downgrade the resource estimate to an entirely "Inferred resource" classification, representing the lowest level of geological confidence:

Sarama downgraded Orezone's Measured and Indicated resource estimate for the Bondi Deposit, set out in above, to an entirely Inferred resource estimate.⁷⁹⁶

618. The technical report relied upon by Sarama is also replete with critical and damning comments on Orezone's exploration results, as noted above.⁷⁹⁷ Mr Schmiede, who co-authored the Fifth Cube Report,⁷⁹⁸ identified numerous shortcomings in Orezone's

⁷⁹⁴ Dinning WS1, ¶ 76 (emphasis added).

⁷⁹⁵ Memorial, ¶ 125 ("As Mr Schmiede explains, there is a degree of subjectivity to resource classifications, and Sarama and its QP, Cube, generally took a more conservative approach. On that basis, Sarama elected to disclose the Bondi Deposit mineral resource estimate based on Orezone's exploration works as an 'historic estimate' rather than current mineral resource estimate."); Schmiede ¶ 56 ("As Sarama had only recently acquired the Bondi Deposit, there was no overt need or desire for Sarama to adopt the Orezone mineral resource estimate as its own. Sarama and the QPs contracted by Sarama tend to take a more conservative approach to mineral resource estimation and disclosure and instead opted to disclose the Bondi Deposit estimate as a 'historic estimate' rather than current mineral resource estimate.").

⁷⁹⁶ Memorial, ¶ 151.

⁷⁹⁷ See *supra*, ¶¶ 279-297.

⁷⁹⁸ **Ex. C-0029**, Fifth Cube Report of 2022.

exploration work.⁷⁹⁹ Clearly Orezone's exploration had not yielded positive results. This constitutes further evidence—drawn from Sarama's own contemporaneous statements and its position in this arbitration—that Orezone's USD 10.9 million in costs, subsequently increased to USD 16.4 million following Accuracy's (questionable) inflation adjustment, should be disregarded and replaced, if sunk costs are considered at all, by the historical acquisition price of USD 1.5 million.⁸⁰⁰

619. Mr Searby, with the help of Mr Rousseau, has reviewed Accuracy's cost base and concludes that a large amount of costs cannot be considered relevant and reasonable and should therefore be excluded from any reliable cost base. He identifies several flaws, including the following:

Accuracy's total exploration expenses amount to USD 41.7 million for the three properties. In contrast, Mr Schmiede's assessment of 'Direct Exploration – Projects' amount to a total of USD 44.8 million. Clearly, Sarama and its experts do not agree on the correct basis for assessing exploration expenses;⁸⁰¹

and

Accuracy and Mr Schmiede have included exploration expenditures made in 2010 and 2011 on the Namaré and Bouni properties. I have excluded those expenditures because it appears to me that neither property fell within the ambit of the Sanutura Project.⁸⁰²

⁷⁹⁹ **Ex. C-0029**, Fifth Cube Report of 2022, p. 52 ("The sample collection and preparation, analytical techniques, security and QAQC protocols implemented by Orezone during its ownership of the Djarkadougou 2 Property are broadly considered to be of a poor standard."), p. 53 ("While the overall dataset generated during Orezone's ownership is considered poor quality . . .") (emphasis added). See *also id.*, pp. 54, 212, 230, 328.

⁸⁰⁰ Memorial, ¶ 467; Accuracy Report, ¶¶ 5.21-5.29.

⁸⁰¹ Searby Report, ¶ 4.27.

⁸⁰² Searby Report, ¶ 4.32. See *also* Searby Report, Appendix 3, Rousseau Opinion, p. 11.

620. Among the other costs included by Accuracy in its cost base, Mr Searby also rejects the inclusion of Acacia's payments to Sarama (starting from 2014) and instead retains only the re-acquisition cost of 2019 agreed upon in the Termination agreement between the two companies.⁸⁰³

621. Mr Searby also followed the guidelines provided in industry literature by disregarding "all costs more than five years old,"⁸⁰⁴ and by applying reasonable depreciation.⁸⁰⁵ He also excluded share issue costs "in their entirety because, plainly, they do not add any value to the mineral resources being explored."⁸⁰⁶

622. Mr Searby's criticisms are summarised in his conclusion on Accuracy's cost base:

Against that background, I do not agree with Accuracy's assessment of the relevant historical cost base. In particular, I consider that Accuracy has overstated relevant expenditure by:

- (a) including categories of cost which do not appear directly to add value to the mineral properties themselves;
- (b) relying on apportionments that are insufficiently explained in the Accuracy Report; and

⁸⁰³ Searby Report, ¶ 4.39(c) (Mr Searby disagrees with Accuracy, who "included all acquisition costs relating to the Sanutura Project but deducted inflows received by Sarama from Acacia under its earn-in agreement."). See **Ex. C-0125**, Earn-In Agreement between African Barrick Gold plc and Sarama Resources Ltd, dated 26 November 2014; **Ex. C-0173**, Termination Agreement between Acacia Mining plc and Sarama Resources Ltd, dated 14 May 2019.

⁸⁰⁴ Searby Report, ¶ 4.57(a) ("I have ignored all costs more than five years old. In my opinion, any such assets would be fully depreciated and, very likely, without value at the valuation date in August 2023.").

⁸⁰⁵ Searby Report, ¶ 4.57(b) ("I have reduced expenses from the past five years on a straight-line basis to reflect their depreciation.").

⁸⁰⁶ Searby Report, ¶ 4.59.

(c) giving inadequate weight to transactions in which interests in the relevant properties were, as a factual matter, acquired or disposed of.⁸⁰⁷

623. Mr Searby's review of the cost base, applying the relevance and reasonableness tests in accordance with industry literature, reduces the total cash cost base from USD 64.8 million to USD 31.8 million.⁸⁰⁸ This figure does not constitute an alternative valuation advanced by Mr Searby or Respondent, but merely reflects a corrected version of Accuracy's cost base.

624. Respondent also notes that when Sarama wrote to the Minister of Mines on 8 December 2020 to transmit its summary report on Tankoro (no. 284), it indicated that it had incurred over the 2008-2020 period a total amount of CFA 10,340,909,348,⁸⁰⁹ which, converted to approximately USD 17.9 million.⁸¹⁰ This figure, disclosed to the Burkinabe authorities in December 2020 prior to the expiry of the Tankoro permit, is inconsistent with the figures recorded in Sarama's accounts and further adds to the confusion regarding the amount of costs actually incurred.

625. In light of the fundamentally flawed manner in which Accuracy constructed its alleged cost base, and the confusion arising from contemporaneous documents, Claimant's cost analysis must be rejected in its entirety as inflated and incapable of reflecting the genuine FMV of Claimant's assets.

⁸⁰⁷ Searby Report, ¶ 4.72.

⁸⁰⁸ Searby Report, ¶ 4.74.

⁸⁰⁹ **Ex. R-0011**, Letter of Transmission dated 8 December 2020, with Summary Report on the Expiry of Tankoro Permit (No. 284), p. 1 (p. 3 of the pdf). See *also* Searby Report, ¶¶ 4.28-4.29.

⁸¹⁰ Searby Report, Appendix 3, Rousseau Opinion, p. 11.

626. In addition, Respondent submits that, in light of the undisputed fact that no act, decision, or regulation was directed at the Bondi project or any of the Additional Projects, all costs related to those deposits must be excluded from any reliable analysis. International law permits compensation only for losses directly caused by the acts of the State.⁸¹¹ In the present case, there is no direct causal link between the alleged wrongful acts of Burkina Faso and the losses allegedly incurred in connection with the Bondi deposit and the Additional Projects. Respondent and its experts reserve all rights to comment on the cost deductions required in light of the absence of any causal link between the impugned acts and the deposits other than Tankoro.

2. The MEE Method with the Associated PEM Is Inappropriate and Highly Speculative and Should Be Rejected Outright

627. Having determined an inflated figure of USD 98.2 million, Accuracy then applies a multiplying factor known as the PEM (Prospectivity Enhancement Multiplier)⁸¹² as part of its reliance on the MEE method.⁸¹³ Respondent objects to the use of such a multiplier, which is misplaced, results in arbitrary inflation of the valuation, and should not be accepted in a litigation context, particularly in relation to Sarama's projects.

628. First, the MEE method is not applied in international arbitration, and for good reason: it fails to meet the standard of sufficient certainty and non-speculation required for the award of damages under international law.

⁸¹¹ **Ex. CL-0015**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 31, p. 62 of the pdf; **Ex. CL-0129**, *Odyssey v. Mexico*, ICSID Case No. UNCT/20/1, Award dated 17 September 2024, ¶ 573.

⁸¹² Accuracy Report, ¶¶ 5.30-5.41.

⁸¹³ Accuracy Report, ¶¶ 5.3-5.4.

629. Indeed, industry literature recognises that the MEE method—of which the PEM is a central component—is highly subjective and does not necessarily reflect real value. A well-known mining valuation study explains that:

There is no necessary nexus between the base expenditure derived from past expenditure and current book value of the project. This was recognised in NCSC Policy Release 149 which stated “Such carrying values may not, and frequently will not, appropriately reflect the fair market value of the property or lease”.⁸¹⁴

630. Another mining valuation specialist states the following:

The Prospectivity Enhancement Multiplier tends to be highly variable amongst its proponents and, sometimes, even the same valuer. Some insights into the value of this method could be tested using analysis based on Baye’s theorem in which could be used to synthesise a large number of consecutive decisions to commit to exploration expenditures. Given that the simulation is sufficiently realistic, regression analysis could be applied to the simulation results in order to assess how good exploration expenditure is as a surrogate for value. Until such time as these empirical tests are performed and made available, this method must be used with caution and only by well experienced valuers.⁸¹⁵

631. It follows that the MEE method, whereby costs are adjusted using a PEM, cannot yield a figure that reflects the genuine FMV of a project for the purposes of compensation in legal proceedings. Rather, it constitutes an essentially arbitrary uplift

⁸¹⁴ **Ex. R-0045**, Peter Onley, *Multiples of Exploration Expenditure as a Basis for Mineral Valuation*, in Mineral Valuation Methodologies Conference, 27-28 October 1994, p. 195 (p. 5 of the pdf) (emphasis added). Mr Searby, in his expert report, refers to this paper (as JS-02) and to other publications that confirm the highly subjective nature of the MEE/PEM method. Searby Report, ¶¶ 4.8-4.11.

⁸¹⁵ **Ex. R-0046**, Carlos Sorentino, *Valuation Methodology for VALMIN*, The Codes Forum, Sydney, 2000, p. 50 (p. 14 of the pdf) (emphasis added).

sometimes used in industry negotiations, which runs afoul of the requirement under international law for certainty of damages.

632. Moreover, the selection of an appropriate adjustment PEM requires the specialised expertise of a trained geologist. Accuracy’s experts are accountants, not geologists,⁸¹⁶ whereas Mr Searby has relied on the input of Mr Rousseau, a qualified geologist and mining specialist who is also a “competent person”.⁸¹⁷

633. While Claimant uses the plural in asserting that “[i]nvestment treaty tribunals have endorsed the MEE method in cases involving exploration stage mining projects,” it can identify only a single arbitral authority in which a tribunal has allegedly accepted and applied this method, namely *Nachingwea et al. v. Tanzania*.⁸¹⁸

634. Burkina Faso submits that the *Nachingwea* award does not support Claimant’s position with respect to the MEE method, as the tribunal in that case accepted the method only on the basis that both experts agreed that historical costs had to be adjusted in order to reflect fair market value. The tribunal stated as follows:

The Tribunal accepts Mr Taylor’s use of the MEE method to assess the fair market value of the Project. In this regard, the Tribunal notes that Mr Mwangakala had accepted that historical costs should be adjusted in calculations of a fair market value. The relevant portion of Mr Mwangakala’s evidence in this regard is set out below.⁸¹⁹

⁸¹⁶ See Accuracy Report, Appendix 1, p. 52 of the pdf.

⁸¹⁷ See Searby Report, Appendix 3, Rousseau Opinion.

⁸¹⁸ Memorial, ¶ 463 (citing to **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023).

⁸¹⁹ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 352 (emphasis added).

635. The tribunal then quoted parts of the evidence given by the respondent's expert:

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

A. Correct.⁸²⁰

636. The respondent's expert further admitted that MEE should be given application:

Mr Mwangakala also acknowledged that the MEE method is consistent with valuation guidance, and in particular, that the MEE method was recommended as a primary valuation approach by the Canadian Institute of Mining, Metallurgy, and Petroleum ("CIMVAL") Code.⁸²¹

637. It is "in light of" this acknowledgement and acceptance by the respondent that the tribunal considered it possible to use the MEE method.⁸²²

638. In the present case, however, Respondent and its experts object to the use of such a method. In addition, it should be emphasised that the PEM applied by the tribunal in *Nachingwea* was significantly lower than those advocated by Accuracy (the tribunal applied a 1.6x multiplier).⁸²³ Importantly, the PEMs advanced by the claimants' expert in *Nachingwea* were grounded in real-world transactions relating to the project at issue. The multipliers were derived from "historical transactions in the Project."⁸²⁴ The

⁸²⁰ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 352.

⁸²¹ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 354 (emphasis omitted).

⁸²² **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 355.

⁸²³ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 367.

⁸²⁴ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 356.

spectrum of historical PEMs, interestingly, ranged from 2.1 down to 0.1.⁸²⁵ Burkina Faso notes that Mr Searby observes in his report that past transactions relating to Sarama's projects imply historical real-life PEMs of less than 0.2.⁸²⁶

639. Moreover, the claimants in *Nachingwea* had completed a full PEA for their project,⁸²⁷ and had subsequently revised it the PEA using updated information the following year.⁸²⁸ Both PEAs were produced in the arbitration.⁸²⁹ A few years later, the claimants had also completed a draft feasibility study, which was likewise produced in the arbitration,⁸³⁰ as well as a scoping study completed in 2017.⁸³¹

640. In the case at hand, Accuracy has arbitrarily picked up PEMs for each of the four deposits and applied them to the already inflated cost base. It used multipliers of x3 for Sanutura (Tankoro and Bondi), which is at the higher end of the usual range of PEM values,⁸³² x2.7 for Karankasso and x2.2 for Koumandara.⁸³³

641. First, these PEMs are not grounded in real-life transactions, as opposed to the PEMs used by the claimants in the *Nachingwea* case. They appear to have been

⁸²⁵ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 356.

⁸²⁶ Searby Report, n. 85 ("I note in passing that the prices paid by Sarama for acquiring the Bondi deposit and buying back half of the 'South Houndé' project were in both cases less than 0.2."), ¶ 4.69 ("I note that low values of this order would be consistent with the transaction prices paid by Sarama to acquire the Bondi permit and Acacia/Barrick's 50% interest in Sanutura, both of which were below 0.2."), n. 127 ("Sarama paid c. USD 1.5 million for Bondi, as compared to alleged expenditure of USD 10.6 million by Orezone. Sarama paid USD 1.26 million for Acacia/Barrick's interest in the South Houndé Project despite Acacia/Barrick having incurred expenditure of USD 12.3 million.").

⁸²⁷ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 58.

⁸²⁸ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 60.

⁸²⁹ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 60, nn. 12-13.

⁸³⁰ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 63.

⁸³¹ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 67.

⁸³² **Ex. AC-0048**, *Applying the Cost Approach to Valuation of Exploration Stage Mineral Assets*, 2017, p. 5 ("usual values would be between 0.5 and 3.").

⁸³³ Accuracy Report, ¶ 5.41, Table 5.3.

selected arbitrarily, without proper justification, other than by reference to a table providing only imprecise descriptions of exploration stages.⁸³⁴ Accuracy fails to demonstrate how each of Sarama's deposits corresponds to the descriptions set out in that table. It must be emphasised that the first category in the table includes a "technical appraisal" that reads as follows:

Limited potential for mineralisation of economic significance
and/or prospectivity has been downgraded by exploration
carried out prior to valuation date.⁸³⁵

642. As a matter of fact, this is exactly what happened on several of Sarama's deposits. First, and as already noted, exploration conducted on the Bondi Deposit (within the Sanutura project), effectively downgraded the prospectivity of the project. Orezone's exploration yielded poor and problematic results,⁸³⁶—as admitted by Claimant⁸³⁷—, which forced Sarama to downgrade the estimate issued by Orezone "to an entirely Inferred resource estimate."⁸³⁸

643. Second, the same downgrading happened with respect to the Karankasso resource estimate. The November 2017 estimate issued by Savary (the Karankasso operator) included "an updated Inferred mineral resource estimate of 805,000 ounces of

⁸³⁴ Accuracy Report, ¶ 5.30, Table 5.2; **Ex. AC-0049**, AIMVA, Valuation and Appraisal of Mineral Projects 2014, p. 9.

⁸³⁵ Accuracy Report, ¶ 5.30, Table 5.2, first row (emphasis added).

⁸³⁶ **Ex. C-0029**, Fifth Cube Report of 2022, p. 52 ("The sample collection and preparation, analytical techniques, security and QAQC protocols implemented by Orezone during its ownership of the Djarkadougou 2 Property are broadly considered to be of a poor standard."), p. 53 ("While the overall dataset generated during Orezone's ownership is considered poor quality . . .") (emphasis added). See *also id.*, p. 54, 212, 230, 328.

⁸³⁷ Dinning WS1, ¶ 76 ("Orezone had not adequately explored the Bondi Deposit and the surrounding permit area.").

⁸³⁸ Memorial, ¶ 151; Schmiede WS1, ¶ 61.

gold,”⁸³⁹ while the February 2020 SEMAFO estimate only included “709,000 ounces of gold” at the inferred level.⁸⁴⁰ Accuracy confirms that “the MRE was downgraded.”⁸⁴¹

644. It follows that, for Sarama’s principal projects, Sanutura and Karankasso, the exploration conducted resulted in a downgrading of the assets’ prospectivity, such that the applicable range of multipliers should lie at the lower end of the spectrum recommended by AIMVA, as reflected in Accuracy’s Table 5.2.⁸⁴² On that basis, the PEM could not exceed 0.9, which itself represents the upper bound of the range applicable to projects whose resources have been downgraded.⁸⁴³

645. Mr Searby and Mr Rousseau also comment on Accuracy’s selection of PEMs, and Burkina Faso refers the Tribunal to Mr Searby’s report for their respective analysis. While Mr Searby does “not purport to offer an expert opinion as to the appropriate PEM,”⁸⁴⁴ it suffices to note that the PEMs applied are exaggerated and inconsistent with the status of the project as at the valuation date.⁸⁴⁵ Moreover, Mr Rousseau opines that the choice of PEMs is highly subjective and that using PEMs in the case at hand is not appropriate.⁸⁴⁶

646. Mr Searby further notes that, based on his market approach, which yields a range between “USD 6 million and USD 15 million,”⁸⁴⁷ and taking into account his value

⁸³⁹ Schmiede WS1, ¶ 137.

⁸⁴⁰ Schmiede WS1, ¶ 138.

⁸⁴¹ Accuracy Report, n. 179 (emphasis added).

⁸⁴² Accuracy Report, ¶ 5.30, Table 5.2.

⁸⁴³ Accuracy Report, ¶ 5.30, Table 5.2.

⁸⁴⁴ Searby Report, ¶ 4.76.

⁸⁴⁵ Searby Report, ¶ 4.70.

⁸⁴⁶ Searby Report, Appendix 3, Rousseau Opinion, p. 11.

⁸⁴⁷ Searby Report, ¶ 4.68.

of USD 39.9 million of corrected and inflation-adjusted costs, his “conclusion implies a PEM of between 0.15 and 0.38.”⁸⁴⁸ This is consistent with some of the PEMs put forward by the claimants in the *Nachingwea* case, in which the spectrum of historical PEMs had a lower end of range as low as 0.1.⁸⁴⁹

647. Mr Searby concludes as follows:

I do not consider that Accuracy’s MEE-based valuation provides a sound basis for assessing loss in these Proceedings in its present form. The method is highly sensitive to subjective judgements, and in this instance both the expenditure base and the PEM adopted by Accuracy appear to me to produce results that are difficult to reconcile with my assessment of the market evidence and arm’s length transactions in various of the Assets.⁸⁵⁰

648. Moreover, applying a PEM above 1 would be totally inconsistent with the status of the project. In addition to the downgrading of resources at Sanutura and Karankasso, Claimant remained in the dark when it came to the economic viability of its project, having completed neither a PEA nor an updated PEA, let alone a scoping study or a draft feasibility study. Exploration conducted at Tankoro was erratic and inconsistent: it stopped in 2017, and only resumed in 2022, as acknowledged in a corporate presentation.⁸⁵¹ That same presentation states that the Tankoro deposit was still “under-explored” in 2022,⁸⁵² and comprised an overwhelming majority of inferred resources.

⁸⁴⁸ Searby Report, ¶ 4.68.

⁸⁴⁹ **Ex. CL-0125**, *Nachingwea v. Tanzania*, ICSID Case No. ARB/20/38, Award dated 14 July 2023, ¶ 356.

⁸⁵⁰ Searby Report, ¶ 4.77. See also Searby Report, Appendix 3, Rousseau Opinion, p. 11.

⁸⁵¹ **Ex. C-0229**, Sarama Resources Ltd, ‘Company Overview & Project Outlook’ (Presentation) dated 17 November 2022, p. 6 of the pdf (“Exploration Ongoing in 2022-2023 After ~5 Year Hiatus”) (emphasis added), and p. 7 of the pdf (“**no substantial exploration since ~2017**”) (emphasis in original).

⁸⁵² **Ex. C-0229**, Sarama Resources Ltd, ‘Company Overview & Project Outlook’ (Presentation) dated 17 November 2022, p. 7 of the pdf (“Very large mineralised system, extending for 16km along strike and to ~550m vertical depth and still under-explored.”) (emphasis added).

According to Sarama, the Bondi deposit, for its part, had not been substantially explored since 2007.⁸⁵³

649. Further considerations warrant mention. Acacia (Barrick Gold) invested more than USD 12 million from 2014 to 2018 and subsequently withdrew from the Tankoro project, accepting to be reimbursed of approximately USD 1 million by Sarama,⁸⁵⁴ effectively writing off more than USD 10 million. Karankasso was not controlled by Sarama, and its interest in the joint venture with successive operators and majority owners steadily declined prior to 2023, from 35% to 17.5%.⁸⁵⁵ Koumandara had not even been the subject of a resource estimate, given the minimal work undertaken there, as funds were prioritised and allocated to Tankoro.⁸⁵⁶

650. In addition, Sarama's sequential development strategy—under which one mine was to be brought into production to generate cash and subsequently fund exploration of the other deposits—rendered the project vulnerable to cash shortages and exposed it to heightened execution risk in the event that the main asset did not develop into a reserve-rich deposit and, ultimately, a producing mine.

651. In this respect, Claimant's alleged plan to combine several of its deposits is unsupported and remains a chimera in the absence of any technical basis. Claimant has failed to provide any technical evidence to substantiate its preliminary idea that several of its deposits could have been combined in order to build a single processing facility.

⁸⁵³ **Ex. C-0229**, Sarama Resources Ltd, 'Company Overview & Project Outlook' (Presentation) dated 17 November 2022, p. 7 of the pdf ("no substantial exploration since ~2007") (emphasis omitted).

⁸⁵⁴ Searby Report, ¶¶ 4.29-4.30.

⁸⁵⁵ See *supra*, ¶ 336.

⁸⁵⁶ Schmiede WS1, ¶ 135.

652. The conclusion is clear: in light of the foregoing, the MEE/PEM method cannot be accepted in the present case and should not be applied in legal proceedings. This is due both to the inherently subjective nature of the method and to the flawed manner in which it was applied by Accuracy in these arbitration proceedings. The figures derived by Accuracy using the cost approach, including the USD 260.8 million figure,⁸⁵⁷ must be disregarded as erroneous, disconnected from reality and unreliable.

3. The USD 215 million Value Based on Accuracy's Comparable Transactions Approach Is Flawed

653. Accuracy has conducted a second valuation exercise based on market comparables, yielding a result of USD 215 million.⁸⁵⁸ Mr Searby and Mr Rousseau have reviewed this analysis, and conclude that it is both flawed and overstated, even on its own terms, and unlikely to be an appropriate measure of the assets' FMV.

654. Certain of the screening criteria used by Accuracy are not appropriate. Accuracy has, for instance, excluded all transactions below a threshold of USD 10 million.⁸⁵⁹ Mr Searby states as follows with respect to this screening criterion:

[T]he transaction threshold of USD 10 million is, in my opinion, arbitrary and Accuracy do not say why it was selected. There is no reason, in principle, why lower value transactions might not contain relevant information about the value of the Assets, particularly given that Sarama's market capitalisation was around USD 6.4 million at Accuracy's instructed date of valuation.⁸⁶⁰

⁸⁵⁷ Memorial, ¶ 470.

⁸⁵⁸ Memorial, ¶ 476.

⁸⁵⁹ Accuracy Report, ¶ 6.12 a) ("We further filter for deals with a (i) transaction value of over USD 10m . . .").

⁸⁶⁰ Searby Report, ¶ 3.16.

655. This is all the more relevant in light of Mr Dinning's own valuation of Sarama two months prior to the valuation date of barely USD 10 million:

I would like to underline Sarama's ongoing commitment to Burkina Faso and the fact that it is a small exploration company of barely ten million dollars, earning no income from Burkina Faso.⁸⁶¹

656. Another problematic screening issue in Accuracy's analysis is that the data used does not enable a distinction between indicated and inferred resources, which is a major difference in mining. Mr Searby opines as follows:

Third, and perhaps most importantly, the screening criteria on Capital IQ do not permit the user to distinguish between Indicated resources and Inferred resources. Indicated resources have a much greater degree of certainty associated with them and, logically, will be valued more highly by potential acquirers than inferred resources. To identify the division between Indicated and Inferred resources associated with a given transaction, it is necessary to do further research, which Accuracy did not do.⁸⁶²

657. Mr Rousseau, a geologist and mining specialist who assisted Mr Searby, identifies further issues in Accuracy's comparables analysis. He notably states that "the benchmarked projects are very different from one another, and most importantly, cannot be compared with the Tankoro, Bondi, Karankasso and Koumandara deposits."⁸⁶³ He further states that Accuracy's approach "introduces a bias towards ratios and figures that apply to assets at a much more advanced stage of exploration, development or even

⁸⁶¹ **Ex. C-0308**, Letter from Sarama to Minister of Mines dated 22 June 2023, p. 1 (emphasis added).

⁸⁶² Searby Report, ¶ 3.18 (emphasis omitted).

⁸⁶³ Searby Report, Appendix 3, Rousseau Opinion, p. 7 (emphasis omitted).

operation.”⁸⁶⁴ Indeed, 5 benchmarked projects out of 7 are producing mines, and the other two projects have already completed PEAs.⁸⁶⁵

658. Burkina Faso respectfully refers the Tribunal to the full comparables analysis in Mr Searby’s report,⁸⁶⁶ and sets out the conclusion he draws regarding Accuracy’s application of this valuation method:

The first conclusion to be drawn is that Accuracy’s selective approach to the transaction evidence has resulted in what I consider to be a misleading conclusion. It is evident, on the basis of transactions by the Company in the Assets, and its overall market capitalisation, that the Sanutura Project does not rank among the more advanced African gold properties being traded at values in excess of USD 10 million.⁸⁶⁷

[A]fter almost 12 years of effort, the Claimant had failed to conduct a PEA for any of its projects, which is the first step towards establishing commercial viability.⁸⁶⁸

I therefore consider that the market value conclusions reached by Accuracy are not indicative of the value of the Sanutura Project because they relate to assets that were qualitatively superior to it. Further, as discussed in **Section 5** below, transactions in the Assets that the Claimant now alleges to be worth around \$240 million took place at values far below that level. This suggests that such third parties as transacted with the Claimant took a different view of its projects’ likely prospects after several years of their own involvement with them. In my opinion, the values at which those transactions occurred are likely to represent the best-

⁸⁶⁴ Searby Report, Appendix 3, Rousseau Opinion, p. 7 (emphasis omitted).

⁸⁶⁵ Searby Report, Appendix 3, Rousseau Opinion, p. 8 (emphasis omitted). Mr Rousseau concludes that “[t]he valuation estimated by Accuracy does not reflect reality. Such a valuation exercise, in my view, is not appropriate”. *Id.* (emphasis in original).

⁸⁶⁶ Searby Report, Section 3.

⁸⁶⁷ Searby Report, ¶ 3.53.

⁸⁶⁸ Searby Report, ¶ 3.54.

informed opinion as to the approximate worth of the Claimant's projects in Burkina Faso.⁸⁶⁹

659. Mr Searby provides an alternative figure in the range of USD 6 million to USD 15 million:

[M]y overall conclusion in respect of the market value approach is that a prospective purchaser of the Assets would pay no more than USD 10 million to USD 15 million to acquire them and might – based on the terms of Sarama's transaction with Acacia/Barrick – pay even less.⁸⁷⁰

660. As will be seen below, it bears noting that the 2014 earn-in agreement between Acacia (Barrick) and Sarama contemplated an investment of USD 14 million by Acacia.⁸⁷¹ Mr Searby notes in his respect that:

On the basis of the earn-in agreement, the 'post-money' valuation of the company (i.e., after Barrick had invested USD 14 million) would have been USD 18.67 million (i.e. 14m/75%). Such a value would only arise, potentially several years in the future. The future value of the company, discounted to the date of the earn-in agreement would therefore have been considerably less than USD 18.75m. It is not possible to assess with any precision the implied 'pre-money' value of the project at the time, but on any view, I consider was substantially below USD 5 million.⁸⁷²

661. **In conclusion**, the value of USD 215 million, or USD 233 million,⁸⁷³ derived by Accuracy using the comparables method, should likewise be disregarded entirely as unlikely to reflect the FMV of Sarama's project, disconnected from reality and unreliable.

⁸⁶⁹ Searby Report, ¶ 3.55.

⁸⁷⁰ Searby Report, ¶ 3.61.

⁸⁷¹ **Ex. C-0125**, Earn-In Agreement, p. 10 of the pdf (indicating the 4 amounts that make up the total of USD 14 million), and Article 11.

⁸⁷² Searby Report, n. 114 (emphasis added).

⁸⁷³ Memorial, ¶ 476.

662. Accordingly, the figure of USD 242 million claimed by Sarama, arrived at by averaging the figures derived from the costs method (using PEMs) and the comparables method, should be entirely rejected as failing to meet the international law standard of non-speculative and sufficiently certain compensable damages.

663. As shown below, a market approach grounded in objective, real-world data—such as market capitalization and past transactions involving the same assets—yields values that are significantly lower than those advanced by Claimant.

C. FMV Is Best Achieved Using Market Capitalisation and Same-Asset Contemporaneous Transactions

664. Burkina Faso sets out below the reasons why market capitalization and historical transactions constitute persuasive benchmarks for FMV and demonstrates that Sarama's market capitalization and the prices paid in past transactions indicate a company or project value of only a few million dollars, broadly consistent with the corrected market value determined by Mr Searby.

1. Contemporary Market Capitalization and Past Transactions Constitute a Particularly Persuasive Benchmark for FMV

665. In assessing damages, contemporary market capitalization and past transactions constitute a particularly persuasive indicator of value. When a market exists for an asset, the market price itself provides strong evidence of its FMV.

666. Ripinsky and Williams state that:

Where there is an active market for a particular asset, tribunals will generally have little difficulty in establishing its value. Here 'no formal theory of value is needed. We can take the market's word for it.'⁸⁷⁴

⁸⁷⁴ **Ex. RL-0067**, Ripinsky and Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW, Chapter 6 (British Institute for International and Corporate Law, 2008), ¶ 6.2.1 at p. 189 (p. 7 of the pdf).

667. Damages specialist Mark Kantor explains that actual market prices and arm's-length transactions are often the best evidence of FMV. For publicly traded companies, listed share prices provide a natural benchmark of value. He states that:

The best evidence of a company's value, or course, may be the actual price received in an arm's-length transaction for the sale of an interest in that very business. As the US Tax Court has stated, "While listed market prices are the benchmark in the case of publicly traded stock, recent arm's-length transactions generally are the best evidence of fair market value in the case of an unlisted stock."⁸⁷⁵

668. The *Enron v. Argentina* tribunal endorsed the approach of using past market transactions as an "accurate reflection of the current market value of [a] company," noting that willing buyers and sellers were no longer hypothetical when actual transactions have taken place:

In the present case there is yet another aspect that must be considered. Market transactions have taken place in respect of the Claimants' participation in TGS, both in connection with the swap that took place with Petrobras and the later sale of shares to an investment fund. Willing sellers and willing buyers in this case are thus no longer hypothetical but real enough, a situation that has turned to be meaningful in the Tribunal's findings. In fact, these transactions and in particular the sale of the Claimants' 15.2% stake in TGS to D.E. Shaw and the option to purchase the remaining 4.3% participation in TGS are an accurate reflection of the current market value of the company.⁸⁷⁶

669. The *Tenaris v. Venezuela* tribunal also referred to past same-asset transactions to derive the final figure it placed on the asset to be valued—the claimant's

⁸⁷⁵ **Ex. RL-0068**, M. Kantor, VALUATION FOR ARBITRATION, INTERNATIONAL ARBITRATION LAW LIBRARY, VOL. 17 (Kluwer Law International, 2008), at 17-18 (p. 11 of the pdf).

⁸⁷⁶ **Ex. RL-0069**, *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, ¶¶ 387-388.

50.2% equity interest in the “Matesi” plant.⁸⁷⁷ The tribunal was not satisfied with either the DCF or the market multiples methods,⁸⁷⁸ and relied instead on the price paid by a buyer to purchase the Matesi plant.⁸⁷⁹

670. Mining industry codes, such as the CIMVAL Code in its 2019 edition, refer to the market capitalization or farm-in agreements to determine the value of a project:

The *Market Approach*, also known as the “*Sales Comparison Approach*”, is based primarily on the principle of substitution. The Mineral Property being valued is compared with the attributed transaction value of similar Mineral Properties, transacted in an open market. Methods include comparable transactions, market capitalization analysis, and option or farm-in agreement terms analysis.⁸⁸⁰

2. The Market Capitalisation of Sarama Is a Reliable Proxy for FMV and Was USD 6.4 million at the Time of the Alleged Breach

671. In his report, Mr Searby determines that Sarama’s market capitalization was of approximately USD 6.4 million at the time of the alleged breach. He tracks down the evolution of the market for Sarama’s stock throughout 2022 and 2023,⁸⁸¹ and indicates that:

[D]uring the course of August 2023 – prior to Sarama making an announcement to the stock exchange about the status of the Assets – declined to USD 6.4 million, which was its value both at Accuracy’s instructed date of valuation and on 5 September 2023, immediately prior to Sarama’s

⁸⁷⁷ **Ex. RL-0070**, *Tenaris and Talta v. Venezuela (I)*, Award dated 29 January 2016, ¶¶ 550-566.

⁸⁷⁸ **Ex. RL-0070**, *Tenaris and Talta v. Venezuela (I)*, Award dated 29 January 2016, ¶ 550.

⁸⁷⁹ **Ex. RL-0070**, *Tenaris and Talta v. Venezuela (I)*, Award dated 29 January 2016, ¶¶ 559-566.

⁸⁸⁰ **Ex. AC-0045**, CIMVAL Code for the Valuation of Mineral Properties dated 29 November 2019, p. 15 (p. 18 of the pdf) (Italics in original, underline added).

⁸⁸¹ Searby Report, ¶ 5.16, Figure 5-2.

announcement to the stock exchange regarding the Tankoro permit on 6 September 2023.⁸⁸²

672. Mr Searby addresses the criticisms raised by Accuracy regarding the relevance of market capitalisation for determining FMV⁸⁸³ and concludes as follows:

Sarama's market capitalisation provided a strong indication of the order of magnitude of the value of its underlying assets. Immediately prior to Sarama's announcement on 6 September 2023, that market capitalisation was USD 6.4 million.⁸⁸⁴

673. As stated by Mr Searby, market capitalisation necessarily “bear[s] some relationship to [the] fair market value.”⁸⁸⁵ Mr Searby further notes that the USD 6.4 million figure is not outside the bounds of his range of USD 6 million to USD 15 million.⁸⁸⁶ It is of particular relevance to note that two months before the alleged breach—and the valuation date of 24 August 2023—, Sarama wrote to the Ministry of Mines on 22 June 2023, stating that it was “a small exploration company of barely ten million dollars.”⁸⁸⁷

674. Burkina Faso submits that, if any damages are to be awarded to Sarama, the figure of USD 6.4 million constitutes a reliable proxy for its fair market value. It is grounded in market reality and consistent with the contemporaneous statements of Sarama's CEO.

⁸⁸² Searby Report, ¶ 5.17(d) (emphasis added). See *also* Searby Report, Appendix 3, Rousseau Opinion, p. 8 (“[T]he capitalization of Sarama US 6.4 M\$ in TSX & ASX describes the reality of Sarama Resources Ltd in terms of value. This amount represents the belief and price that Sarama was worth to potential investors. This is a reality check or feedback by the market and investors.”).

⁸⁸³ Searby Report, ¶ 5.26 (answering to Appendix 3 to the Accuracy Report).

⁸⁸⁴ Searby Report, ¶ 5.27(a).

⁸⁸⁵ Searby Report, ¶ 5.27(a).

⁸⁸⁶ Searby Report, ¶ 5.27(c).

⁸⁸⁷ **Ex. C-0308**, Letter from Sarama to Ministry of Mines dated 22 June 2023, p. 1.

3. Real-Life Contemporary Transactions in Sarama's Project Are Reliable and Compelling Valuation Benchmarks and Provide Values of Only a Few Millions

675. Transactions involving Sarama's projects indicate that the value of the project does not exceed a few million dollars. These real-life valuations have the advantage of avoiding reliance on hypothetical buyers and sellers to a notional agreement; instead, the agreements in the present case are real, historical transactions that provide compelling evidence of the value of Sarama's project.

676. These transactions are the following:

- Sarama's acquisition of the Bondi project from Orezone in 2016 for CAD 1.44 million,⁸⁸⁸ valued at approximately USD 1.5 million (including the value of warrants⁸⁸⁹) in Sarama's financial statements.
- Sarama's sale of its SWA BF subsidiary and the Djarkadougou (Bondi) permit to Beoogo in August 2025 for a consideration of USD 1.5 million (USD 1.486 million),⁸⁹⁰ the same price at which Sarama had acquired it some nine years earlier. The Bondi project was therefore valued at USD 1.5 million.
- The Earn-in agreement of November 2014 between Acacia and Sarama pursuant to which Acacia committed to expend USD 14 million in order to earn up to a 75% interest in the Tankoro project.⁸⁹¹ 100% of the Tankoro project was therefore valued "post-money" at USD 18.67 million, but Acacia (Barrick) withdrew from the project after it had expended approximately USD 12 million.⁸⁹²

⁸⁸⁸ **Ex. C-0141**, Letter from Sarama Resources Ltd to Orezone (containing HOTs for Djarkadougou acquisition) dated 23 May 2016; **Ex. C-0152**, Deed of Transfer between Orezone Inc. and SWA dated 25 April 2017 (English version); **Ex. C-0152**, Acte de Cession de Permis de Recherche entre Orezone Inc. et SWA, 25 April 2017 (French version).

⁸⁸⁹ Searby Report, ¶ 5.28(a) ("Sarama purchased 100% of the Bondi deposit for a consideration of USD 1,093,000 in Sarama shares plus 3 million warrants at CAD 0.195 per share and 2 million warrants at CAD 0.24/share. Sarama's financial statements for 2016 ascribed a fair value to those warrants of USD 275,861 and USD 167,196 respectively. The total consideration, excluding any value for the promised royalties in the event of commercial production (consistent with Sarama's financial statements), was therefore USD 1,486,057").

⁸⁹⁰ **Ex. C-0261**, Share Sale and Purchase agreement between Sarama and Beoogo dated 18 August 2025.

⁸⁹¹ **Ex. C-0125**, Earn-In Agreement, p. 10 of the pdf (indicating the 4 amounts that make up the total of USD 14 million), and Article 11; Dinning WS1, ¶ 59; Schmiede WS1, ¶ 28.

⁸⁹² See Dinning WS1, ¶ 65.

Mr Searby opines that the implied value of the project “was substantially below USD 5 million.”⁸⁹³

- The Termination agreement of May 2019 between Sarama and Acacia (terminating the Earn-in agreement)⁸⁹⁴ pursuant to which Sarama reimbursed Acacia the amount of USD 1.25 million only for the 50% interest Acacia had obtained. Acacia had expensed more than USD 12 million; 100% of the Tankoro project was therefore valued at USD 2.5 million.
- Sarama’s acquisition of its initial 35% interest in Karankasso for USD 1.430 million,⁸⁹⁵ meaning that 100% of the Karankasso project was valued at approximately USD 4 million.
- Sarama’s transaction with BIC West Africa in 2024 for the sale of the Koumandara project at a price of USD 160,000.⁸⁹⁶
- Soleil purchased the Tankoro mining asset from the Burkinabe state in 2024 for FCFA 800 million, or approximately USD 1.4 million.⁸⁹⁷

677. In his report, Mr Searby provides comments on and valuations for four of these agreements, as follows:

There have been four transactions in the subject assets between Sarama and third parties over the last ten years, namely:

(a) in 2016, Sarama purchased 100% of the Bondi deposit for a consideration of USD 1,093,000 in Sarama shares plus 3 million warrants at CAD 0.195 per share and 2 million warrants at CAD 0.24/share. Sarama’s financial statements for 2016 ascribed a fair value to those warrants of USD 275,861 and USD 167,196 respectively. The total consideration, excluding any value for the promised royalties in the event of commercial production (consistent with Sarama’s financial statements), was therefore

⁸⁹³ Searby Report, n. 114.

⁸⁹⁴ **Ex. C-0173**, Termination Agreement between Acacia Mining plc and Sarama Resources Ltd dated 14 May 2019.

⁸⁹⁵ Searby Report, Figure 4-3 (Karankasso column).

⁸⁹⁶ Memorial, ¶ 240; Dinning WS1, ¶ 189; **Ex. C-0333**, 2024 MD&A dated 28 March 2025, p. 13; Accuracy Report, ¶ 3.39.

⁸⁹⁷ Kéré WS1, ¶¶ 35-36.

USD 1,486,057. Accuracy implicitly values 450,000oz of Inferred resources in the Bondi deposit at USD 35.8 million, a multiple of 24x the acquisition cost;

(b) in 2019, Sarama bought back 50% of the 'South Houndé Project' (which I understand broadly conforms to the Sanutura Project) from Acacia for USD 1,000,000 plus 2 million warrants at CAD 0.10/share and 3 million warrants at CAD 0.20/share. Sarama's financial statements for 2019 value those warrants at USD 137,162 and USD 120,957 respectively. The total consideration, excluding any value for the promised royalties in the event of commercial production, was therefore USD 1,258,119, again excluding royalties of an uncertain value. Implicitly, the 100% value of the Sanutura Project in 2019 was USD 2,516,238. Between 2020 and 2023, according to Mr Schmiede's evidence, Sarama spent a total of USD 5,334,889 on exploring the Sanutura Project. In total, therefore, if Sarama's expenditure had a PEM of 1 (which I do not agree that it did), the total value of the Project would be USD 7,851,127. Accuracy's valuation of the Sanutura project in August 2023 is USD 207.9 million, a multiple of 26.4x that value;

(c) in in 2024, Sarama sold the Koumandara Project for USD 160,000. Accuracy says that the Koumandara Project was worth USD 11.9 million. The implied discount of the sale price to Accuracy's assessed value is 98.7%. In other words, Accuracy's valuation is c. 74x higher. It is the Claimant's case, unsupported by independent evidence so far as I am aware, that the sale price of USD 160,000 embodies an element of financial distress. A discount of 98.7% is, in my opinion, too high to reflect financial distress alone (or, indeed, almost any other valuation factor I have ever encountered in my experience). A more reasonable interpretation would be that, even allowing for an element of financial distress, the Koumandara Project was not worth an amount approaching USD 11.9 million; and

(d) recently, in August 2025, I understand that Sarama has sold the Bondi permit for a consideration of USD 1.5 million. This is, approximately, the same price paid for the asset in

2016. Far from enhancing the prospectivity of the deposit, as the Claimant contends, it would appear that no value has been added to the permit in nominal terms over the preceding nine years. In real terms (i.e. adjusted for inflation) the value of the asset has fallen under Sarama's ownership. Once again, the realised sale value is at a discount of almost 96% to Accuracy's implicit valuation of USD 35.8 million, which is at a multiple of 24x the sale price. The Claimant might contend that the Bondi deposit lost value as a result of the alleged expropriation of the Tankoro 2 Permit. If so, it suggests that the best party to negotiate with would have been the new owner of that permit, or another nearby permit owner, in which case the sale price might embody some division of the synergy value of the two permits combined. I do not know whether that happened. If it did, then Sarama's loss might be limited to the value of whatever synergy benefits the other side managed to negotiate for itself. Even allowing, as the Claimant alleges, an element of financial distress, the implied discount in the Bondi sale transaction might indicate a certain lack of care on Sarama's part in the sale negotiations or, once again, that the value of the deposit did not approach the valuation placed on it by Accuracy.⁸⁹⁸

678. Mr Searby concludes that "[s]imply put, the evidence from the transactions in the Assets is not supportive of Accuracy's valuation of them. It is, however, broadly consistent with my market value assessment and the company's market capitalisation."⁸⁹⁹

679. The foregoing should provide the Tribunal with sufficient comfort and grounding to dismiss the exaggerated valuations advanced by Accuracy, which rely on speculative figures, costs and multipliers, and inappropriate screening criteria. Burkina Faso submits that none of the damages claimed—whichever amount Claimant has put

⁸⁹⁸ Searby Report, ¶ 5.28.

⁸⁹⁹ Searby Report, ¶ 5.29.

forward—should be accepted by the Tribunal, as none comes close to reflecting the FMV of Sarama or its projects.

680. In any event, Burkina Faso reiterates that only figures, amounts, or costs relating exclusively to Tankoro may be awarded to Sarama, as no causal link exists between the impugned acts and the losses alleged in connection with Bondi and the Additional Projects.⁹⁰⁰

VI. CLAIMANT’S CLAIMS ON INTEREST SHOULD BE DISMISSED

681. Burkina Faso rejects the type of interest and the rates put forward by Sarama. Burkina Faso submits that if any damages are awarded to Claimant, then only simple interest with a risk-free rate may be applied.

682. Allocating interest at a risk-free rate is consistent with arbitral practice, as evidenced by the *Vestey* award:

In conclusion, the Tribunal will resort to a risk free rate applicable to US currency debt, i.e. the six-month US Treasury bond rate. The practice of international tribunals confirms this conclusion.⁹⁰¹

⁹⁰⁰ See **Ex. CL-0015**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 31, p. 62 of the pdf.

⁹⁰¹ **Ex. CL-0093**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award dated 15 April 2016, ¶ 446. See also **Ex. RL-0071**, *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Award dated 25 July 2007, ¶ 102.

683. Many tribunals have applied the US treasury rates, in particular when the applicable currency was the US dollar.⁹⁰² This trend was recently confirmed by the *Bilcon v. Canada* award.⁹⁰³

684. Any interest awarded should be simple rather than compound, as nothing would justify the application of compound interest in this case. Many tribunals have refused to apply compound interest,⁹⁰⁴ and the ILC Commentary on the Articles on Responsibility of States confirms this practice as follows:

An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest.⁹⁰⁵

685. Mr Searby confirms the above and rejects the rates put forward by Accuracy, in particular SOFR 12m +6% and SOFR 12m +11.8%, which are not “commercially reasonable”.⁹⁰⁶

⁹⁰² **Ex. CL-0084**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 September 2014, ¶ 853; **Ex. RL-0072**, *Occidental v. Ecuador (II)*, ICSID Case No. ARB/06/11, Award dated 5 October 2012, ¶ 842; **Ex. CL-0045**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 November 2007, ¶ 300 (“As compensation in the present arbitration is to be awarded in U.S. Dollars, the simple interest rate for U.S. Treasury bills is appropriate.”); **Ex. RL-0071**, *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Award dated 25 July 2007, ¶¶ 102, 105.

⁹⁰³ **Ex. RL-0073**, *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages dated 10 January 2019, ¶ 321.

⁹⁰⁴ **Ex. RL-0074**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, CNUDCI, PCA Case No. 2005-04/AA227, Final Award dated 18 July 2014, ¶¶ 1689-1691; **Ex. RL-0075**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008, ¶ 295; **Ex. CL-0018**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated 14 March 2003, IIC 62 (2003), ¶ 647; **Ex. CL-0017**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award dated 16 December 2002, 18(2) ICSID REVIEW— FOREIGN INVESTMENT LAW JOURNAL 488 (Fall 2003), ¶ 211; **Ex. RL-0076**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, ¶ 236.

⁹⁰⁵ **Ex. CL-0015**, ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Commentary to Article 38, ¶ 8 (p. 79 of the pdf).

⁹⁰⁶ Searby Report, ¶¶ 5.32-5.35.

686. Burkina Faso submits that only simple interest should apply and that, as suggested by Mr Searby, only a rate “based on the US Federal Reserve’s federal funds rate, plus a premium of perhaps 0.5% to 1.0%” may be applied.⁹⁰⁷ Only such a rate would be relevant and commercially reasonable in the present context.

VII. COSTS

687. Given the unmeritorious nature of Claimant’s claim, Respondent should be awarded all of its costs incurred in connection with this arbitration, including, without limitation, the fees and expenses of the arbitrators, ICSID’s administrative fees, the legal fees and expenses of its attorneys, the fees and expenses of its experts, and the expenses of Government employees incurred in connection with the preparation of Burkina Faso’s arbitration defence and jurisdictional objections, together with simple interest.

VIII. CONCLUSION AND REQUEST FOR RELIEF

688. For the reasons stated above, all of Claimant’s claims and requests for relief should be dismissed, and Respondent should be awarded all the costs it has incurred in connection with this arbitration, together with a reasonable rate of post-award interest.

IX. RESERVATION OF RIGHTS

689. Respondent hereby reserves the right to submit such additional defences, evidence and arguments as it may deem appropriate to supplement this Counter-Memorial and Memorial on Jurisdiction or to respond to any argument submitted by Claimant in relation to this arbitration.

⁹⁰⁷ Searby Report, ¶ 5.36.

690. In addition, Burkina Faso, as Respondent in the present ICSID arbitration proceedings, expressly reserves the right to submit, at any stage of the proceedings and in accordance with Article 46 of the ICSID Convention and the Arbitration Rules, counterclaims based on the serious breaches and fraudulent acts attributable to Claimant, Sarama.

691. It has been unequivocally established that Claimant has engaged in repeated misconduct, false statements, and acts of bad faith that have caused direct, substantial, and compensable harm to Burkina Faso. These breaches, including in particular the failure to provide mining data upon the expiry of the Tankoro Permit, despite this being a regulatory requirement, have not only undermined confidence in Burkina Faso's institutions but have also hindered the country's economic and social development, resulting in significant financial losses to the public treasury of Burkina Faso.

30 March 2026

Respectfully submitted,

By: 

*Counsel for Respondent
Burkina Faso*

**Curtis, Mallet-Prevost,
Colt & Mosle LLP**

**SCPA BIRBA-GUITANGA
& ASSOCIES**