INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

WALAM ENERGY LLC

v.

REPUBLIC OF KENYA

(ICSID CASE NO. ARB/15/7)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated July 10, 2020.

Meg Kinnear
Secretary-General

Washington, D.C., July 10, 2020

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WALAM ENERGY LLC

Claimant

and

REPUBLIC OF KENYA

Respondent

ICSID Case No. ARB/15/7

AWARD

Members of the Tribunal
Mr Joe Smouha QC, President of the Tribunal
Mr Swithin J. Munyantwali, Arbitrator
The Honourable James Spigelman AC QC, Arbitrator

Secretary of the Tribunal
Ms Ella Rosenberg

Date of dispatch to the Parties: 10 July 2020

REPRESENTATION OF THE PARTIES

Representing WalAm Energy LLC:

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and

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Ms Charline Yim
Mr Zachary Kady
Ms Masha Bresner
Ms Magan Haycock
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and

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Representing the Republic of Kenya:

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Ms Muthoni Kimani MBS
Senior Deputy Solicitor General
Ms Njeri M. Wachira MBS
Deputy Solicitor General
Ms Pauline Mcharo
Deputy Chief State Counsel
Ms Christine K. Omwakwe HSC
Principal State Counsel
Mr Daniel Kiptoo
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and

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and

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Mr Ben Juratowitch QC
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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimant's Exhibit
Claimant's Memorial	Claimant's Memorial on the Merits dated 29 March 2017
Claimant's Rejoinder on Preliminary Objections	Claimant's Rejoinder on Preliminary Objections to Jurisdiction dated 16 December 2016
Claimant's Reply	Claimant's Reply on the Merits dated 19 February 2018
Claimant's Response to Preliminary Objections to Jurisdiction	Claimant's Response to Preliminary Objections to Jurisdiction dated 21 October 2016
CL-[#]	Claimant's Legal Authority
Decision on Jurisdiction	Decision on the Respondent's Preliminary Objections to Jurisdiction dated 27 March 2017
ESIA	Environmental and Social Impact Assessment
GDC	Geothermal Development Company
GRMF	Geothermal Risk Mitigation Facility
Hearing on Jurisdiction	Hearing on Jurisdiction held on 6-7 February 2017
Hearing on the Merits	Hearing on the Merits held on 16-25 May 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IRR	Internal Rate of Return

KPLC	Kenya Power and Lighting Company
Minister or MOE	Minister of Energy of the Republic of Kenya
PPA	Power Purchase Agreement
R-[#]	Respondent's Exhibit
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 31 October 2017
Respondent's Preliminary Objections to Jurisdiction	Respondent's Preliminary Objections to Jurisdiction dated 9 August 2016
Request	Claimant's Request for Arbitration dated 30 January 2015
Respondent's Rejoinder	Respondent's Rejoinder on the Merits dated 16 April 2018
Respondent's Reply on Preliminary Objections to Jurisdiction	Respondent's Reply on Preliminary Objections to Jurisdiction dated 18 November 2016
RL-[#]	Respondent's Legal Authority
Transcript D[day #]:P[page #]:L[line #] (Speaker(s))	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 2 June 2016

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Geothermal Resources Licence No. 1/2007 (the "**Licence**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The claimant is WalAm Energy Inc. ("**WalAm**" or the "**Claimant**"), a company incorporated under the laws of Nevada, U.S.A. in 2017, and registered in Alberta, Canada.

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

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

5. This dispute relates to Kenya's allegedly unlawful declaration of forfeiture, on 1 November 2012, of the Licence to explore and develop the Suswa geothermal concession, which had been obtained by WalAm from Kenya's Ministry of Energy on 5 September 2007.

II. PROCEDURAL HISTORY

6. On 30 January 2015, ICSID received a Request for Arbitration from WalAm Energy Inc. against Kenya.

7. By letter dated 6 February 2015, ICSID requested that the Claimant provide further information, in the following terms:

> *We refer to the Request for Arbitration dated January 26, 2015 (the "Request") of Walam Energy Inc. ("WalAm").*
>
> *As we proceed with the review of the Request, we ask that you provide ICSID with the following:*
>
> *Pursuant to ICSID Institution Rule 2(1)(d)(i), please explain how WalAm qualified as a national of an ICSID Contracting State, pursuant to Article 25 of the ICSID Convention, on the date of the*

consent to arbitration, alleged to be September 5, 2007 (Request, paras. 68, 74-75).

We ask that you provide us with the above-listed clarification by February 13, 2015.

8. Under the cover of a letter dated 11 February 2015, the Claimant filed "*Submissions on WalAm's Consent to ICSID Arbitration*" which, in its conclusive part, read:

> *Based on the above, the Claimant respectfully submits that:*
>
> *(i) By agreement of the Parties, the Claimant is a national of Canada for purposes of Article 25(2)(b) of the ICSID Convention.*
>
> *(ii) Canada became a Contracting State, in accordance with Article 68 of the ICSID Convention, on 1st December 2013.*
>
> *(iii) The Claimant gave conditional consent to submit any dispute between the Parties to ICSID arbitration when it entered into the arbitration agreement in the Licence on 5th September 2007. The Claimant's consent became fully effective on 1st December 2013, when Canada became an ICSID Contracting State.*
>
> *(iv) The Claimant is willing to amend paragraph 74 of the Request to clarify the effective date of the Claimant's consent as 1st December 2013 and awaits the Secretary-General's directions in this regard.*
>
> *(v) The requirements of Article 25 have been fulfilled and the Request should proceed to registration.*

9. On 23 February 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

10. By letter of 8 April 2015, the Claimant provided further information to ICSID regarding its status as a national of another Contracting State under Article 25 of the ICSID Convention. The letter read as follows:

> *We refer to the Notice of Registration of this matter dated 23 February 2015.*

Given that the case is now registered, the Claimant will make such further submissions on jurisdiction as may be required before the Tribunal at the appropriate juncture.

In the interim, and purely for the purposes of clarification, we wish to advise that the Claimant's case regarding how the Claimant qualified as a national of another Contracting State, pursuant to Article 25 of the ICSID Convention, rests upon three points in particular:

(a) The parties have agreed that the Claimant is a national of Canada[1] (as stated at para 1 and para 68 of the Request for Arbitration); and/or

(b) The Claimant has its registered office and seat in Canada (as stated at page 1 of the Request for Arbitration); and/or

(c) The Claimant is incorporated in the United States of America[2] (as stated at page 1 and para 9 of the Request for Arbitration).

Yours faithfully,

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[1] Canada signed the ICSID Convention on 15 December 2006 and became a party to the same on 1 November 2013. Canada remains a party to the ICSID Convention to this day. See also paragraphs 7 to 12 of the Claimant's submissions on Claimant's consent to ICSID arbitration dated 11 February 2015.

[2] The United States of America ('USA') signed the ICSID Convention on 27 August 1965 and became a party to the same on 14 October 1966. The USA remains a party to the ICSID Convention to this day.

11. By letter of 27 April 2015, the Claimant requested that the Tribunal in this case be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention. The Centre reminded the Parties that the 60-day period after registration of the Request in this case had elapsed and informed the Respondent that pursuant to ICSID Arbitration Rule 2(3), the Tribunal in this case was to be constituted pursuant to Article 37(2)(b) of the ICSID Convention. The Centre further invited the Claimant and the Respondent to inform ICSID of their appointment of an arbitrator and of their proposals for the President of the Tribunal.

12. By letter of 30 April 2015, the Claimant appointed Mr Swithin J. Munyantwali, a dual national of Uganda and the United Kingdom, as arbitrator, and proposed a President of the Tribunal.

13. By letter of 9 June 2015, the Respondent (i) appointed Mr James Spigelman AC QC, a national of Australia, as arbitrator, (ii) rejected the Claimant's proposal for President of the Tribunal, and (iii) proposed a different candidate as President of the Tribunal.

14. By letter of 10 June 2015, the Centre informed the Parties that on 30 April 2015, it had informed Mr Munyantwali of his appointment as arbitrator in this case by the Claimant, but it was unsuccessful in its attempts to contact him. Consequently, the Centre invited the Claimant to proceed to the appointment of another arbitrator in accordance with the method followed for the appointment of Mr Munyantwali.

15. By letter of 11 June 2015, the Centre informed the Parties that Mr Munyantwali confirmed that he had only received the letter informing him of his appointment on 9 June 2015.

16. By letter of 12 June 2015, ICSID notified the Parties of Mr Munyantwali's acceptance of his appointment.

17. By letter of 15 June 2015, ICSID notified the Parties of Mr Spigelman's acceptance of his appointment.

18. By letter of 23 June 2015, the Claimant rejected the Respondent's proposed candidate for President of the Tribunal and proposed a list of three candidates for the role of President of the Tribunal. By letter of 13 July 2015, the Respondent rejected the Claimant's proposals and proposed three new candidates for the role of the President of the Tribunal.

19. By letter of 10 August 2015, the Claimant proposed three further candidates to the Respondent.

20. By letter of 30 December 2015, the Centre asked the Parties for an update on the status of the appointment of the President of the Tribunal in this case.

21. On 14 January 2016, the Claimant wrote to ICSID "*to follow-up on Claimant's letters of February 11, 2015 and April 8, 2015*" and to request "*that the case details for this matter on ICSID's website add the United States to the nationality listing, and that for*

jurisdictional purposes, ICSID treat WalAm as a national of the United States and/or Canada."

22. On 17 January 2016, ICSID wrote to the Parties to confirm that it would update its website per the Claimant's request, to recall that the listing of nationalities on ICSID's website "*is without prejudice to any argument of the parties or holding of the Tribunal*" and to indicate that the "*Claimant's request that WalAm Energy Inc. be treated as a national of the United States and/or Canada for jurisdictional purposes is for the Tribunal, once constituted, to decide and cannot be addressed by ICSID*."

23. By emails of 17 and 18 February 2016, the Claimant and the Respondent informed the Centre of their agreement on a candidate to serve as President of the Tribunal in this case pursuant to Article 37(2)(b) of the ICSID Convention. By letter of 19 February 2016, the Centre informed the Parties that that nominee had declined the appointment.

24. By letter of 29 March 2016, the Respondent requested, on behalf of both Parties, the Centre's assistance with the process to identify and appoint the President of the Tribunal and submitted a list ranking procedure agreed upon by the Parties.

25. By letter of 1 April 2016, the Centre proposed to the Parties timetables for (i) the constitution of their lists of candidates, (ii) the ranking of the candidates and (iii) the selection of the President of the Tribunal. The Respondent and the Claimant confirmed their agreement on the proposed timetables by emails dated 4 and 7 April 2016, respectively.

26. By letter of 21 April 2016, the Centre submitted a list of ten candidates for the appointment of the President of the Tribunal to the Parties.

27. By correspondence exchanged on 26, 27, 28 April, and 8 May 2016, the Parties discussed and agreed on the removal of one of the candidates on the list proposed by the Centre on 21 April 2016.

28. By letter of 9 May 2016, the Centre asked the Parties to confirm whether it should identify a new candidate, check his or her availability and provide the Parties with an updated list of ten names, and whether the ranked list previously transmitted to them by the Claimant, should be disregarded.

29. As requested by the Parties, by letter of 17 May 2016, the Centre submitted a new ranked list of ten candidates for the appointment of the President of the Tribunal.

30. By letter of 23 May 2016, the Centre informed the Parties that the ranked-list procedure was successful and that they had appointed Mr Joe Smouha QC, a national of the United Kingdom, as the presiding arbitrator in this case.

31. By letter of 2 June 2016, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was constituted on that date. Mr Benjamin Garel, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

32. By letter of 21 June 2016, the Centre circulated a draft agenda and a draft Procedural Order No. 1 to help the Parties prepare for the first session and to help them reach an agreement on the agenda items.

33. On 7 July 2016, the Tribunal confirmed to the Parties that the first session would take place in London on 6 September 2016.

34. On 9 August 2016, the Respondent submitted Preliminary Objections to Jurisdiction.

35. On 16 August 2016, the Parties informed the Tribunal that they had not reached an agreement on three items in draft Procedural Order No. 1, namely, the place of the proceedings, the question of bifurcation and the procedural calendar.

36. On 22 August 2016, the Tribunal invited the Parties to file short written submissions on the remaining contentious items by 2 September 2016 and informed the Parties of its wish to hear them orally on the same issues during the first session.

37. On 2 September 2016, the Parties filed their submissions on the items in draft Procedural Order No. 1 they did not agree upon.

38. The first session of the Tribunal with the Parties was held at the International Dispute Resolution Centre in London on 6 September 2016. During the first session, the Parties confirmed that the Tribunal was properly constituted, that they had no objection to the appointment of any member of the Tribunal and that they agreed on the application of the 2006 version of the ICSID Arbitration Rules. The Tribunal further invited the Parties to submit revised proposed timetables for this proceeding.

39. On 7 September 2016, as instructed by the Tribunal during the first session, each Party submitted their proposed timetables.

40. On 26 September 2016, the Tribunal issued Procedural Order No. 1, whereby it decided (i) that the place of the proceedings shall be Washington, D.C. and (ii) to bifurcate the proceedings. The Tribunal attached to Procedural Order No. 1 a draft procedural timetable as Annex A and a draft Procedural Order No. 2 as Annex B.[1] The Tribunal invited the Parties to comment on draft Procedural Order No. 2 by 30 September 2016, and asked them to confirm their preference as to the location for the oral hearing scheduled for 6 and 7 February 2017 in respect of the jurisdiction phase.

41. On 13 October 2016, further to the Parties' communications of 30 September 2016 and 4 October 2016, the Tribunal issued Procedural Order No. 2 together with Annex A, the procedural timetable. The Tribunal also took note of the Parties' agreement to hold the hearing on jurisdiction in London.

42. On 21 October 2016, the Claimant filed a Response to Preliminary Objections to Jurisdiction.

43. By letter of 28 October 2016, the Centre informed the Parties that due to an internal redistribution of workload at the Centre, Ms Ella Rosenberg had been assigned to serve as Secretary of the Tribunal in this case.

44. On 18 November 2016, the Respondent filed a Reply on Preliminary Objections to Jurisdiction.

45. On 16 December 2016, the Claimant filed a Rejoinder on Preliminary Objections to Jurisdiction.

46. On 29 December 2016, Mr. Munyantwali asked the Centre to transmit to the Parties, a declaration stating:

> *One of my Geneva-based colleagues at Appleton Luff, an international boutique law firm with which I am a member, is in the process of exploring a potential opportunity to advise the Kenyan Trade Ministry. As a potential conflict matter, I raise this due to my*

[1] Draft Procedural Order No.1 was circulated to the Parties on 21 June 2016 and discussed at the first session. It was re-numbered as draft Procedural Order No. 2 upon issuance of Procedural Order No. 1.

> *role as an arbitrator in the Walam Energy Inc. vs. Republic of Kenya Arbitration.*
>
> *I would have no involvement whatsoever in project implementation, nor would I benefit from any remuneration should the opportunity materialize. My assurance to the parties, is that this will in no away affect my judgement in the pending arbitration.*

47. In his declaration, Mr. Munyantwali asked the Parties whether they objected to his partner's pursuit of the matter and stated "[m]*y colleague who is sensitive to my involvement on the arbitration panel will abide by any decision reached*."

48. By letter of 3 January 2017, the Claimant requested that Mr Munyantwali provide additional details regarding the mandate being considered, before responding.

49. By letter of 9 January 2017, the Respondent confirmed that it had no objection to Mr Munyantwali's partner pursuing the potential opportunity to advise the Kenyan Trade Ministry.

50. By letter of 11 January 2017, Mr Munyantwali provided the additional information requested by the Claimant, and by letter of 26 January 2017, the Claimant responded that it was "*not comfortable with Appleton Luff being engaged by Respondent at this time*." On the following day, in response to this communication, Mr. Munyantwali wrote "[m]*any thanks for this communication which I understand, and will convey*."

51. By letter of 11 January 2017, the Centre informed the Parties that the Tribunal would not be available for a pre-hearing telephone conference on 25 January 2017, as provided in Procedural Order No. 2, and proposed to hold it on 27 January 2017.

52. By letter of 13 January 2017, the Centre confirmed that the pre-hearing organizational meeting would take place on 27 January 2017.

53. By letter of 17 January 2017, the Centre circulated a draft agenda for the pre-hearing organizational meeting, and the Tribunal invited the Parties to submit, by 24 January 2017, a joint proposal containing their points of agreement and their respective positions where they were unable to reach an agreement.

54. By email of 24 January 2017, the Centre acknowledged receipt of the Claimant's letter transmitting the Parties' joint proposal on the draft agenda for the pre-hearing organizational meeting.

55. On 27 January 2017, the Tribunal held a pre-hearing organizational meeting by telephone conference with the Parties at 7:00am EST / 12:00pm GMT / 1:00pm CET / 3:00pm EAT and 11:00pm AEDT.

56. On 6 and 7 February 2017, the Tribunal and the Parties held a hearing on jurisdiction at the International Dispute Resolution Centre in London. In attendance at the hearing were the members of the Tribunal, the Secretary of the Tribunal and the following Party representatives:

On behalf of the Claimant

Counsel:

Mr Cyrus Benson	Gibson, Dunn & Crutcher LLP
Mr Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms Charline Yim	Gibson, Dunn & Crutcher LLP
Ms Masha Bresner	Gibson, Dunn & Crutcher LLP
Ms Christine Noella Lubano	Oraro & Company Advocates

Party Representatives:

Mr Maherab Walji	WalAm Energy

On behalf of the Respondent

Counsel:

Mr Noah Rubins	Freshfields Bruckhaus Deringer
Mr Ben Juratowitch QC	Freshfields Bruckhaus Deringer
Ms Gisèle Stephens-Chu	Freshfields Bruckhaus Deringer
Ms Natasha McNamara	Freshfields Bruckhaus Deringer
Mr Evans Monari	Coulson Harney Advocates
Mr Anthony Njogu	Coulson Harney Advocates

Party Representatives:

Hon Prof Githu Muigai	Attorney-General
Ms Muthoni Kimani	Senior Deputy Solicitor General, Office of the Attorney- General and Department of Justice

Ms Njeri Wachira	Chief State Counsel, Office of the Attorney-General and Department of Justice
Ms Pauline Mcharo	Senior Principal State Counsel, Office of the Attorney-General and Department of Justice
Mr Charles Wamwayi	State Counsel, Office of the Attorney-General and Department of Justice
Mr Daniel Kiptoo	Legal Adviser, Ministry of Energy
Ms Irene Agum	State Law Office, Communications

57. Hon Prof Muigai, Mr Rubins, Mr Juratowitch and Ms Stephens-Chu presented oral arguments on behalf of the Respondent and Messrs Benson and Moloo presented oral arguments on behalf of the Claimant.

58. The hearing on jurisdiction was sound recorded and a verbatim transcript was produced. Both the recording and the transcript were subsequently distributed to the Parties in accordance with paragraph 21 of Procedural Order No. 2 on 10 February 2017.

59. On 21 February 2017, the Parties submitted their respective submissions on costs.

60. On 27 March 2017, the Tribunal issued its Decision on Jurisdiction, which forms part of this Award. The Decision on Jurisdiction dismissed the Respondent's objections, namely (i) that there was no consent by the Respondent to ICSID arbitration because the Claimant did not have the nationality of a Contracting State (as required by Article 25(2)(b)) either at the date the Licence was issued or at any later relevant date and (ii), that the Tribunal lacked jurisdiction *ratione temporis* because the act that formed the basis of the claims (the forfeiture of the Licence) preceded the entry into force of the ICSID Convention between Canada and Kenya.

61. The dispositive part of the Decision on Jurisdiction reads as follows:

> *i. Dismisses Respondent's Preliminary Objections to Jurisdiction;*
>
> *ii. Reserves questions of costs of the jurisdictional phase in accordance with paragraph 248 above; and*
>
> *iii. Orders the merits phase of the proceedings to proceed with the Claimant's Memorial being filed on 28 March 2017 and the Procedural Timetable to continue thereafter in accordance with the*

Procedural Timetable as set out in Annex A to Procedural Order No. 2.

62. On 28 March 2017, the Claimant requested an extension until 29 March 2017, to file its Memorial on the Merits in order to take into account the Tribunal's Decision on Jurisdiction. Tribunal granted the Claimant's request on the same date.

63. On 29 March 2017, the Claimant filed its Memorial on the Merits, Exhibits C-047 through C-116, Legal Authorities CL-048 through CL-132, together with the First Expert Report of Mr Santiago Dellepiane A., the Witness Statement of Dr. Gordon Bloomquist, the Witness Statement of Mr Alexander Laing, the First Witness Statement of Mr Maherab Walji, and the First Witness Statement of Dr Subir Sanyal.

64. By email of 3 April 2017, the Claimant gave its consent to the publication of the Decision on Jurisdiction.

65. By letter of 7 April 2017, the Respondent informed the Centre that it did not consent to the publication of the Decision on ICSID's website. The Respondent made an application for an order, pursuant to Rule 19 of the ICSID Arbitration Rules, that the Parties "*preserve the confidentiality of the Decision until the Award is issued*" (the "**Confidentiality Application**"). The Respondent submitted that "[a]*ny publication of the Decision at this stage would carry with it the risk of adverse publicity in relation to this arbitration that may expose employees of the Kenyan government who are familiar with the facts relevant to this case to external pressures that may make them unwilling to contribute to or be associated with the Respondent's defence.*" The Respondent also made a request for certain amendments to the Decision on Jurisdiction.

66. By letter of 27 April 2017, the Claimant indicated that it had no objection to the amendments requested by the Respondent. In relation to the Confidentiality Application, the Claimant indicated, *inter alia*, that it was only willing to agree to keep the Decision on Jurisdiction confidential until the Tribunal's Award, on certain conditions.

67. By letter of 9 May 2017, the Respondent filed a response to the Claimant's observations dated 27 April 2017, declining to agree to the proposed conditions and maintaining its Confidentiality Application.

68. By letter of 11 May 2017, the Tribunal sent the Parties a revised Decision on Jurisdiction (marked "Revised Version") maintaining the same dispatch date, containing the amendments agreed upon by the Parties and the Tribunal.

69. On 18 May 2017, the Tribunal issued Procedural Order No. 3 concerning the confidentiality of the Decision on Jurisdiction whereby it declined the Respondent's Confidentiality Application. The Tribunal stated:

> *The Tribunal accordingly refuses the Respondent's application in the form made. The Tribunal is confident that the Parties will respect the integrity of the proceedings and will act responsibly in deciding whether to publish any information about the outcome of the preliminary phase and the reasoning of the Decision, and if any decision is made so to publish, to do so in an accurate and balanced way.*

70. On 31 October 2017, the Respondent submitted its Counter-Memorial on the Merits, Exhibits R-002 through R-029, Legal Authorities RL-043 through RL-098 as well as the Witness Statements of Messrs Patrick Nyoike and Christopher Shibuyanga, the First Expert Report of Mr Colin Johnson, and the First Expert Report of Messrs Thorleikur Jóhannesson and Guðni Axelsson.

71. On 7 December 2017, the Parties submitted their respective requests for production of documents in the form of Redfern Schedules, in accordance with the paragraph 15 of Procedural Order No. 2, and asked the Tribunal to decide on the outstanding requests.

72. On 21 December 2017, the Tribunal issued the Procedural Order No. 4 deciding on the Parties' outstanding requests for the production of documents.

73. On 23 January 2018, the Tribunal informed the Parties that a potential issue had arisen due to delays in the processing of the renewal of Mr. Munyantwali's United States green card, which could affect his ability to attend the hearing on the merits in Washington, D.C., scheduled to take place from 16 May 2018 to 25 May 2018. The Tribunal invited the Parties to confer and to discuss how to proceed.

74. On 30 January 2018, the Parties informed the Tribunal that they had agreed to hold the hearing on the merits at the IDRC in London, United Kingdom.

75. On 2 February 2018, the Tribunal issued the Procedural Order No. 5 concerning the hearing venue. Accordingly, the hearing on the merits was scheduled to take place from 16 to 25 May 2018 at the IDRC in London.

76. By emails of 14 February 2018, the Parties informed the Tribunal that they had agreed to adjust the Procedural Calendar. Accordingly, the Claimant would file its Reply on the Merits on 19 February 2018 and the Respondent would submit its Rejoinder on the Merits on 16 April 2018.

77. On 19 February 2018, the Claimant submitted its Reply on the Merits, Exhibits C-117 through C-150, Legal Authorities CL-133 through CL-158, together with the Second Expert Report of Ms Daniela M. Bambaci and Mr Santiago Dellepiane A., the Witness Statement of Mr Nicholas Goodman, the Witness Statement of Mr Glenn Tobias, the Second Witness Statement of Dr Subir K. Sanyal, and the Second Witness Statement of Mr Maherab Walji.

78. By letter of 2 March 2018, the Centre informed the Parties that the Tribunal was available for the pre-hearing organizational meeting on 26 April 2018, and requested them to confirm their availability by 7 March 2018.

79. By emails of 6 March 2018, the Parties confirmed their availability on 26 April 2018 for the pre-hearing organizational meeting.

80. On 4 April 2018, the Parties agreed to revise the date for the notification of the witnesses and experts to be cross-examined during the hearing on the merits to 18 April 2018.

81. On 16 April 2018, the Respondent submitted its Rejoinder on the Merits, Exhibits R-030 through R-057, Legal Authorities RL-099 through RL-139, together with the Second Witness Statement of Mr Christopher Shibuyanga, the Witness Statement of Ms Laurencia Njagi, the Witness Statement of Mr Paul Ngugi, the Second Expert Report of Mr Colin Johnson, and the Second Expert Report of Messrs Guðni Alexsson and Thorleikur Jóhannesson.

82. By letter of 18 April 2018, the Centre circulated a draft agenda for the pre-hearing organizational meeting to be held on 26 April 2018 by telephone conference.

83. On 18 April 2018, the Parties notified the list of witnesses and experts they intended to examine during the hearing on the merits.

84. On the same date, the Respondent submitted Ms. Laurencia Njagi's signed Witness Statement.

85. On 24 April 2018, as requested by the Tribunal, the Claimant submitted the Parties' joint comments on the pre-hearing call agenda proposed by the Tribunal.

86. On 26 April 2018, the Tribunal held a pre-hearing organizational meeting by telephone conference with the Parties at 7am EST/ 12pm GMT / 1pm CET/ 2pm EAT and 9pm AEDT, regarding the organization of the hearing to be held from 16 May 2018 to 25 May 2018 at the IDRC in London.

87. On 1 May 2018, the Tribunal issued Procedural Order No. 6 regarding the organization of the hearing, together with Annex A, the Tribunal's Rulings, Annex B, Draft Index of Key Exhibits, and Annex C, Draft List of Issues. Procedural Order No. 6 established the total time reserved for the hearing, the manner of time keeping, the sequence of the hearing, the scope and manner of witness and expert examination.

88. On 3 May 2018, in accordance with Mr Munyantwali's instructions, the Centre transmitted to the Parties a declaration stating:

> *An Institute, the International Law Institute African Centre for Legal Excellence ("ILI-ACLE") for which I am Vice Chair has been approached by the Kenyan Government to carry out training activities on extractives. In addition to serving on the board of the ILI-ACLE, I serve on the international board of International Law Institute in Washington, DC ("ILI"). Both Institutes are regularly requested by developing countries world-wide to carry out training and technical assistance, and in the case of the Africa Centre, to do so for countries throughout sub-Saharan Africa. As a board member, I am not involved in the day-to-day affairs of the Institutes.*
>
> *I am confident that even if the Institute does go ahead with the Kenyan request, it will not affect my impartiality on the Tribunal. As is the case in all instances, I will have no involvement in any aspects to decide the handling of the request, or during implementation.*

89. On 4 May 2018, the Parties informed the Centre that they had no objection to the ILI-ACLE pursuing the matter identified in Mr Munyantwali's declaration.

90. On 5 May 2018, the Parties submitted their amended list of issues (Annex C to Procedural Order No. 6).

91. On 11 May 2018, the Parties submitted their respective Skeleton Arguments in accordance with Procedural Order No. 6. On the same date, they also submitted their chronologies of events and schedules of references.

92. On 11 May 2018, the Claimant filed a replacement for Exhibit C-125 as requested by the Tribunal in Procedural Order No. 6, Annex B.

93. By letter of 14 May 2018 addressed to the Claimant, the Respondent requested

> *that the Claimant confirm whether the terms of any relevant funding agreement between the Claimant and any of Tenor Capital Management, Gray Elephant Investments, LLC WalAm Canada ULC and/or another third party include responsibility to fund satisfaction by the Claimant or any order that the Claimant pay the costs of the arbitration and of the Respondent.*

94. By email of 15 May 2018, the Claimant filed its observations concerning the Respondent's communication of 14 May 2018.

95. By letter of 15 May 2018, pursuant to Article 47 of the ICSID Convention and ICSID Arbitration Rule 49, the Respondent filed an Application for Security for Costs, and Legal Authority RL-142. The Respondent alleged that there was "*serious doubt as to whether funds would be available to pay an eventual costs award against the Claimant*".

96. On the same date, the Respondent submitted the electronic copies of Legal Authorities RL-140 and RL-141, and requested leave to submit Exhibit R-058, to which the Claimant consented.

97. By email of 15 May 2018, the Tribunal invited the Parties to discuss and propose an agreed timetable for written submissions with regard to the Respondent's Application for Security for Costs.

98. By email dated 16 May 2018, the Claimant requested leave to submit Legal Authority CL-159 into the record. The Claimant further sought leave to submit Exhibit C-151, invoices issued to WalAm by Mr Domenic Falcone, to which the Respondent did not

object, and Exhibit C-152, a short video clip of the Suswa geothermal concession area, to which the Respondent objected.

99. The Hearing on the Merits was held at the IDRC in London from 16 May 2018 to 25 May 2018 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Mr Joe Smouha QC	President
Mr Swithin J. Munyantwali	Arbitrator
The Honourable James Spigelman AC QC	Arbitrator

ICSID Secretariat:

Ms Ella Rosenberg	Secretary of the Tribunal

For the Claimant:

Counsel:

Mr Cyrus Benson	Gibson, Dunn & Crutcher LLP
Mr Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms Charline Yim	Gibson, Dunn & Crutcher LLP
Mr Zachary Kady	Gibson, Dunn & Crutcher LLP
Ms Magan Haycock	Gibson, Dunn & Crutcher LLP
Mr Patrick Taqui	Gibson, Dunn & Crutcher LLP
Mr Paul Evans	Gibson, Dunn & Crutcher LLP
Ms Noella Lubano	Oraro & Company Advocates

Party Representatives:

Mr Maherab Walji	WalAm Energy
Mr Sandy Laing	WalAm Energy
Mr Nicholas Goodman	WalAm Energy
Mr David Kay	WalAm Energy
Mr Pierre Amariglio	WalAm Energy

For the Respondent:

Counsel:

Mr Evans Monari	Coulson Harney
Mr Anthony Njogu	Coulson Harney
Ms Agnes Akal	Coulson Harney
Mr Noah Rubins	Freshfields Bruckhaus Deringer
Mr Ben Juratowitch QC	Freshfields Bruckhaus Deringer
Ms Gisèle Stephens-Chu	Freshfields Bruckhaus Deringer
Mr Baxter Roberts	Freshfields Bruckhaus Deringer
Ms Amy Tan	Freshfields Bruckhaus Deringer

Ms Elizabeth Forster	Freshfields Bruckhaus Deringer
Ms Stephanie Mbonu	Freshfields Bruckhaus Deringer

Party Representatives:

Ms Njeri Wachira	Deputy Solicitor General
Mr Joseph Njoroge	Principal Secretary, Ministry of Energy
Mr John Omenge	Principal Secretary, Ministry of Mining
Mr Daniel Kiptoo	Legal Adviser, Ministry of Energy
Mr Chrispin Lupe	Chief Geologist, Ministry of Energy
Ms Pauline Mcharo	Deputy Chief State Counsel, Office of the Attorney General and Department of Justice
Ms Christine Kusa	Principal State Counsel, Office of the Attorney General and Department of Justice
Ms Victoria Munyi	State Counsel, Office of the Attorney General and Department of Justice
Mr Charles Wamwayi	State Counsel, Office of the Attorney General and Department of Justice
Ms Naomi Githui	State Counsel, Office of the Attorney General and Department of Justice
Ms Juster Nkoroi	Head, Kenya International Boundaries Office

Court Reporter:

Mr David Kasdan	WWReporting

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

On behalf of the Claimant

Dr Gordon Bloomquist	
Dr Subir Sanyal	Geothermal Resources Group
Mr Glenn Tobias	FTI Consulting
Mr Santiago Dellepiane	Compass Lexecon
Ms Daniella Bambaci	Compass Lexecon
Mr Federico Gonzalez Loray	Compass Lexecon
Mr Eric Tao	Compass Lexecon

On behalf of the Respondent

Mr Patrick Nyoike	Ministry of Energy
Ms Laurencia Njagi	Kenya Power and Lighting Company
Mr Christopher Shibuyanga	Kenya Power and Lighting Company
Mr Paul Ngugi	Geothermal Development Company
Mr Colin Johnson	Charles River Associates
Mr Thorleikur Jóhannesson	Verkís

101. The Hearing was sound recorded and a verbatim transcript was produced. Both the recording and the transcript were distributed to the Parties in accordance with paragraph 21 of Procedural Order No. 2 on 29 May 2018.

102. During the course of the Hearing, the Claimant submitted Legal Authorities CL-159 and CL-174, and Exhibit C-151 and the Respondent submitted Legal Authorities RL-143 to RL-144, RL-157, and Exhibit R-059.

103. By letter of 19 May 2018, as requested by the Tribunal, the Parties submitted their agreed procedural timetable for the written submissions on the Respondent's application for security for costs as follows:

a. The Claimant's Response to the Respondent's application by 21 May 2018.

b. The Respondent's Reply by 23 May 2018.

c. Brief oral submissions on the Respondent's application on 25 May 2018.

104. On 20 May 2018, the Respondent submitted an amended version of Ms. Laurencia Njagi's Witness Statement.

105. On 21 May 2018, the Claimant submitted its Response to the Respondent's Application for Security for Costs, together with Legal Authorities CL-160 through CL-173.

106. On the same date, the Claimant submitted an erratum to Ms Bambaci and Mr Dellepiane's Second Expert Report and model.

107. By email of 23 May 2018, the Tribunal informed the Parties that it would request further submissions on certain points as well as further and/or updated supporting documentation and invited the Parties to agree on a schedule.

108. On 23 May 2018, the Respondent filed its Reply on the Application for Security for Costs, together with Exhibit R-060, and Legal Authorities RL-145 and RL-146.

109. On the same date, the Respondent also submitted a Note regarding the Additional Legal Authorities, along with Legal Authorities RL-146 through RL-156.

110. On 24 May 2018, in accordance with the Tribunal's instructions, the Claimant filed a Revised Request for Relief.

111. By email of 29 May 2018, the Tribunal wrote to the Parties as follows:

> *During the course of the oral argument in relation to the security for costs application, the Tribunal asked to be informed of the date on which the Respondent received the information about the financial status of the Claimant produced during document production on which the Respondent had relied as a basis for its application. The Respondent's counsel informed the Tribunal the following morning (T/1872 lines 7-12) 'that was on 11th of January 2018. That was the date of disclosure of the batch of documents which included the Financial Statements'. The Tribunal notes that Freshfields' letter to the Tribunal of 2 January 2018 stated: "We refer to the financial records produced by the Claimant in response to Request 1 of the Respondent's Redfern Schedule dated 17 November 2017 (enclosed in Annex 1 to this letter)". The Tribunal's request was for clarification of the date of production by the Claimant to the Respondent of the documents referred to and enclosed with the letter of 2 January 2018 and the Tribunal would be grateful if the Parties could check and confirm the correct date.*

112. By email of the same date, the Claimant informed that Tribunal that WalAm had voluntarily produced the financial statements enclosed with Freshfields's letter of 2 January 2018 on 14 December 2017.

113. On 30 May 2018, the Respondent confirmed that it had received WalAm's 2007-2014 financial statements on 14 December 2017 and attached those documents to its letter of 2 January 2018. The Respondent further indicated that it had received WalAm's 2015-2016 financial statements on 11 January 2018 and that the 2016 financial statement was added to the record as Exhibit R-060. Finally, the Respondent noted that it had received a complete and unabridged version of WalAm's 2012 financial statement on 8 February 2018.

114. On 31 May 2018, the Tribunal issued Procedural Order No. 7 rejecting the Respondent's Application for Security for Costs of 15 May 2018.

115. On 1 June 2018, the Respondent submitted a Note on Legal Authorities, together with Legal Authorities RL-158 through RL-167.

116. On 5 June 2018, in accordance with the Tribunal's instructions, the Parties transmitted their agreed timetable for the post-hearing deliverables.

117. On 6 June 2018, the Tribunal agreed to the proposed schedule for the post-hearing deliverables.

118. On 8 June 2018, in accordance with the Tribunal's instructions, the Parties submitted an Index of Key Exhibits Ordered by Exhibit Number and confirmed that:

> *1. The scope of further matters to be addressed and dates as set out in the Tribunal's message.*
>
> *2. There are no matters on which the Parties consider that any further submissions are required.*
>
> *3. Save in respect of items 6(i) and (ii), the Parties do not anticipate additional factual or expert evidence* [was] *to be adduced.*

119. On 15 June 2018, the Respondent filed its Submissions on Non-Pecuniary Remedies, along with Legal Authorities RL-168 through RL-171.

120. On the same date, the Parties submitted their updated chronologies and schedules of references.

121. On 16 June 2018, the Claimant submitted Ms Bambaci and Mr Dellepiane's updated calculations comprised of an explanatory note and Exhibits SD-142 and SD-143.

122. On 20 June 2018, the Claimant filed its Submission on Administrative Law Authorities, together Legal Authorities CL-175 to CL-183.

123. On 29 June 2018, the Respondent filed its Submission on Administrative Law Authorities.

124. On the same date, the Parties submitted their corrections to the transcripts of the Hearing.

125. On 6 July 2018, the Claimant submitted its Response on Non-Pecuniary Remedies, along with Legal Exhibits, CL-184 through CL-189.

126. On the same day, the Respondent submitted Mr. Johnson's Response to Ms Bambaci and Mr Dellepiane's updated calculations, together with Exhibits CJ-153 through CJ-156.

127. On 20 July 2018, the Parties filed their respective Post-Hearing Submissions on Quantum.

128. On 24 July 2018, the Parties informed the Tribunal that they had agreed a short extension for submitting their statements of costs to 3 August 2018, to which the Tribunal agreed on the same day.

129. On 5 August 2018, the Claimant requested a further extension until 10 August 2018 for the Parties to file their statements of costs, which the Tribunal granted.

130. The Parties filed their statements of costs on 10 August 2018.

131. On 27 August 2019, the Claimant informed ICSID that "*Claimant WalAm Energy Inc. had changed its name to WalAm Energy, LLC*" and requested that "*ICSID's records be updated to reflect this name change, and that such change be reflected in the Tribunal's award*".

132. On 29 August 2019, the Tribunal noted that section 2.1(a) of the Amended and Restated Limited Liability Company Agreement states that:

> *The Company, formerly WalAm Energy Inc., was formed as a Nevada limited liability company upon the conversion of WalAm Energy Inc. into a Nevada limited liability company and the filing on January 12, 2018 of the Articles of Organization of the Company (as amended from time to time, the "Certificate") in the office of the Secretary of State of the State of Nevada under and pursuant to Chapter 86 of the Nevada Revised Statutes of the Act.*

133. The Tribunal invited the Claimant to confirm whether that description was accurate and to provide an appropriate documentary record of the corporate status of WalAm Energy, LLC as a Nevada limited liability company such as a copy of a register or certificate from Nevada state records.

134. The Tribunal further invited the Respondent to comment on the Claimant's letter and in particular to state whether it agreed that there had been the change referred to and that the proceedings should be amended accordingly.

135. On 5 September 2019, the Claimant confirmed the accuracy of section 2.1(a) of the Amended and Restated Limited Liability Company Agreement and provided documentation from the Nevada Secretary of State confirming its name change and WalAm Energy, LLC's status as an active entity.

136. On 12 September 2019, the Tribunal invited the Respondent to comment on the Claimant's communication of 5 September 2019, as requested in ICSID's letter of 29 August 2019.

137. On 19 September 2019, the Respondent "*agree*[d] *that there ha*[d] *been such a change of name and that the proceedings should be amended accordingly*". The Respondent also indicated that it had "*no objection to the Tribunal recording this position in a Procedural Order*".

138. On 2 October 2019, the Tribunal issued Procedural Order No. 8 taking note of the change in Claimant's name and status from WalAm Energy Inc. to WalAm Energy, LLC.

139. The Parties asked for an update on when the Tribunal expected to issue its decision on 7 February 2020 and the Tribunal provided updates on 26 February 2020 and 30 April 2020.

140. The proceeding was closed on 22 June 2020.

III. BACKGROUND OF GEOTHERMAL DEVELOPMENT IN KENYA AND THE LEGISLATIVE CONTEXT

A. BACKGROUND OF GEOTHERMAL DEVELOPMENT IN KENYA

(1) Introduction

141. This section sets out the general context of geothermal development in Kenya during the 2007-2012 period, the relevant timeline of the WalAm dispute. By way of commercial context, it also identifies some of the principal issues and challenges for a developer that could be expected to arise in a new geothermal development project, such as Suswa.

(2) Context

142. Exploitation of Kenya's geothermal resources has been ongoing since the 1950's. The bulk of these resources are located in the "*Kenya Rift that transects the country from north to south*."[2]

[2] **[CJ-021]**, *Geothermal Development in Kenya: A Country Update – 2012,* Peter A. Omenda ("GDC 2012 Country Update"), p. 89.

> *The geothermal activity in the East African rift occurs in the form of hot springs, fumaroles, hot and altered grounds. … During the last 2 million years … volcanic activities became more intense within the axis of the rift due to extension. … Shield volcanoes, most of which are geothermal prospects, developed in the axis of the rift. The volcanoes include Suswa, Longonot, Olkaria, Eburru, Menegai, Korosi, Paka, Silali, Emuruangogolak and Barrier.*[3]

143. Currently, the principal source of energy in Kenya is petroleum and electricity, with wood fuel meeting the energy needs for the traditional sector, comprising the rural communities and the urban poor. National energy use breaks down as follows: wood fuel and biomass (68%), petroleum (22%), electricity (9%), coal and others (<1%). Solar energy is also increasingly used for drying, heating and lighting.[4]

144. Kenya has sought to focus on geothermal power for a number of reasons:[5]

a. Climate change has made hydro power unreliable;

b. The potential abundance of geothermal resources;

c. It is a green energy source with no emissions;

d. It is a least cost source of power;

e. It is an indigenous resource;

f. It is not affected by adverse weather conditions;

g. It has high availability (>95%); and

h. The cost of power can be predictable over the plant life.

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[3] **[CJ-022]**, *Country update report for Kenya 2016*, Peter A. Omenda et al., African Rift Geothermal Conference, 2016, pp. 2-3.

[4] **[CJ-021]**, GDC 2012 Country Update, *supra* note 2.

[5] **[SD-026]**, *GDC's Geothermal Development Strategy For Kenya: Progress and Opportunities*, Ruth Masembi, Power Africa – Africa Union Commission Geothermal Roadshow, September-October 2014 ("GDC Roadshow"), slide 9.

145. The GDC Report of 2012 referred to the development of Government policy until the time that the Licence the subject of these proceedings was granted:

> *The Least Cost Power Development Plan (2010-2030) prepared by the Government of Kenya indicates that Geothermal plants have the lowest unit costs and therefore suitable for baseload and thus, recommended for additional expansion.*[6]

146. Kenya's Vision 2030 Strategy indicates that energy is a key (one of three pillars) infrastructure enabler to transform the country to middle income status by 2030. "*The level and intensity of commercial energy use is viewed as a key indicator of* [*Kenya's*] *socio-economic development.*" Kenya therefore expects more energy use in its path towards Vision 2030. Key stakeholders are positioning to meet the energy demand ultimately allowing Kenya to meet its Vision 2030, and the first Medium Term Plan 2012-2016.[7]

(3) Status of Geothermal Development

147. The southern segment of the Kenya Rift Valley is a unique petrological province comprising of at least four Quaternary to Recent volcanic complexes (from south to north): Suswa, Longonot, Olkaria and Eburru. Although these volcanoes are located only about 40 km from each other, the eruptive rock types from each volcano are compositionally different. Active geothermal systems are associated with each of these volcanic complexes although only Olkaria and Eburru have been developed for power generation (currently 206 MWe and growing).

148. In reporting on the largest concentration of potential geothermal activity in Kenya, the GDC 2012 Country Update noted in relevant part:

> *The centers are dotted with hydrothermal activity and are envisaged to host extensive geothermal systems. The prospects from south to north are Lake Magadi, Suswa, Longonot, Olkaria, Eburru, Badlands, Menegai, Arus Bogoria, Lake Baringo, Korosi, Paka, Silali, Emuruangogolak, Namarunu and Barrier.*[8]

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[6] See **[CJ-021]**, GDC 2012 Country Update, *supra note 2*, p. 89.

[7] *Id*.

[8] *Id.*, at p. 90.

149. The report detailed exploration of geothermal energy commencing in the 1960s as follows:

> *Kenya started in the 1960's with surface exploration that culminated in two geothermal wells being drilled at Olkaria. In the early 1970's more geological and geophysical work was carried out between Lake Bogoria and Olkaria. This survey identified several areas suitable for geothermal prospecting and by 1973, drilling of deep exploratory wells at Olkaria commenced and was funded by UNDP. The Government through the Ministry of Energy, GDC, KenGen and other partners has undertaken detailed surface studies of some of the most promising geothermal prospects in the country.*
>
> *The areas that have been studied include Suswa, Longonot, Olkaria* [*and other*] *geothermal prospects. Evaluation of these data sets suggest that over 10,000 MWe can be generated from the high temperature resource areas in Kenya.*[9]

150. Regarding current active sites for geothermal development the SKM Development Plan notes:

> *Active geothermal systems are associated with each of these volcanic complexes although only Olkaria and Eburru* [(described below)] *have been developed for power generation (currently 206 MWe and growing).*[10]

151. Suswa: Suswa, the subject of the current dispute is located in the Kenya Rift Valley, approximately 50 km west-northwest of Nairobi and 25 km south of the Olkaria geothermal development.[11]

152. It is described as follows:

> *The Suswa geothermal prospect is located in the Kenya Rift Valley, approximately 50 km west northwest of Nairobi and 25 km south of the Olkaria geothermal development. The Kenya Rift Valley is part of the East African Rift system that runs from Ethiopia in the north (the Afar triple junction) to Beira, Mozambique in the south. …*
>
> *Suswa is made up of two calderas; the inner (younger) and the outer caldera. The outer caldera is a 12 x 10 km ellipse with a general orientation of ENE-WSW. The inner caldera has a diameter of about*

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[9] *Id.* at p. 91.

[10] **[C-017]/[KE-99]**, Sinclair Knight Merz, *Suswa Geothermal Power Plant – Development Plan (Version 9)* ("SKM Report"), p. 1.

[11] *Id.* at p. 13.

4 km and the central resurgent block measures about 3 km in diameter.

Geothermal manifestations (fumaroles, hot ground) primarily occur within the annular trench particularly along the northern half of the inner caldera. The presence of fumaroles indicates high temperatures at least in the central part of the system. Based on the geological setting and descriptions of fumarolic activity and steam-heated features, a high-temperature geothermal system is likely at Suswa.

Previous studies indicated that a geothermal reservoir probably exists beneath Suswa Volcano; however, the temperature, chemistry, size, and exact location of this system have yet to be determined. The geothermal potential of the Suswa prospect was initially recognized many decades ago. In more recent times a comprehensive series of investigations of the geothermal potential of Suswa has been carried out, including geology, geochemistry and geophysics.[12]

153. The most important studies for Suswa's viability include:

- *Geothermal and geological surveys by UNDP (led by Helgi Torfason), 1987*
- *Surface investigations including geophysical surveys by Geotermica Italiana, 1989*
- *British Geological Survey, 1990*
- *Surface and geological investigations by Kenya Power Company, 1993 – 94*
- *Geology and the geothermal systems of the southern segment of the Kenya Rift by Lagat, 2003*[13]

154. As discussed in the Section IV below, these reports and others were reviewed and analysed by GeothermEx Inc of San Francisco California under contract to WalAm Energy Inc. "G*eothermEx concluded that there was a 90% probability of developing at least 75 MWe of generation at the Suswa site and a 50% probability of developing 200 MWe for a project*

[12] **[C-017/[KE-99]**, *SKM Report*, *supra* note 10, pp. 1-2.

[13] *Id.* at p. 2.

life of 30 years. They also concluded that the project [could] *proceed to drilling of full diameter wells without the need for further surface exploration.*[14]

(4) Institutional Structure

155. The Kenyan power sector was the subject of reform from the mid-1990s, resulting in the *Energy Act 2006*.[15]

156. The following are the key elements of the structure:

(a) Ministry of Energy and Petroleum

157. Under the Energy Act, the Ministry of Energy and Petroleum is responsible for promulgation of policy, and facilitating an environment for all participants in the energy sector.[16] The relevant part of the Ministry of Energy and Petroleum role is described as follows:

> [T]*he Ministry of Energy's geo-exploration department formulates fiscal, legal and regulatory frameworks and policies, including setting the feed-in tariff for geothermal projects. … Licenses for exploration and drilling in relation to geothermal IPPs would have to be negotiated and obtained through the Ministry.*[17]

(b) Energy Regulatory Commission ("ERC")[18]

> *PART II – ENERGY REGULATORY COMMISSION*
>
> *4. Establishment of the Commission*
>
> *(1) There is established a Commission to be known as the Energy Regulatory Commission.*
>
> *(2) The Commission shall be a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of—*

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[14] *Id.*

[15] **[CJ-017]**, *Investing in the African Electricity Sector*, Norton Rose Fulbright, July 2013 Report ("Norton Rose Report"), p. 1.

[16] *Id.* at p. 2.

[17] *Id.* at p. 2.

[18] **[CL-142]**, *Kenya Energy Act, No. 12 of 2006* ("Energy Act").

(a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

(c) borrowing and lending money; and

(d) doing or performing all other things or acts for the furtherance of the provisions of the Act which may be lawfully done or performed by a body corporate.

(3) Except as otherwise provided in this Act, the Commission shall be independent in the performance of its functions and duties and exercise of its powers and shall not be subject to the direction or control of any person or authority. …

5. Objects and functions of the Commission

The objects and functions of the Commission shall be to—

(a) regulate—

(i) importation, exportation, generation, transmission, distribution, supply and use of electrical energy…

(b) protect the interests of consumer, investor and other stakeholder interests;…

6. Powers of the Commission

The Commission shall have all powers necessary or expedient for the performance of its functions under this Act and in particular, the Commission shall have the power to—

(a) issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;

(b) make proposals to the Minister, of regulations which may be necessary or expedient for the regulation of the energy sector or for carrying out the objects and purposes of this Act;

(c) formulate, enforce and review environmental, health, safety and quality standards for the energy sector, in coordination with other statutory authorities;

(d) enforce and review regulations, codes and standards for the energy sector;

> *(e) prescribe the form and manner in which any application for a licence or permit or amendment thereof or objection thereto shall be made and the fees payable in respect of any such application;*
>
> *(f) prescribe the form and manner in which any application for any authority, consent or approval under this Act shall be made;*
>
> *(g) prescribe the conditions which may be attached to the grant of licences or permits under this Act;*
>
> *(h) make and enforce directions to ensure compliance with conditions of licenses or permits issued under this Act;*
>
> *(i) set, review and adjust electric power tariffs and tariff structures, and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment;*
>
> *(j) approve electric power purchase and network service contracts for all persons engaging in electric power undertakings;…*

158. Through its commission, it safeguards the interests of Kenya's electricity consumers.[19]

159. The Geothermal Resources Regulations, 1990, Regulation 3(2) states as follows:

> *A geothermal resources license shall be accompanied by, or be conditional upon, the execution of a contract (to be known as "geothermal resources contract") between the licensee and the relevant Government department or other body designated by the Minister for the purpose of providing for the utilization of the geothermal resources.*[20]

(c) Kenya Electricity Generation Company ("KenGen")

160. KenGen is the leading power generation company in the country, supplying the bulk (80%) of the electricity sold on a wholesale basis to Kenya Power & Lighting Company, also referred to as Kenya Power.[21] KenGen "*has an installed capacity of 1,564 MW* [as of March 2015], *which accounts for 68% of total installed capacity from various sources* [(described below)]".[22] It is publicly listed (on the Nairobi Stock Exchange), with 30%

[19] **[CL-142]**, *Kenya Energy Act*, *supra* note 18.

[20] **[CL-049]/[KE-4]**, *Geothermal Resources Regulations*, 1990.

[21] **[CJ-013]**, *Investment Brief for the Electricity Sector in Kenya*, Power Africa, p. 3.

[22] *Id.*

private shareholders and 70% government ownership.[23] It provides energy from a variety of resources, which include hydro, geothermal and thermal. As of 2012, KenGen owned and operated the Olkaria I and II geothermal power plants.[24]

(d) Kenya Power & Lighting Company ("KPLC")

161. KPLC "*is the wholesale buyer of electricity, and is obligated to purchase electricity from all power generators – including KenGen and IPPs*[25] *– on the basis of negotiated Power Purchase Agreements.* [KPLC] *is responsible for onward transmission of purchased electricity and is the sole distributor of electricity from the national grid to consumers in Kenya.* [KPLC] *is listed on the Nairobi Stock Exchange is 49.9% owned by private shareholders, with the remainder* [50.1%] *owned by the Government of Kenya, and is profitable and creditworthy*".[26] Its network covers approximately 41,486 kilometers.[27] KPLC is the national offtaker for power in Kenya.[28]

(e) Kenya Electricity Transmission Company ("KETRACO")

> *In 2008, the Kenyan government created KETRACO to develop new, high-voltage electricity transmission infrastructure to facilitate grid access for rural areas, allow for grid interconnection with new generating plants. … KETRACO is 100% owned by the Government of Kenya and is responsible for planning, designing, constructing,*

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[23] *Id.*

[24] **[CJ-021]**, *GDC 2012 Country Update*, *supra note* 2, p. 91, Table 2.

[25] Independent Power Producers are independently financed projects with long term power purchase agreements with a state utility or other off-taker, **[SD-123]**, See Gratwick, Katharine Nawaal, and Anton Eberhard, 2008, "An analysis of Independent Power Projects in Africa: Understanding the Development and Investment Outcomes", Development Policy Review, 26 (3): 309-338. See also *infra* paragraph 32.

[26] **[CJ-013]**, *Investment Brief for the Electricity Sector in Kenya*, Power Africa, *supra* note 21.

[27] **[CJ-017]**, *Norton Rose Report, supra* note 15, p. 2.

[28] **[C-116]**, The Senate, Parliament of Kenya, *Report of The Standing Committee On Energy, Roads And Transportation On The Familiarization Tour Of The Geothermal Power Plants In Baringo And Nakuwa Counties Held Between 11-13 July 2013*, November 2013, p. 7; Claimant's Memorial, ¶¶ 41, 149.

owning, operating, and maintaining new high voltage (132 kV and above) electricity transmission infrastructure.[29]

(f) Geothermal Development Company ("GDC")

162. GDC, wholly owned by the Government of Kenya, was established in December 2008 to facilitate development of 5,000 MW by 2030.[30] Part of GDC's remit was to enhance geothermal development in the country; "*it has a 10-year US$2.6 billion exploration plan which will involve drilling 566 wells and locating 2,336 MW of geothermal energy. These potential energy reserves have been located in 14 'high-potential' areas and estimates of their value are around US$30 billion.*"[31] GDC was also to ease investment in the sector by facilitating entry by private developers, by removing upfront risks, reducing costs (through infrastructural development), exploration work and production drilling, and selling steam to power producers.[32]

163. It was also "*responsible for entering into Steam Sales Agreements with investors in the electricity sector, including KenGen and IPPs, in order that these entities can develop electricity generation capacity with energy sourced from geothermal wells*".[33]

(g) Independent Power Producers ("IPPs")

164. The relevant section of the US Power Africa Report, though describing the later 2013-2014 position describes IPPs as follows:

> [P]*rivate investors in the power sector involved in generation either on a large scale or in renewable energy projects under the Feed-in-Tariff Policy. The IPPs listed below, currently contribute about 28% to the country's installed capacity (numbers below are in MWs):*
>
> | | |
> |---|---|
> | *Iberafrica* | *108* |
> | *Tsavo* | *74* |
> | *Mumias—Cogeneration* | *26* |

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[29] **[CJ-013]**, *Investment Brief for the Electricity Sector in Kenya*, Power Africa, *supra* note 21.

[30] **[SD-026]**, *GDC Roadshow, supra* note 5, slide 3.

[31] **[CJ-017]**, *Norton Rose Report, supra* note 15, p. 2.

[32] *Id.* at p. 4.

[33] **[CJ-013]**, *Investment Brief for the Electricity Sector in Kenya*, Power Africa, *supra* note 21.

OrPower 4 – Geothermal	*110*
Rabai Diesel	*90*
Thika Diesel	*87*
Gulf Diesel	*80*
Imenti FiT hydro	*0.3*
Gikira FiT hydro	*0.5*
Aggreko	*30 (emergency plant)*
Total	***606 MW***[34]

(h) Kenya Nuclear Electricity Board ("KNEB")

165. KNEB "[h]*as the responsibility of developing a comprehensive legal and regulatory framework for the use of nuclear energy in Kenya*".[35]

(5) Investment and private participation in the power sector

166. In recent years the electricity sector has evolved from a monopolistic to competitive one, where previously, KPLC exclusively handled generation, transmission, and distribution.[36] With the generation liberalisation of the sector "*several licensed IPPs now in operation, and the transmission function of KPLC is now vested in KETRACO.*"[37]

> *Kenya is open to both private sector investments from local sources as well as from foreign sources of capital, and has developed a number of policies aimed at attracting foreign capital. FDI into Kenya has shown significant increase in the last ten years as companies respond to incentives by investing in Kenya's privatized industries and infrastructure.*[38]

167. It is required that all energy activities comply with sustainable and environmentally acceptable practices. The Kenyan government has targeted the private sector to deliver the substantial electricity deficit, which is being implemented through public private

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[34] *Id.*

[35] *Id.*

[36] **[CJ-017]**, *Norton Rose Report, supra* note 15, p. 3.

[37] *Id.*

[38] **[CJ-013]**, *Investment Brief for the Electricity Sector in Kenya*, Power Africa *, supra* note 21, p. 2.

partnerships. There is evidence in the record that in recent years KPLC has well established PPAs that have been developed with its IPPs in Kenya.[39]

(6) Legislative Structure

168. The legislative structure is set out in detail in the factual section below.

(7) Challenges to developing a Geothermal Project

169. The Sinclair Knight Merz Development Plan ("**SKM**")[40] outlines the principal challenges that were present in developing a geothermal project in Kenya at the time. These can be seen from the SKM Report Risk Register[41] which listed the risks in developing a geothermal project:

No	Risk	Likelihood	Impact	Consequence	Mitigation
1	Difficulty/cost of securing a drilling water supply	M	M	Delay, higher cost	Resolve at earliest opportunity Consider alternatives
2	Delay in obtaining permit for drilling	L	L	Delay	Understand requirements, monitor closely
3	Unavailability of drilling materials or rigs	M	L	Delay	Monitor rig availability
4	Worse than expected drilling conditions	M	M	Delay, higher cost	Conservative early assumptions. Verify asap
5	Worse than expected well productivity/injectability	M	H	Delay, higher cost	Conservative early assumptions. Verify asap
6	Delivered enthalapy of geothermal fluid significantly lower than expected	M	H	Reduced output/revenue	Conservative early

[39] *Id*. at p. 3.

[40] **[C-017]/[KE-99]**, *SKM Report*, Appendix E, Risk Register, *supra* note 10.

[41] *Id.* at pp. 0-1. For each of the named risks, the Risk Register denotes the likelihood, impact, consequence and mitigation for each of the risks; impact and consequence are ranked from low to high risk.

No	Risk	Likelihood	Impact	Consequence	Mitigation
					assumptions. Verify asap
7	Geothermal fluid found to have unusual physical or chemical properties	L	M	Higher cost	Conservative early assumptions. Verify asap
8	Deeper than expected wells required to reach geothermal activity	M	M	Delay, higher cost	Conservative early assumptions. Verify asap
9	Major safety incident during drilling, construction or commissioning	L	M	Delay	Rigorous safety management in drilling
	Power Plant				
10	Unexpectedly high cost for power plant contract(s)	L	M	Higher cost	Allow adequate contingency margin in planning
11	Unsatisfactory geotechnical conditions found at plant site	L	L		
12	Difficulty in securing sufficient/adequate resources to implement the project	M	M	Delay, higher cost	Monitor Kenya/global situation. Pay premium to secure
	Commercial				
13	Delay in finalising acquisition or securing title to project land	L-M	L	Delay	Sensitive negotiation stance
14	Higher than expected proof of resource requirement for geothermal resource	M	H	Delay, higher value at risk	Discuss with funders, use conservative assumption
15	Inability to negotiate satisfactory PPA	M	H		Secure at early stage
	Operational				
16	Inability to hire suitable staff – both managerial and operational	M	L	Higher cost	Monitor Kenya/global situation. Pay premium to secure
17	Faster than expected decline in geothermal resource over time	M	M	Reduce revenue, higher OPEX	Conservative initial estimates, close monitoring

170. Some of the more important and relevant of those risks are discussed in more detail below.

(a) Lending Regime

171. If a project is to be financed by a multilateral institution the considerations are quite different from those considered by commercial banks. Commercial banks do not participate in these projects due to the short tenor (five to six years) and high cost of capital.[42]

172. Furthermore, project financing in Africa (unlike Europe) results in project sponsors having to come up with more equity; "[a]*nd the equity has much higher expectations*"[43] resulting in the promoter having to manage those expectations and ensuring the lenders understand what to realistically expect. The most active lenders in this space are the bilaterals, and multilaterals, such as the World Bank IFC, African Development Bank, European Investment Bank, and others including Bank DEG, Frontier Markets, Proparco.[44]

(b) Resource Risk

173. Resource risk is the first risk to consider when developing a geothermal project. The basic question here is whether a commercial reservoir exists in the area to be developed. "*Until exploration, including drilling and initial well testing, has confirmed the existence of a commercial resource, no bank or financial institution will provide project financing. …* [E]*xploration or initial drilling … is financed by some combination of equity contribution, corporate funds, corporate loans and public power revenue band issues, depending on project ownership.*"[45]

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[42] **[CJ-006]/[KE-178]**, The Challenges of Financing Renewable Energy Projects in Africa, Eric McCartney, Executive Director, Chapin International & Co, p. 31.

[43] *Id.*

[44] *Id.*

[45] **[CJ-074]/[KE-161]**, Subir K. Sanyal and James B. Koenig, Resource Risk and Its Mitigation for the Financing of Geothermal Projects, 1995, p. 2911.

174. Even following the discovery of a commercially attractive resource (following geoscientific surveys and drilling), the size of the resource and its ability to produce at a commercially sustainable rate cannot be determined with certainty. These risks may affect the bankability of the project until sufficient wells have been drilled and tested to demonstrate adequate resources for a commercially viable project. It is helpful (in defraying perceived risk) if an adjoining area has demonstrated commercial viability, in which case only one or two wells needs to be drilled for a financial institution to consider the project bankable.[46] "*If the project is the first one to be developed in a field, typically 10% to more than 30% of the production necessary to supply the plant needs to be proven before project financing can be obtained; the higher the perceived resource risk, the higher the required level of proven production*."[47]

175. Following confirmation of reservoir size, well production and injection capacity, substantial uncertainty remains to the financial resources required for development, and costs of "*operating and maintaining the steam (or hot water) supply to the plant from year to year.*"[48] These factors are considered in the due diligence process towards project financing. It is not uncommon for such projects to have cost overruns due to higher than anticipated operations and maintenance costs; this is a concern for lenders as it directly impacts loan performance.

(c) Environmental and Permitting Risk

176. It is not uncommon for projects to be substantially delayed (by many years) due to delays in obtaining necessary environmental approvals. *"Other projects have suffered shorter but still significant delays or have been burdened with an unexpected environmental evaluation, monitoring or mitigation cost. … In some projects, unexpected environmental issues have arisen after the field has already been developed and power generation has started. For these reasons, a significant part of the due diligence effort before project financing now consists of assessing environmental and permitting risks associated with the*

[46] *Id.*

[47] *Id.*

[48] *Id.* at p. 2912.

resource not only prior to or during field development, but also subsequently during power plant operation."[49]

> *From the above discussion it is apparent that resource risk perception of the investors and bankers is determined primarily by the potential cost consequence of the risk. If the resource risk cannot be managed or mitigated, it will result in increased cost, loss of revenue, or both, at times leading to economic failure and shut down of the project. If the cost consequences of the resource risk is relatively small compared to that of the other risks, or if the reward-to-risk ratio is sufficiently large, the resource risks appear negligible.*
>
> …
>
> *Increased costs due to unmitigated or unmanageable resource risks accrue to the developer and the equity investors. In certain cases the costs can be passed on to lenders (default and rescheduling of loan repayment) or to the public (increased power cost or taxes). This in turn may cause investors or lenders to shun future geothermal projects, or to increase the requirement for either a corporate guaranty or cash reserves to be built up from project revenues. Often such cash reserves are maintained in the form of a revolving account that is used to fund unforeseen operations and maintenance costs; as the project incurs such costs, the developer is required to replenish the reserves from its project earnings. The final consequence of these unmitigated resource risks is to make future geothermal projects costlier to finance, and thus less likely to succeed economically.*[50]

(d) Mitigation Of Resource Risk[51]

177. Financiers employ a number of due diligence measures towards mitigating resource risk. Relevant ones are highlighted below:

a. Adequate exploration of the field before development plans are made;

b. Develop careful profitability criteria towards servicing project debt;

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[49] *Id.*

[50] *Id.* at p. 2913.

[51] *Id.*

c. Selection of projects where developers have prior experience;

d. Careful review of development plans before making financial commitments;

e. Ensuring all environmental requirements and other regulatory issues have been complied with towards ensuring there are no delays which could impact cost, and timeliness of project implementation;

f. Routine milestone review meetings;

g. Risk-sharing by increasing the number of investors and lenders to the project; and

h. Careful risk shifting through purchasing various insurance against various man-made failures.

(e) Resource Verification Required By Lenders

178. In order to minimize resource risk, lenders require verification of the resource during the period the bulk of the capital is at risk. Relevant considerations before closing of a geothermal construction loan include:[52]

a. Data verifying the resource;

b. Resource adequacy verifying estimated cash flows;

c. Project development and management risk;

d. Field development plan and budget proposed by the developer; and

e. Minimum resource criteria which eventually result in conversion of construction loan into a longer-term project loan.

B. THE LEGISLATIVE CONTEXT

179. The Geothermal Resources Act (the "**GRA**")[53] is "[a]*n Act of Parliament to control the exploitation and use of geothermal resources and vest the resources in the Government and to provide for connected purposes*." It provides:

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[52] *Id.* at pp. 2913-2914.

[53] **[CL-048]/[KE-3]**, Geothermal Resources Act, Chapter 314A [1982] [Rev. 2012].

3. Geothermal resources vested in the Government

All un-extracted geothermal resources under or in any land shall be vested in the Government subject to any rights which, by or under any written law, have been or are granted or recognized as being vested in any other person.

…

6. Minister to authorise search of geothermal resources

(1)For the purposes of and subject to this Act, the Minister may authorize any person (including a public officer), in writing, to make surveys, investigations, tests and measurements in search of geothermal resources and for that purpose the authorized person may—

(a) enter upon any land specified in the authority with such assistants, gear, appliances, and equipment as he thinks fit;

(b) sink any bore on the land;

(c) make geological surveys and geophysical surveys on the land; and

(d) generally do all things necessary in connection with the survey, investigation, test or measurement.

(2) When practicable, reasonable notice of the intention to enter upon any land shall be given to the owner or occupier of the land.

(3) Every person who is authorized in writing under subsection (1) to enter upon any land shall produce his authority when required to do so by the owner or occupier of the land on which he intends to enter or has entered.

(4) Every authority granted under this section shall be subject to—

(a) the condition that every bore made pursuant to the authority shall be—

(i) kept under close supervision;

(ii) maintained in a safe condition;

(iii) finally left in a condition of lasting safety;

(b) such other conditions as the Minister may impose either at the time of granting the authority or subsequently at the time of closure of the bore.

(5) An authority granted under this section shall not be transferable, and shall be in force for a period of one year from the date of issue, but may be renewed for a period of one year from the date of expiration thereof or from the expiration of any renewal.

(6) An authority granted under this section may be revoked by the Minister on any of the following grounds—

(a) that the person to whom the authority is granted has not complied with any requirement or condition of his authority;

(b) that operations being carried on under the authority are, in the opinion of the Minister, affecting detrimentally other specified bores or the supplies of geothermal resources for other specified purposes;

(c) that it is in the public interest that operations being carried on under the authority should cease.

7. Minister may grant a geothermal resources licence

(1) The Minister may, on application being made to him in respect of any land, grant a licence (to be known as a "geothermal resources licence") over part or the whole of a geothermal resources area under such terms and conditions as he may determine.

(2) An application for a licence to be issued under this section shall be in the approved form and be accompanied by the prescribed fees.

(3) A licence may be granted under this section for such term, not exceeding thirty years, as the Minister may determine and shall be in the prescribed form.

8. Rights under licence

(1) A licence shall, subject to this Act, confer upon the licensee the right—

(a) to enter upon the land being the subject of the licence to bore and to extract geothermal resources and to do all such things as are reasonably necessary for the conduct of those operations;

(b) in so far as it may be necessary for and in connection with the operations referred to in paragraph (a)—

(i) to drill and construct all necessary boreholes;

(ii) to erect, construct and maintain houses and buildings for his own use and for use by his employees;

(iii) to erect, construct and maintain plant, machinery, buildings and other erections as may be necessary;

(iv) to utilize the geothermal resources;

(v) subject to the Water Act (Cap. 372), to reclaim and utilize any water; and

(vi) to construct and maintain roads and other means of communications and conveniences;

(c) to take and use or apply the geothermal resources for any purpose specified in the licence.

(2) Where any by-product obtained in the production of geothermal resources may be reclaimed for further use or sale and is a mineral within the meaning of the Mining Act (Cap. 306), the licence may be modified so as to allow for the inclusion of a mining lease to enable recovery of that by-product.

….

11. Forfeiture of licence

(1) The Minister may, by notice to the licensee, declare a licence to be forfeited

(a) if the licensee ceases work in or under the land the subject of the licence during a continuous period of six months, without the written consent of the Minister;

(b) if the licensee commits a breach or is in default of any provision of this Act or of the regulations made thereunder or of any terms or conditions of the licence and the Minister has caused a notice to be served upon the licensee requiring him—

(i) in the case of a breach which, in the opinion of the Minister, is capable of being repaired or made good, to repair or make good the breach within a specified period;

(ii) in the case of a breach which, in the opinion of the Minister, is not capable of being repaired or made good, to show cause within a specified period why his licence should not be forfeited.

(2) The forfeiture of a licence under subsection (1) shall not affect any liability already incurred by the licensee.

(3) The forfeiture of a licence under subsection (1) shall be published in the Gazette.

…

24. Regulations

(1) The Minister may make regulations necessary for carrying into effect the provisions of this Act.

(2) Regulations may be made under this section for the following purposes—

(a) prescribing any forms that may be required for the purposes of this Act;

(b) prescribing conditions upon or subject to which authorities and licences may be applied for, granted or renewed;

(c) providing for the keeping of records and the furnishing of information and returns by persons authorized by or under this Act, and prescribing the nature of the records, information, and returns and the form, manner and time in which they shall be kept or furnished;

…

(f) prescribing the responsibilities of licensees and persons to whom authorities are granted by or under this Act, and the operations to be carried out under licences;

…

(o) providing for the exemption of licensees and persons to whom authorities have been granted under this Act, either wholly or partially, and either absolutely or conditionally, from any of the requirements of their licences or authorities or of regulations made under this section.

180. Regulations pursuant to Section 24 of the GRA were made being the Geothermal Resources Regulations 1990 (the "**Regulations**").[54] They provide:

1. Citation

These Regulations may be cited as the Geothermal Resources Regulations, 1990.

PART II – APPLICATION FOR AUTHORITY AND LICENCE

2. Application for authority to search for geothermal resources

[54] **[CL-049]/[KE-4]**, Geothermal Resources Regulations, 1990.

(1) The application for an authority under section 6 of the Act shall be made to the Minister in writing in respect of any land and shall specify—

(a) the name, nationality, nature of business and the principal place of business of the applicant;

(b) the name and nationality of every director or equivalent officer where the applicant is a company, corporation or other body corporate; and, if the body corporate has a share capital the name of any person who is the beneficial owner of more than five per centum of the issued share capital;

(c) the delineation of the area or areas proposed to be covered by the authority;

(d) the particulars of work and minimum expenditure proposed to be carried out or expended in respect of the area over which the authority is sought, and a statement of any significant adverse effect which the proposed operations would have on the environment and proposals for controlling or eliminating that effect.

(2) The Minister may call for such additional information as he may require under this Regulation to enable him to assess the suitability of a grant of the authority to the applicant.

(3) The Minister may, when granting an authority to explore, also grant to the holder of that authority the right to be granted, on application, a geothermal resources licence in agreed terms in respect of all or part or parts of the area covered by that authority.

3. Geothermal resources licence

(1) A geothermal resources licence granted under section 7 of the Act, shall be negotiated on the basis of the model licence set out in the First Schedule.

(2) A geothermal resources licence shall be accompanied by, or be conditional upon, the execution of a contract (to be known as "geothermal resources contract") between the licensee and the relevant Government department or other body designated by the Minister for the purpose of providing for the utilization of the geothermal resources.

(3) The Minister shall in granting a geothermal resources licence, allow an exploration phase of a period not exceeding five years and if at the end of that period no geothermal resources of a potential commercial interest is discovered the Minister may require the licensee to surrender the licensed area.

(4) Where the licensee, during the exploration phase, discovers geothermal resources which is of potential commercial interest, he

shall within a period of sixty days after the discovery submit an appraisal programme to the Minister for his approval.

(5) If the appraisal programmed results into the declaration by the Minister and the licensee of a visible commercial geothermal resources, the licensee shall, within twelve months from the date of the declaration, submit to the Minister a development and production programme which shall include—

(a) the date by which the applicant intends to commence production;

(b) the capacity of production and scale of operations;

(c) the estimated overall production;

(d) the marketing arrangements made for disposal of the geothermal energy, including details of all contracts or arrangements made with proposed users;

(e) proposals for the prevention of pollution, the treatment of wastes, the safeguarding of natural resources, the progressive reclamation and rehabilitation of lands disturbed by prospecting or production operations and for the minimization of the effect of such operations on adjoining or neighbouring lands; and

(f) a statement of any significant adverse effect which the carrying out of production operations would be likely to have on the environment and proposals for controlling or eliminating that effect;

(g) a technical report on the production possibilities and the intention of the applicant in relation thereto; and

(h) a detailed forecast of capital investment, operating costs and sales reserves and the anticipated type and source of financing.

(6) The development and production phase shall commence upon the approval by the Minister of the development and production programme.

4. Application for geothermal resources licence

(1) The application for the grant of a geothermal resources licence may be made to the Minister in respect of any geothermal resources area and shall specify—

(a) the name and nationality, nature of business and the principal place of business of the applicant;

(b) the name and nationality of every director or equivalent officer where the applicant is a company, corporation or other body corporate and if the body corporate has a share capital, the name of any person who is the beneficial owner of more than five per centum of the issued share capital;

(c) a full statement giving the applicant's financial status, technical competence and experience;

(d) the delineation of the area proposed to be covered by the geothermal resources licence together with a plan of the area;

(e) a general statement of the proposed programme of exploration of the geothermal resources, including a comprehensive report on the location, nature and characteristics of the source of geothermal energy to be explored;

(f) the terms on which the applicant proposes to negotiate;

(g) proposals with respect to the employment and training of citizens of Kenya;

(h) the goods and services required for the production operations which can be obtained within Kenya and the applicant's intention in relation thereto; and

(i) details of expected infrastructure requirements.

(2) The Minister may call for such additional information as he may require under this Regulation to enable him to assess the suitability of the grant of a geothermal resources licence.

…

17. Report to the Minister

(1) The holder of an authority to explore shall transmit to the Minister—

(a) once a year, a report in respect of the previous year, specifying—

(i) the progress of operations, the results obtained, events of significance, occurrences, accidents and like matters; and

(ii) the number of persons employed indicating each category; and

(b) at the end of each stage of geological or geophysical operations and at the end of every boring operation, a report on that stage of operations together with a copy of the logs relating to the bore.

(2) The holder of a geothermal resources licence shall transmit to the Minister within the first fifteen days of every year, a report in respect of the preceding year, specifying in respect of each month in the year—

(a) the quantities of geothermal fluids extracted and any subsequent variations of their physical characteristics;

(b) the quantities of geothermal fluids delivered for consumption;

(c) the amount of energy transmitted to cables from power stations;

(d) the quantities of commercial products, if any, extracted from geothermal fluid, the quantities delivered for consumption and the end of month stocks;

(e) all occurrences and accidents; and

(f) the number of persons employed indicating each category.

(3) The holder of a geothermal resources licence, being a body corporate, shall transmit to the Minister, in triplicate, and within the month following every annual general meeting, the report of the Board and that of the auditors, the complete statement of accounts relating to the last financial year, and copies of the resolutions, if any, adopted at the meeting.

181. The First Schedule to the Regulations was a Model Geothermal Resources Licence. The terms of the Model Licence and of the Licence as issued are not the same (for example the "*in and under the land*" wording in Clause 1(1) of the Licence does not appear in clause 1(1) of the Model Licence though it does appear in the forfeiture clause (clause 6(1)(a)) of the Model Licence) but the Tribunal does not consider that anything turns on those differences, the issues arising falling for determination by reference to the terms of the Licence as granted.

(1) The Licence[55] and Authority to Explore[56]

182. The Licence was granted on 5 September 2007 by the Minister for Energy, the Hon Kiraitu Murungi EGH MP (the "**Minister**" or the "**MOE**").[57]

183. It stated:

1. The licensee is hereby granted the following exclusive rights:

(1) The right and privileges to enter, explore, drill for and extract, produce, utilize and dispose geothermal steam and associated geothermal resources in and under the land specified in the Appendix 1) and shown on the map set forth in Appendix II hereof (the 'License Area').

[55] **[C-003]/[KE-1]**, Geothermal Resources Licence No. 1/2007, 5 September 2007.

[56] **[C-002]/[KE-2]**, Exploration Authority Letter from Hon Minister Kiraitu Murungi (MOE) to Mr Maherab Walji (WalAm), 5 September 2007.

[57] **[C-003]/[KE-1]**, Geothermal Resources Licence No. 1/2007, 5 September 2007.

(2) In so far as it may be necessary for and in connection with the said operations, the exclusive rights to -

(a) drill and construct all necessary boreholes;

(b) erect, construct and maintain houses and buildings for the licensee's own use and for the use by the licensee's employees;

(c) erect, construct and maintain plant, machinery, buildings and other erections as may be necessary;

(d) utilize the geothermal resources;

(e) subject to the Water Act, reclaim and utilize any water; and

(f) construct and maintain roads and other means of communication and conveniences.

(3) The exclusive right to take and use or apply the geothermal resources for the purpose of generating electric power. Power Purchase Agreement ('the geothermal contract') to be entered into between the licensee and the government.

2. The rights granted shall be for a term of thirty years from the date hereof and such term may be renewed at the option of the licensee, for two further period of five years each; provided the licensee has complied with all the terms hereof.

…

4. The licensee shall comply with the provision of the Geothermal Resources Regulations, 1990 and drilling conditions as specified in the Second Schedule thereto.

…

7. (1) The Minister may, by notice to the licensee, declare this license to be forfeited

(a) if the licensee wholly ceases work in or under the license area during a continuous period of six months, without the written consent of the Minister;

(b) if the licensee commits a breach or is in default of any provision of the Geothermal Resources Act or of the Geothermal Resources Regulations, 1990 or of any terms or conditions of the license and the Minister has caused a notice to be served on the licensee requiring the licensee -

(i) in case of a breach which, in the opinion of the Minister, is capable of being repaired or made good, to repair or make good the breach within a specified period;

(ii) in the case of a breach which, in the opinion of the Minister, is not capable of being repaired or made good, to show cause why this license should not be forfeited.

(2) The forfeiture of this license under paragraph (1) shall not affect any liability already incurred by the licensee.

…

9. The licensee shall provide the Minister with periodic written reports of the progress of operations under this license as follows-

(1) on drilling operations, daily;

(2) on production operations, daily;

(3) on geophysical operations, monthly;

(4) on geothermal operations -

(a) within one month of the last day of March, June, September and December covering the previous three months;

(b) within three months of the date of expiry or surrender of this license.

(5) Each report under paragraph (4) shall contain, in respect of the period which it covers-

(a) details of the geothermal operations carried out and the factual information obtained;

(b) a description of the area in which the licensee has operated;

(c) an account of the licensee's expenditure on geothermal operations;

(d) a map indicating all bores and other geothermal operations.[58]

184. The combined effect of Regulation 3(2) and Clause 1(3) of the Licence show that there would have to be a PPA pursuant to which the licensee would supply power. Accordingly

[58] Clause 19 of the Licence contained the dispute resolution provisions which have been the subject of consideration in the Tribunal's Decision on Preliminary Objections.

WalAm's and Kenya's understanding would have been from the outset that in accordance with the statutory and regulatory regime a PPA would have to be negotiated and agreed with the relevant entity (KPLC) to enable the Licensee to exploit its rights under the Licence.

185. WalAm was granted an Authority to Explore for Geothermal Resources by letter dated 3 September 2007 but signed by the Minister on 5 September 2007 (the "**Authority to Explore**"),[59] the same date as the Licence. The Authority to Explore was granted pursuant to Section 6(1) of the GRA. The recitals recorded that WalAm had applied for the grant of authority to explore for geothermal resources in Suswa and that the government wished to promote and encourage the development of geothermal resources in the area.

186. Section 1.0 of the Authority to Explore granted WalAm authority "*to make surveys, investigations, tests and measurements in search of geothermal resources*" in the specified area and for that purpose authorised WalAm to:

> *(a) Enter upon the Specified Area with such assistants, gear, appliances, and equipment as it deems fit for the objects of the Authority;*
>
> *(b) Sink any bore within the Specified Area;*
>
> *(c) Make geological surveys and geophysical surveys within the Specified*
>
> *Area; and*
>
> *(d) Generally do all things necessary in connection with the objects of the Authority.*

187. Section 3.0 of the Authority to Explore stated:

> *3.0 WORK OBLIGATION*
>
> *The company will carry out a two phased exploration programme as follows:*
>
> *Phase I*

[59] **[C-002]/[KE-2]**, Exploration Authority Letter from Hon Minister Kiraitu Murungi (MOE) to Mr Maherab Walji (WalAm), 5 September 2007.

a. Carry out an Independent Geothermal Expert Review of Suswa, prospect including reports/data being held by KenGen/M.O.E and other agencies from inside and outside Kenya.

b. Undertake a Feasibility study on:-

- *Load and demand curve*
- *Cost of the power plant using an independent consultant and*
- *Kenya power sector*

c. Undertake multi-disciplinary survey to evaluate the Geothermal Potential using techniques such as:-

- *SAR remote sensing,*
- *active and passive seismic array,*
- *gravity,*
- *magnetics*
- *detailed geochronology coupled with petrological modelling to acceptable interpretable standards.*
- *MT and TEM soundings to come up with a suitable geothermal model.*
- *Geochemical measurements to determine reservoir characteristics.*
- *Radon (RN-222) and C02 surveys and mercury in soil air measurements.*
- *Heat loss measurements to be taken in areas with poor data coverage.*
- *Hydrological studies*
- *Further geological/geophysical studies*
- *Socio/economic impact studies*

c. Carry out a full EIA study for the prospect area before commencement of exploratory drilling.

d. Determine best well locations.

The phase 1 exploration shall cost a minimum of US $250,000.00

Phase 2

e. Undertake the drilling of at least two exploration wells.

f. Proceed with Development program in accordance with the Act.

The Estimated minimum financial Cost for phase 2 exploration will be U.S$8,250,000.00.

IV. THE FACTS

A. THE GRANT OF THE LICENCE AND THE AUTHORITY TO EXPLORE

188. The legislative context suggests that the usual sequence of events would be an application for and the grant of an authority to explore (see Section 6 of the GRA) followed in due course by an application for and grant of a licence (see Section 7 of the GRA). The distinction is reflected also in the Regulations, with the content of an application for an authority under Section 6 of the GRA set out in Regulation 2, and the content of an application for a licence under Section 7 of the GRA set out in Regulation 4. What appears to be contemplated is that the information obtained from and results of exploration carried out pursuant to an authority to explore would be used as a basis for the application for the grant of a licence. Hence, for example, Regulation 4(1)(e) requiring the application to specify "*a general statement of the proposed programme of exploration of the geothermal resources, including a comprehensive report on the location, nature and characteristics of the source of geothermal energy to be explored*".

189. That sequence did not happen in this case. WalAm made an "*Application for Geothermal Exploration Authority as per Kenya Geothermal Act 1982*" by letter to the Minister of Energy dated 20 July 2007.[60] That letter gave various particulars concerning WalAm, its directors, and beneficial ownership. It stated:

5) Work Program: As per work program and expenditures attached.

190. It also stated as to financing that:

6) Financing: The initial exploration will be funded by private equity provided by directors and business associates of the directord

[60] **[R-003]/[KE-6]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE) attaching Suswa Geothermal Authority Application – Work Program dated 20 July 2007, 20 July 2007.

[sic] *up to item # 6 on the work program i.e. up to completion of project feasibility.*

Subsequently, based on the report, further exploration drilling funds will be raised in public market with a listing on the US Nasdaq.BB.exchange.

191. It also stated:

7) Technical Capability: The directors of the corporation have over 100 years of combined business, geological and power engineering experience.

Specialized services will be provided by external consultants such as Geothermex, Power Engineers Inc and Identified Power Partner.

8) Conditions:

1) Period of Exploration Authority 5 years as per Geothermal Resources Act.

2) Geothermal Resources Authority will specify clause 2(3) of the Geothermal Resources Act, 1982

3) Mutually agreeable Memorandum of Understand [sic] *for Power Purchase Agreement before exploration drilling commences. The tarrifs* [sic] *would be based on after tax I.R.R. of 18.5%*

4) The Government of Kenya to provide access road for transportation of equipment up to the drilling site.

5) The Ministry of Energy will second required technical personnel to assist with exploration.

192. The attached Work Program was as follows:

Suswa Geothermal Authority Application - Work Program

July 20, 2007

1. Exploration

1. Independent Geothermal expert review of KenGen/M.O.E Suswa prospect report/data

2. Feasibility study

a. Load and demand studies

b. Costing with independent consultant

c. Independent report on Kenya power sector

3. Exploration Program:.

a. Undertake multi disciplinary survey to evaluate the Geothermal Potential. Techniques would include in SAR remote sensing, active and passive seismic array, magnetotellurics, gravity, magnetics and detailed geochronology coupled with petrological modeling.

b. MT and TEM soundings to come up with a suitable geothermal model.

c. Undertake geochemical measurements to determine reservoir characteristics.

d. Conduct RN-222 and CO2 surveys and mercury in soil air measurements.

e. Additional surface heat loss measurements to be taken in areas with poor coverage.

f. Hydrological studies as required.

g. Further geological/geophysical studies

h. Socio/economic impact studies.

4. Carry out a full EIA study for the prospect area before commencement of exploratory drilling

Determine best well locations

Note: The cost of the above is estimated to be U.S $250,000.00 [61]

5. Based on success of above, drill two exploration wells

6. Analysis of results and delineation of resource

7. Decision to proceed with Development program and apply for Geothermal Resources License in accordance with the Act to undertake development

Estimated Cost for exploration program U.S. $8,250,000.00 [62]

193. By letter dated 31 July 2007[63] the Minister informed WalAm that:

> *I have reviewed your application for the licence to explore for Geothermal Resources in Suswa Geothermal Area and am pleased*

[61] Emboldened in the original.

[62] Emboldened in the original.

[63] **[C-118]/[KE-7]**, Letter from Hon Minister Kiraitu Murungi (MOE) to Mr Maherab Walji (WalAm), 31 July 2007. Mr Nyoike gave evidence that he prepared this letter. Transcript D3:P794 (Nyoike cross-examination).

to convey my decision to grant your firm a geothermal resources licence …

194. WalAm acknowledged receipt and accepted the terms of that letter by letter dated 2 August 2007,[64] stating in relevant part "[t]*hank you for your letter of July 31, 2007. All the terms set out in this letter are gratefully accepted.*"

195. The Authority to Explore and the Licence were then issued as described above.

196. The following should be noted about these exchanges:

a. WalAm's letter of 20 July 2007[65] applied for a "*Geothermal Resources Authority for Suswa*". That description and the terms of the application show that what was being sought was an authority to search and explore pursuant to Section 6 of the GRA. That appears from:

i. The heading of the document as being an "*Application for Geothermal Resources Authority for Suswa*"; and

ii. The proposed conditions which refer to "*Exploration Authority*" and the Work Program which consisted of exploration activities.

b. The Authority to Explore granted was a Section 6 of the GRA authority to explore:

i. The terms of the Authority to Explore itself refer to the fact that "*WalAm has applied for the grant of Authority to explore*" which must be a reference to the letter of 20 July 2007, though not expressly identified.

ii. The Minister expressly granted the Authority to Explore pursuant to Section 6(1) of the GRA.

c. There was no document that purported to be an application for a licence. The letter dated 20 July 2007 was in terms an application for an authority. The legal

[64] **[C-119]/[KE-8]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 August 2007.

[65] **[R-003]/[KE-6]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE) attaching Suswa Geothermal Authority Application – Work Program dated 20 July 2007, 20 July 2007.

significance of there being no application for a licence is discussed below in Section VII.B. The Respondent contends that this invalidates the Licence.

d. Mr Walji's evidence was that he had submitted a letter of interest on behalf of WalAm for licences to explore and develop two different geothermal concessions in February 2007 and that in response the Ministry of Energy had indicated that those concessions were not available but that "*it would grant WalAm the rights to Suswa*".[66] In cross-examination Mr Walji said that he had had an indication and encouragement to that effect.[67]

e. By the Authority to Explore, the Minister accepted WalAm's proposed Work Program which had been attached to the application letter. Section 3.0 of the Authority to Explore required WalAm to carry out the two phased exploration programme that WalAm had proposed. The Authority to Explore records that exploration programme including WalAm's costings of a minimum of US$250,000 for phase 1 and US$8,250,000 for phase 2.

f. The Work Program proposed consisted of two parts – studies (including MT and TEM soundings which Mr Walji described as being geophysical studies[68]) the cost of which was estimated to be US$250,000 to be followed by the drilling of two exploration wells, analysis of results and then "*Decision to proceed with Development program and apply for Geothermal Resources License in accordance with the GRA to undertake development*" (with a total estimated cost for the whole program of US$8,250,000). Thus, the proposed Work Program attached to the application for an Authority itself appears to have contemplated a subsequent application for a licence.

197. The Tribunal considers that the proposed Work Program was effectively approved and accepted by the terms of the Authority to Explore – indeed the language of the Authority

[66] Walji Second Witness Statement, ¶ 4.

[67] Transcript D2:P360:L3-4 (Walji).

[68] Transcript D2:P363:L14-18 (Walji cross-examination). Mr Walji said that he had prepared the application and the Work Program, Transcript D2:P361:L9-13 (Walji cross-examination).

to Explore is in mandatory terms under the heading "*Work Obligation*": "[t]*he company will carry out a two phased exploration programme as follows: …*"

198. The application for an authority had stated that initial exploration would be funded by private equity provided by directors and business associates of the directors up to completion of project feasibility – that according to the work program would include the drilling of exploration wells, in other words suggesting that the "*private equity*" funding would extend to the US$8.25 million costs including the exploration well drilling.[69]

199. The Tribunal notes also that the "*conditions*" stated in the application referred to a "[m]*utually agreeable Memorandum of Understand* [sic] *for Power Purchase Agreement before exploration drilling commences. The tarrifs* [sic] *would be based on after tax I.R.R. of 18.5%*". Such a memorandum of understanding would have been different from a fully negotiated Power Purchase Agreement ("**PPA**").[70] It is unlikely that at this stage it was contemplated that a binding PPA could have been concluded prior to exploration drilling.

200. In any event the issuance of the Authority to Explore by the Minister was not made on the basis of any acceptance or indeed any reference to the "*conditions*" in the application.

201. It is not clear therefore how and why a Licence came to be issued at the same time as the Authority to Explore in response, apparently, to the application for an Authority. However Mr Nyoike's evidence was that he had been "*asked by Minister Murungi to facilitate issuance of the geothermal resources authority and licence for WalAm in accordance with the Geothermal Resources Act and the National Energy Policy*",[71] that he did so, that he considered that it had been done in accordance with the GRA and that the Minister had himself decided that they should be issued with the benefit of whatever information he thought was important to make that decision.[72] The Minister had considered the application

[69] Mr Walji confirmed that the drilling of two exploration wells, if required, was to be funded by the private equity of Directors and their associates. Transcript D2:P364:L2-6 (Walji cross-examination).

[70] Transcript D2:P371:L2-5 (Walji cross-examination).

[71] Nyoike Witness Statement, ¶ 11.

[72] Transcript D3:P785:L3-P786:L11 (Nyoike cross-examination).

to be for a licence.[73] Mr Nyoike said that he had reviewed WalAm's application to ensure that it complied with the GRA. He had understood from the "*Conditions*" that WalAm wanted a memorandum of understanding for Power Purchase Agreement, but that condition was not agreed.[74]

202. On the basis of the evidence the Tribunal finds that as a matter of fact WalAm wished to obtain both a Section 6(1) GRA authority to explore and a licence in respect of Suswa and that the Minister granted the Authority to Explore and the Licence respectively pursuant to Sections 6 and 7 of the GRA, considering (on the advice of the Permanent Secretary) WalAm to have complied in all respects with the GRA for those purposes.

203. The Tribunal finds that WalAm proposed a work program of exploration, including minimum costings which the Minister accepted in granting the Authority to Explore.

B. WALAM'S FINANCIAL POSITION AT THE TIME OF THE GRANT OF THE LICENCE AND AUTHORITY TO EXPLORE

204. Mr Walji's evidence was that WalAm did not have US$8 million or anything like that at the time of the application for the Authority to Explore and grant of the Authority to Explore and Licence or indeed at any time up to November 2012.[75] As Mr Walji said, "[t]*he intent was to raise that capital.*"[76] Indeed the evidence suggests that WalAm was financially stretched from the start even to cover the initial first phase expenditure that was estimated in its proposed Work Program to cost US$250,000.[77] WalAm's financial statements to 31 December 2007 showed current assets of around US$100,000 and very thin capitalisation. In the statements to 31 December 2008 current assets were about US$250,000 with cash being less than US$170,000.

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[73] Transcript D3:P795:L11-13 (Nyoike cross-examination).

[74] "*Yes, that's what they wanted, but they were not granted that*." Transcript D3:P791:L1-3 (Nyoike). "*In the License … in the Authority that was removed*." Transcript D3:P792:L15-16 (Nyoike).

[75] As the later sequence of events shows even in December 2011 WalAm did not have sufficient funds even to cover the costs of negotiating and concluding a PPA. Transcript D2:P369:L9-P370:L1 (Walji cross-examination).

[76] Transcript D2:P369:L17-18 (Walji).

[77] Transcript D2:P382:L19-P383:L3 (Walji cross-examination).

C. WALAM'S ASPIRATIONS FOR A PPA AS AT THE TIME OF OBTAINING THE LICENCE

205. While WalAm did not have in place funding or commitments to fund the exploration program that it proposed as part of its application for an authority to explore, it is apparent that it considered that it would have to raise private equity capital to do so from its directors and associates, and that some form of commitment in relation to its ability to obtain a Power Purchase Agreement would be needed to help raise finance. The reference to a "*Memorandum of Understand*[ing] *for Power Purchase Agreement before exploration drilling commences*" in condition 3 of the application shows that WalAm appreciated that it would not be able to get a PPA before exploration drilling had taken place – indeed the Work Program suggested that "*analysis of results and delineation of resource*" would be needed based on the results of the two proposed exploration wells.

206. Though Mr Walji had been advised by Mr Fred Mbatau (a former Principal Geologist in the Ministry of Energy[78]) at the time of the application in 2007, Mr Walji did not have a good understanding of what would be required in order to negotiate and conclude a PPA or indeed of whether he could assume that any kind of commitment sufficient to support a fundraise would be obtained without drilling of some kind having taken place. He did however know that WalAm could not get a PPA at least until the results of drilling two exploration wells had been obtained successfully and analysed. That is demonstrated by the Work Program which showed that he contemplated that exploration wells at least would be necessary and also by the condition (3) which he sought to attach that there would be a mutually agreeable memorandum of understanding for a PPA before exploration drilling commences. Mr Walji confirmed in evidence that the conclusion of a mutually agreeable memorandum of understanding for a PPA and the conclusion of a PPA were not the same thing.[79]

207. WalAm may, by the reference to a memorandum of understanding for a PPA in the conditions in its application, have been trying to obtain some commitment from the

[78] Transcript D2:P358:L19-22 (Walji cross-examination). It was Mr Mbatau who had introduced Mr Walji to Minister Murungi.

[79] Transcript D2:P370:L21-P371:L5 (Walji cross-examination).

Minister or even just to mark that it would need some form of confirmation that it would get a PPA for fundraising purposes.[80] It is important to note that WalAm did not obtain any comfort from the Minister in that regard at that time. The Authority to Explore specifically included the Work Program proposed by WalAm as an obligation on the company as part of the giving of the authority to explore but did not accept the conditions that WalAm had proposed in its application. Mr Nyoike's evidence was that they had been "*removed*",[81] in other words deliberately not included in the Authority to Explore when the terms of the Work Program proposed by WalAm were set out. Mr Walji's evidence was that he noticed that when he received the Authority.[82] This is important because WalAm accepted the Authority to Explore without demur as to its terms and there was no indication given by WalAm to the Minister that it might not be able to fulfil the obligations which the Authority to Explore set out, in according with WalAm's own proposal. Moreover, Mr Nyoike specifically asked Mr Walji before the Licence was granted whether WalAm "*was capable of seeing it through and whether he could manage to deliver according to its terms and he confirmed that WalAm was capable of doing so.*"[83]

208. The Licence was clear that geothermal resources taken by the licensee could only be used for the purpose of generating electric power supplied pursuant to a Power Purchase Agreement.[84] Mr Walji's letter of 2 August 2007[85] on behalf of WalAm accepted the

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[80] There is no doubt that some evidence of commitment to being able to obtain a PPA would have been important to WalAm's attempts to raise finance. There was some evidence that for a major external equity finance raise it could be critical to have a PPA in place. See Transcript D3:P728:L8-15 (Bloomquist cross-examination). But as Mr Johnson explained high risk capital or somebody who was willing to come in early and take the risk would not require a PPA to be in place though it would be good to have one. To obtain equity finance that was not such early high risk capital you would probably want a signed PPA. See Johnson's response to Arbitrator Spigelman question: Transcript D5:P1557:L17-22 (Johnson).

[81] Transcript D3:P792:L15-16 (Nyoike).

[82] "*A. The Ministry of Energy took my application, and transferred the same Work Program, et cetera, into the License. Q. Did you notice that the condition that you had put in your application is not reflected in the Authority? A. Yes, I noticed that, but this was issued according to Geothermal Act of Kenya.*" Transcript D2:P373:L5-12 (Walji cross-examination).

[83] Nyoike Witness Statement, ¶ 15. Mr Nyoike explained why, in view of previous poor experience with companies who had not had the financial muscle to meet their obligations, he had raised that question with Mr Walji, when he realised that WalAm was "*just a minnow*". Transcript D3:P909-912 (Nyoike Tribunal's questions).

[84] **[C-003]/KE-1]**, Geothermal Resources Licence No. 1/2007, 5 September 2007, Clause 1(3). There is a separate legal issue as to whether that clause imposed any obligation on Kenya in relation to the concluding of a PPA.

[85] **[C-119]/[KE-8]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 August 2007.

Licence on its terms, again without demur: "[a]*ll the terms set out in [the Minister's letter of 31 July 2007] are gratefully accepted*." WalAm could have rejected (but did not) the terms of the Authority to Explore or could have sought only to explore pursuant to the Authority to Explore and not accepted the Licence. It accepted both, knowing that it did not have any commitment or conditionality from Kenya in relation to a PPA, indeed that its proposed condition had been rejected in that regard.

209. The Tribunal accordingly finds that as of the date of the Authority to Explore and Licence:

a. WalAm did not have the financial resources to carry out the Work Program to which it committed by its application for and acceptance of the Authority to Explore.

b. While the Licence envisaged the conclusion of a PPA (and indeed that was also contemplated and required by the statutory and regulatory regime and understood by the parties) WalAm understood at least that it could not negotiate and obtain a PPA before the results of drilling two exploration wells were obtained. It hoped to raise the modest costs of a feasibility study and exploration program (estimated at US$250,000) which would determine the best locations for exploration wells and the more substantial finance needed to drill two exploration wells (estimated at an additional US$8 million) from "*private equity provided by directors and business associates*".

c. WalAm did not accordingly expect that it would have a PPA before commencing some kind of exploration drilling, let alone make obtaining a PPA a condition of proceeding with such work on the land.

d. WalAm wanted to obtain some kind of evidence of Kenya's intent to give a PPA in the form of a memorandum of understanding, which may have helped with obtaining finance, but WalAm's attempt to make that a condition of the grant of the Authority to Explore was rejected by the Minister and in any event Mr Walji understood that any such memorandum of understanding would not be the same as obtaining a PPA and that a PPA could not be concluded until after results from exploration wells have been obtained.

e. Kenya had not made any promise to WalAm as regards either the conclusion or the timing of a PPA in relation to exploration and the Work Program that WalAm had committed to undertake. WalAm did not believe that Kenya had made any such promise – indeed Mr Walji had noted from the Minister's response to WalAm's application that the proposed conditions even in relation to a memorandum of understanding had not been accepted.

D. SEPTEMBER 2007 – NOVEMBER 2008

210. Following the grant of the Licence, WalAm asked for information including surveys and data relating to the Suswa area. By letter dated 24 September 2007 Mr Nyoike requested KenGen to provide that information to WalAm.[86] In a letter dated 7 February 2008 from Mr Walji to the Minister (copied to Mr Nyoike),[87] Mr Walji complained that KenGen was holding back from providing data. There had been a three-month delay in submission of information to WalAm which had been directed to be provided by the Ministry. Mr Walji also reported generally in that letter on the progress WalAm had made "*to fulfill the company's obligation of the Geothermal Authority/License granted to the company.*" It is to be noted from that letter that:

a. Mr Walji's terminology recognised that the "*Authority/License*" did impose obligations on WalAm though what he understood those to be was not at this stage clear. His letter concluded by saying "[p]*lease be assured that I will stick with my commitment and contractual obligations*".

b. Little progress had been made by WalAm in terms of fundraising. Mr Walji said that "*seed capital*" had been "*committed by private investors and myself*". The amounts and identity of the investors were not stated.

211. Mr Walji states in that letter that approaches had been made to ten geothermal consulting firms, of whom four had responded with the intent that a contract would be awarded to "*the*

[86] [**R-004]/[KE-193]**, Letter from Mr Patrick Nyoike (MOE) to Mr Edward Njoroge (KenGen), 24 September 2007.

[87] **[C-008]/[KE-9]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 7 February 2008.

most qualified firm of our choice to complete the first phase of Suswa exploration". The reference to "*first phase*" was to the first phase of the Work Program, in other words feasibility studies, survey work etc. all before and with a view to exploratory drilling.

212. There was no indication in the progress report of anything being done by WalAm in Kenya other than a reference to Mr Mbatau being the contact person and operations manager who was authorised to collect data from KenGen.

213. On 10 December 2007, WalAm had issued a Request for Proposal to GeothermEx to provide evaluations and advice on the Suswa project, and overall feasibility of developing geothermal power from the concession;[88] eventually GeothermEx was selected as their consultant and retained to prepare a report including making recommendations as to how to proceed and develop the project.[89]

214. On 6 August 2008, GeothermEx emailed a signed proposal for a feasibility evaluation of the Suswa project.[90] It set out the proposed scope of work, with a budget not to exceed US$90,000 and a timeline of about 3 months after receipt of necessary documents. The proposal itself is dated 15 January 2008. This raises questions as to why there was an almost eight-month delay in the submission by GeothermEx to WalAm of this proposal. The Tribunal notes that the cover email stated "[w]*e acknowledge receipt of and express appreciation for the prepayment check.*"[91] Mr Walji had only signed the proposal on 21 July 2008.[92] There is a question as to whether engagement of GeothermEx and the delayed signing of the proposal was occasioned by WalAm's late payment of the deposit necessary to ask GeothermEx to initiate work (which was $30,000).[93]

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[88] **[C-047]/[KE-148]**, Email from Ms Marianne Erk (WalAm) to Ms Ann Robertson-Tait (GeothermEx), attaching Request for Proposal from Mr Sandy Laing (WalAm) to Ms Ann Robertson-Tait (GeothermEx) dated 6 December 2007, 10 December 2007.

[89] Laing Witness Statement, ⁋ 9.

[90] **[C-048]**, Email from Ms Elizabeth Agawa (GeothermEx) to Mr Maherab Walji and Mr Sandy Laing (WalAm), attaching GeothermEx Proposal for Feasibility evaluation of the Suswa prospect, Kenya dated 15 January 2008, 6 August 2008.

[91] *Id.*

[92] *Id.* at p.6 of the Proposal.

[93] *Id.* at p. 6 of the Proposal.

215. According to a further progress report letter from Mr Walji to Mr Nyoike dated 5 November 2008[94] WalAm had:

a. Obtained all the available data by June 2008;

b. Retained GeothermEx in July 2008 to prepare a "*Prospect Evaluation Report*" at a cost of US$90,000 and received an interim report in October; and

c. Planned a field trip for GeothermEx and WalAm personnel for 18 November 2008.

216. Mr Laing of WalAm and Mr Granados, GeothermEx's Drilling Manager made that site visit in November 2008. As appears from the detailed GeothermEx's Feasibility Report of March 2009[95] that visit was "*to evaluate site logistics and infrastructure, and to assess the availability and possible sources of water for drilling*." A WalAm Annual Report records that during this visit meetings were held in Nairobi with Mr Nyoike, MOE Chief Geologist, John Omenge and other MOE staff[96]; MOE staff were invited to a field visit of the Olkaria area. A field visit was conducted to KenGen offices in Olkaria to introduce GeothermEx personnel to KenGen and have discussions of drilling issues and drilling experiences KenGen had had in the course of drilling the Olkaria geothermal wells. Field visits also included Olkaria IV drilling sites with a rig tour provided by Great Wall Drilling, as well as to the Suswa caldera and surrounding area where two representatives of the local Maasai were also met. Issues identified from those meetings included water availability, the necessity for road upgrades and the need for a separate civil engineering and logistics study to address water and road issues.

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[94] **[C-049]/[KE-10]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), 5 November 2008.

[95] **[C-009]/[KE-13]**, GeothermEx, Inc., *Feasibility of Developing a Geothermal Power Project at Suswa, Kenya for WalAm Energy, Inc.*, March 2009, p. (vi).

[96] **[C-031]**, Compilation of WalAm Energy Inc Annual Reports (2007–2010) and Interim 2011 Work Program, pp. 3-5.

217. The GeothermEx report covered analysis of exploration data, estimation of recoverable geothermal energy reserves, well productivity considerations, site evaluation, well design and cost estimate, and (at a very high level) development costs.[97]

218. There is also evidence that in this period individuals including former directors of WalAm with whom Mr Walji was communicating with a view to increasing their investments expressed unwillingness to put in any more by way of equity investment than they had already and that such amounts were in any event very modest.[98]

E. FEBRUARY TO SEPTEMBER 2009 – MARCH MEETINGS AND PRESENTATIONS, POST-MEETING CORRESPONDENCE

219. On 13 February 2009 Mr Walji emailed Mr Nyoike, attaching a letter dated 11 February 2009 to the Minister. By that letter WalAm informed the Minister that it had "c*ompleted the exploration of Suswa Geothermal Prospect and Pre-feasibility to the company's satisfaction.*" It was proposed that they should proceed "*with the Geothermal License rights and initially drill up to five (5) exploration wells*". He then stated that:

> *In this regard we would like to avail ourselves to the Government Kenya during the week of March 2, 2009 and attend to the following:*
>
> *- Present to yourself the progress report and exploration program findings for Suswa Exploration Field.*
>
> *- Further discern Kenya Power needs and Government of Kenya move forward position.*
>
> *- Present up to five (5) well drilling program and Suswa Field Development Plan.*
>
> *- Present Suswa Geothermal Project costs and Economics.*

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[97] **[C-009]/[KE-13]**, GeothermEx, Inc., *Feasibility of Developing a Geothermal Power Project at Suswa, Kenya for WalAm Energy, Inc*., March 2009, pp. ii-iii. In relation to development costs, GeothermEx were careful to explain that the costs they indicated were "*approximations only*" and would need a power plant engineering firm to provide better supported costs estimates for the costs of power plant construction, operation and maintenance. (p. 7-2 of the Report).

[98] **[R-031]/[KE-130]**, Emails between Mr. Zohrab Mawani and Mr. Maherab Walji (WalAm), 19 December 2007 and **[R-032]/[KE-131]**, Emails between Mr. Johann Reiter and Mr. Maherab Walji (WalAm), 16 February 2008.

> *- Discuss Power Purchase Agreement 'PPA' terms to provide comfort and safeguard investment in excess of U.S. $80 million that WalAm is contemplating in Kenya.*[99]

220. GeothermEx's report was dated March 2009.[100] It describes their retainer as being "*to assist in determining the feasibility of developing the geothermal resources at Suswa*". The report gave some assessment of reserves but of "*an admittedly broad range*", namely from 20 to more than 800 MW. The report indicated "[a] *minimum (90% probable) value of about 75 MW is estimated.*" It suggested that the most likely or modal value was nearly 200 MW for a project life of 30 years and stated:

> *Drilling and testing of productive wells is required to prove that these reserves can be utilized for a commercial power project.*[101]

but further concluded that:

> *Further no additional* geophysical *survey data is recommended; instead the project can proceed directly to drilling full-diameter wells.* [102]

221. As the discussion in the report explained, the recommendation that the project could proceed directly to drilling full diameter wells would be "*to confirm the resource*"[103] and that "[d]*rilling and testing of commercially productive wells is required to prove that these reserves can be utilized, increasing the reliability of the reserve estimate*." [104]

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[99] **[C-050]/[KE-12]**, Email from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), attaching Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE) dated 11 February 2009, 13 February 2009.

[100] **[C-009]/[KE-13]**, GeothermEx, Inc., *Feasibility of Developing a Geothermal Power Project at Suswa, Kenya for WalAm Energy, Inc.*, March 2019.

[101] *Id.* at p. vii.

[102] *Id.* at p. viii.

[103] *Id.* at pp. 1-2.

[104] *Id.* at pp. 3-5. Dr Sanyal, who had involvement in the preparation of the report, gave evidence as to the reasons for and meaning of these recommendations. He explained that whilst GeothermEx had been able to make the recommendation to proceed directly to drill full diameter wells, the precise productivity and the costings involved would not be known until particular wells had been drilled. GeothermEx had given a very wide range of estimate of productivity from 3MW to 12 MW. See generally his evidence at Transcript D4:P1197-1243 (Sanyal cross-examination).

222. The report gave estimated costs for different size projects with drilling costs ranging from US$42 million (for a 20 MW project) to US$140 million (for a 75MW project) and total development costs ranging from US$96 million to US$312.5 million.

223. The very specific reference in Mr Walji's letter to the Minister dated 11 February 2009[105] (copied to Mr Nyoike) to a program for drilling up to five wells would suggest that Mr Walji must have had the GeothermEx report (or at least a final draft of it) prior to writing his letter.

224. In that letter Mr Walji had also proposed two weeks of meetings with the Minister and various Kenyan stakeholders including KPLC, and KERC. It suggested that a three-hour meeting would "[c]*ommence PPA terms discussion and project commencement plan*" and that a final meeting of suggested time of four hours would "[c]*onclude Government of Kenya and WalAm intent*".[106]

225. Meetings did take place with WalAm representatives in March 2009. The contemporaneous evidence in relation to those meetings as to dates and the contents of the discussions is not in all respects clear and consistent. However, as concluded by the Tribunal below, the essential matters relevant to the issues which the Tribunal has to decide can be clearly discerned. In particular, the correspondence through the remainder of 2009 is important both in establishing the positions taken by the various parties at the March meetings and subsequently. The Tribunal received witness evidence in particular from Mr Walji, Mr Laing and Mr Nyoike in relation to those meetings but takes the view that the contemporaneous record is in material respects likely to be more reliable and that oral evidence of meetings which took place more than eight years before the evidence being given must be considered with care and some caution, despite the well-intentioned efforts of all the witnesses to assist the Tribunal.

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[105] **[C-050]/[KE-12]**, Email from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), attaching Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE) dated 11 February 2009, 13 February 2009.

[106] Emphasis added.

226. WalAm's evidence is that Mr Walji and Mr Laing met with and made presentations to the Ministry of Energy and KPLC[107] and that WalAm emphasised that the next step was drilling, that drilling required funding and that funding required a PPA. This account is supported by Mr Walji's subsequent letter to the Minister, dated 15 June 2009, and which is referenced below.[108] The presentation which WalAm says was made on 20 March described GeothermEx's recommendations as follows at slide 17:[109]

> *– Proceed to drilling full diameter wells to complete feasibility stage*
> *… Project becomes feasible after two successful wells are completed*

and then stated at slide 19 that there was a need to drill a minimum of three wells at a cost of US$23.5 million to prove feasibility, at slide 25 that there was a need to attract Risk Capital and, at slide 29 that:

> *Capitalization requires Power Purchase Agreement*
> *– WalAm will raise equity capital on the strength of the PPA …*
> *– Minimum funding required for (10 MW) 3 well program $23.5m*
> *– Minimum funding required for (20 MW) 6 well program $44m.*

And at slide 31 that:

> *WalAm will undertake to raise the capital under the following terms:*
> *– Mutually agreed PPA*
> *– Cooperation from Ministry of Energy, KPLC, Energy Regulatory Commission, Ministry of Land and Water*
> *– Government of Kenya to take responsibility to facilitate the project*

227. A later letter dated 15 June 2009[110] from Mr Walji to the Minister stated that he and Mr Laing visited Kenya from 17 March to 15 April 2009 and that:

a. Ministry of Energy personnel had been briefed on 20 March 2009;

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[107] Laing Witness Statement, ¶ 10.

[108] **[C-016]/[KE-21]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 15 June 2009 & Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 September 2009.

[109] **[C-011]/[KE-14]**, WalAm Energy Inc., *A Renewable Energy Company* (as presented to MOE), March 2009, p. 13.

[110] **[C-016]/[KE-21]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 15 June 2009 & Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 September 2009.

b. Some progress was achieved however not to the extent expected due to unavailability of Ministry of Energy and KPLC personnel as scheduled and confirmed in the letter from the MOE dated 25 February 2009. The letter (at paragraph 6) expressed frustration at "*the delays and lack of motivation in Kenya.*" He further requested the Minister to "*use his good offices to expedite the process*" (at paragraph 10) of submission of information from KPLC and Government of Kenya (presumably the Ministry) to enable the process of RFPs for well design and the preliminary Suswa Geothermal Development Plan to move forward;

c. A follow-up meeting had been held on 9 April 2009 to deal with project economics, power tariffs and the terms of a PPA, a meeting said to have been conducted by Mr Njoroge (of KPLC); and

d. A meeting had been held with Mr Omenge, the Chief Geologist, on 27 March 2009 at which questions had been addressed to Mr Omenge, some of which had been answered at the meeting, and information was awaited by WalAm in relation to others.

228. A document dated 27 March 2009[111] sheds some light on the discussions with Mr Omenge. It appears that at the meeting with Mr Omenge on 27 March 2009, WalAm provided Mr Omenge with a list of questions. The Ministry of Energy wrote to Mr Walji on 29 September 2009, attaching that document and responding to the requests for clarification. In addition there is a version of this document with additions in red[112] (presumably prepared subsequently by Mr Walji) which Mr Walji said recorded discussions at the meeting itself.[113] It would however appear from the version attached to the Ministry of Energy's letter of 29 September that the document given to the Ministry of Energy in March included the statements under the heading "*Drilling Rig*" that "*WalAm*

[111] **[R-007]**/**[KE-29]**, Letter from Mr Paul Ngatia (MOE) to Mr Maherab Walji (WalAm) attaching WalAm Suswa Concession Development dated 27 March 2009, 29 September 2009, attachment, p. 7.

[112] **[C-023]**/**[KE-18]**, Notes of Meeting between Mr John Omenge, Mr Peter Nyakundi (MOE) and Mr Maherab Walji (WalAm), 27 March 2009.

[113] Transcript D2:P399 (Walji cross-examination).

expects to award the drilling contract prior to December 31, 2009 and to commence drilling at Suswa before the end of 1st QTR 2010" and in the concluding paragraph that:

> *For WalAm to proceed at the planned place we do need quicker responses from Kenya. With closer and more timely cooperation we can complete the Environmental Impact Study, Suswa Development Plan and Power Purchase Agreement and the drilling program more effectively. We are still targeting the drilling program to commence in the first quarter of 2010.*

229. For completeness, there is another WalAm presentation probably of the same period though its intended audience and precise timing is not clear[114] nor whether it was in fact used, which stated at slide 15 that a minimum of 3 wells were required to prove feasibility at a cost of US$23.5 million and that "*Funding – PPA with adequate returns will attract investment*".

230. Any discussion of a PPA with the Ministry of Energy would not have been appropriate for the Chief Geologist. This would explain why, even in the version of the 27 March 2009 document[115] which is said to record the discussions at the meeting, there is no discussion of a PPA.

231. Mr Nyoike, not Mr Omenge, wrote the Ministry's response to this document by letter of 29 September 2009:[116]

a. Under the heading "*General Discussion*" in the 27 March 2009 document WalAm had stated "[a]*ll of the challenges and issues below represent potential costs to the Suswa project. All costs must be addressed in the final electricity rates. The lower the costs, the lower the electricity rates.*" Mr Nyoike responded in the letter of 29 September as follows:

1.0 General Discussions

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[114] **[C-014]**/**[KE-15]**, WalAm Energy Inc., *A Renewable Energy Company* (as presented to KPLC), March 2009. WalAm suggest in their chronology that it was a presentation to KPLC.

[115] **[C-023]**/**[KE-18]**, Notes of Meeting between Mr John Omenge, Mr Peter Nyakundi (MOE) and Mr Maherab Walji (WalAm), 27 March 2009.

[116] **[R-007]/[KE-29]**, Letter from Mr Paul Ngatia (MOE) to Mr Maherab Walji (WalAm) attaching WalAm Suswa Concession Development dated 27 March 2009, 29 September 2009. Mr Nyoike explained that one of his officers, Mr Ngatia, signed it on his behalf. Transcript D3:P875-876 (Nyoike cross-examination).

WalAm presented that the challenges and issues raised represent potential costs on the Suswa prospect and that the costs must be addressed in the final electricity costs. This is explained as follows:

It is expected that WalAm obtained the license to develop the Suswa Geothermal Prospect on full understanding that the company has the necessary financial and technical capability to fulfill the power development.

The Ministry can not therefore determine the project costs for WalAm or engage in entering Power Purchase Agreement (PPA) with WalAm unless steam wells have been drilled.[117]

b. In addition, Mr Nyoike added a section 6.0 in the letter addressing Power Purchase Agreements (in between questions raised by WalAm on Project Coordination and Transmission) stating:

6.0 Power Purchase Agreements (Ppa)

Whereas this Ministry endeavours to ensure geothermal projects are developed to maximum steam production and utilization to capacity, WalAm will need to drill at least three (3) geothermal wells which will provide the required information on the capacity of power to be generated and therefore making it possible to fruitfully negotiate for PPA with Kenya Power and Lighting Company.[118]

c. It is also relevant to note that in response to WalAm's question as to what financial guarantees would be available, Mr Nyoike responded:

8.0 Financial Guarantees

WalAm will need to operate within the terms and conditions specified in the Geothermal Resources Act, 1982 and the Geothermal Resoruces [sic] *Regulations, 1990 as no other guarantees will be provided outside the stipulated policy, and legal framework.*

232. The Tribunal finds the following facts in relation to WalAm's position as at March 2009 and the meetings in March 2009, and subsequent responses of Kenya:

[117] Emphasis added.

[118] Emphasis added.

a. WalAm had obtained the GeothermEx recommendations that it was necessary to drill wells in order to prove the productivity of the reserves. GeothermEx were sufficiently confident of the reserves to be able to recommend that WalAm could proceed to drill full-diameter wells without the need for exploration wells, but they were not in a position to predict what the productivity of particular wells would be. That would only become apparent once wells had been drilled and the range of productivity predicted by GeothermEx was very broad.

b. Indeed as appears from WalAm's letter of 14 April 2009 to Mr Njoroge, the CEO of KPLC, following their meeting on 9 April, WalAm could not even say "*whether the Geothermal Resources exists in commercial quantity or not.*"[119] "*To prove this resource would entail drilling high cost exploration wells at cost of in excess of $23 million initially to prove feasibility*."[120]

c. The estimated costs for drilling costs at the lower end of the range were US$42 million. WalAm had estimated US$8 million for the exploration wells phase of the Work Program submitted to and accepted by the Minister in applying for the Authority to Explore.

d. WalAm did not have the finance available to undertake either exploration drilling or full diameter well drilling of the kind recommended by GeothermEx. Nor did it

[119] This letter is of evidential significance for other reasons. In it WalAm inaccurately predicted exploration costs. It conflated economic, and legal issues and confirms that Mr Walji was not experienced in either, and did not appear to have independent expertise to handle these issues. In his evidence Mr Walji stated that even the discussions at the meeting with KPLC had been "[n]*ot quite a negotiation at that stage. It was just purely discussions leading to a memorandum of understanding*." Transcript D2:P539:L7-9. (Walji). He had not been in geothermal field exploration before, the full impact of the GeothermEx report "*sunk in more*" and so "*I might have used some wrong terminology as I was learning*". Transcript D2:P540:L19-P541:L10 (Walji cross-examination). The reference in the letter to the need to "*consult our energy lawyer and our energy economist*" in order to be able to respond to KPLC's positions is striking. Mr Walji said that these were references to a law firm, Heenan Blaikie, and an economist, Tony Ranch, who would have been on the negotiating team if in due course WalAm had gone into face to face negotiations with KPLC. Transcript D2:L539:L10-P540:L10 (Walji cross-examination).

[120] **[C-015]/[KE-20]**, Letter from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC), 14 April 2009.

have a prospect of raising those levels of investment from existing shareholders, directors or business associates.[121]

e. Mr Walji considered that the only prospect of raising finance of the levels sufficient to undertake drilling was if WalAm could obtain a PPA which he could use as a basis for seeking to obtain substantial outside investment. The suggestion of a memorandum of understanding preparatory to a PPA, as referred to in the application for the Authority to Explore was not pursued.[122]

f. In the meetings which Mr Walji and Mr Laing had in March 2009, probably in the meeting with Ministry of Energy representatives around 20 March, but possibly also in the meetings with KPLC and Mr Omenge, they raised the question of the negotiation and conclusion of a PPA and did state (as the presentations show) that obtaining a PPA was critical to their ability to raise the finance necessary to fund drilling.[123] Nobody on Kenya's side at that stage gave any positive response or indication that a PPA could be given. At most KPLC indicated a willingness to take forward discussions to indicate what the parameters would be for negotiations.[124]

g. However a definitive response was given by Mr Nyoike in the 29 September 2009 letter. By that letter the Ministry of Energy expressly rejected WalAm's suggestion that a PPA should precede the obtaining of funding and capitalisation that would

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[121] Mr Walji confirmed in cross-examination that WalAm did not have $8.25 million of private equity either at the time of the application for an authority in 2007 or at any time up to November 2012. Transcript D2:P369-370 (Walji cross-examination). Indeed even in December 2011 WalAm was seeking to raise amounts of US$3 million in order to cover expenses sufficient to enable negotiation and conclusion of a PPA. **[R-038]/[KE-140]**, Emails between Mr Maherab Walji (WalAm), Mr Lawrence Riungu, and others, 8 December 2011; Transcript D2:P380-383 (Walji cross-examination). The contention that further financing could be raised from an eventual IPO is preposterous at best, since the record is devoid of any information that could sustain the high threshold of due diligence required in planning an IPO. Again, this points to the lack of expertise necessary for technical discussions.

[122] As noted above, Mr Walji himself did not appear to regard his discussions with KPLC at this stage as other than very preliminary and not as being active negotiations, because he did not have the necessary experts in either legal or economic issues to assist him.

[123] See also Walji First Witness Statement, ¶ 16. In cross-examination Mr Walji said that he had verbally told the Ministry that a PPA was a condition for exploratory drilling. Transcript D2:P397:L9-P398:L1 (Walji cross-examination).

[124] The detail of how the negotiations progressed with KPLC particularly in the period 2011 is considered below.

enable drilling to take place. WalAm was told in unequivocal terms that a PPA could not be concluded until the results of drilling were known, that that would require the drilling of three wells, and that the Licence had been granted on the understanding that WalAm had the technical and financial capacity to fulfil the project development.

h. Mr Walji understood the 29 September 2009 letter in those terms. He understood that the Ministry of Energy was not accepting WalAm's suggestion that a PPA should be a precondition to drilling. Mr Laing did not recall whether he saw the letter at the time but he recalled that Mr Walji had told him that the Ministry expected WalAm to drill wells prior to a PPA.[125] There was no subsequent correspondence in which either Mr Nyoike changed his position or in which WalAm disputed it and suggested that he was going back on some commitment given at the March meetings.[126]

233. For completeness, reference should be made to other communications in this period which bear on WalAm's and Kenya's understanding of the position in relation to negotiations for a PPA.

234. On 26 August 2009, Mr Fred Mbatau emailed Mr Walji to informing him of a discussion he said he had had with the Minister regarding the PPA negotiations:[127]

> *I personally went looking for the Minister today in his office to pass your request that you are inviting him and his delegation to Canada to conclude the PPA. He categorically told me he that he will not be available. He wanted to know the problem. I briefed him on what transpired with KPLC that they insisted on entering into a PPA of 75mgw instead of your proposed 20mgw.*
>
> *He told me to let you know confidentially that he is ready to help you personally enter into a 20mgw PPA with a condition to increase*

[125] Transcript D3:P657-659 (Laing cross-examination).

[126] Transcript D2:P404:L19-P405:L20 (Walji cross-examination).

[127] **[C-055]/[KE-26]**, Email from Mr Fred Mbatau (WalAm) to Mr Maherab Walji (WalAm), 26 August 2009.

> *to 75mgw or more in the future after drilling more wells apart from the initial 6 you had proposed.*
>
> *He also said he wants you to come and with his help conclude this PPA ...*[128]

235. Two days later, Mr Mbatau emailed Mr Walji[129] saying in relevant part:

> *Thanks for your email and the information.*[130]
>
> *1. The Minister was very serious about his commitment ad* [sic] *he even apologized for not meeting you when you were here. I propose you take his word very seriously and do what he advised. By proposing to see you before any further negotiations for the PPA with KPLC it means he is serious. Note also that in Kenya it is very rarely you get Minister's replies only their PSCS or their juniors who handle most of the correspondences.*

236. A few days later, on 2 September 2009, in an email to the Ministry of Energy (which was copied to Mr Nyoike, and Mr Njoroge, the Managing Director of KPLC),[131] Mr Walji stated:

> *The attached brief (Appendix One)*[132] *outlines the steps required to bring Walam's Suswa Geothermal prospect to the drilling stage. In order to complete the work required in as expeditious a manner as possible, Walam will need the utmost cooperation from both the Ministry of Energy and KPLC. ...*
>
> *The steps are numerous but not so onerous that, together, we cannot complete them in a timely manner in order that new electricity may be delivered to the Kenyan grid by early 2012.*
>
> *The brief is detailed however we can summarize the necessary steps as:*
>
> *1. Environmental Impact Assessment;*
>
> *2. Suswa Development Plan;*

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[128] Emphasis added.

[129] **[C-056]/[KE-27]**, Email from Mr Fred Mbatau (WalAm) to Mr Maherab Walji (WalAm), 28 August 2009.

[130] Mr Walji's email to Mr Mbatau is not in the record.

[131] **[C-057]/[KE-28]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 September 2009.

[132] The Appendix is not attached to the email in the exhibit in the record.

> *3. Power Purchase Agreement; and*
>
> *4. Equity Financial Closure to commence the drilling in the first quarter of 2010.*
>
> *WalAm is continuing to proceed with development of the Suswa Geothermal prospect. We are currently evaluating bids from consulting firms for both the Development Plan and the Environmental Impact Assessment (EIA) and looking at the design of the drilling program as well as rig availability.*
>
> *The sooner we get a complete and <u>not piecemeal reply</u> to our letter of 14th April 2009 and a response to the feedback requested from the Ministry of Energy submitted in meetings in March 2009 to the Chief Geologist, Mr. Omenge, the sooner we can commence with the Suswa development as outlined below.*[133]

237. These are consistent with the line of communications referred to already:

a. The emphasis by Mr Walji on WalAm's need for a PPA to be able to obtain finance;

b. The emphasis on the need for negotiation of a PPA, and absence of any suggestion that key terms had been agreed;

c. The absence of any suggestion that Kenya had agreed that WalAm need not progress anything unless and until a PPA had been concluded; and

d. The absence of any suggestion that there was an original agreement by the Licence or otherwise that a PPA was a precondition to performance of obligations in the Licence.

[133] Emphasis added.

F. WALAM'S POSITION IN RELATION TO THE PPA AFTER SEPTEMBER 2009

238. After September 2009, as discussed below, there were developments which show that it was possible for there to be preliminary discussions and negotiations of a PPA. It is not clear that conclusion of a PPA would have been impossible without the results of drilling. (Separate considerations in relation to the detailed financial information necessary for negotiation and WalAm's financial resources to conduct such negotiation are considered later.) The Tribunal does not consider that in itself to be significant. What is clear is that at no point did Kenya either through the Minister of Energy or otherwise agree or accept that WalAm did not have to proceed with drilling or other development work physically in and under the land until a PPA had been concluded. As has already been noted WalAm had been repeatedly stating that it needed a PPA and continued to do so. The consistency of that repetition in the Tribunal's view confirms the absence of any agreement or acceptance by Kenya of the position that WalAm sought to establish, that it need not comply with its obligations under the Authority to Explore and exploit the Licence until a PPA was concluded. That repetition confirms also that WalAm knew and understood that it had not obtained any such agreement. It is striking that the terms of WalAm's statements in relation to its need for a PPA did not refer to any alleged agreement with Kenya to that effect, or any suggestion that it had obtained Ministerial waiver or suspension of the need to comply with obligations it had assumed.

239. WalAm relies on evidence suggesting that the Minister was encouraging the conclusion of a PPA. An email dated 28 October 2009[134] from Mr Fred Mbatau to Mr Walji reports a meeting with the Minister in which Mr Mbatau says he told the Minister that WalAm "*require this PPA for security and that you are ready to start drilling early next year*" and the Minister is said to have stated that:

> [H]*e has already discussed the matter with both the PS* [Mr Nyoike] *and Njoroge* [KPLC] [presumably neither of whom were at the meeting] *and they have agreed the following … 2. To ensure this PPA is finalized quickly he proposed that you come the last week of November from 23rd November and finalize this PPA … He wants you to confirm this timing so that he can ensure KPLC and the*

[134] **[C-059]/[KE-30]**, Email from Mr Fred Mbatau (WalAm) to Mr Maherab Walji (WalAm), 28 October 2009.

> *negotiating team is ready to finalize this matter to enable WalAm to start drilling early next year.*

240. Putting on one side questions as to the reliability and accuracy of this evidence, it does not provide sufficient support for the position advanced by WalAm. Mr Mbatau does not say that the Minister was asked to agree that WalAm need do nothing including any drilling until a PPA was concluded. No reference is made to the Licence or the GRA. Nor was this email followed by any letter from Mr Walji claiming such agreement, waiver or suspension. That the Minister would have encouraged negotiations of a PPA with KPLC to progress is not surprising (and would be consistent with the earlier communications from Mr Mbatau referred to above and later correspondence specifically advising WalAm to do so). That is not sufficient however to assist WalAm.

241. Indeed the next communication from WalAm to the Minister, Mr Walji's letter of 14 January 2010,[135] is inconsistent with Mr Walji having any such understanding. It refers to meetings Mr Walji had in December 2009 and January 2010 including meetings with Dr Simiyu of GDC at which a different arrangement was discussed under which WalAm would develop Suswa in cooperation with GDC. Mr Walji asked for a detailed proposal in relation to that idea (which would have been consistent with GDC's mandate) to evaluate it. Mr Walji concludes his letter by saying:

> *If arrangement cannot be concluded then WalAm will continue with the exploration of the Suswa field and evaluate and explore the field further as per* ***Geothermal Resource Authority to Explore for Geothermal Resources in the Suswa Prospect*** *granted to WalAm after the current dialogue with GDC id* [sic] *concluded. As you are aware the obligations of Geothermal Authority have been fulfilled to date and WalAm is in compliance. Any delays while we await response from Kenya should not be construed as a delay by WalAm.*[136]

242. Importantly that letter was copied to Mr Nyoike.

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[135] **[C-029]/[KE-34]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 14 January 2010.

[136] Emboldened in original.

243. The Tribunal draws three points from this letter which become consistent themes over the subsequent period of some 22 months before the forfeiture:

a. First, as already noted, there is nothing to suggest that Mr Walji considered that the Ministry, either through the Minister or otherwise, had agreed or accepted that WalAm need do nothing in or under the land, otherwise fulfil obligations under the Licence or not perform obligations accepted as a condition of the grant of the Authority to Explore until it had a PPA.

b. Second, and to the contrary, Mr Walji affirmed without qualification or reservation the intention to proceed with exploration. Mr Walji's reference to the Authority is important because it was the Authority to Explore which contained the Work Program commitment. That Work Program did not contain any conditionality in relation to a PPA and assumed that WalAm would have the financial resources to effect it. WalAm was thus confirming that it understood its obligations under the GRA, Authority to Explore and Licence.

c. Third, Mr Walji's statements of compliance and references to delay can be seen, particularly in light of what follows, as betraying a consciousness on his part that WalAm was delaying. It was obvious that WalAm had not done what it had said it would do. In 2009 it had been saying it would start drilling in early 2010. It was not in a position to do so and would not become so. The Tribunal considers that Mr Walji's assertions of compliance and complaints of delay showed a full understanding on his part that WalAm was not able to comply and was delaying. As became clear, that was increasingly a concern of the Ministry.

244. These themes can be seen again in Mr Walji's next letter to the Minister of 30 August 2010.[137] Mr Walji wrote:

> *This correspondence is to provide you with an update of the progress that has been made to date and to keep you informed as to*

[137] **[C-065]/[KE-37]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), appending Letter from Dr Silas M Simiyu (GDC) to WalAm dated 23 March 2010, and Letter from Mr Maherab Walji (WalAm) to Dr Silas M Simiyu (GDC) dated 31 March 2010, 30 August 2010.

how WalAm intends to lead the development of Suswa Geothermal Field further.

…

Upon my return from Kenya and in order not to loose [sic] *more time, loose* [sic] *momentum and continue with progress WalAm had achieved to date, we continued to work on various aspects of Suswa Field Development as indicated below:*

1. Continued working with Sinclair Knight Merz (SKM) on the comprehensive Suswa Development Plan. [details were then set out of the discussions with SKM and the expectation of a finalized report by the end of the third week of September 2010]. Subsequently WalAm's technical team and I will attend to Kenya and provide you with a ***comprehensive work program for Suswa Development.***

2. While the work on the development plan was proceeding I dispatched Sandy Laing, P.Geo,Chief Technical Officer, to Kenya to complete the following tasks in order to keep moving the Suswa project further.

a) We had previously put out an RFP for an Environmental Impact Study and a SocioEconomic Study. Two Kenyan firms were short listed and Mr. Laing conducted a face to face interview with each in order to select the finalist. This was done.

b) To source out the availability of drilling rigs within Kenya. In this regard Sandy worked with our Kenyan consultant Mr. Mark Jenkins and Great Wall Drilling of China. They looked at the possibility of moving the drilling rig from Isiolo to Suswa. Also looked at the possibility of retaining the Crowkow rig which is being demobilized from Uganda.

c) Investigate further the best approach for providing water for drilling at Suswa. This information was needed to verify assumptions in the Suswa development plan.

d) Worked with the Engineering firm of Howard Humphreys to resolve some of the civil works challenges at Suswa and most certainly try and arrive at the best approach for providing water for drilling, staff and local residents. (Previously we had surveyed the residents of Suswa and their main need was water thus we are sensitive to that fact Suswa development plan should definitely take this into account).

e) Generally work on logistics in which regard he worked with our Kenyan consultant, Mr. Mark Jenkins.

f) Investigate the suitable office location and cost of rental for budgeting purposes.

g) Meetings with the Ministry officials to have general discussions regarding Suswa development. In this regard very productive meetings were held with Chief Geologist Mr. John Omenge. His input was very encouraging.

3) The company kept engaging the International investment community and Institutions to promote the Suswa development with positive results and the company kept up it's [sic] *public relations work with the investors with an eye to their future participation in future debt and equity.*

Hon. Minister, it may seem that WalAm has not been doing much work in Kenya due to perceived absence, however a lot of technical work, planning, management aspect work, etc: has been done by WalAm while other work was being done on behalf of WalAm by SKM, Howard Humphreys, Mark Jenkins, Martin Mwangi and other independent Consultants who WalAm has retained from time to time for specific tasks. Most certainly late Mr. Fred Mbatau played an important role in coordinating some of these activities, which will now lead to WalAm being ready to drill as per schedule in the Suswa Development Plan.

Honorable Minister, you will find the Suswa Development Plan very comprehensive dealing with various aspects of Suswa development from Environmental and Socio Economic Impact Studies right through to Plant commissioning. This will be a road map for WalAm to "Fast Track" the Suswa development here on forward. Furthermore, this document will lend itself well to your Ministry and K.P.L.C. to monitor the Suswa development and progress. You will find that using WalAm's approach will lead to faster development of Suswa field, due to the comprehensive approach that the company is taking using knowledge and technology; rather then [sic] *reactive and piece meal approach that is traditionally taken in exploration and development of geothermal fields.*

As soon as we finish an internal review of Suswa Development Plan, which would take about 10 days after the receipt of the final document from SKM, another ten days will be required to prepare 12 month Suswa ***work program for presentation*** *; subsequently we will request an appointment date to present our* ***work program*** *for Suswa prospect development Please anticipate this for late next month.*

Honorable Minister, we can confidently state that once you review the final Suswa Development Plan, you will appreciate how much

> ***attention to detail that WalAm has paid to Suswa, from Resource Evaluation to Development. In fact, at your discretion you will be proud to share Suswa Development Plan with the Kenya Cabinet of Ministers and how WalAm will be able to commence Development of Suswa well before the five year Exploration Authority expires and without requesting additional 5 year extension stipulated in the Kenya Geothermal Act.***
>
> *Hon. Minister Murungi, we thank you for your time, patience and support. Your sincerity in developing Geothermal Resources in Kenya is recognized and we hope one day the people of Kenya will thank you for it.*
>
> *Yours truly,*
>
> [Signature]
>
> *WALAM ENERGY INC.*
>
> *Maherab Walji. President*
>
> *C.c. Mr. Patrick Nyoike, P.S. Ministry of Energy.*
>
> *Dr. Silas Simiyu CEO, GDC.*[138]

245. The Tribunal notes the following from this important letter, consistent with the themes identified above.

a. First the letter made no suggestion that the commencement of actual development by drilling or other work on the land was conditional on or subject to a PPA.

b. Second, and consistent with the absence of any such condition, Mr Walji was promising the Minister that WalAm would propose a final Suswa Development Plan which would contain a comprehensive work program for development.

c. Third Mr Walji was clearly sensitive to the fact that there had been delay on WalAm's part ("*it may seem that WalAm has not been doing much work in Kenya*") and that what mattered in that regard was the commencement of drilling ("*will now lead to WalAm being ready to drill as per schedule in the Suswa Development Plan*") ("*This will be a road map for WalAm to 'Fast Track' the Suswa Development here on forward*"). Indeed, Mr Walji positively invited the Minister

[138] Emboldened in original and emphasis added.

and KPLC "*to monitor the Suswa development and progress*" by reference to the development plan that was to be submitted.

246. It is also to be noted that Mr Walji's comments on financing suggested that no investors had in fact been obtained ("*with an eye to their future participation in future debt and equity*").

247. For completeness the Tribunal notes that Mr Walji was asked in cross-examination why no mention was made by him of any PPA conditionality. He said that "[PPA] *requirement had been made clear right at the onset. I didn't see it necessary to mention that again and sound impolite in my letter*."[139] The Tribunal does not accept that that was the reason. Rather Mr Walji knew and understood that no such condition had been accepted and was, in his letter (which was copied to Mr Nyoike), anxious to state that progress would now be made to actual physical development by drilling in accordance with a program to be submitted and, he hoped, approved, in circumstances where he knew that Kenya was concerned about the lack of progress now almost three years after the grant of the Authority to Explore and Licence. The references to the expiry of the Authority to Explore show that, as always, Mr Walji was acutely aware of the statutory context of WalAm's rights and the obligations it had undertaken.

G. THE SKM DEVELOPMENT PLAN, WALAM'S 2011 WORK PROGRAM AND DISCUSSIONS WITH THE MINISTRY IN MARCH 2011

248. The Development Plan was not ready by the third week of September. On 9 December 2010 Mr Walji wrote to the Minister[140] to say that it had been received from SKM and that

> *During the next 10 days we will prepare and be ready to present to you the following:*
>
> *1.Progress report to date in regard to the Suswa Geothermal Field exploration.*

[139] Transcript D2:P484:L10-13 (Walji).

[140] **[C-066]/[KE-38]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 9 December 2010.

2.Next 12 months of Work Program that WalAm Energy Inc will undertake at Suswa.

3.A Comprehensive Suswa Development Plan which will take the Suswa Geothermal field from Environmental Impact Study through permitting, drilling exploration and development wells ultimately leading to the commissioning of a 75 MWe power generation facility: provided the geothermal resource at Suswa can support it.

The letter went on to propose a series of meetings starting with a 30 minute meeting with the Minister to present a brief synopsis of those matters. Mr Walji then stated:

The same day or the next morning we would be prepared to present, to your senior management and technical personnel from MOE and KPLC, a more comprehensive and detailed technical overview of the three topics mentioned above. Total time required will be approximately 4 hours. Please note the Suswa Development Plan report is approximately 150 pages including detailed project timelines, costs and economics. With all due respect, this will be of great interest to Mr. Nyoike P.S. at your Ministry, Mr. Njoroge CEO of KPLC and Senior economists from both entities.

…

After our presentation, we anticipate that it will take the Kenyan personnel approximately one week to complete their analysis and submit their report to you. During this time. WalAm will begin handling the numerous tasks required to get the Suswa project moving forward. Establish and lease a permanent office in Nairobi. award the contract for the Environn1ental Impact Study preferably to a selected Kenyan company, retain Kenya personnel in permanent job positions, begin the permitting process for the drilling program etc. Basically, following our road map for sustainable, efficient .and successful power project development at Suswa. This will be done with full transparency supported by independent third party report is prepared by internationally respected firms with expertise in Geothermal Systems Resource and Engineering fields.

Approximately one week after we arrive in Nairobi, Mr. Thomas S. Drolet, CEO of WalAm, along with the firm's Chief Financial Officer, would be prepared to join us for a further round of preset appointments with Senior Personnel of MOE/KPLC to discuss the terms of the Power Purchase Agreement (PPA). Finalizing the terms of the PPA is a prerequisite for the financial drawdown for drilling of the exploration wells and further development of the Suswa project. This is dictated by financial markets and is a normal

international practice when high risk capital intensive exploration drilling is undertaken.

The suggested series of meetings would be scheduled over a two week period, our suggestion being as follows:

1. Presentation to Honourable Minister of Energy - 30 minutes

2. Presentation to MOE/KPLC personnel - 4 hours

3. One week break for MOE/KPLC personnel to review the Suswa Development Plan Report and prepare their analysis and recommendations to you. WalAm personnel available to answer any inquiries.

4. WalAm CEO and CFO arrive in Nairobi. Maximum five working days stay.

5. MOE/KPLC and WalAm discuss and finalize the PPA 'terms' through a series of meetings over next three to five days.[141]

249. The Tribunal notes the terms of Mr Walji's reference to the terms of the PPA being a prerequisite for the financial drawdown for drilling. Mr Walji was not saying he had agreed to such a precondition – on the contrary he prayed normal international practice and the financial markets in aid of his position. His aspiration was clearly to have the Development Plan and Work Program agreed at the same time as finalising the terms of a PPA.

250. It is not clear what, if any, version of an SKM report was sent to WalAm in November 2010. Version 1 is dated 8 February 2011.[142] It provided estimated costs for Phase 1 Exploration which included exploratory drilling, Phase 1 Production drilling and Initial costs and Phase 2 Production Drilling costs for a 20MW project and a 55 MW project[143] but emphasised the uncertainties around technical and financial viability:

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[141] Emphasis added.

[142] **[R-010]/[KE-39]**, Sinclair Knight Merz, *Suswa Geothermal Power Plant – Development Plan (Version 1)*, 8 February 2011. The record contains later versions including Version 9 which is dated April 2013 (**[C-017]/[KE-99])** so the report was repeatedly updated.

[143] **[R-010]/[KE-39]**, Sinclair Knight Merz, *Suswa Geothermal Power Plant – Development Plan (Version 1)*, 8 February 2011, pp. 4-6.

Well productivity and injectivity has to be demonstrated – well costs are a major and highly uncertain component of the project.[144]

[A] *power plant can only be specified once the nature of well production is known and wells can only be sensibly located once surface based exploration surveys are done.*[145]

6.4 Exploration drilling is essential for confirming the reservoir characteristics that can only be inferred from the surface exploration. This "resource proving" is of strategic importance to the project for demonstrating to a very high level of confidence that the resource is sufficiently large and of suitable quality such that construction of a power plan is justified. … It is anticipated that conventional full-bore drilling (rather than slimhole drilling) will be utilised to achieve the exploration and resource characterisation objectives within the required timeframe.[146]

The drilling phase consists of three drilling stages (phase 1 – exploration, phase 1 production and phase 2 production) … Phase 1 (20MWe) – exploration drilling (initial 3 wells).[147]

6.4.2 Drilling Preparations and Approval: Based on the results of the exploration programme, a full specification for the well designs and required materials should be prepared, and a detailed cost estimate developed, based on tender prices. Drilling work involves very considerable expense, and should be subject to formal approval by WalAm and any funding partners. The approval decisions should also involve a review of the overall viability of the entire project, based on the firm cost information, if this is very different from initial assumptions made. Total drilling expenditure is contingent on success with initial wells: although not every well will be successful, in general expenditure can be curtailed if the results of previous wells are not sufficiently encouraging.[148]

6.4.3 Drilling: …. Full bore exploration wells (as opposed to slimholes) will confirm deep reservoir characteristics and confirm the production capacity of the resource for commercial power production. Based on GeothermEx's recommendation, WalAm and

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[144] *Id.* at p. 39.

[145] *Id.* at p. 40.

[146] *Id.* at p.41.

[147] *Id.* at p. 42.

[148] *Id.* at p. 43.

SKM have agreed that there should be an initial three development wells and, dependent on the well productivity and temperature results, a further three wells will be drilled during this first stage.[149]

6.5.1. Engineering: At this early stage of the project, a conceptual design and cost estimate for the power plant is used to inform development plans and pre-feasibility analyses. This work is very preliminary because little detailed information is available at this stage, particularly in relation to fluid enthalpy and steam conditions.[150]

7.2. Approach

Implementation of the Suswa geothermal project requires that the proposed development be demonstrated with sufficient confidence to be technically and financially viable, with all necessary regulatory approvals in place. In simple terms this requires the following activities. Where work has already been undertaken in these activities this is noted:

- *Three exploration wells will be drilled to determine that the geothermal resource is present and available to the project over its life. Initial field exploration work has been done to provide greater confidence in the available resource as verified by the Suswa GeothermEx report.*
- *Demonstrate that the resource will be available over the long term. This involves significant expenditure of both time and funds on drilling and well testing. In turn, these activities require specific infrastructure works and permits.*
- *Define the technical nature and cost of the proposed development. This involves engineering design, specification and tendering for the power plant, and also budgeting of operating costs. Need to address all the related environmental and social issues associated with the project, and obtain required permits. Cost estimates have been made within an accuracy range which will be improved in the coming months as further work is undertaken to indicate well productivity and site conditions.*[151]
- *Fully define the benefits of implementing the project including sale of electricity and other tangible and intangible benefits.*

[149] *Id.* at p. 44.

[150] *Id.* at p. 46.

[151] Mr Laing in cross-examination accepted that this showed that it would only be possible to know the well productivity if wells had been drilled. Transcript D3:P682-683 (Laing cross-examination).

This involves agreeing firm prices for the sale of electricity, and quantifying carbon credits available to the project. On-going discussions have taken place with Kenya Power regarding the PPA. Parameters have been agreed regarding the required rate of return to equity investors. The final PPA will be agreed prior to financial close, when the project costs and performance can be more reliably estimated.

- *Confirm the financial viability of the project, demonstrating that an adequate return will be earned on the required investment, given the degree of risk involved. A detailed financial modelling exercise has been undertaken and the required rate of return to equity investors has been discussed with KPLC.*

The project schedule shows all the key activities and their inter-relationships. At this point the schedule is based on a number of assumptions as well as experience from other projects. The schedule will be regularly reviewed in the light of new and emerging information, and adjusted as necessary as the project unfolds.[152]

251. For whatever reason and despite what Mr Walji had promised the Minister, WalAm did not provide a Work Program to the Ministry until February 2011. There are various versions of the 2011 Work Program in the record. It appears from a letter from Mr Walji to the Minister dated 8 March 2011[153] that a first version was presented in the first week of February 2011 in relation to which the Ministry asked WalAm to add timelines and budget allocations for each activity in the Work Program and for other clarifications. Nothing turns on the differences between the versions because counsel for the parties agreed at the evidential hearing that the version at Exhibit **C-067/KE-41** was the version that had been submitted following revisions to include timeliness and budgets.

252. Two particular matters of importance arise from the meetings and correspondence in relation to the Work Program in February and March 2011:

a. First it is clear that these discussions took place in a context where WalAm was made aware of the Minister's dissatisfaction with the lack of progress of development, the lack of work on the ground, and that the Licence was under threat of forfeiture; and

[152] Emphasis added.

[153] **[R-035]/[KE-44]**, Letter from Mr Maherab Walji (WalAm) to Mr Kiraitu Murungi (MOE), 8 March 2011.

b. Second, WalAm did not try to condition the work to be done on the ground under its Work Program on conclusion of a PPA and, though it clearly was looking to obtain a term sheet for a PPA in short order, there was no linkage between the dates of work to be done and the date when a PPA or term sheet would be agreed. More importantly Mr Nyoike confirmed approval of the Work Program on the basis that it would be strictly adhered to, and without reference to, indeed without referring at all the status of PPA negotiations.

253. As to the first, the Tribunal has already noted that Mr Walji was alive to concerns on the part of the Minister about delay because he had acknowledged and apologised for delay in his letters in 2010. There had now been yet further delay with the Work Program being proposed in February 2011 when it had been foreshadowed for September 2010. Mr Laing said in his witness statement that "[i]*n or around early 2011 Mr Nyoike threatened to take away WalAm's License on the basis that it had not yet drilled a well*".[154] In cross-examination he said that Mr Walji had indicated in early 2011 that Mr Nyoike had said that WalAm was under threat of having its Licence taken away.

254. There is support in the contemporaneous documents for finding that Mr Nyoike was indeed exasperated by WalAm's delays and in particular its failure to do "*work on the ground*" and that this was communicated to WalAm in the context of the discussions about the work program.

a. On 7 March 2011 Mr Nyoike wrote manuscript comments to the Chief Geologist on a letter from WalAm seeking a waiver of VAT as follows: "[t]*his is another delaying tactic. It is not prudent to have WalAm sit on this area doing virtually nothing*".[155] Mr Nyoike annotated comments to the Chief Geologist also on 7 March 2011 on a WalAm letter of 4 March saying: "[t]*his is totally unacceptable. Where is the legal opinion?*". He explained in his witness statement that with the ongoing lack of work and progress at Suswa, the Ministry of Energy's concern and

[154] Walji First Witness Statement, ¶ 18.

[155] **[R-012]/[KE-40]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE) with annotations, 28 February 2011.

frustration grew due to the fact that "*in Kenya's 20 year rolling Least Cost Development Power Plan geothermal power production was expected to be a major source of electricity for sale to the national grid.*"[156] When he wrote his comments to the Chief Geologist, he was frustrated with WalAm's lack of progress at Suswa. Three and half years had passed since the grant of the Licence and almost nothing had been done to progress the project. The reference to a legal opinion was to the obtaining of an opinion directed at whether WalAm had failed to comply with its obligations under the Licence.

b. This frustration and specifically the complaint that WalAm had failed to do anything at Suswa was undoubtedly communicated to Mr Walji at the meetings in February 2011 and as appeared from Mr Laing's evidence, Mr Walji understood the concerns to give rise to the possibility of the Licence being forfeited.

c. There may be some linkage between this threat and what Mr Walji stated in his letter to the Minister of 8 March 2011[157] that at the 21 February 2011 meeting Mr Nyoike had stated "*that WalAm had not done enough 'work on the ground'*". In that letter Mr Walji was alive to the problem of WalAm's delay ("*the Suswa geothermal development project is running 15 months behind the timeline WalAm had envisioned*") and that there was an issue about compliance with its obligations ("*Suffice it to say that WalAm Energy Inc is still fully in compliance with the Suswa Geothermal Authority granted to the company and further the 2011 Work Program presented to your Ministry in the first week of February 2011 keeps the company in compliance*"). Mr Walji said in evidence that during the meeting that had taken place before he wrote his letter the feedback from the Ministry was criticism for not having done enough work at Suswa.[158] In his letter he had written that Mr Nyoike had said that WalAm had not done enough "*work on the ground*" with that phrase in inverted commas because those were exactly the words used by

[156] Nyoike Witness Statement, ¶¶ 22-23.

[157] **[R-035]/[KE-44]**, Letter from Mr Maherab Walji (WalAm) to Mr Kiraitu Murungi (MOE), 8 March 2011.

[158] Transcript D2:P485-486 (Walji cross-examination).

Mr Nyoike.[159] Mr Walji understood that Mr Nyoike was referring to physical work at Suswa such as building roads, infrastructure and drilling.[160]

d. That accords with Mr Nyoike's evidence as to what his concerns were. Mr Nyoike explained in his evidence that his concerns about the lack of progress and work by WalAm were not directed at drilling specifically. Before drilling could take place there was work that needed to be done in the field – identification of sites for drilling, civil works for accessing sites, access roads, and water was a critical element that needed ground activities to get water to the sites for drilling.[161] In his conversation with Mr Mugambi Gituru (see below) he told him that he had seen the report on water supply options but on the ground there was nothing moving toward provision of that water for drilling.[162]

e. The linkage between this discussion and the "*in and under the ground*" requirement in the GRA is less clear in view of Mr Walji's description in his letter of a subsequent "*clarification*" obtained by Mr Mugambi Gituru from Mr Nyoike as to what was meant by "*work on the ground*" and then the generation of a "*Briefing Document*" which addressed 5 matters that WalAm said it was asked to address (attached to the 8 March letter[163]). There was extensive questioning in evidence about this document, which did not include drilling or other work which might have obviously been work of the kind contemplated by the GRA though, as referred to above, Mr Nyoike had concerns about the absence of physical work on the ground that would be a necessary prerequisite to drilling such as relating to roads and water.

f. The Tribunal does not consider it necessary or significant to resolve precisely who raised which of these five elements. Mr Nyoike's evidence was that Mr Mugambi Gituru had contacted him to obtain clarification as to what he had meant by "*work*

[159] Transcript D2:P486-487 (Walji cross-examination).

[160] Transcript D2:P487-488 (Walji cross-examination).

[161] Transcript D3:P813-817 (Nyoike cross-examination).

[162] Transcript D3:P818 (Nyoike cross-examination).

[163] **[R-035]/[KE-44]**, Letter from Mr Maherab Walji (WalAm) to Mr Kiraitu Murungi (MOE), 8 March 2011.

on the ground" and that Mr Nyoike had made specific reference to clauses 7 and 9 of the Licence.[164] He said that he had told Mr Mugambi "*that they needed to be doing some work in the field and then in addition to that, the reporting mechanism was detailed in Clause 9.*"[165] He specifically referred to other matters such as roads and water which would have entailed physical activity on the ground at Suswa.[166]

g. WalAm's awareness that it had delayed, that the Ministry was concerned about lack of progress of development and the threat of termination if progress was not made are clear from WalAm's own evidence and the contemporaneous documents.

255. As to the second important factual aspect of the February/March discussions, the Tribunal finds that WalAm, in seeking and obtaining approval of the 2011 Work Program, assuaged or at least deferred the concerns about lack of progress and activity by promising to carry out a program which included (at item 6) a Geothermal Drilling Program of five wells in the period April to December 2011 at an estimated cost of US$21 million.

256. Mr Nyoike wrote to Mr Walji on 23 March 2011[167] as follows:

> *Workplan on the Suswa Geothermal Prospect, 2011*
>
> *The meeting of 11th March, 2011 between a Ministerial team and yours on the above captioned subject matter, and your subsequent submission of a work plan for the year 2011 as per the regulations refers.*
>
> *I have noted from your presentation on the work programme that:*
>
> *1. A Resource Assessment of the prospect has been undertaken, and a development plan submitted where five (5) drill wells have been sited, with preliminary plans to drill* ***three (3) exploratory wells*** *at an estimated cost of USD 19,500,000;*

[164] Transcript D3:P813-814 (Nyoike cross-examination).

[165] Transcript D3:P814 (Nyoike cross-examination).

[166] Transcript D3:P813-817 (Nyoike cross-examination).

[167] **[C-019]/[KE-46]**, Letter from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), 23 March 2011.

2. The Environmental and Social Impact Assessment (ESIA) process, the development of roads and water infrastructure, and the establishment of a local office are all underway; and

3. The initial exploratory drilling programme is planned and budgeted for, with the first full diameter well estimated to be spudded in by December 2011;

*A budgetary provision of **US$ 15,680,000** for the work plan of the year **ending December 2011** has been provided as summarized below.*

Programmes	Timelines	Estimated cost	Status
Analyze the SKM Report	January 2011	$20,000.00	Completed 30th January, 2011
WalAm Office	February-March 2011	$250,000.00	Ongoing
Environmental and Social Impact Studies	February-April 2011	$50,000.00	Contract awarded 4th March, 2011
Owner's Engineer-Drilling and Engineering	18th February to July, 2011	$600,000.00	To commence
Infrastructural Development	February to December 2011	Roads: $2,700,000.00 Water pipeline: $4,960,000.00	Ongoing Preliminary discussions with relevant ministries completed 15th March, 2011
MT Survey	August to November 2011	$600,000.00	To commence
		Sub-total	**$15,680,000.00**
Geothermal Drilling Programme	April-December 2011	$6,500,000.00	1st well spud in December 2011
	January-December 2012	$13,000,000.00	2nd and 3rd well drilled by July 2012
		Sub-total	**$19,500,000.00**
		Grand total	**$35,180,000.00**

This is therefore to confirm that approval of your work plan is hereby granted, with the understanding that the schedule will be strictly adhered to.

By a copy of this letter, you are advised to seek direct audience with the Managing Director, Kenya Power and lighting Company

(KPLC) for negotiations on a Power Purchase Agreement (PPA) as per the regulations.[168]

257. The terms of Mr Nyoike's letter were clear. Approval of the work plan set out in the body of the letter was granted "*with the understanding that the schedule will be strictly adhered to*". The letter went on to advise WalAm to seek direct audience with the Managing Director of KPLC to negotiate a PPA. There was no linkage or conditioning as between the two. The work plan proposed by WalAm and approved by this letter provided for "*Infrastructure Development*" including roads and water pipelines in the period February to December 2011 and the drilling programme to commence in the period April to December 2011 with a view to first well spud in December 2011.

258. The advice to WalAm to seek direct audience with KPLC to negotiate a PPA was consistent with what Mr Shibuyanga described as the practice that the Ministry of Energy would issue a letter which guided the developer and KPLC to commence negotiations of a PPA.[169] Mr Nyoike's letter was copied to Mr Njoroge, the Managing Director of KPLC.[170]

259. WalAm may have regarded it as critical to obtain a PPA to be able then to raise the finance necessary to start physical work (the workplan showed a budget of over US$15 million even before getting to the drilling programme and another US$19.5 million for the drilling programme) but the work plan proposed was not conditioned on obtaining a PPA first though it emphasised the intent to conclude a Term Sheet for a PPA in March 2011.[171]

260. More importantly Mr Nyoike's letter did not approve the work plan on the basis that nothing might be done if no PPA was obtained. On the contrary its terms required the

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[168] Emphasis in original.

[169] Transcript D4:P1175:L18-P1176:L3 (Njagi Tribunal's questions). See also **[SD-086]**, Kenya Energy Regulatory Commission, "Approval of Power Purchase Agreement: (Geothermal Energy-Non FiT Based)", describing a process whereby the Investor will seek a go ahead to negotiate with KPLC and the Permanent Secretary will grant the investor authority to do so.

[170] It is pertinent to repeat that KPLC was a private corporation listed on the Nairobi Stock Exchange, with the government having a controlling 50.1% interest and the remaining shares held by private investors.

[171] There are five documents that are or relate to what WalAm proposed as the 2011 Work Program – **[C-018]/[KE-141]**, **[C-021]**, **[C-031]**, **[C-067]/[KE-41]** and **[C-074(d)]/[KE-55]**. In response to a query from the Tribunal the parties agreed that **[C-67]/[KE-41]** was submitted by Mr Walji and Mr Laing to the Ministry in March 2011 and was the version on the basis of which Mr Nyoike wrote his 23 March 2011 letter (**[C-019]/[KE-46]**).

schedule to be strictly adhered to. Further the letter noted that the work programme presented at the meeting of 11 March 2011 between WalAm and a Ministerial team had stated that "[t]*he initial exploratory drilling programme is planned and budgeted for with the first full diameter well estimated to be spudded in by December 2011*". This suggests that the Ministry had been told that WalAm had the money already for the first well (which would be consistent with the suggestion in section 6 of the Work Program document[172] that described the status of the Geothermal Drilling Program as "*Ongoing*").

261. The Tribunal accordingly finds that the Ministry had established a clear position as of March 2011, that it had concerns about lack of any development progress by WalAm and compliance with its obligations, and that it required strict adherence to the Work Program that WalAm had itself proposed. The Ministry was entitled to expect WalAm to have completed drilling of a first well by December 2011 and the second and third wells by July 2012.

H. OTHER CORRESPONDENCE FEBRUARY/MARCH 2011

262. There had been a flurry of correspondence in February and March 2011 in relation to matters which could be regarded as ancillary to but not actually progressing physical development work suggesting that WalAm was trying to generate activity, engaging with various Kenyan authorities and third parties but in a way which would not involve significant expenditure.[173] None of it evidences any physical activity on Suswa.

263. For completeness an email from Mr Walji to Ms. Njagi (the KPLC Company Secretary) of 16 March 2011[174] should be mentioned. Mr Walji stated:

> *As you may have been informed by Mr Njoroge that MOE and WalAm have agreed on 2011 Suswa Geothermal Development work program. Part of WalAm's conditions are that before the company*

[172] **[C-067]/[KE-41]**, WalAm 2011 Work Program – Finalized, March 2011.

[173] **[C-025]/[KE-197]** (Ministry of Roads and Ministry of Water); **[R-012]/[KE-40]** (Ministry of Energy, VAT and import duties); **[R-013]/[KE-198]** (Commissioner of Lands, maps); **[C-068]/[KE-42]** (request for proposal to provide drilling equipment); **[C-26]** (Ministry of Roads); **[R-15]/[KE-200]** (Chief Geologist); **[R-14]/[KE-199]** (Chief Geologist and GDC); **[R-016]/[KE-143]** (appointment of Redplan to complete ESIA); **[C-69]** (request for budget for drilling equipment for the purposes of discussions with the MoE); **[R-17]/[KE-201]** (Chief Geologist and Redplan).

[174] **[C-070]/[KE-45]**, Emails between Mr Maherab Walji (WalAm) and Ms Laurencia Njagi (KPLC), 16 March 2011.

> *commences and commits high capital expenditure in high risk geothermal exploration well drilling, a mutually acceptable PPA be in place. In this regard I have been asked to request from you a draft PPA for our review ….. It is the Hon Minister for Energy's expectation and Mr Nyoike concurs that WalAm fast track the Suswa development and commence drilling Q4 2011...*

264. The Tribunal does not view this email as altering the evidential picture as to what Mr Walji sought, what he obtained and what he understood by the end of March 2011.

a. Though he purported to copy Mr Nyoike into the email he used an incorrect email address (pnyoike@energymin.co.ke instead of pnyhoike@energymin.go) and the email did not reach Mr Nyoike.[175]

b. It would not in any event have called for a response from Mr Nyoike who was about to write formally to WalAm in relation to the terms of approval of the work plan.

c. The email was sent on 16 March before Mr Nyoike responded on 23 March.

d. WalAm's Work Plan as proposed had not in fact sought to make it a condition that a PPA be in place before work commenced. As discussed above, item 9 of the Work Plan suggested that a Term Sheet and finalisation of a PPA take place before the end of March.

e. In any event even if Mr Walji had been seeking that as "*part of WalAm's conditions*" when he received Mr Nyoike's letter of 23 March he knew and appreciated that there was no such condition or any linkage between the conclusion of a PPA and the steps in the Work Plan which the Ministry was requiring WalAm strictly to adhere to. Indeed Mr Walji's use of the phrase "*WalAm's conditions*" rather than any suggested agreement of such condition, together with the reference to the Minister's expectation that drilling be commenced Q4 2011 confirms that Mr Walji well appreciated that he had not got any agreement on the part of the Ministry to such a condition.

[175] Transcript D3:P849-851 (Nyoike cross-examination).

I. APRIL 2011 TO 18 APRIL 2012 I.E. THE PERIOD BETWEEN THE NYOIKE 23 MARCH 2011 APPROVAL OF THE WORK PROGRAM LETTER TO THE SHOW CAUSE LETTER OF 18 APRIL 2012

(1) April 2011

265. On 12 April 2011 Mr Walji wrote to Mr Nyoike[176] stating:

> *Thank you for your correspondence of March 23, 2011. confirming and approving WalAm's 2011 proposed Work Program. It is WalAm's intent to perform as proposed; which as you will realize and appreciate that it is dependent on the host country cooperation and required timely action.*
>
> *The immediate necessity being the conclusion of satisfactory Power Purchase Agreement 'PPA' with bankable commercial terms satisfactory to both parties i.e. KPLC and WalAm. This will enable us to commit funding for drilling and infrastructure developments which as you are aware require long lead time.*
>
> ….
>
> *We would like to advice you and re-affirm that, as stated in our 2011 Work Program, all of the proposed tasks timelines are contingent on WalAm concluding an **acceptable** PPA prior to the end of May 2011. Meanwhile other work is running concurrently; otherwise, we likely not have sufficient time required to carry out the work program as outlined. We are proceeding with such premise.*[177]

266. The Tribunal considers that the terms of this letter again confirm what had already been established and well understood. Mr Walji did not believe that he had obtained agreement from the Ministry that timelines were dependent on a PPA being concluded. The Work Program proposed had not contained such a contingency. The approval of it was not contingent, indeed it required strict adherence to the dates proposed. The May 2011 date was new and not reflective of anything discussed let alone agreed.

(2) May 2011 to December 2011

267. There is no evidence of anything being done by WalAm which actively progressed development, particularly with regard to physical activity, after the work plan was agreed

[176] **[C-020]/[KE-47]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), 12 April 2011.

[177] Emphasis in original.

and directed in accordance with the Ministry's 23 March 2011 letter. Exchanges with KPLC in relation to obtaining a draft PPA are discussed separately below but since no linkage with a PPA had been agreed, they are not material. There is correspondence in relation to Redplan and the environmental and social impact assessment ("**ESIA**") report which is of significance in indicating what WalAm were and were not doing at this time which is separately discussed below.

(3) Comparison of work done in 2011 with the 2011 Work Program

268. Even apart from first drilling, it is worth noting what work WalAm said would be done in 2011 and to which it committed and the Ministry approved. The table in Mr Nyoike's 23 March letter set out the "*Programmes*" and adopted the timelines proposed by WalAm in the Work Program but without the detailed steps of each programmes being copied over from the proposed Work Program. Looking only at the table, it can be seen that WalAm stated that they would within 2011 complete:

a. WalAm Office;

b. Environment and Social Impact Studies;

c. Owner's Engineer-Drilling Engineering;

d. Infrastructural Development; and

e. MT Survey.

269. The detail of the programmes on WalAm's work plan as submitted[178] shows that WalAm Office was to involve finalising plans for a WalAm Energy Inc Nairobi office including appointing a General Manager at an estimated cost of US$250,000.

270. Owner's Engineer was to involve the issue of RFPs, interview and screening of Geosciences, Geothermal Resources, Drilling and Engineering engineers at an estimated cost of US$600,000.

[178] **[C-067]/[KE-41]**, WalAm 2011 Work Program – Finalized, March 2011.

271. The Infrastructure programme details refer to the fact that road and water are crucial to the commencement of the drilling, and since drilling was to be initiated with the first full diameter well to be spudded by December 2011 (see 6g and 6h), the road and water works necessary were being programmed to be done during 2011. Substantial cost was associated with Infrastructural Development (Roads US$2.7 million, Water Pipeline US$4.96 million).

272. Even those matters of a relatively modest cost though not involving physical activity at Suswa were not completed, or much progressed.[179] By way of small example, even the setting up of a Nairobi office with a general manager was not done.[180]

273. That there was no such progress is not surprising. WalAm did not have the financial or technical capability to make any such progress. If it had access to the technical capability it did not have the financial means to utilise it. On 7 November 2011 Mr Walji wrote the Mr Nyoike, sending him "*the final Suswa ESIA*" prepared by Redplan.[181] He told Mr Nyoike that he was still awaiting a draft PPA from KPLC which he expected by

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[179] There is an annotated version of the 2011 Work Program with the status column amended and various comments noted in the Program **[C-074(D)]/[KE-55]** which shows the extent of progress on the ESIA and the absence of progress on other programmes. Some matters were suggested to be awaiting response from the MOE and the work plan did emphasise that it would require "*timely and cooperative efforts with all stakeholders*" – namely, WalAm, Ministry of Energy, GDC, KPLC, Ministry of Water and Irrigation, Ministry of Roads and NEMA. It is not dated but WalAm says that it was sent under cover of the letter of 16 April 2012 **[C-074(C)]/[KE-61]** which was itself an attachment to WalAm's responses to the Show Cause letter which were sent by email on 23 April [**C-074(A)]/[KE-65]** . It must have been prepared some time after October 2011 because it refers to the Redplan ESIA report having been completed on October 11#, 2011. It refers also to "RFP Updated April 2012" which may be a reference to the GeothermEx 5 April 2012 updated proposal **[C-074(H)]/[KE-60]**. A number of the programmes are marked in the status column as "*Pending completion of PPA*". In addition a "*2011 Annual Report*" **[C-074(E)]/[KE-56]** illustrates similarly the lack of material progress and completion of the matters on the various programmes. The accuracy even of that document is questionable in material respects – for example in suggesting that as of 11 October 2011 the ESIA was "*completed and ready for submission to NEMA*" which is contradicted by the record of communications with Redplan, considered in detail below. The document says that *t*he "*Submission to NEMA waiting on completion of PPA*" but it is unclear why that process should have needed the PPA to be in place, other than perhaps because WalAm did not even have the money to pay the NEMA fee estimated in this document to be US$150,000.

[180] As appears from WalAm's internal document 2012 Proposed Work Program which Mr Laing prepared and on which Mr Walji commented. **[C-030]/[KE-57]**, WalAm Energy Inc 2012 – Proposed Work Program Suswa Geothermal Concession, 2012 and Transcript D2:P412 (Walji cross-examination). It was being suggested that this would not now be done until the third quarter of 2012.

[181] **[C-028]/[KE-53]**, Letter from Mr Maherab Walji (WalAm) to Mr. Patrick Nyoike (MOE), appending REDPLAN Consultants Ltd., *Environmental and Social Impact Assessment (ESIA) Mount Suswa Geothermal Concession*, 7 November 2011.

December 15. He stated that "[u]*pon review and satisfactory conclusion of the same we will be proceeding with permitting for Suswa drilling program as indicated in our 2011 work program*."

274. The ESIA report had been due, under the work plan set out in Mr Nyoike's 23 March letter in February to April 2011 (the dates that WalAm had itself proposed). Regardless of the PPA, WalAm was not meeting its own proposed Work Program even for those preliminary matters which involved modest expenditures. Mr Walji did not attempt to address in his letter to explain the inaction and delay or to put revised dates on other steps in the Work Program.

275. An email to a potential investor of 8 December 2011[182] gives a striking picture of how financially restricted WalAm was and the reason why WalAm was unable to progress in a timely way even those matters which did not require major expenditure. Mr Walji indicates that "*WalAm is currently seeking US $3 million private equity investment to cover G&A* [general and administration], *expenses for concluding PPA, permitting to take the project towards drilling stage as outlined in SDP* [Suswa Development Plan]".

276. As Mr Walji accepted in cross-examination, WalAm had not had and still did not have by December 2011 the funds necessary to cover the cost and expenses of negotiating and concluding a PPA.[183] The reference in the same email to "*hav*[ing] *$30m*" in private equity backing for drilling was, Mr Walji said, in fact an indication from various individuals "*that they would be able to raise 30 million*."[184]

277. There is an annotated version of the 2011 Work Program with the status column amended and various comments noted in the Work Program[185] which shows the extent of progress on the ESIA and the absence of progress on other programmes. It is not dated but WalAm

[182] [**R-038]/[KE-140]**, Emails between Mr Maherab Walji (WalAm), Mr Lawrence Riungu, and others, 8 December 2011.

[183] Transcript D2:P380-383 (Walji cross-examination).

[184] Transcript D2:P383-384 (Walji cross-examination).

[185] **[C-074(D)]/[KE-55]**, WalAm 2011 Work Program Updated to 31 December 2011, 31 December 2011.

says that it was sent under cover of the letter of 16 April 2012[186] and was together with that letter one of the 9 attachments to Mr Walji's email sent in response to the show cause letter (discussed further below). It must have been prepared sometime after October 2011 because it refers to the Redplan ESIA report having been completed on 11 October 2011. It refers also to "*RFP Updated April 2012*" which may be a reference to the GeothermEx 5 April 2012 update proposal.[187] A number of the programmes are marked in the status column as "*Pending completion of PPA*". Whatever its precise date, it confirms that WalAm did not and was not able to progress and complete the many matters it had said it would and that the Ministry had agreed should be done in 2011, work which included both preparatory work for development and physical activity on Suswa necessary to enable drilling to commence. Though WalAm described matters as "*pending completion of PPA*" the effective suspension of any significant work of any kind, including that which should not have needed to await a PPA even on Mr Walji's view of the conditioning of commencement of drilling activity, must be seen as consequent on WalAm's lack of financial means and inability to build technical capacity to progress.

(4) Redplan and the ESIA process

278. In relation to the ESIA process, there was an inability to progress and complete it and evidence of delay by WalAm.

a. Redplan had been appointed in March 2011 to undertake the ESIA for the area to enable drilling of three wells, which would encompass all project planning, access road construction, pre-drill operations, a drilling environmental management plan

[186] **[C-074(C)]/[KE-61]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending various documents, 16 April 2012.

[187] **[C-074(H)]/[KE-60]**, GeothermEx, Inc., *Proposal for Services: Suswa Geothermal Project – Drilling Engineer Assistance*, 5 April 2012.

and other baselines studies.[188] The report would be used to obtain environmental permits.[189]

b. The Work Program showed a timeline for completion of the report, and submission to NEMA for approval across the period February to April 2011 and 1 May to 15 June 2011 with permits being obtained from June 15 onwards.

c. On 9 May Mr Laing emailed Mr Krhoda of Redplan to say that he understood that the ESIA was progressing very well and that he looked forward to receiving the draft report as soon as available.[190] Mr Krhoda replied the same day to say that they had completed gathering field information and that they were on schedule and would be able to send the draft report soon. [191]

d. An email from Mr Krhoda of Redplan of 3 July 2011[192] suggests that there was a draft report available to WalAm by that date but that WalAm was delaying or slowing down Redplan's ability to progress the report and the steps necessary to move it forward with consultation with the appropriate bodies.[193]

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[188] **[R-016]/[KE-43]**, Letter from Mr Sandy Laing (WalAm) to Mr Patrick Nyoike (MOE) with annotations, attaching Redplan ESIA Terms of Reference for Suswa Geothermal Concession, 4 March 2011.

[189] See [**R-016]/[KE-43]**, Letter from Mr Sandy Laing (WalAm) to Mr Patrick Nyoike (MOE) with annotations, attaching Redplan ESIA Terms of Reference for Suswa Geothermal Concession, 4 March 2011, Terms of Reference.

[190] **[R-019]/[KE-49]**, Emails between Mr Sandy Laing (WalAm), Mr George Krhoda (Redplan), and others, 9 May 2011, p. 1.

[191] **[R-019]/[KE-49]**, Emails between Mr. Sandy Laing (WalAm), Mr. George Krhoda (Redplan), and others, 9 May 2011, p. 1.

[192] **[R-037]/[KE-151]**, Email from Mr George Krhoda (Redplan) to Mr Sandy Laing (WalAm) and others, 3 July 2011.

[193] "*I write again to request that you allow the ESIA process to move on unless there are serious issues that you may want to raise at this stage. There are still rounds and other layers of bureaucracy that the report shall go through and therefore changes will be made still. The lead agency is friendly, but the document shall be sent to many stakeholders, held in public office for inspection and gazetted for 21 days for comments. After which NEMA shall compile comments that will need to be addressed. ….*

I do not know why WalAm thinks that the Report is shoddy while still unread, and delayed. It is probably the right time for your technical person who will be pursuing the licence to be in NBO to meet some of the players here. Please help the process move."

e. An email of 22 July 2011 shows Redplan chasing for payment of an unpaid invoice.[194]

f. In a detailed email from Mr Krhoda of 4 August 2011 summarising the position, he says that WalAm have already had the draft report and that WalAm has delayed the process. Mr Krhoda's assessment gives a good idea of the state of play and absence of progress at that date and is worth quoting at some length:

> *You must have received the Draft Report (pdf) with the comments that we needed to proceed by receiving your comments/suggestions, edit and lodge the Final Draft with NEMA with copies to be sent to the Ministry of Energy and District Environment Committees of the respective districts. We also sent invoices for payment of the second tranche according to the contract. You are also aware of our brief regarding the entire process leading to the finalization of the ESIA Study. Sandy had introduced Bob Mick, WalAm's environmental consultant who was to contact us and to discuss the progress of the Suswa ESIA.*
>
> *I must confess that the responses from yourselves to us have not been very good; always delayed, probably because of your busy programmes. We emphasised the need for a quick implementation of the study and also raised pertinent issues of the study being side tracked by distractions if we did not finalize as discussed and contracted. The comments that were expected from Sandy and Bob never came, our requests for payment to enable us to discharge our Research Assistants and part time consultants never replied to, and the essence of allowing the process to be concluded never responded to.*
>
> *Allow me to state the following:*
>
> *1. The study has been grossly delayed due to limited response to every suggestion that we made on the way forward in bringing the ESIA Study to a logical conclusion*
>
> *2. Our requests for payment after we sent the invoice was never responded to thus causing the company unnecessary financial stress.*

[194] **[R-019]/[KE-49]**, Emails between Mr Sandy Laing (WalAm), Mr George Krhoda (Redplan), and others, 9 May 2011, p. 4.

3. There has been limited technical input on the design and Programme of Action after the ESIA has been examined and before an EIA Certificate is awarded as required for payment of NEMA fees.

I am not qualified to advice the company that there are several issues that will cause us to regret these delays, and some are of very dangerous proportions:

1. We have increasingly lost the good will of project supporters on the ground, including the Provincial Administration who were quite upbeat about the development taking place during their tenure of duty in the region. The district leaders, politicians and civil society groups rallied around the project in spite of several unknowns that we agreed will be discussed downstream. Instead of keeping project supporters informed and briefed on next steps, all of us have gone quite thus dimming their hope.

2. There is growing discontent regarding the legitimacy and sincerity of the investor. The local people are able to see progress of geothermal drilling and exploration going on in other places along the Rift. WalAm neither has a local office nor a strong presence in the country.

3. REDPLAN Consultants Ltd is a small firm that can be easily paralyzed by delays in payment while retaining consultants that have completed their work but the payment has stalled in the pipeline.

4. The changing political environment will catch with you in your tracks. The tenure of the present parliament/government is coming to an end. The incumbent President will retire and a new leadership is expected after the general elections, probably by August 2012. The new leadership may imply new senior officers and WalAm shall be starting negotiations afresh in everything they want to accomplish. Of course you will have the Papers and Agreements, but that will be all that you shall show. If Mr. Mugambi has not advised you on this then probably you need a political/investment analysts to help navigate the process.

Allow me to confess that time is of essence in negotiations of such huge investments which have several stakeholders, and need for powerful strings to be pulled at the same time. In this case reducing the numbers of distractors and tilting support to the project supporters in order to achieve the desired results will be the best investment for WalAm at the present time.

g. That email, if accurate, is a striking indictment of WalAm's failures to progress the project and existential financial and technical limitations. It is significant precisely because this related to a process (the ESIA report process which would lead to permitting) which was a prerequisite to drilling but not part of the drilling program. Even taking Mr Walji's PPA precondition position at its highest, he was saying that drilling could not commence until WalAm had a concluded PPA. The ESIA process was never suggested to be affected by or subject to a PPA. The estimated costs of the entire ESIA process including obtaining permits was shown as US$50,000 in the Work Program. The email also gives a good picture of the general concern in Kenya by stakeholders about lack of progress, especially when other geothermal projects were progressing. The reference to "*growing discontent regarding the legitimacy and sincerity of the investor*" is not made with regard to the Ministry of Energy but more generally, but it resonates consistently with the concerns that were being expressed by Mr Nyoike in March 2011.

h. The Tribunal has no evidential reason to doubt the accuracy of the email. Redplan had no reason to misstate the position. There is no reply email or communication in the record in which WalAm respond or otherwise dispute anything which Mr Krhoda says.

i. The next communication in the record is an email of 2 November 2011[195] when Mr Krhoda informs WalAm that it must pay the EIA licence fees to NEMA of 0.05% of the total estimate project cost of US$30,150,000 (i.e. about US$15,000).[196] Mr Laing responds:

> *We are very pleased with the progress to date regarding the ESIA, however, I was under the impression that we were still one step away from submitting to NEMA. My impression was that there was one more round of consultation where the stakeholders would make their final comments, WalAm would respond, if required, to the final*

[195] **[R-020]/[KE-152]**, Emails between Mr George Krhoda (Redplan), Mr Sandy Laing (WalAm), and others, 2 November 2011.

[196] The WalAm "*2011 Annual Report*" suggests that the fee may have been US$150,000. **[C-074(E)]/[KE-56]**, WalAm Energy Inc 2011 Annual Report Suswa Geothermal Concession, 31 December 2011, p. 2.

comments, the report would undergo its final review and edit and then it would be ready for submission to NEMA for a formal review.

to which Mr Krhoda replies:

Thanks for your communication.

The next process is handled by NEMA and the District Environment Committees, chaired by the respective District Commissioners and Ministry of Energy. After this round of discussion, the report will come back to us to make the necessary changes. WalAm representative must attend these final meetings.

There is no need of arranging one more round of public consultation where the stakeholders would make their comments. The next public consultation process is one managed by NEMA as required by law. WalAm would respond, if required, in the consultations with stakeholders during these final meetings with the district leaders and local communities. The changes will not commit WalAm to any social responsibility except the traditional ones such as service provision such as employment for local people, etc. After which the report would undergo its final edit after the stakeholders' consultation and signed to become a NEMA Report carried out by an interdependent consultant as required by the law.

I suggest that we proceed in this direction as expeditiously as possible.

j. That exchange confirms that the delay had been on WalAm's side. Mr Laing's affirmation of Redplan's work and progress was unqualified. Mr Laing says in his witness statement that Redplan had sent its report to WalAm in September 2011.[197] He makes no comment on the issues raised by Mr Krhoda.

[197] Laing Witness Statement, ¶ 12.

k. The Redplan report sent to Mr Nyoike on 7 November 2011[198] was undated and unsigned and there was some question as to whether this was because final payments for it had not been made.[199]

l. Nothing further appears to have happened because in March 2012 Mr Krhoda emailed Mr Walji[200] saying:

> *It has been a little while since we heard from you. We are increasingly becoming anxious that the process of completing the ESAI* [sic] *study to its logical conclusion has grounded to a halt and your initiatives in the sector abandoned on its truck. While we appreciate that the investment required for the project is enormous and complex, it is your responsibility to complete the process that you had initiated and for which you have running contracts.*
>
> *We would like to conclude this assignment and close our books as soon as possible. Of course the Ministry of Energy, NEMA and the stakeholders continue to enquire the status of the study and the prospects for investment in their region. Currently we are engaged in related geothermal assessments and this pending work does not support our expertise in this area.*
>
> *We shall appreciate if you could provide us with your up-dated plan on how you would like to conclude this task and also pay us for our services.*[201]

m. There is no response in the record. An email from Mr Krhoda in December 2012[202] suggests that WalAm had done nothing further in this regard since November 2011 and had not paid Redplan's outstanding invoices.

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[198] **[C-028]/[KE-53]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending Redplan Consultants Ltd., *Environmental and Social Impact Assessment (ESIA) Mount Suswa Geothermal Concession*, 7 November 2011.

[199] See **[R-020]/[KE-152]**, Emails between Mr George Krhoda (Redplan), Mr Sandy Laing (WalAm), and others, 2 November 2011 and Transcript D3:P613-615 (Walji cross-examination).

[200] **[R-021]/[KE-146]**, Emails between Mr Maherab Walji (WalAm), Mr George Krhoda (Redplan), and others, 16 March 2012.

[201] Emphasis added.

[202] **[R-023]/[KE-85]**, Email from Mr George Krhoda (REDPLAN) to Mr Maherab Walji (WalAm) and others, 6 December 2012.

(5) Conclusions on work done in 2011

279. As to whether such work as was done in 2011 was legally significant in relation to the termination, this issue is discussed in Section VIII.B. WalAm relied in its Closing Submissions on the "*2011 Annual Report*".[203] The assessment of what is described there in comparison with the approved 2011 Work Program has been considered above. Regardless of the legal requirements, from a factual perspective WalAm failed in 2011 to complete any of the matters which it said it would complete within that year.

(6) January to April 2012

280. Mr Laing prepared an undated "*2012 – Proposed Work Program*" which showed "[p]*ending the mutually satisfactory completion of a Power Purchase Agreement (PPA) the following work program is proposed for 2012*."[204] It is an internal discussion document, not sent to the Ministry, and contains Mr Walji's comments in red at the end.[205] The document is of significance for two reasons:

a. It shows what work that had been included in the 2011 Work Program that should have been done in 2011 had not been done – the document states "*Note that most of the 2012 work program consists of deferred work from 2011*." It thus confirms what has been concluded above in relation to WalAm's failure to do in 2011 even those matters which WalAm had not sought condition on conclusion of a PPA and of modest cost such as hiring a General Manager for a Nairobi office and submitting the ESIA to NEMA.

b. Mr Walji's comments on Mr Laing's draft are revealing in showing that the time line that had been proposed to and approved by the Ministry in March 2011 was never achievable even if a PPA had been concluded. Mr Walji comments that:

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[203] **[C-074(E)]/[KE-56] (**referred to in footnote [196] above); See Claimant's Closing Submission Presentation, slide 25.

[204] **[C-030]/[KE-57]**, WalAm Energy Inc 2012 – Proposed Work Program Suswa Geothermal Concession, 2012.

[205] See Transcript D2:P412 (Walji).

This is time line we both want but it is way too tight for the following reasons:

Raising the $30MM [the estimated cost of exploratory drilling and associated infrastructure[206]] *takes 6 months which means June through December as we can't raise anything without a signed PPA.*

We won't/can't award contracts prior to having the money in hand and we need about $8MM to build our share of the infrastructure and another $0.5m to 1.0MM to do the engineering for the wells.

…

5. I would say the time line should be spread over another 6 to 12 months to be realistic.

c. This demonstrates that the Work Program proposed by WalAm and approved by Mr Nyoike was never realistic or viable. That program showed a PPA (or perhaps term sheet for a PPA) being concluded by 31 March 2011 and items 6a to 6g of the drilling program commencing in April 2011 and being concluded in December 2011 (including initiating the drilling of up to three full diameter geothermal wells) and item 6h the first full diameter well to be spudded December 2011.

d. The Tribunal does not need to assess whether this raises questions about Mr Walji's belief in the schedule he proposed to Mr Nyoike in March 2011 in the face of the concerns about WalAm's lack of progress and failure to develop at that time. It does however show that even if a PPA had been concluded, WalAm would not have been able to meet its own proposed schedule for works in 2011 and that there would have been periods of more than 6 months when WalAm would have been doing no work at Suswa while it sought to raise finance . Even Mr Laing's 2012 timelines shows nothing being done on the land until the fourth Quarter (road construction, water pipeline construction and drilling in late December). Mr Walji said that contracts could not be awarded until finance was raised which would defer Mr Laing's third quarter work program items 4 to 7 in relation to awarding contracts. Mr Walji was in effect telling Mr Laing that, even with a PPA negotiated and completed as suggested by Mr Laing by June 2012, no work would be done on the

[206] Transcript D2:P411 (Walji cross-examination).

ground until well into 2013 (six months to raise finance; then contracts to be awarded, then work to commence on infrastructure, then drilling).

281. The Tribunal discusses the legal issues in relation to the show cause letter and any questions of notice or absence of notice in relation to the Forfeiture Notice in Section VIII.B below. Without commenting on the legal significance of the question, the Tribunal finds that on the basis of what was and was not done in 2011, and on the basis of WalAm's contemporaneous documents in 2012 as to its financial limitations and projected timelines, even if the Minister had given notice in early 2012 that WalAm should commence work in or under the land within six months (whether in relation to infrastructure work or drilling) it would not have been able to do so.

282. On 5 April 2012 GeothermEx provided an update on their 2009 proposal for technical services related to the drilling engineer requirements at Suswa.[207] It is not suggested that this proposal was accepted or progressed and WalAm does not rely on this proposal as work completed in 2012.[208]

283. WalAm says that a letter dated 16 April 2012 from Mr Walji addressed to Mr Nyoike "*providing you with an update to the 2011 Suswa Work Program*" and other documents[209] was sent by Mr Walji attached to an email of 23 April 2012 responding to the show cause letter.[210] Because there is an issue as to whether it was sent and because even on WalAm's case it was not sent before the show cause letter, it is dealt with below when that email is considered.

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[207] **[C-074H]/[KE-60]**, GeothermEx, Inc., *Proposal for Services: Suswa Geothermal Project – Drilling Engineer Assistance*, 5 April 2012.

[208] See Claimant's Closing Submission Presentation, 24 May 2018, slide 26.

[209] **[C-074(C)]/[KE-61]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending various documents, 16 April 2012.

[210] **[C-074(A)]/[KE-65]**, Email from Mr Maherab Walji (WalAm) to Mr. Patrick Nyoike (MOE), attaching various documents, 23 April 2012.

J. 18 APRIL 2012 – THE SHOW CAUSE LETTER

284. As of April 2012, there had been no written communication between WalAm and the Ministry since November 2011. There had also been no written report to the Ministry on progress of work to be done in 2011 as set out in the Work Program. As the Ministry would have known, a first well had not been drilled and no work on infrastructure necessary to enable drilling had commenced. On 18 April 2012 Mr Nyoike wrote to Mr Walji in the following terms (the "**Show Cause letter**"):[211]

> *WalAm Geopower Inc. was granted the above captioned licence covering Suswa Prospect on 5th September, 2007 for exploration, appraisal and development of the geothermal resource therein to construct a power plant (copy of licence attached for ease of reference).*
>
> *Under normal practice, it takes five years from geothermal resource exploration to construction of such power plant. However, it is noted that WalAm has not carried out sufficient work at Suswa despite the licence running close to five years now. Under the circumstances, it will not be possible for the company to construct the power plant within the five years. In addition, WalAm is also in breach of Articles 9 and 17 of the licence.*
>
> *Pursuant to Article 7 of the licence, the Minister for Energy intends to declare Geothermal Resources Licence No.1/2007 as forfeited. Notice is, therefore, hereby given to you to show cause why this Licence should not be forfeited.*
>
> *Yours Sincerely*
> [Signature]
> *Patrick M. Nyoike, CBS*
> *Permanent Secretary*

285. Mr Nyoike said in his witness statement that this letter was written for him by Mr Omenge, the Chief Geologist. The reference to "*it takes five years from geothermal resource exploration to construction of such power plant*" was "*based on my experience of industry practice*."[212]

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[211] **[C-032]/[KE-63]**, Letter from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), 18 April 2012.

[212] Nyoike Witness Statement, ¶ 27.

286. The Tribunal considers in the legal analysis below the proper interpretation of this letter in the statutory context. From a factual perspective the letter was clearly a culmination of concerns that the Ministry had had for a long time. WalAm had been told in March 2011 that there were concerns about its lack of progress of development. It had made its position clear in the 23 March 2011 letter and the schedule set out there which was to be "*strictly*" adhered to, had not been performed at all.

287. Mr Nyoike accepted in cross-examination that the Licence did not contain any obligation on WalAm to construct a power plant within five years but said "*this was not an open-ended License going on forever*" and "*you are given a license with intention to proceed*".[213]

K. APRIL TO OCTOBER 2012 – THE PERIOD BETWEEN THE SHOW CAUSE LETTER AND FORFEITURE

288. Mr Walji responded to the Show Cause letter by email to Mr Nyoike on 23 April 2012.[214] The email had nine attachments.[215] The most important parts of those are set out below insofar as not already referred to:

289. Letter dated 16 April 2012:[216]

a. Mr Walji stated:

> *We take pleasure in providing you with an update to the 2011 Suswa Work Program as well as our annual report for the Suswa geothermal concession for 2011. Both are attached to this email. Also attached is our anticipated Work Program 2012 which will be commenced after the successful conclusion of the Power Purchase Agreement (PPA).*

[213] Transcript D3:P881-883 (Nyoike cross-examination).

[214] **[C-74(A)]/[KE-65]**, Email from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), attaching various documents, 23 April 2012.

[215] The Tribunal was provided with a helpful cross referencing table for the attachments which are Exhibits C-074(A) to J, and all except one of which are in the Key Exhibits at KE-54 to 56, 58, 60-62 and 64-66.

[216] **[C-074(C)]/[KE-61]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending various documents, 16 April 2012.

b. The attachments included "*an update to the 2011 Suswa Work Program*",[217] "*our annual report for the Suswa geothermal concession for 2011*"[218] and "*our anticipated Work Program 2012.*"[219]

c. The letter (which must have been drafted before sight of the Show Cause letter even if not sent until after) then stated:

> *During the presentation of WalAm Suswa 2011 Work Program in early 2011 it was indicated and agreed with MOE that the Suswa exploration/ development drilling program and it's high cost associated work program would not be undertaken in the absence of a bankable PPA. Please note that many items could not be completed during 2011 as they consist of large capital expenditures which could not be risked without an acceptable and bankable PPA.*

d. As has been shown by reference to the documents from March 2011, it was not correct to say that it had been agreed with the Ministry that exploration/development drilling would not be undertaken in the absence of a bankable PPA. The Tribunal rejects the suggestion, if this is WalAm's contention, that this letter evidences that there had been any such agreement. In its Closing Submissions[220] WalAm gave this letter as an example of "*WalAm informing Kenya that capital intensive work was contingent on a PPA*". The Tribunal agrees that it is an example of Mr Walji repeating a position that he had made before in different formulations that WalAm did not want to, or would not or could not commence capital intensive work or drilling or other expensive work on the ground. As the Tribunal has discussed above and found, Mr Walji's repetition of that position was made despite him knowing and understanding that it was not accepted or agreed by the Ministry, and its continued repetition rather affirms that he so understood. The Tribunal does not need to determine whether Mr Walji claimed that there had been agreement to this effect with the Ministry in his letter of 16 April 2012 knowing it

[217] **[C-074(D)]/[KE-55]**, WalAm 2011 Work Program Updated to 31 December 2011, 31 December 2011.

[218] **[C-74(E)]/[KE-56]**, WalAm Energy Inc 2011 Annual Report Suswa Geothermal Concession, 31 December 2011.

[219] **[C-74(F)]/[KE-58]**, WalAm 2012 Work Program, 2012.

[220] Claimant's Closing Submission Presentation, 24 May 2018, slide 44.

not to be true or rather (and perhaps in some desperation at this stage) had persuaded himself of that.

290. The attached "*WalAm 2012 Work Program*"[221] was a reworking of the table for 2011 Work Program set out in Mr Nyoike's 23 March 2011 letter but with the status shown for the main matters as "[c]*ontingent on successful completion of PPA*". The Tribunal notes that this was wording in the Work Program proposed by WalAm and not agreed to by Mr Nyoike.

291. Letter dated 22 April 2012:[222]

a. This was Mr Walji's response to the Show Cause letter. He set out seven matters which were described as "*delays beyond the control of WalAm Energy Inc*." Points 5, 6 and 7 said:

> *5) After numerous attempts a copy of a conventional PPA was received from KPLC in November, 2009. An unusable document which did not reflect Geothermal Greenfield Development contractual requirements.*
>
> *6) Meanwhile WalAm completed Suswa development plan and lined up funding in order to get Suswa project to drilling stage subject to bankable PPA.*
>
> *7) March 2011, I Tariff Rate terms were provided verbally by you; please note that nothing has been received in writing in this regard in spite of number of requests by WalAm's Kenya Representative Mr. Mugambi Gituru. After recognizing WalAm's work performance and intended Work Program MOE approved the work program for 2011 which was contingent upon concluding a mutually agreed bankable PPA. WalAm was requested to commence PPA negotiations with KPLC in March 2011. Subsequently Draft PPA document promised by KPLC to be ready on or about April 15, 2011. Not received as of this date. We have been informed that there*

[221] **[C-74(F)]/[KE-58]**, WalAm 2012 Work Program, 2012.

[222] **[C-074(B)]/[KE-66]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), 22 April 2013 [sent on 23 April 2012].

were delays due to unforeseen circumstances beyond the control KPLC control [sic] *and workload dealing with other PPA's.*[223]

b. The letter went on to "***respectfully but totally disagree*** *with the second paragraph of your letter*"[224]

1) The Licence NO. 1/2007 does not require the licensee to construct a Power Plant within five years. The physical impossibility of achieving the same for Greenfield Geothermal Development can be discussed and argued under the article 19 of the referenced licence. At that time expert opinion will agree with us that a 75 MWe Greenfield Development cannot be achieved in the time frame indicated especially in absence of a bankable PPA. We have no doubt of the same. Please review your position and advice the Hon. Minister for Energy accordingly and also our indicated position and opinion.

2) The the [sic] *drilling and development associated infrastructure developments were to commence after conclusion of satisfactory bankable PPA, as mutually agreed with yourself. Previously WalAm had contemplated the option of drilling slim holes (bores) for exploration pre PPA conclusion due to delays that had occurred in PPA conclusion but you had personally rejected this option and insisted that WalAm undertake full bore exploration/development drilling. Not required under the subject licence until later stage of exploration/development. Please refer to the Geothermal Act. Yet WalAm was willing to cooperate and undertake high risk Full Bore Drilling with indicated cooperation from Kenyan authorities.*

It was ***mutually agreed*** *that WalAm would undertake this high risk exploration at a cost of U.S. $21Million plus approximate $9Million of infrastructure development, provided a bankable PPA was in place. This cooperation was not appreciated by yourself as indicated in your correspondence at hand.*

…

We had concluded the annual report for 2011 in March which was not sent out due pending an update of revised Owners Engineer's quote from GeothermEx which was received on April 18, 2011.[225]

[223] Emphasis added.

[224] Emboldened in original.

[225] Emboldened in original and emphasis added.

c. The letter went on to respond to the comments on Clause 17 of the Licence.

d. An implicit threat was made to commence arbitration under Clause 19 of the Licence – "*We hope that the crossroad we are both facing can be overcome with a mutual understanding and amicably without WalAm having to invoke its rights under Article # 19.*"

e. Mr Walji then stated:

> *Mr. Nyoike, with this correspondence you will note that WalAm has not abandoned the Suswa Project in fact it is very anxious to move the project forward with cooperation from Kenya. In this regard may I suggest that you use your good offices to prioritize and expedite the forwarding of the Draft Geothermal Greenfield Development PPA. In turn initially WalAm's very experienced power sector/renewable energy Management Team consisting of Mr. Falcone, Mr. Drolet, Mr Allen and the writer will review the document. Turn it around in short order, obtain legal review and attend to Kenya at the earliest and finalize the PPA. Based on your proposed (March 2011) Levelised Lifetime Tariff of US $0.085 with adjustments, we think that is reasonable starting point for 75MWe geothermal development.*
>
> *We understand the challenges that Kenya faces and we hope that you understand the challenges we are facing and also do understand that the initial US $30 plus resource risk investment cannot be undertaken with just a Geothermal Licence. Investors require much more solid contracts.*

f. The Tribunal considers Mr Walji's references to the PPA condition as being "*as mutually agreed with yourself*" in the same way as discussed above in relation to the 16 April 2012 letter. WalAm relied in its Closing Submissions on this letter also as an example of WalAm informing Kenya that capital intensive work was contingent on a PPA, and the Tribunal expresses the same view of that submission as in relation to the 16 April 2012 letter.

292. It is worth noting, looking prospectively forward to the Forfeiture Notice, that 30 April 2012 was six months before the Forfeiture Notice. Insofar as therefore it is relevant to consider what WalAm did or did not do in that six-month period, what followed is to be considered in that context.

293. On 14 May 2012 Ms Meso of KPLC sent Mr Walji a draft PPA.[226] She stated in her email "[m]*ost of the issues will be agreed by the parties after negotiations*." Ms. Njagi gave evidence that this draft was based on the AGIL PPA which had been substantially concluded at this stage. Her evidence in relation to the extent to which this would have made negotiations with WalAm easier and enabled a quick conclusion of a PPA was helpful:

> *Q. And as it turned out, a draft was not provided to WalAm until May of 2012.*
> *Do you recall that?*
> *A. I recall that, but that was with full understanding from WalAm that because it was not also ready to prepare one himself, that KPLC did not have one which was on the shelf. We had never prepared it, that we were actually going to do what was otherwise unprecedented, to use the intellectual capacity of another developer, what the resources that they are putting and share that with WalAm.*
> *Q. Understood. We've already talked about the origin of this in terms of how it came about. And as it turned out, that draft was provided in May of 2012?*
> *A. Yes, because that's the--that's how long it took to conclude.*
> *Q. And that was my next question: At that point in time, had the AGIL PPA been concluded?*
> *A. Substantially concluded, substantially concluded.*
> *Q. And had it been provided yet to the KPLC Board for its review?*
> *A. I cannot remember. I do not remember, but I remember the Board review process will be through first the IPP Committee of the Board before you go to the main board, yes.*
> *Q. Um-hmm. And do you recall when the draft was provided to WalAm, do you remember whether it had gotten through part or all of that board approval process?*
> *A. I do not remember. I do not remember that, but should I also add that I don't think that was--that was material--significant because we were not going to reproduce the WalAm--the AGIL PPA--we were really not--that was not the gist. What you wanted to do was to have the specific provisions that related to what AGIL contributed that is on the world confirmation, the world confirmation, just that because that was the only thing which was not in the 2008--the 2009 draft.*
> *Q. So, that edition that AGIL had contributed was important to make sure that it was in what you gave to WalAm.*

[226] **[C-075]/[KE-67]**, Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm), attaching "*Blank Geothermal PPA*", 14 May 2012.

> *A. I cannot say because we cannot--we wanted to be very careful that we really are not--we really are not--we're not just so vastly saying that we are giving an AGIL PPA to WalAm.*
> *Q. That, of course, is clear. You're giving them a model PPA that's based upon--*
> *A. Yes.*
> *Q. --the AGIL PPA?*
> *A. That's true, that's true. That's true. But, of course--of course, they also--the fact that there is--although you can have a PPA that is based on another one, there are so many things which are project-specific that you do not know that only the developer can give.*
> *Q. Understood. And those would remain to be negotiated separately?*
> *A. Those would remain to be put in by the developer because he knows his project.*[227]

294. Ms Njagi had 17 years' experience of negotiating PPAs. Clearly the provision of a "*model*" PPA in this way to WalAm was going to help in relation to the structure and typical terms (all of which WalAm would have known had it been able to deploy a legal and technical team with experience of PPA negotiations). However, the model PPA could not advance matters in relation to the commercial terms which would have to be negotiated and which, in critical part, would be dependent on matters such as costs particular to the developer.

295. On 14 June 2012 Mr Walji emailed Mr Nyoike to chase a reply to his letter of 22 April which had responded to the Show Cause letter.[228] He stated that WalAm had received a draft model from KPLC on 15 May, that that was under review and that it "*could be bankable after certain missing items are brought forth and addressed by both parties. We do not anticipate this to be a protracted task.*"

296. That email was copied to Mr Mugambi Gituru who reported to Mr Walji by email on 27 June that he had met with Mr Nyoike and also the Chief Geologist informally, following up on the reply to the Show Cause letter. Mr Gituru reported that "[a]*s usual* [Mr Nyoike] *said he was unhappy with your work progress and your reply contained nothing new and*

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[227] Transcript D4:P1098:L7-P1101:L2 (Njagi cross-examination).

[228] **[C-077]/[KE-70]**, Emails between Mr Mugambi Gituru (WalAm) and Mr Maherab Walji (WalAm), 3 July 2012, p. 2.

therefore should be rejected."[229] Mr Gituru then describes a further discussion with the Chief Geologist and then the Minister. He reports on a further meeting with the Minister by email of 3 July in which he says that the Minister encouraged the idea of a further meeting with GDC. [230]

297. On 26 July 2012, Mr Walji wrote to Mr Njoroge, the CEO of KPLC, copying Ms Njagi in relation to the draft PPA.[231] He said:

> During our internal review, we noted that although the document may lead to a bankable PPA a number of gaps exist within this document which need to be addressed; not just for the benefit of the developer/seller's interest but also for KPLC's interests. In this regard from our review, we would like to pose clarification comments and questions to your company which are attached for your legal department's response who were the originator of the PPA documents received. The response in turn will enable us to get the document ready for a legal review by our counsel. Subsequently we will provide you with a legally reviewed PPA document which we hope will be acceptable to both parties and also open up final negotiations in Kenya.
>
> **In regard to the power tariff we were wondering if KPLC has set a baseline Tariff or would you prefer WalAm to set the baseline tariff and if so on what basis e.g. Levelised Lifetime Tariff which would be most suitable in this instance or any other methodology that you may prefer.**
>
> Please also note that the Suswa Project is at a point whereby WalAm has to move forward with permitting and a very capital intensive drilling and development program at the concession. In order for WalAm to undertake the MOE approved work program, our position and understanding with the Ministry of Energy is that a comprehensive bankable Greenfield Development PPA has to be in place. The work program is laid out in the letter from Ministry of Energy dated 23 March 2011 which was copied to you. Also attached for your convenience.
>
> We would appreciate your early response in order for us to provide you with a comprehensive negotiable PPA document which we hope will be bankable for both parties and will lead to being a model PPA for Geothermal Greenfield Development in Kenya.

298. The cover email asked Mr Njoroge to prioritise the matter "*in order for WalAm to be able to start drilling at Suswa before the end of the year*."

299. The letter attached 1½ pages of comments and questions.

300. There was a lack of reality in Mr Walji's letter as to how quickly PPA negotiations would take. Whether this was as a result of naivety stemming from his lack of experience or

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[229] *Id.* at p. 1.

[230] *Id.*

[231] **[C-078]/[KE-71]**, Email from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC), attaching Letter with comments to draft PPA, 26 July 2012.

because he wished to create a record of stating that drilling could start by the end of the year (i.e. within 6 months) in view of the Show Cause letter does not critically matter. The Tribunal would note however that, in the light of Mr Walji's comments on Mr Laing's revised timeline at the beginning of 2012 ("*Raising the $30MM takes 6 months which means June through December as we can't raise anything without a signed PPA*"[232]) Mr Walji cannot genuinely have believed there was any prospect, as at 26 July 2012 of drilling commencing in 2012.

301. The Tribunal notes also that Mr Walji's very limited queries and questions were being raised more than two months after receiving the draft PPA from KPLC (and that delay being in the context of the Show Cause letter and the known concerns of Mr Nyoike about lack of progress).

302. Mr Njoroge replied promptly the next day by email through Ms Meso saying: "[t]*hrough our CEO Mr. Njoroge, I wish to suggest that our preferred mode of handling the PPA process is that you markup the draft we have given you and return to us the marked up document for our review*."[233]

303. A month later, on 28 August 2012, Mr Walji provided a mark up and said in the cover email that the draft PPA that KPLC had provided was incomplete and asked for a more complete document.[234] MS Meso replied the same day[235] saying that a substantive response would follow but that:

> *This is a generic PPA which in our understanding is intended to evolve to a PPA with firmed up positions between the parties thus the blank spaces in a few places*

and

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[232] **[C-030]/[KE-57]**, WalAm Energy Inc 2012 – Proposed Work Program Suswa Geothermal Concession, 2012.

[233] **[C-79(A)]/[KE-75]**, Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm), attaching KPLC and WalAm's comments to Draft PPA and PPA Schedules, 7 September 2012, p. 2.

[234] *Id.* at p. 1.

[235] **[R-044]/[KE-73]**, Emails between Ms Beatrice Meso (KPLC), Mr Maherab Walji (WalAm), and others, 28 August 2012.

Regarding the schedules again, we cannot be in position to give specific details describing your plant hence this will be arrived at after discussions with you.

304. In cross-examination Mr Walji was asked:

> *Q. So, you understood from this that KPLC required information from you on the details of the plant that you would build; is that correct?*
>
> *A. Yes.*[236]

305. On 7 September 2012 Ms Meso sent Mr Walji the PPA main body and schedules and asked for the information package on the project.[237]

306. Schedule 5 of the draft was the schedule providing for Tariff and Payment. Progress on negotiating commercial terms including tariff was going to require information from WalAm on project costs.[238] Mr Walji understood that but was either unwilling or unable to provide KPLC the information package which they needed. Mr Walji's important evidence on this was as follows:

> *Q. Could you go, sir, now to Page 1145. It's headed, "Schedule 5: Tariff and payment."*
> *Do you see that?*
> *A. Yes.*
> *Q. And that subject matter, tariff and payment, that would have been of great importance to both Parties, wouldn't it?*
> *A. Yes, it would have been.*
> *Q. You see Number 1, the heading is "Energy Charges."*
> *Do you see that?*
> *A. Yes.*
> *Q. And there's a list of formulae.*
> *And then over the page on 1146, Number 2, "interim capacity payments."*
> *Do you see that?*
> *A. Yes.*
> *Q. And there are more formulae, and over the page to 1149, do you see Number 3, "capacity payments"?*

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[236] Transcript D3:P579:L15-18 (Walji cross-examination).

[237] **[C-079(A)]/[KE-75]**, Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm), attaching KPLC and WalAm's comments to Draft PPA and PPA Schedules, 7 September 2012, p. 2.

[238] **[C-079(C)]/[KE-77]**, KPLC and WalAm's comments to Draft PPA Schedules, 7 September 2012, see also Transcript D2:P583-596 (Walji cross-examination) (emphasis added).

A. Yes.
Q. And then there's more formulae. And that runs on to the end of Schedule 5. It comes to force majeure at Page 1155, but until then, it's about the formulation of the tariff, isn't it?
A. Yes, it is.
Q. And did you understand that these formulae set forth a detailed methodology for the calculation of a tariff?
A. Yes.
Q. And did you understand that you would need to identify your project costs before any formula could produce a tariff?
A. Yes.
Q. And that would involve knowing the size of the power plant; correct?
A. Yes.
Q. And the cost of that power plant.
A. Yes.
Q. And you didn't provide any comments on this Schedule 5, did you?
A. Don was handling that, and this was--this was to be--as far as I remember and understood, this was to be concluded at a later stage when the whole PPA was put together, in our version provided to KPLC.
Q. And at this stage, WalAm did not provide any comments on Schedule 5, did it?
A. Because the full document was not ready.
Q. Well, you see--what else you were you expecting in terms of tariff and payment formulae from KPLC before the document would be ready?
A. I'll need to re-read the whole request and answer your question.
Q. Could you just go back to Tab 76, and there you will find the rest of the PPA. We were just looking at the schedules which were behind Tab 77. The main body of the PPA is at Tab 76. That's C-79(b).
Do you see that?
A. Yes, I see that.
Q. Would you agree with me that that is a substantial document?
A. Substantial but incomplete.
Q. And so some of the things that were incomplete, if you look at--it's just the second page of the document, 1028, it says in track changes at the bottom, "Schedules 10 and 12 do not exist," and it describes things in relation to that.
Do you see that?
A. I guess I do.
Q. And so you were into the detail of pointing out that Schedules 10 and 12 did not exist at this stage; correct?
A. Yes.

Q. And you were considering this document, which runs from Page 1027 of the bundle through to 1,106. That's the main body of the PPA; you agree?
A. Yes.
…

Q. Tariff and payment was a schedule that was present; correct?
A. Yes.
Q. And you could have commented on that, couldn't you?
A. It was our concrete decision. I recall that that was to be handled once the whole PPA package was ready, then we would complete the whole document all at once and not in piecemeal basis.
Q. And you were conscious of the KPLC requests to you for information, were you?
A. I'm sorry?
Q. The e-mails that we looked at earlier today where KPLC was asking you for information, you were aware of that?
A. Yes, and we had our method of handling.
Q. You had a method of handling.
A. Yes.
Q. Our method or a method?
A. A method.
Q. And that method included not marking up Schedule 5; is that right?
A. Not dealing with the PPA in piecemeal basis.
Q. And not providing any information on project costs; correct?
A. Not at that stage.
Q. Which would have been essential for the determination of a capacity charge; right?
A. And that would have been handled in due course. Like I mentioned, we didn't want to do it on piecemeal basis.
Q. Could you go to Page 1110. It's Schedule 1.
Do you have that?
It's Schedule 1: "Exploration confirmation and construction programs."
Do you have that page?
A. That's Page 1110?
Q. Exactly, sir.
Then you see Part A: "Reservoir exploration period."
Do you see that?
A. I see Schedule 1.
Q. And then just below that: "Part A, Reservoir exploration period."
A. Yes, I see that.
Q. And then "Construct exploration drilling infrastructure?"
Do you see that?

A. Yes.
Q. "Drill at least two exploration wells?"
Do you follow?
A. Yes.
Q. Then Part B: "Reservoir confirmation period," and there are six bullet points under that.
Do you see those?
A. Yes.
Q. And then Part C, "Construction period," and then there's five bullet points under that.
Do you see those?
A. Yes.
Q. And there's a comment. That's a WalAm comment, isn't it?
A. I believe so.
Q. It says: "More detailed specification required from KPLC. Alternatively, WalAm can provide further detailed schedule input in regard to geothermal greenfield development in the next draft. Please confirm preference."
Do you see that?
A. Yes.
Q. So, you were asking in your first alternative, you were asking KPLC to provide specifications about your project; is that right?
A. We were just being--we were requesting that information for efficiency.
Q. Information on the drilling of exploration wells at Suswa. You were requesting that from KPLC?
A. No.
You'll recall that this was reported to be the model PPA derived from others--other two that had been negotiated.
And we were trying to get as much information and clarity as possible for efficiency.
Q. And those other ones involved different wells on different pieces of land.
A. None of the wells were drilled at that time, so at that time differences could not be distinguished.
Q. But you'd need to know your own project-specific costs to be able to fill out this schedule, wouldn't you?
A. That, we knew.
Q. You'd need to know your project-specific costs with sufficient certainty to base a capacity charge rate on it, wouldn't you?
A. Yes.
Q. And you didn't know that at this point in time, did you?
A. We had the definite verified information.
Q. Why didn't you put it in Schedule 1?
A. As I mentioned before, we were going to complete--once we got all the outstanding documentation, the team would go to work on

> *the PPA and legal expertise, et cetera, would all come together. We did not want to have numerous meetings and go back and forth, so we wanted to put the whole package together.*
> *Q. Even though KPLC had asked you for information that only you could provide.*
> *A. They had requested that information to be completed in the PPA.*[239]

307. The Tribunal considers that this evidence suggests at least a decision on the part of WalAm to delay the provision of such information as it had in relation to project costs which would have been critical to enable negotiations with KPLC to progress and despite KPLC's requests for that information which it made clear (and Mr Walji understood) it needed. WalAm for example never gave KPLC the SKM Report.[240]

308. On 23 September Mr Walji emailed Ms Meso attaching comments on the draft PPA and Schedules but saying "[t]*his PPA is far from complete and it will still have to through Legal Review, Financial Review, Owners Engineer's Analysis etc*."[241] Presumably this was a reference to WalAm's further review but on 14 October Mr Walji chased Ms Meso for a response.[242] On 1 November Mr Walji then emailed Mr Njoroge referring to a conversation he had had with Ms Meso and suggesting that it would be more practical to use the AGIL PPA, which he understood had been concluded, as a model.[243]

L. 30 OCTOBER 2012 – THE FORFEITURE NOTICE

309. On 30 October 2012 the Minister wrote to WalAm as follows:

> *I am concerned that despite having granted a Geothermal Resource Licence to WalAm Geothermal Inc on 5th September 2007, there have not been any apparent efforts made by the company to explore and exploit geothermal resources in the Suswa geothermal field and ultimately to construct a power plant. Under normal practice, it takes five (5) years from geothermal resource exploration to*

[239] Transcript D3:P583-593 (Walji cross-examination) (emphasis added).

[240] Transcript D4:P1148:L1-4 (Njagi cross-examination).

[241] **[C-82(A)]/[KE-79]**, Emails from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC) and Ms Beatrice Meso (KPLC), re-attaching WalAm's updated comments to Draft PPA and Schedules, 1 November 2012, p. 2.

[242] *Id.* at p. 1.

[243] *Id.* Though this is the day after the Forfeiture Notice, WalAm had not yet received it.

construction of a power plant which period has since been exceeded. This amounts to a direct violation by the company of its obligations under Clauses 7 and 9 of the said Licence.

Given this untenable position, I hereby exercise the powers conferred on me by the Geothermal Resources Act, 1982 in Section 11 (1) (a) as the Minister for Energy and I forthwith revoke the Licence granted to WalAm Geopower Inc with effect from the date of this letter.

This decision shall hereinafter be published in the Kenya Gazette as per the provisions of the Law.

310. WalAm says that it did not receive the letter until 28 November 2012 because it had been sent to the wrong address. Nothing ultimately turns on that.

311. The forfeiture of the Licence was published in the Kenya Gazette Supplement No 169 Legal Notice No 129 on 1 November 2012.[244]

312. On the same date the Ministry allocated the Suswa Geothermal Field to GDC in the exercise of powers under Section 6(1)of the GRA.[245]

313. The terms and effect of the Forfeiture Notice are considered in the legal analysis below.

[244] **[R-001]**, Kenya Gazette Supplement No 169, Legal Notice No 129: Forfeiture of Geothermal Resource Licence No 1/2007, 9 November 2012.

[245] **[R-022]/[KE-83]**, Letter from Hon Minister Kiraitu Murungi (MOE) to Dr Silas M Simiyu (GDC), 1 November 2012.

M. NOVEMBER – DECEMBER 2012

314. Before WalAm had received the Forfeiture Letter, it sent an expression of interest to apply for a GRMF grant.[246]

315. Mr Walji wrote to the Minister in relation to the Forfeiture Notice on 5 December 2012.[247] He set out the history from WalAm's perspective, stating in particular that from 22 March 2011:

> *WalAm's* [sic] *has considered that it had an understanding with MOE that the capital intensive drilling and infrastructure work program would not be undertaken until a bankable PPA was in place and that both sides would work towards a PPA in a timely manner. WalAm stood ready to receive a draft model PPA from KPLC.*

316. Mr Walji also stated that:

> [I]*t is not WalAm who has caused the delays nor stopped work on the Suswa project. In fact the company has been ready willing and able to perform but has been restrained to a large extend* [sic] *due to delays and lack of coordinated effort forthcoming.*

317. Subject to one matter, the Tribunal does not consider that this and subsequent exchanges either add materially to the assessment of the relevant facts prior to termination, nor that any separate legal issue arises as a result.

318. Mr Nyoike responded on 19 December 2012.[248] His letter referred to the fact that in respect of four matters – drilling as recommended by GeothermEx, MT survey as included in the SKM Development Plan, drilling in accordance with the approved Work Program in Mr Nyoike's letter of 23 March 2012 and work on roads and water – WalAm had not undertaken work. These were all matters covered by the Work Program. The letter concluded by saying that:

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[246] **[C-083(A)]/[KE-153]**, WalAm Energy Inc, *Suswa Geothermal Concession Kenya: Application for Geothermal Risk Mitigation Facility for East Africa – Request for Expression of Interest for Surface Studies And Exploration Drilling Programs*, 7 November 2012.

[247] **[C-084]/[KE-84]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 5 December 2012.

[248] **[C-086]/[KE-87]**, Email from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), attaching Letter dated 19 December 2012, 21 December 2012.

> *The failure by WalAm to execute the above mentioned critical milestones was a reflection of the inability of the company to meet its obligation under the* [Licence]. *Given the foregoing state of affairs the license remains terminated.*

319. The Tribunal considers that this letter is of some relevance and significance if it were necessary to consider what the Minister would have decided, were it established that his actual decision was infected by illegality and that, as a matter of Kenyan law, it should be determined what his decision would have been had he correctly applied the GRA and/or taken into account all relevant considerations and/or not taken into account irrelevant considerations.

320. The further exchanges between Mr Walji and Mr Nyoike, and the Minister which led first to attempts to find an amicable settlement of the dispute with the possibility of reinstatement of the Licence being discussed, but ultimately to commencement of the arbitration by Request for Arbitration on 26 January 2015 are not of significance to the factual issues which the Tribunal has to decide.

N. THE EXCHANGES AND DISCUSSIONS WITH KPLC IN RELATION TO A PPA

321. The Tribunal has, in outlining the key contemporaneous communications in the record touched on the important exchanges between WalAm and KPLC in relation to a PPA. Because of the allegations made by WalAm in respect of that process, the Tribunal considers some of those aspects in more detail here and makes certain findings.

a. WalAm had a preliminary indicative term sheet for a PPA[249] prepared by a specialist energy lawyers, Heenan Blaikie.[250] It was shared with KPLC at meetings in March 2009. It proposed a single tariff structure covering a capacity charge and an energy charge so as to give WalAm an internal rate of return of 25% after tax from the capacity charge, though Mr Walji said this was an error and it should have

[249] **[C-012]/[KE-142]**, Power Purchase Agreement – Preliminary Indicative Term Sheet, 22 March 2009. A version with annotations perhaps reflecting discussion of the document is at **[R-006]/[KE-17]**, Power Purchase Agreement – Preliminary Indicative Term Sheet with annotations, 22 March 2009.

[250] Transcript D2:P531 (Walji cross-examination).

said before tax.[251] It set out various terms which would have obviously been regarded as unacceptable by KPLC but which Mr Walji said would all have been up for negotiation.

b. A draft Memorandum of Understanding dated 7 April 2009[252] contained at Schedule B amended terms of those set out in the indicative term sheet. The requested IRR was now 18.5% after tax. But, as with the indicative term sheet, because no costings were provided and known, no proposal could be made as to what the tariff would actually be. It is also notable that the draft Memorandum of Understanding, in clause 5 provided that WalAm's counsel would have the responsibility for drafting the PPA, but as Mr Walji accepted, WalAm never did so though he said that KPLC said they would provide one.[253]

c. As shown by exchanges between WalAm and KPLC such as the email from David Mwangi, the Chief Manager of KPLC, to Mr Walji of 21 July 2009,[254] any discussion of a PPA even in outline or with a view to a term sheet, was necessarily going to require agreement on a tariff, perhaps the most important component of any agreement. WalAm had proposed to KPLC that the tariff structure would be a single rate tariff (US$/Kwh).[255] As appears from Mr Walji's letter of 14 April 2009,[256] at the meeting on 9 April, KPLC had said they would require a tariff structure comprising a (fixed) capacity charge (US$/kW/year) and a variable energy charge (US cents/kWh). Mr Walji had said in his letter that he did not anticipate this would be a problem but needed to discuss it with his lawyer and

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[251] Transcript D2:P527 (Walji cross-examination).

[252] **[C-051]/[KE-19]**, Draft Memorandum of Understanding between WalAm and KPLC, 7 April 2009.

[253] Transcript D2:P533 (Walji cross-examination).

[254] **[C-054]/[KE-25]**, Email from Mr David Mwangi (KPLC) to Mr Maherab Walji (WalAm), attaching Letter from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC) dated 14 April 2009, 21 July 2009.

[255] See **[C-015]/[KE-20]**, Letter from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC), 14 April 2009, p. 2, ¶ 3. Mr Walji accepted that in fact KPLC did send WalAm a sample PPA (the Ormat PPA) but that it was not appropriate. This still left matters with WalAm to prepare a draft PPA if it wished to. It never did. Transcript D2:P543-549 (Walji cross-examination).

[256] **[C-015]/[KE-20]**, Letter from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC), 14 April 2009**.**

economist. In his email of 21 July 2009 Mr Mwangi confirmed that that was the tariff structure that KPLC would require and indicated that KPLC were looking forward to receiving a revised tariff proposal on that basis. The ball was in WalAm's court to put numbers on a proposal – to specify the capacity charge, WalAm would need to know its costs including the costs of building the power plant. [257] It did not know those costs.

d. Indeed, as Mr Walji accepted, following discussions with Mr Mwangi in Washington, D.C. in November 2009, it was for WalAm to finalise documentation generally taking into account the drafts and the discussions that had taken place.[258]

322. The 2011 Work Program item 9[259] contemplated concluding a term sheet for a PPA in the period 7 March to 31 March 2011. Mr Walji seems to have thought that if a term sheet could be agreed, after that a PPA would not take long to finalise. It was estimated that there would be costs of doing this of US$65,000.

323. The Tribunal has considered the sequence of contemporaneous records of the progress of discussions between WalAm and KPLC in relation to developing a PPA in particular the following documents referred to above:

a. Emails between Mr Maherab Walji (WalAm) and Ms Laurencia Njagi (KPLC) dated 16 March 2011;[260]

b. Letter from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC) dated 3 May 2011;[261]

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[257] Transcript D2:P542-543 (Walji cross-examination).

[258] **[C-060]/[KE-144]**, Email from Mr Maherab Walji (WalAm) to Mr David Mwangi (KPLC), 10 November 2009. Transcript D2:P448 (Walji cross-examination).

[259] **[C-067]/[KE-41]**, WalAm 2011 Work Program – Finalized, March 2011.

[260] **[C-070]/[KE 45]**.

[261] **[C-071]/[KE-48]**.

c. Email from Mr Mugambi Gituru (WalAm) to Mr Maherab Walji (WalAm) dated 11 May 2011;[262]

d. Email from Mr Mugambi Gituru (WalAm) to Ms Laurencia Njagi (KPLC) dated 27 July 2011;[263]

e. Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm) dated 14 May 2012, attaching "*Blank Geothermal PPA*";[264]

f. Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm) dated 7 September 2012, attaching KPLC and WalAm's comments to Draft PPA and PPA Schedules;[265]

g. Emails between Ms. Beatrice Meso (KPLC), Mr. Maherab Walji (WalAm), and others dated 28 August 2012;[266]

h. KPLC and WalAm's comments to Draft PPA dated 7 September 2012;[267]

i. KPLC and WalAm's comments to Draft PPA Schedules dated 7 September 2012;[268]

j. WalAm's updated comments to Draft PPA dated 23 September 2012;[269] and

k. WalAm's updated comments to Draft PPA Schedules dated 23 September 2012.[270]

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[262] **[C-072]/[KE-50]**.

[263] **[C-073]/[KE-52]**.

[264] **[C-075]/[KE-67]**.

[265] **[C-079(A)]/[KE-75]**.

[266] **[R-044]/[KE-73]**.

[267] **[C-079(B)]/ [KE-76]**.

[268] **[C-079(C)]/ [KE-77]**.

[269] **[C-082(B)]/[KE-80]**.

[270] **[C-082(C)]/[KE-81]**.

324. The Tribunal has also considered the evidence, by witness statement and oral evidence at the evidential hearing of in particular Mr Walji and Ms Njagi and the witness statement of Mr Shibuyanga[271] in relation to the dealings between WalAm and KPLC.

325. It does not find that there was any unreasonable conduct let alone bad faith on the part of KPLC in relation to the discussions. There were delays on both sides. In 2011 there was some slow to-and-fro between Mr Walji and KPLC as he sought to obtain a draft PPA and KPLC offered to provide something but wanted to wait until they had concluded negotiations with AGIL before providing a draft.[272]

326. But there were more fundamental issues which meant that WalAm could not have achieved a concluded PPA.

a. WalAm was not in a position to make a sufficiently detailed proposal – indeed its original contemplation was that it would draft the full PPA but lack of funds precluded it doing so.

b. WalAm did not have the capability (technical or financial) to take forward PPA negotiations to a conclusion. There is a lack of clarity about what exactly WalAm was trying to achieve in the period after the grant of the Licence – there are references to memoranda of understanding, indicative term sheets and other documents that would have been preparatory and perhaps not even binding. WalAm was clearly desirous of obtaining some document on the basis of which it could seek to attract investment. But it was not in a position to conclude a PPA and did not actually suggest that that was what it sought in the first instance.

c. A concluded PPA would have required in particular agreement on tariff. The capacity charge component of the tariff would have been dependent on costs and in particular the costs of development and of construction of the power station. WalAm was never in a position to estimate those costs with precision. The very

[271] The Claimant did not have any questions for Mr Shibuyanga, who had attended the Hearing, and he was released. Transcript D4:P1096 (Benson).

[272] See for example **[C-072]/[KE-50]**, Email from Mr. Mugambi Gituru (WalAm) to Mr. Maherab Walji (WalAm), 11 May 2011.

broad estimates given by SKM were subject to many variables. Costs would also be affected by the productivity of the first wells and the question whether further wells would be necessary. In addition, WalAm created its own obstacle to conclusion of a PPA by taking a position throughout that what it required was an "*acceptable*" PPA. WalAm in particular was set on obtaining an internal rate of return on its investment at a level which KPLC was not yet near the time which it could consider and agree absent a vast amount of further information which WalAm was not yet able to produce.

d. Ms Njagi, KPLC Company Secretary and a part of the executive management team, was involved in structuring, procuring and negotiating PPAs with private sector developers for all independent power projects from 1997. She describes in paragraphs 7 to 10 of her witness statement the limitations on WalAm's ability to negotiate a PPA in the way that would have been expected and would have been normal for a developer. Mr Walji attended discussions on his own when a developer would need and would usually have a team of legal, technical and financial experts and advisers to negotiate on its behalf. Mr Walji did not have a sufficient understanding of the issues in order to negotiate and prepare a PPA. The negotiation of the tariff would be based on the financial model provided by the developer. She says in paragraphs 9-10:

> *Without such a model it was impossible for us to negotiate any tariff and to conclude a PPA. As I recall, we requested WalAm's financial model but never received one. We also would have needed detailed information regarding the development, such as project costs, including costs of financing, key project milestones, and details of equipment and machinery requirements. … We also saw no evidence of WalAm engaging with any lenders or providing information on the terms on which the project would be financed.*

e. A PPA could not be negotiated by email (and in addition to detailed and complex negotiation across various issues and areas of expertise, would require a number of complex related transactional agreements). From Mr Walji's "*Preliminary*

Indicative Term Sheet" in March 2009[273] on which Ms Njagi made detailed manuscript annotations, Ms Njagi questioned WalAm's understanding of the role and requirements of a developer in a geothermal energy project[274] and her subsequent dealings with Mr Walji led her to question his knowledge and understanding of the PPA negotiations process.[275]

f. Mr Walji had from the outset a misconception about how quickly a PPA could be negotiated. In the 2011 Work Program proposed in March 2011 he was suggesting it could be completed by the end of that month. In later documents and in 2012 WalAm was suggesting it could be done in 3 months. Ms Njagi was of the strong view that this was wrong.

> *Q. And per Mr. Njoroge's recommendation and his suggestion, that they contacted the KPLC on March 28, 2011, in order to obtain a draft PPA.*
> *Do you see that?*
> *A. Yes.*
> *Q. And that's what happened?*
> *A. Yes.*
> *Q. And then, as you were just confirming to the Tribunal, the document that you wished to provide to him was, at that point, 30 to 40 percent ready, and you thought you'd have it done for them by the middle of April?*
> *A. Yes.*
> *Q. Now, you knew from the second paragraph that Mr. Walji was anxious to receive that document?*
> *A. Yes.*
> *Q. For the reasons he expressed.*
> *A. Yes.*
> *Q. And then at the bottom of the third paragraph, he says: "Since we will be working from your draft model based on pre-determined Feed-in Tariff and pre-determined tariff adjustments, the process of concluding the negotiations should be easier."*
> *I think that's what he's saying. That's just what he's saying. And you understood that was his view, anyway?*
> *A. Which I disagreed completely with.*

[273] **[R-006]/[KE-17]**, Power Purchase Agreement – Preliminary Indicative Term Sheet with annotations, 22 March 2009.

[274] Njagi Witness Statement, ¶ 12.

[275] Njagi Witness Statement, ¶¶ 40, 42.

Q. Yes.
A. Yes.
Q. Mr. Nyoike told the Tribunal the other day that he thought this could be done in three months, too. And you would disagree with that?
A. Completely. I have negotiated PPAs for close to 17 years; never has.[276]

327. Ultimately WalAm was under a misconception from the start as to what was involved in concluding a PPA both as to cost and time. It thought that it could be done quickly and that investment capital would immediately flow in to WalAm to enable it to progress the capital intensive infrastructure and drilling work. It was wrong in all respects and there must be a question as to whether WalAm's financial limitations meant that its investment was in truth doomed from the start.

O. GDC

328. GDC was formed in 2008 with a mandate to support private sector entry into power generation from geothermal resources in Kenya.[277]

329. WalAm alleges that GDC had a desire in fact to take back all of Kenya's geothermal concessions including those already granted to private investors for development and that Dr Simiyu, the CEO of GDC, told an independent geothermal consultant, Dr Bloomquist, as much in a conversation in early 2009.[278]

330. The Tribunal does not find that there was any such intention or motivation on the part of Kenya through GDC with regard to concessions which had already been granted. Rather, as appeared from Dr Bloomquist's oral evidence clarifying the context of his discussion with Dr Simiyu:[279]

[276] Transcript D4:P1090:L13-P1092:L3 (Njagi cross-examination) (emphasis added).

[277] **[C-106]/[KE-113]**, Geothermal Development Company, Ruth Musembi, *GDC's Geothermal Development Strategy For Kenya: Progress & Opportunities*, September-October 2014, slide 4.

[278] Bloomquist Witness Statement, ¶ 33.

[279] Transcript D3:P729-733 (Bloomquist cross-examination).

a. He was talking to GDC as a consultant to USAID and therefore a potential source of funds.

b. The conversation had been casual.

c. Dr Bloomquist, after reminding himself of GDC's mandate under the law establishing it, said that GDC was intended actually to develop and then market steam reserves to the private sector which would enter the project as project developer, power plant developer and operator. In that respect the intent was that GDC would mitigate some of the risk in order to facilitate the entry of private investments.

d. Dr Bloomquist disowned the implication placed on his evidence that his evidence in relation to his conversation with Dr Simiyu evidenced GDC policy: "*I'm not saying that this was, you know, a GDC policy. This Mr Simiyu's opinion*". [280]

P. WALAM'S FINANCIAL POSITION

331. The Tribunal has referred in the course of the chronological analysis to much evidence which reflects WalAm's financial position at the date of the grant of the Licence and subsequently. WalAm had no significant assets at any time during the period from the grant of Licence to forfeiture. Its financial statements[281] show current assets of never exceeding a few hundred thousand dollars, and minimal cash. Mr Walji's emails in late 2007 and early 2008 show that even obtaining very small amounts of money was difficult. See:

a. Emails between Mr Zohrab Mawani and Mr Maherab Walji (WalAm) dated 19 December 2007;[282] and

[280] Transcript D3:P732:L9-11 (Bloomquist).

[281] The Financial Statements for the years 2007 to 2012 are at **[CJ-075]/[KE-132]**, **[CJ-076]/[KE-133]**, **[CJ-077]/[KE-134]**, **[CJ-078]/[KE-135]**, **[CJ-079]/[KE-136]**, **[CJ-080]/[KE-137]**.

[282] **[R-031]/[KE-130]**.

b. Emails between Mr Johann Reiter and Mr Maherab Walji (WalAm) dated 16 February 2008.[283]

332. Mr Walji accepted that WalAm did not have the investment capital to carry out the Work Program at any time up to November 2012.[284] A WalAm presentation of August 2012[285] shows WalAm trying to raise US$3 million to fund the conclusion of negotiations of the PPA. The document and Mr Walji's evidence in cross-examination on it[286] confirmed that WalAm's financial incapacity was not limited to an inability to finance infrastructure and drilling costs. It was unable even to finance the costs of negotiating the PPA which it was pressing repeatedly as the key to it being to obtain the large investments necessary to progress development. The document states at that "*the direct costs associated with concluding the PPA in Kenya are estimated by WalAm at $1,500,000*".[287] The document also showed[288] that WalAm had at this stage accounts payable of US$350,000 which included, according to Mr Walji, US$20-30,000 still outstanding as owed to Redplan.[289]

333. The date of this document is significant being more than three months after the Show Cause letter and very shortly after Mr Walji had written to Mr Njoroge on 26 July 2012[290] to suggest that WalAm was ready and keen to enter into PPA negotiations with a view to a quick conclusion of the PPA.

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[283] **[R-032]/[KE-131]**.

[284] Transcript D2:P368-370 (Walji cross-examination) .

[285] **[R-043]/[KE-72]**, WalAm Energy Inc., *Executive Summary*, August 2012.

[286] Transcript D2:P459-469 (Walji cross-examination).

[287] **[R-043]/[KE-72]**, WalAm Energy Inc., *Executive Summary*, August 2012, p. 2.

[288] *Id.* at p. 5.

[289] Transcript D2:P467-468 (Walji cross-examination).

[290] **[C-078]/[KE-71]**, Email from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC), attaching Letter with comments to draft PPA, 26 July 2012.

V. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

334. The Claimant's request for relief is formulated in its Memorial as follows:

> *198. On the basis of the foregoing, without limitation and reserving WalAm's right to supplement these prayers for relief, including without limitation in light of further action which may be taken by Kenya, WalAm respectfully requests that the Tribunal:*
>
> *(a) DECLARE that Kenya has breached Kenyan and customary international law by unlawfully declaring the License forfeited and failing to negotiate a PPA with WalAm in good faith;*
>
> *(b) ORDER restitution in the following form:*
>
> *(i) Respondent must reinstate or reissue to WalAm the License for Suswa;*
>
> *(ii) In order to place WalAm in the position it would be in but for Respondent's unlawful conduct, the thirty-year duration (and potential two five-year extensions) of the License contemplated under Article 2 be tolled from the date of the unlawful declaration of forfeiture of the License on 30 October 2012, until such time that a PPA is executed between the Parties;*
>
> *(iii) Respondent must negotiate, in good faith, a PPA with WalAm within 60 days of the Award (the "Restitution Window");*
>
> *(iv) Respondent must compensate WalAm for interim losses suffered since 30 October 2012 to the date of the Award;*
>
> *(c) ORDER, if Respondent fails to reinstate or reissue to WalAm the License for Suswa or no PPA is concluded within the Restitution Window, Respondent to pay WalAm compensation in the amount of USS 312.7 million as of 1 March 2017, to be updated as of the date of the Award;*
>
> *(d) AWARD such other relief as the Tribunal considers appropriate; and*
>
> *(e) ORDER Kenya to pay all of the costs and expenses of the Arbitration, including WalAm's legal and expert fees, the fees and*

expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs.[291]

335. The Claimant reiterated the same request in its Reply.[292]

336. On 24 May 2018, in accordance with the Tribunal's instructions, the Claimant submitted an updated request for relief as follows:

> *1. On the basis of the foregoing, Claimant respectfully requests that the Tribunal:*
>
> *(a) DECLARE that Respondent's purported forfeiture of the License is illegal, null and void and of no effect;*
>
> *(b) ORDER that Respondent, through its Ministry of Energy, take such steps as are necessary to:*
>
> *(i) reinstate or reissue the License and amend its term to be 25 years from the date of reinstatement (plus the existing option for Claimant to extend said term by two 5-year periods); and*
>
> *(ii) cause the KPLC to enter into negotiations with Claimant for a PPA, including by issuing a letter of request to the KPLC;*
>
> *(c) ORDER Respondent to pay Claimant the damage it has suffered since the date of the forfeiture to the date of the Award (to be assessed on the basis of the time value of its lost profits for that time period);*
>
> *(d) ORDER, if Respondent fails to reinstate or reissue to Claimant the License for Suswa or cause KPLC to enter into PPA negotiations, Respondent to pay Claimant compensation in the amount of at least US$ 339.6 million (including interest) as of 16 February 2018, to be updated as of the date of the Award;*
>
> *(e) If, pursuant to the Order set forth in (a) to (d) above, negotiations with KPLC (i) do not commence or (ii) commence but do not conclude, within ninety (90) days from the date of this Award or such other time as may be agreed between the Parties, the Order will cease to have effect and a case management conference will be scheduled within fourteen (14) days of a request by either Party to establish the procedure to finally determine Claimant's claim for damages;*

[291] Claimant's Memorial, ¶ 198 (footnote omitted).

[292] Claimant's Reply, ¶ 202.

> *(f) In the alternative to (a) to (e) above, order Respondent to pay Claimant US$ 339.6 million (including interest) as of 16 February 2018, to be updated as of the date of the Award;*
>
> *(g) AWARD such other relief as the Tribunal considers appropriate; and*
>
> *(h) ORDER Respondent to pay all of the costs and expenses of the Arbitration, including Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs.*[293]

337. The Respondent's request for relief is formulated in its Counter-Memorial as follows:

> *278. On the basis of the foregoing, the Respondent respectfully requests that the Arbitral Tribunal:*
>
> *(a) DISMISS all of the Claimant's claims; and*
>
> *(b) ORDER the Claimant to pay all of the costs and expenses incurred by the Respondent in defending against the Claimant's claims, including, but not limited to, the Arbitral Tribunal's fees and expenses, ICSID's fees, the fees and expenses of the Respondent's counsel and experts, and interest on these sums.*[294]

338. The Respondent reiterated the same request in its Rejoinder.[295]

339. The Parties' respective positions in regard to the matters at issue in this arbitration are summarised in the sections that follow. The Tribunal emphasizes that it has considered the full extent of the Parties' arguments in their written and oral submissions. The fact that a given argument might not be referred to expressly in the brief summary of the Parties' positions included in this Award should not be considered as an indication that the Tribunal has not considered the argument.

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[293] Claimant's Revised Request for Relief dated 24 May 2018, ¶ 1.

[294] Respondent's Counter-Memorial, ¶ 278.

[295] Respondent's Rejoinder, ¶ 207.

VI. APPLICABLE LAW

A. PARTIES' POSITIONS

(1) Claimant's Position

340. The Claimant argues that the Tribunal has jurisdiction over its claims brought pursuant to both Kenyan law and customary international law. It argues that the Tribunal's jurisdiction is founded on the basis of Article 42(1) of the ICSID Convention and Kenyan law, which incorporates customary international law.[296]

341. The Claimant argues that the Parties consented to the Tribunal's jurisdiction over claims founded in Kenyan law and customary international law by agreeing, in Article 19 of the Licence, to arbitrate "*all disputes arising out of this license or relating to any investment made under it*".[297] The Licence has no applicable law provision. The Claimant argues that in the absence of an agreement between the Parties regarding the applicable law, the Tribunal must turn to Article 42(1) of the ICSID Convention which states that "*the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*."[298] Claimant thus argues that by consenting to arbitrate disputes "*pursuant to*" the ICSID Convention, Respondent agreed to arbitrate claims arising under Kenyan law and rules of international law.[299]

342. The Claimant further argues that when the Respondent accepted the Tribunal's jurisdiction over claims arising under Kenyan law, the Respondent also consented to the Tribunal's jurisdiction over claims founded in customary international law because Kenyan law expressly recognises and incorporates international law pursuant to Article 2(5) of the

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[296] Claimant's Memorial, ¶ 98; Claimant's Reply, ¶ 12.

[297] Claimant's Skeleton, p. 1, citing **[C-003]/[KE-1]**, Geothermal Resources Licence No. 1/2007, 5 September 2007, Clause 19 (emphasis omitted).

[298] Claimant's Reply, ¶ 15.

[299] Claimant's Reply, ¶ 16.

Kenyan Constitution which states that "[t]*he general rules of international law shall form part of the law of Kenya*".[300]

(2) Respondent's Position

343. As a preliminary point, the Respondent contends that the Claimant's submission on applicable law, that the scope of the Parties' consent to arbitrate covers both claims under Kenyan law and under customary international law is actually a question of jurisdiction. It argues that the Tribunal lacks subject matter jurisdiction over claims brought under customary international law unless they are made through Article 42 of the ICSID Convention or through Kenyan law.[301] The Respondent's position is that "[t]*he Parties have not consented to the Tribunal adjudicating claims brought under customary international law as such*."[302]

344. The Respondent explains that the applicable law in this arbitration is to be determined in accordance with the second sentence of Article 42(1) of the Convention ("*In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*.")[303] It argues that consenting to arbitration under the ICSID Convention does not constitute consent to the Tribunal having jurisdiction over claims made under customary international law and does not itself make any rule of customary international law applicable to this dispute.[304]

345. According to the Respondent, only Kenyan law is applicable in the present case. Its position is that Kenyan law applies because it is the law of the State party in dispute, the law of the State in which the investment was made, and the law under which the Licence was issued and subsequently forfeited. The Respondent submits that a rule of international law may be applicable if a rule of Kenyan law is contrary to it, or if the subject matter of a

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[300] **[CL-070]**, Constitution of Kenya 2010, p. 13; Claimant's Reply, ¶ 18.

[301] Respondent's Counter-Memorial, ¶ 109.

[302] Respondent's Counter-Memorial, ¶ 113.

[303] Respondent's Counter-Memorial, ¶ 114; Respondent's Rejoinder, ¶ 12.

[304] Respondent's Skeleton, ¶ 22.

claim is not addressed by Kenyan law but is addressed by international law.[305] To the extent that Kenyan law may incorporate customary international law, the relevant rules of international law would apply as Kenyan law.[306] However, international law plays no role in the merits of this case because the Claimant has not alleged that Kenyan law is contrary to international law or that there is a lacuna in Kenyan law.[307]

B. TRIBUNAL'S ANALYSIS

346. Article 42(1) of the ICSID Convention states that "*the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*."

347. The Tribunal considers that the applicable law is Kenyan law as the law under which the Licence was issued and the law of the State party to the dispute. Questions such as the validity of the Licence and whether it has been forfeited in accordance with the statute pursuant to which it was purportedly granted fall to be considered under the legislation which forms part of Kenyan law. Similarly, the questions of the legality of the declaration of forfeiture (including challenges made to the basis and manner of the Minister's decisions) fall to be considered under the constitutional and public law of Kenya.

348. Customary international law could be relevant to a particular issue through Kenyan law insofar as customary international law is incorporated into Kenyan law. (Article 2(5) of the Kenyan Constitution provides that "[t]*he general rules of international law shall form part of the law of Kenya*".) But that would not be to change the applicable law to that issue but rather to apply Kenyan law including the incorporated "*general rules*" of customary international law.

349. The Respondent also accepts that a rule of international law could become applicable if (i) a rule of Kenyan law is contrary to a rule of international law or (ii) the subject matter of a claim is not addressed by Kenyan law but is addressed by international law. There is no

[305] Respondent's Counter-Memorial, ¶¶ 116-117; Respondent's Rejoinder, ¶ 18.

[306] Respondent's Counter-Memorial, ¶¶ 119, 120.

[307] Respondent's Counter-Memorial, ¶ 119; Respondent's Rejoinder, ¶ 19; Transcript D7:P2056:L18-P2057:L8 (Juratowitch).

need to consider whether such circumstances would fall to be considered by application of Article 2(5) of the Kenyan Constitution or Article 42(1) of the ICSID Convention (or both) because the Claimant does not allege that any rule of Kenyan law is contrary to international law or that Kenyan law does not address the subject matter of the claim.

350. The Claimant argues that international law has a wider application (i) because the Licence has no applicable law provision and (ii) because of the jurisdiction agreement in Article 19 of the Licence. Thus, it is argued, by consenting to arbitrate disputes "*pursuant to*" the ICSID Convention, the Respondent agreed to arbitrate claims under Kenyan law and rules of international law. That submission states the effect of the jurisdiction agreement too broadly. The Licence does not have an applicable law provision because it does not need one – it is not a domestic law contract but a Licence issued (purportedly) under a Kenyan statute and regulations and therefore its existence and any validity derives from and is subject to Kenyan law. As to the Article 19 of the Licence, the Claimant is correct that the Tribunal's jurisdiction is sourced in the ICSID Convention and that international law is applicable to questions of jurisdiction. As the Tribunal held in paragraph 111 of its Decision on the Respondent's Preliminary Objections to Jurisdiction the determination of whether the requirements of Article 25 of the ICSID Convention are satisfied is a question of international law. That does not however have the effect of extending the application of international law for that reason to questions on the merits.

VII. THE VALIDITY OF THE LICENCE

A. PARTIES' POSITIONS

(1) Claimant's Position

351. The Respondent submits that the Claimant (i) did not make an application for the Licence and (ii) that in the absence of an application, the Minister did not have the authority to grant WalAm the Licence. As a consequence, it submits that the Licence is null and void.[308]

352. The Claimant's position is that in July 2007, it did indeed make an application with the Minister of Energy to explore and develop Suswa (the "**Application**")[309] and that by letter of 31 July 2007,[310] the Minister informed the Claimant that it had reviewed the Application and decided to grant it a geothermal resources licence.[311]

353. The Claimant submits that the Licence was granted in accordance with both the GRA and the GRR. It explains that those instruments make clear that authorities and licences are granted at the discretion of the Minister, and that the purpose of an application for a licence is to enable the Minister to assess the suitability of the grant of a geothermal resource licence to an applicant.[312]

354. The Claimant argues that the formalities listed in Regulation 4 of the GRR are not "*strict and inflexible*." Even if they were not covered in the Application, such Application still complies with the Regulation 4 because it provided the Minister the necessary information to satisfy the Minister of the applicant's suitability.[313] Unlike the geothermal resource authority, nothing in the GRA and GRR requires even a written application. Therefore, the

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[308] Respondent's Counter-Memorial, Section IV.C.

[309] Claimant's Reply, ¶ 23.

[310] **[C-118]/[KE-7]**, Letter from Hon Minister Kiraitu Murungi (MOE) to Mr Maherab Walji (WalAm), 31 July 2007. Claimant indicates that: "*WalAm immediately accepted the terms set out in the Minister's letter*", referring to **[C-119]/[KE-8]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 2 August 2007.

[311] Claimant's Reply, ¶ 23.

[312] Claimant's Reply, ¶¶ 26-28.

[313] Claimant's Reply, ¶¶ 28-29.

fact that the Minister considered the Claimant's Application and decided to grant the Licence is sufficient.[314]

355. The Claimant argues that even if the Tribunal was to consider that the Licence was granted without a specific application for a licence, it remains valid because the elements set out in Regulation 4 of the GRR are mere formal requirements.[315]

356. The Claimant also argues that Kenya's practice supports its position. It argues:

> [Kenya granted] *several licenses to developers on the basis of applications that do not satisfy each of the elements identified in the GRR. The status of other licenses is anything but irrelevant. If WalAm's License is null and void, so too must be these other licenses; that Kenya continues to recognize their validity makes Claimant's point. If, as Respondent wrongly suggests, the application requirements are statutory elements that cannot be varied by the Minister, the Minister cannot then have discretion to vary this principle by declaring only WalAm's License null and void (*i.e.*, Respondent cannot have it both ways).*[316]

357. In addition, the Claimant argues that the importance of the underlying procedure must be weighed against the individual rights. The invalidity of the Licence would result in the substantial deprivation of WalAm's rights and result in no discernible benefit to the public interest.[317]

358. The Claimant also argues that the Respondent is prohibited from asserting that the Licence is a nullity because it cannot benefit from its own wrongdoing.[318]

359. Finally, the Claimant argues that Kenya is estopped from declaring the Licence invalid.[319] According to the Claimant:

> *By its terms, the License purports* [sic] *it was duly granted in accordance with the GRA and the GRR and legally issued by the Minister and bears his signature. Since September 2007, WalAm*

[314] Claimant's Reply, ¶ 29.

[315] Claimant's Reply, ¶¶ 32-34.

[316] Claimant's Skeleton, ¶ 4.

[317] Claimant's Reply, ¶ 37.

[318] Claimant's Reply, ¶ 39.

[319] Claimant's Reply, ¶¶ 40-44.

> *devoted substantial time and efforts in reliance on this License for several years and Respondent treated the License as valid. Thereafter, in response to Kenya's wrongful declaration of forfeiture and with the understanding that the License was validly issued, WalAm initiated this Arbitration. Until this Counter-Memorial, at no stage did Respondent suggest any question regarding the validity of the License (or the arbitration agreement contained therein). In fact, Respondent's position is essentially an argument on jurisdiction guised as an argument on the merits. … Respondent's obligation to raise such argument* "as early as possible*" cannot have been met here where an entire jurisdictional phase has been concluded.*[320]

(2) Respondent's Position

360. The Respondent's position is that the Licence is a nullity because it was granted without an application.[321] The Respondent argues that under the applicable statutory framework, a valid licence could only be issued following the filing of an application in the approved form.[322] Since the Claimant never submitted an application for the Licence, as required under Kenyan law, the Licence is void *ab initio*.[323]

361. The Respondent argues that the requirements in the GRA are not, as the Claimant argues, a "*mere formality*".[324] The Respondent explains that under the GRA and the GRR an application is a mandatory requirement. A minister's discretion to grant a licence cannot be exercised unless and until the application (containing specific information) has been made. This is so that the Minister has sufficient information to properly assess the capabilities of potential developers and to ensure that licences are only granted when they are consistent with the GRA.[325] The Respondent submits that the failure of the Claimant

[320] Claimant's Reply, ¶ 44 (footnotes omitted).

[321] Respondent's Counter-Memorial, ¶¶ 127-131.

[322] Respondent's Counter-Memorial, ¶ 126.

[323] Respondent's Counter-Memorial, ¶ 6.

[324] Respondent's Rejoinder, ¶ 29.

[325] Respondent's Rejoinder, ¶¶ 27-28. See also Respondent's Skeleton, ¶ 5.

to follow the application procedure resulted in it being granted the Licence without a proper assessment of WalAm's experience and capabilities.[326]

362. The Respondent further argues that the Minister never received an application from the Claimant for a Licence for Suswa. It contends that the 20 July 2007 letter was not an application for a Licence as it did not meet the mandatory requirements set out in Regulation 4 of the GRR.[327] For the Respondent:

> [T]*he 20 July 2007 letter sent by WalAm to the Minister applying for an Authority states … that it is an 'application for geothermal resources authority', and WalAm explicitly acknowledged in point 7 of the work programme attached to it that WalAm would, at a later stage, need to 'apply for a Geothermal Resources License in accordance with the Act'.*[328]

363. Finally, the Respondent argues that under Kenyan law, estoppel cannot be invoked to defeat the effects of an applicable statute (in this case the GRA and GRR).[329]

B. TRIBUNAL'S ANALYSIS

364. The Tribunal rejects the Respondent's arguments that the Licence is a nullity. There is some lack of clarity about the circumstances in which the Licence came to be issued by the Minister in response, apparently, to the application for an authority to explore (see Section IV.A above). The Tribunal has found that WalAm did wish to obtain both the Section 6(1) authority to explore and a licence pursuant to Section 7 and that the Minister intended to grant both and did so on the advice of the Permanent Secretary that WalAm had complied in all respects with the GRA for those purposes (see paragraph 201 above).

365. The Tribunal does not consider that the existence of the statutory power in the Minister to grant a licence is pre-conditioned upon the making of an application which complies in all respects with the statutory requirements of form for such an application, or indeed an application at all. There is good reason for having a statutory prescription of the form and

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[326] Respondent's Rejoinder, ¶ 33.

[327] Respondent's Rejoinder, ¶¶ 36-37.

[328] Respondent's Rejoinder, ¶ 34 (footnote omitted).

[329] Respondent's Rejoinder, ¶¶ 43-48.

content for an application. It serves a purpose of ensuring that the Minister has information which he should take into account in exercising his power. Thus a failure to provide required information might give good grounds for the Minister to reject an application. It does not follow that the Minister has no power to grant a licence where there is such non-compliance, however trivial or fundamental. The language of the legislation does not create such a conditionality for the existence of the power linked with the form of the application – rather Section 7(2) of the GRA imposes a requirement on the applicant which it must follow and could be waived by the Minister.

366. There could be good reasons why an application in the prescribed form would not be necessary in particular circumstances, for example where all relevant information has been provided to the Minister in some other form and the applicant adds only a request that a licence be granted, the information having been provided. In the present case there was in substance an application through the combination of the application for an authority to explore and the exchanges between Mr Walji and the Ministry indicating willingness to grant a licence and encouragement to WalAm. The Minister (on the advice of the Permanent Secretary) considered that he had all the information he required from the application for the authority to explore to be satisfied that a licence should be granted.

367. Accordingly the Tribunal finds that the Licence was valid when granted and rejects the Respondent's argument of nullity.

VIII. LEGALITY OF THE DECLARATION OF FORFEITURE

A. POSITIONS OF THE PARTIES

(1) Claimant's Position

368. The Claimant argues that the Respondent had no basis to declare the Licence forfeited because it did not breach any obligations under the Licence.[330]

[330] Claimant's Memorial, ¶¶ 103-109; Claimant's Reply, ¶ 47.

369. First, the Claimant explains that at the time of the declaration of forfeiture, the Respondent relied on a breach on the part of WalAm of an alleged obligation under the Licence to build a power plant within five years. Notice of such breach was communicated to WalAm in Mr Nyoike's letter of 18 April 2012.[331] The Claimant argues that the obligation to build a power plant within 5 years is nowhere in the Licence or in Kenyan law. Accordingly, it contends, the Respondent's declaration of forfeiture on this basis is "*meritless*"[332] and "*unlawful*."[333]

370. Second, the Claimant argues that it has not breached Article 9 of the Licence which states that a licensee shall provide periodic written reports on the progress of operations under the Licence. According to the Claimant, such reports are not required until "*operations*" have in fact begun. It argues that the term "*operations*" in a geothermal context typically refers to a phase when the geothermal plant is in production.[334]

371. Third, the Claimant argues that Respondent cannot rely on Section 11(1)(a) of the GRA or Article 7(1)(a) of the Licence to justify the forfeiture of the Licence because WalAm did not cease work "*in or under the land*" for a continuous period of six months.[335] The Claimant disputes the Respondent's interpretation of "*in or under the land*" as requiring that physical work must be performed at the site.[336] According to the Claimant, WalAm routinely kept the Respondent appraised of significant development at Suswa and despite its efforts, it was met with delays and obfuscation on the part of the Respondent.[337]

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[331] **[C-032]/[KE-63]**, Letter from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), 18 April 2012. See also Claimant's Memorial, ¶ 108. The Claimant explains that while in the April 2012 Letter the Minister alleged that WalAm had breached Clauses 9 and 17 of the Licence, in its Forfeiture Notice the Minister revised its allegations to contend that WalAm had beached Clauses 7 and 9 of the Licence by failing to build a power plant within five years of geothermal resource exploration.

[332] Claimant's Memorial, ¶¶ 100, 109.

[333] Claimant's Memorial, ¶ 100; Claimant's Reply, ¶¶ 47-48.

[334] Claimant's Reply, ¶¶ 50-52.

[335] Claimant's Reply, ¶ 58.

[336] Claimant's Reply, ¶¶ 59-60.

[337] Claimant's Reply, ¶¶ 57-58.

372. According to the Claimant, the words "*in or under*" must be read "*merely as relational connectors to indicate the resource to which the 'work' should relate. In other words, assessing data, planning for development, conducting surveys—all with respect to the development of the resource beneath the licensed area—must satisfy the requirement*."[338]

373. The Claimant also points to other greenfield geothermal projects in Kenya granted to private developers where there were periods of at least six months where no drilling had occurred and the applicable licences were not revoked.[339]

374. However, if the Respondent's interpretation of "*work*" is accepted, the Claimant submits that Section 11(1)(a) of the GRA and Article 7(1)(a) of the Licence provide that the Respondent cannot declare the Licence forfeited where it has provided written consent for the licensee to cease work for a continuous period of six months. The Claimant submits that in this case, the Respondent provided its written consent to allow WalAm to forego "*physical*" work and drilling at the site until the conclusion of a PPA. The Tribunal considers the documents relied on in its analysis of the Consent and Estoppel arguments below.

375. Fourth, the Claimant argues that as a matter of Kenyan law and international law, the Respondent cannot declare the Licence forfeited for any alleged breach that was in fact caused by its own wrongdoing.[340] According to the Claimant, if WalAm was in breach of any obligation to conduct "*physical*" work in the form of drilling, the reason that it was not able to do so was because the Respondent refused to negotiate the PPA.[341] The Claimant argues that "[f]*rom March 2009, Respondent was aware that WalAm was ready to proceed with the drilling of full-diameter wells, which would require a substantial financial commitment from external investors and lenders. Respondent was further aware that, in order to provide these funds, financiers required a PPA.*"[342] Therefore, according to the

[338] Claimant's Skeleton, ¶ 7.

[339] Claimant's Reply, ¶ 60.

[340] Claimant's Memorial, ¶¶ 101, 126.

[341] Claimant's Reply, ¶¶ 67-72.

[342] Claimant's Reply, ¶ 77 (footnote omitted).

Claimant, the Respondent was the sole cause of WalAm's inability to progress to the drilling phase.[343]

376. Fifth, the Claimant argues that the Respondent was estopped at the time of the Licence from claiming that the GRA and the Licence require physical work. The Claimant submits that the Respondent never stated or suggested to WalAm that failing to initiate work of a physical nature, such as drilling, could lead to forfeiture of the Licence.[344]

377. Sixth, the Claimant argues that the Respondent's declaration of forfeiture was not proportional. According to the Claimant:

> [T]*he Minister had an obligation to exercise his discretion reasonably so that his response was proportionate to any alleged breach by WalAm. The declaration of forfeiture of WalAm's License as a result of delays caused by Respondent was plainly not a proportional response to a breach that—if it had existed—WalAm could have remedied with Respondent's cooperation.*[345]

378. Finally, the Claimant argued that under the Kenyan Constitution, the Minister was required to provide notice of the intention to exercise the power to declare the Licence forfeited under Section 11(1)(a) of the GRA, which in the present case, was not done.[346]

(2) Respondent's Position

379. The Respondent argues that even if the Licence was not void, it was lawfully declared to be forfeited in accordance with Section 11 of the GRA and Clause 7(1) of the Licence because the Claimant did not perform work "*in and under the land*" at Suswa for a continuous period of six months before forfeiture and otherwise failed to perform its obligations under the Licence.[347]

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[343] Claimant's Reply, ¶ 79.

[344] Claimant's Reply, ¶¶ 82-84.

[345] Claimant's Memorial, ¶ 125.

[346] Transcript D6:P1611:L2-1612:L22 (Benson).

[347] Respondent's Counter-Memorial, ¶ 132.

380. The Respondent argues that it lawfully declared the Licence forfeited. Section 11(1) of the GRA provides the grounds for the Minister of Energy to declare a geothermal licence forfeited.[348] The Tribunal sets out the section below.

381. The Respondent's position is that the Claimant performed no work under the Licence. It argues that none of the "*efforts*" described by the Claimant at paragraph 23 of its Memorial constitute "*work in or under the land*" for the purposes of Section 11(1)(a) of the GRA.[349] According to the Respondent, the preparation of reports does not constitute work in and under the land and none took place within six months of the forfeiture of the Licence.

382. According to the Respondent, the "*work*" that the Claimant needed to perform to keep the Licence from being forfeited was to correspond to the "*categories of 'operations' upon which WalAm was required to report under Clause 9 of the Licence and to the activities that WalAm was permitted to undertake under Clause 1(1) of the Licence*." These operations were physical in nature.[350] For the Respondent, in order to retain the Licence, the Claimant was required to drill to check whether there was a commercially exploitable resource at Suswa and in the affirmative, to exploit it.[351]

383. The Respondent argues that "[n]*otwithstanding the exploration program to which it had committed, over the entire five-year duration of the Licence, WalAm undertook no physical studies, surveys, tests or measurements in the Suswa area, nor did it carry out any exploratory drilling.*"[352] Therefore, even accepting that WalAm did what it alleges, the Minister was lawfully empowered to declare the Licence forfeited under Section 11(1)(a) of the GRA because WalAm performed no work during the year preceding the forfeiture.[353]

384. The Respondent submits that it lawfully declared the Licence to be forfeited on the basis of WalAm's non-performance. According to the Respondent, the Ministry had requested

[348] Respondent's Rejoinder, ¶ 51.

[349] Respondent's Counter-Memorial, ¶¶ 148-150.

[350] Respondent's Rejoinder, ¶ 61.

[351] Respondent's Rejoinder, ¶ 65.

[352] Respondent's Counter-Memorial, ¶ 150.

[353] Respondent's Counter-Memorial, ¶ 160. See also Respondent's Rejoinder ¶¶ 66-71.

WalAm to proceed with exploratory drilling on multiple occasions. It argues that as early as 2009, the Ministry made it clear to WalAm that exploration wells must be drilled in order to determine the overall project costs and to negotiate a PPA.[354] The Respondent also stresses that in 2011, Mr Nyoike insisted that WalAm proceed to drill.[355]

385. In sum, it is the Respondent's position that WalAm did not perform any work in or under the land in the six months prior to the forfeiture notice without the consent of the Minister and for that reason, the Licence was lawfully declared to be forfeited.[356]

386. The Respondent further argues that neither Kenya nor KPLC caused the Claimant's failure to perform under the Licence.[357] In particular, the Respondent refutes the Claimant's contentions that the Government of Kenya and its refusal to negotiate a PPA in good faith was an impediment to the continued progress of the project.[358]

387. First, the main reason that WalAm failed to perform under the Licence was that it did not have the financial means to carry out the work it had undertaken to complete.[359]

388. Second, while the Licence envisioned the conclusion of the PPA, it did not require that to take place before exploratory drilling.[360] According to the Respondent, WalAm's assertion that the negotiation of a PPA was a prerequisite for the drilling of wells is contradicted by its own evidence and by industry practice.[361]

389. The Respondent also submits that the situations of other geothermal developers in Kenya (Longonot and Akiira for example) are legally irrelevant. It argues that those projects "*involved greater commitment and progress by the developer, making it unsurprising that*

[354] Respondent's Counter-Memorial, ¶ 161.

[355] Respondent's Counter-Memorial, ¶ 161.

[356] Respondent's Counter-Memorial, ¶¶ 167-168.

[357] Respondent's Counter-Memorial, ¶ 169. Rejoinder, ¶ 82-85.

[358] Respondent's Counter-Memorial, ¶ 171.

[359] Respondent's Counter-Memorial, ¶ 172-176.

[360] Respondent's Counter-Memorial, ¶ 177-181.

[361] Respondent's Counter-Memorial, ¶ 181.

even if the criteria had been met for the Minister to have a discretion to declare a licence forfeited, no such declaration was made."[362]

390. At the Hearing, the Respondent recognised that Article 47 of the Kenyan Constitution confers a right on individuals to administrative action that is "*procedurally fair*".[363] The Respondent argues that the forfeiture was properly notified to the Claimant and thus "*procedurally fair*".[364] The Respondent insists that it notified the Claimant in advance of the forfeiture that it had "*not carried out sufficient work at Suswa*" and invited WalAm to show cause why forfeiture should not occur on that basis, citing Clause 7 of the Licence, which reflects Section 11 of the GRA.[365] At the Hearing, the Respondent clarified its interpretation of the "*show cause*" letter is as follows:

> [T]*he words in the second sentence of the second paragraph, "WalAm has not carried out sufficient work at Suswa"--those words, combined with the reference to Article 7 of the License is sufficiently fair notice that the view has been taken that not enough work has been done. And whether it says "at Suswa" or "in or and under the land" or "in or under the land" is not material, in my submission, because nothing of substance turns on the difference between those words for the purposes of notice.*
>
> *And secondly, that a reference to the entirety of Clause 7 includes within it a reference to Clause 7(1)(a) just as much as 7(1)(b); and that putting those two things together, that is fair notice of the view that there's not enough work being done, in the Ministry's view, at Suswa; and that forfeiture is a potential consequence of that; and that that arises not only from the terms of this letter, but this letter, viewed in the light of what preceded and followed.*[366]

391. In addition, the Respondent argues that "[t]*he forfeiture was published in the Gazette as required by GRA s 11(3).*"[367]

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[362] Respondent's Rejoinder, ¶ 75.

[363] Transcript D7:P1934:L9-11 (Juratowitch).

[364] Respondent's Rejoinder, ¶ 76-81.

[365] Respondent's Skeleton, ¶ 15; **[C-032]/[KE-63]**, Letter from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), 18 April 2012.

[366] Transcript D7:P2010:L15-P2011:L13 (Juratowitch).

[367] Respondent's Skeleton, ¶ 14.

B. TRIBUNAL'S ANALYSIS

(1) Validity of the Forfeiture of the Licence: Kenyan Law

392. The Claimant challenges the validity of the forfeiture, as a matter of Kenyan law, on a number of distinct grounds.

a. The forfeiture was *ultra vires* the power because the Minister purported to act on the basis of a "*non-existent*" or "*invented*" conduct: namely, that the Claimant had failed to build a power plant within five years from "*geothermal resource exploration*".

b. The Minister was not entitled to rely on Section 11(1)(a) of the GRA, on which he purported to rely.

c. In any event, the Minister had no basis on which to declare the Licence forfeited pursuant to Section 11(1)(a) of the GRA.

d. Alternatively, that the Minister gave written consent to cessation of work or was estopped from terminating the Licence on the basis of insufficient physical activity on the site.

e. Alternatively, the exercise of the discretionary power in Section 11(1)(a) miscarried because it was not exercised in good faith, or was not exercised reasonably, or was disproportionate, or took into account irrelevant considerations, or failed to take account of relevant considerations.

f. Alternatively, Kenya cannot rely on an alleged non-performance which was caused by its own acts or omissions.

g. Alternatively, the Claimant was denied procedural fairness.

393. We will consider each of the grounds below. Three other contentions can be dealt with summarily.

394. Firstly, the Claimant contends that the "*declaration of forfeiture*" was a "*repudiatory breach of the Licence*". This contractual terminology has no place in the determination of the legality of the forfeiture of the Licence which is a public law issue that requires

consideration of the existence and lawful or unlawful exercise of statutory power. Put another way, the Licence was issued pursuant to and subject to the terms of the GRA. The Licence and the GRA provide for the Minister to have the power to forfeit the Licence in the circumstances specified in Clause 7 and Section 11 respectively. The concept of forfeiture is a public law one (in contrast to, for example, express rights of termination in a contract). If it was validly forfeited under those powers, the Claimant can have no complaint. Indeed, the Claimant's contentions that the forfeiture was invalid on public law grounds of improper exercise of discretion and procedural unfairness rely on grounds that would not be available if the Licence represented only a contract between the Claimant and the Respondent and recognises that the questions in issue are public law issues.

395. Regulation 3(2) of the GRR provides:

> *A geothermal resources licence shall be accompanied by, or be conditional upon, the execution of a contract (to be known as "geothermal resources contract") between the licensee and the relevant Government department or other body designated by the Minister for the purpose of providing for the utilization of the geothermal resources.*

No such contract was entered into either at the time of the grant of the Licence or subsequently. However, the parties proceeded on the basis that, eventually, a PPA would be entered into.

396. Secondly, the Claimant contends, that Kenya was "*unjustly enriched*" by the forfeiture. This is not a recognised ground for challenge of an executive decision. As with the first matter, it is an inappropriate application of civil law principles. In any event, if the Licence was validly terminated in the exercise of a statutory power, no issue of "*enrichment*", let alone "*unjust enrichment*", arises.

397. Thirdly, the Claimant contends that the forfeiture of the Licence was an unlawful taking, contrary to the protection of property rights by Article 40(3) of the Constitution of Kenya. If the Licence was validly terminated, there was no unlawful taking. The property right was always subject to a condition that it could validly be forfeited pursuant to the legislative scheme under which it was created. This aspect will be further considered in the context

of international law rights. The reasoning in that section will apply to the cognate Constitutional submission.

398. The central issue that arises in this regard is Kenya's contention that the Licence required the Claimant to carry out physical work "*in and under the land*", the subject of the Licence. It submits that no such "*physical*" work had been conducted for a considerable period. In any event, it contends, no such work of any kind had been performed in the six months before the notice of forfeiture. The reasoning below with respect to that issue applies to the unlawful taking submission.

399. In its Reply, the Claimant contended that the decision to forfeit was not made in good faith. In response, the Respondent submitted that given that the forfeiture was lawful, the Minister's motivation for declaring the forfeiture is irrelevant.[368] The Respondent added that in any event, "*there is no proper factual basis for WalAm's allegation that the Minister was motivated by 'a desire to take back the Suswa concession in order to allow its state-owned GDC to develop the project.' This is an unsubstantiated conspiracy theory. As explained by Paul Ngugi of GDC, 'GDC has no interest in taking over private concessions' – indeed, it 'was created in order to attract private sector investment in Kenyan geothermal energy*'."[369]

400. The Claimant further contends that the Minister's decision to forfeit was not reasonable and proportionate. In response, the Respondent argues that the forfeiture was both reasonable and proportionate because it was based on WalAm's own failure to undertake any work in or under the land as required to avoid forfeiture. The Respondent explains that these circumstances, revoking the Licence was a proportionate response.[370] It also stresses that the forfeiture was properly notified to the Claimant and that the Claimant had a reasonable opportunity to understand the grounds for forfeiture and to react to them before forfeiture was actually declared.[371]

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[368] Respondent's Rejoinder, ¶ 103(f).

[369] Respondent's Rejoinder, ¶ 103(f) (footnote omitted).

[370] Respondent's Rejoinder, ¶ 103(e).

[371] Respondent's Rejoinder, ¶ 103(b).

(2) The Forfeiture

401. To repeat, the GRA relevantly provides:

> *11. Forfeiture of licence*
>
> *(1) The Minister may, by notice to the licensee, declare a licence to be forfeited —*
>
> *(a) if the licensee ceases work in or under the land the subject of the licence during a continuous period of six months, without the written consent of the Minister;*
>
> *(b) if the licensee commits a breach or is in default of any provision of this Act or of the regulations made thereunder or of any terms or conditions of the licence and the Minister has caused a notice to be served upon the licensee requiring him—*
>
> *(i) in the case of a breach which, in the opinion of the Minister, is capable of being repaired or made good, to repair or make good the breach within a specified period;*
>
> *(ii) in the case of a breach which, in the opinion of the Minister, is not capable of being repaired or made good, to show cause within a specified period why his licence should not be forfeited.*
>
> *(2) The forfeiture of a licence under subsection (1) shall not affect any liability already incurred by the licensee.*
>
> *(3) The forfeiture of a licence under subsection (1) shall be published in the Gazette.*

402. The power to grant the Licence, found in Section 7 of the GRA provides that the Licence "*shall be in the prescribed form*". The form is set out in the First Schedule of the GRR. By Regulation 3(1), a licence under Section 7 of the GRA "*shall be negotiated on the basis of the model licence set out in the First Schedule*".

403. The Licence granted to the Claimant contained the following relevant provisions:

> *1. The licensee is hereby granted the following exclusive rights:*
>
> *(1) The right and privileges to enter, explore, drill for and extract, produce, utilize and dispose geothermal steam and associated geothermal resources in and under the land specified in the Appendix 1) and shown on the map set forth in Appendix II hereof (the 'Licence Area').*

404. It is pertinent to note that this provision differs from that found in Article (1) of the First Schedule to the GRR. Relevantly, the reference to "*in and under the land*" is added.

405. The Licence goes onto provide:

> *7. (1) The Minister may, by notice to the licensee, declare this licence to be forfeited*
>
> *(a) if the licensee wholly ceases work in or under the licence area during a continuous period of six months, without the written consent of the Minister;*
>
> *(b) if the licensee commits a breach or is in default of any provision of the Geothermal Resources Act or of the Geothermal Resources Regulations, 1990 or of any terms or conditions of the licence and the Minister has caused a notice to be served on the licensee requiring the licensee -*
>
> *(i) in case of a breach which, in the opinion of the Minister, is capable of being repaired or made good, to repair or make good the breach within a specified period;*
>
> *(ii) in the case of a breach which, in the opinion of the Minister, is not capable of being repaired or made good, to show cause why this licence should not be forfeited.*

406. Clause 7 of the Licence is substantially identical to Section 11(1)(a) of the GRA. It is pertinent to note that the word "*wholly*" has been added before "*ceases*" in the Licence. That word does not appear in Section 11(1)(a) of the GRA. Furthermore, the words "*in or under the licence area*" replace the words "*in or under the land the subject of the licence*" in the GRA. This does not constitute a material change.

407. The Licence further provides:

> *9. The licencee shall provide the Minister with periodic written reports of the progress of operations under this licence as follows -*
>
> *(1) on drilling operations, daily;*
>
> *(2) on production operations, daily;*
>
> *(3) on geophysical operations, monthly;*
>
> *(4) on geothermal operations -*
>
> *(a) within one month of the last day of March, June, September and December covering the previous three months;*

(b) within three months of the date of expiry or surrender of this licence.

(5) Each report under paragraph (4) shall contain, in respect of the period which it covers -

(a) details of the geothermal operations carried out and the factual information obtained;

(b) a description of the area in which the licensee has operated;

(c) an account of the licensee's expenditure on geothermal operations;

(d) a map indicating all bores and other geothermal operations.

…

17. (1) The licensee shall notify the Minister, before operations begin, of the name and address of the person resident in Kenya who will supervise the operations under this licence and prior notice of any subsequent change shall be given to the Minister.

(2) The licensee shall appoint an attorney resident in Kenya with power of representation in all matters relating to this licence of which appointment the Minister shall be notified before the operations begin, and prior notice of any subsequent change shall be given to the Minister.

408. On 30 October 2012, the Minister revoked the Licence by the following Notice:

I am concerned that despite having granted a Geothermal Resource Licence to WalAm Geothermal Inc on 5th September 2007, there have not been any apparent efforts made by the company to explore and exploit geothermal resources in the Suswa geothermal field and ultimately to construct a power plant. Under normal practice, it takes five (5) years from geothermal resource exploration to construction of a power plant which period has since been exceeded. This amounts to a direct violation by the company of its obligations under Clauses 7 and 9 of the said Licence.

Given this untenable position, I hereby exercise the powers conferred on me by the Geothermal Resources Act, 1982 in Section 11 (1) (a) as the Minister for Energy and I forthwith revoke the Licence granted to WalAm Geopower Inc with effect from the date of this letter.

This decision shall hereinafter be published in the Kenya Gazette as per the provisions of the Law.

409. As appears from the penultimate paragraph of this Notice, the Minister purported to exercise the power set out in Section 11(1)(a) of the GRA. That was also the express basis of the forfeiture as published in the Kenya Gazette:

> FORFEITURE OF GEOTHERMAL RESOURCES LICENCE *NO. 1/2007*
>
> *PURSUANT to section 11 (1) (a) of the Geothermal Resources Act, 1982, the Geothermal Resource Licence No. 1/2007 granted to WalaM Geothermal Inc. on 5th September, 2007, is forfeited, with immediate effect, to the state.*
>
> *Dated the 1st November, 2012.*
> *KIRAITU MURUNGI,*
> *Minister for Energy.*

410. The Forfeiture Notice was preceded by a Show Cause letter of 18 April 2012, which stated:

> *WalAm Geopower Inc. was granted the above captioned licence covering Suswa Prospect on 5th September, 2007 for exploration, appraisal and development of the geothermal resource therein to construct a power plant (copy of licence attached for ease of reference).*
>
> *Under normal practice, it takes five years from geothermal resource exploration to construction of such power plant. However, it is noted that WalAm has not carried out sufficient work at Suswa despite the license running close to five years now. Under the circumstances, it will not be possible for the company to construct the power plant within the five years. In addition, WalAm is also in breach of Articles 9 and 17 of the license.*
>
> *Pursuant to Article 7 of the license, the Minister for Energy intends to declare Geothermal Resources License No.1/2007 as forfeited. Notice is, therefore, hereby given to you to show cause why this Licence should not be forfeited.*
>
> *Yours Sincerely,*
> [Signature]
> *Patrick M. Nyoike, CBS*
> *Permanent Secretary*

(3) The *ultra vires* basis

411. The Claimant's contention that the decision to forfeit was beyond power turns on the interpretation of the Forfeiture Notice, in the context of the Show Cause letter and the

course of interaction between the parties. The proposition that the Minister was not entitled to rely on Section 11(1)(a) of the GRA (or Clause 7(1)(a) of the Licence) relies on the same interpretation.

412. The Claimant's interpretation is based on the submission that, properly understood, the sole basis for the forfeiture was the alleged failure to build a power plant within a five-year period. The Claimant argues that the Forfeiture Notice "*follows*" what the Show Cause letter had said and forfeited for failure to construct a power plant within five years. It argued that the word "*this*" in the last sentence of the first paragraph of the Forfeiture Notice is a reference back to the violation notified in the Show Cause letter.[372] The Claimant points out that nothing in the legislative scheme, nor in the Licence, created any such obligation. This was in contrast with two other geothermal licences for other areas, which did contain such an obligation.

413. As to the argument that the Forfeiture Notice should be interpreted as following the Show Cause letter, or even in light of it, it is to be noted that the Minister forfeiture was expressly based on the exercise of the power under Section 11(1)(a) of the GRA. That power is not preconditioned upon there having been a show cause notice. Further, the Forfeiture Notice does not refer to the Show Cause letter. There is no reason to interpret the forfeiture notice other than in its terms and in light of the sections of the Licence and the GRA to which it refers. The Show Cause letter, as we will show, invoked a different power. The broader context, including the Show Cause letter, is, however, material to a number of the public law grounds invoked by the Claimant.

414. We have set out the Forfeiture Notice above. The Claimant contends that the last sentence of the first paragraph, which commences:

> *This amounts to a direct violation …*

refers to the immediately preceding sentence, which refers to the five-year period.

415. The Tribunal is of the view that confining the word "*this*" to what immediately precedes it is not a reasonable interpretation of the Notice. That is so for a number of reasons.

[372] Transcript D6:P1591-1592 (Benson).

416. First, the very first sentence of the Notice contains a reference to building a power plant, but does so in a broader context:

> [T]*here have not been any apparent efforts made by the company to explore and exploit geothermal resources in the Suswa geothermal field and ultimately to construct a power plant.*

417. The next sentence, upon which the Claimant focuses, elaborates the concluding clause: "*ultimately to construct a power plant*". The sentence on which the Claimant relies does not stand alone but refers back to a broader allegation of default, namely the absence of "*apparent efforts … to explore and exploit*". Furthermore, the words "*ultimately to construct*" are more consistent with an event that would have occurred in the future, rather than an event whose time has passed.

418. Secondly, the sentence commencing: "[t]*his amounts to …*" itself concludes with a reference to Clauses 7 and 9 of the Licence. The reference to Clause 7 could, arguably, be confined to Section 11(1)(b), if read only in the context of the Show Cause letter – to which we will return. However, that cannot be said with respect to the reference to Clause 9, which concerns reporting requirements of a broader nature. That reference is much more clearly related to the absence of "*apparent efforts … to explore and exploit geothermal resources*". Any such "*efforts*" should have been the subject of reports under Clause 9.

419. Thirdly, the next paragraph goes on to state, expressly, that the power being exercised is the power under Section 11(1)(a). In its terms, that power is based on a failure to do work in or under the land that continued for a six-month period. That has no, or at best a tenuous, relationship to the alleged failure to build a power plant within five years, but would have a relationship with the absence of "*any efforts to explore and exploit*". The failure to do any "*work on the ground*" was expressly raised in the discussions in February/March 2011 as set out in the Section IV, to which we will refer further below, in our consideration of the grounds of challenge to the Termination decision.

420. As we have noted, the Claimant sought to invoke the Show Cause letter for its interpretation of the Forfeiture Notice. The focus of that earlier communication is on the failure to build a power plant within five years. However, that is not the sole focus. It also states: "*Walam has not carried out sufficient work at Suswa*". That broad language is not confined to

completing the construction of a power plant. Further, breaches of Clauses 9 and 17 are also alleged.

421. On its face, the Show Cause letter is a notice under Section 11(1)(b) and Clause 7(1)(b). This is strongly suggested by the concluding statement that the Minister intends to declare (the Licence) forfeited and invites the Claimant to "*show cause*" why that should not be done. The express reference to the fact that "*it will not be possible … to construct the power plant within five years*" appears to be a reference to a matter that is not curable and therefore intended to be a reference to Clause 7(1)(b)(ii).

422. The structure of the Show Cause letter, indeed its very existence, cannot be interpreted as relying on Clause 7(1)(a). It is only consistent with Clause 7(1)(b).

423. The reference to "*WalAm has not carried out sufficient work at Suswa*" is not, of itself sufficient to constitute a reference to Clause 7(1)(a). In any event, that basis for the forfeiture does not lead to a request to "*show cause*". Clause 7(1)(a) does not require any further notice.

424. It is pertinent to note how the reference in the Show Cause letter ("*WalAm has not carried out sufficient work*") is reflected in the Forfeiture Notice in an expanded form:

> [T]*here have not been any apparent efforts made by the company to explore and exploit geothermal resources.*

425. Whatever may have been the confines of the Show Cause letter, the Forfeiture Notice states a specific basis for the decision. The Tribunal rejects the *ultra vires* challenge to the validity of the Forfeiture Notice to the effect that the reason for forfeiture was the failure to build the power plant within five years. The invocation of Section 11(1)(a) is express and is confirmed in the publication of the Notice in the Gazette, which gives the forfeiture effect. The terminology referring to construction of a power plant in the termination notice itself – "*and ultimately to construct a power plant*" – abandons any suggestion that the plant should have been constructed by the time of the forfeiture.

426. For the same reasons, we reject the Claimant's contention that, on procedural fairness grounds, Kenya is not entitled to rely on Section 11(1)(a) or Clause 7(1)(a). Before this Tribunal, Kenya did not rely on the failure to build a power plant within five years as a

justification for the forfeiture. However, as we have shown, on the proper interpretation of the Notice, that was not what Kenya purported to do on 30 October 2012.

427. We reject the Claimant's contention that there was no reliance on Section 11(1)(a) on any basis other than the alleged five-year obligation to build a power plant. The five-year reference bears no relationship to the six-month passage of time referred to in that provision. The express reference to Section 11(1)(a) in both the Notice, and in the Gazette, is itself sufficient to reach that conclusion. Reading the whole of the Forfeiture Notice, in its context, affirms that the basis of the decision was the failure to do any physical work in or under the land.

428. That, however, does not resolve further challenges raised by the Claimant: including whether there was a proper factual basis for a Section 11(1)(a) forfeiture, reasonableness, relevant considerations and procedural fairness grounds.

(4) The Factual basis

429. As noted above, the Claimant contended that the Minister had no factual basis for a Section 11(1)(a) finding, because of the work the Claimant had done. The circumstances in which a Ministerial decision can be set aside on the basis that there was no factual basis for it, are limited in administrative law jurisprudence. The Tribunal was not provided with evidence of that character. In any event, as appears from the detail in Section IV, particularly in the respective Work Programs we discuss, WalAm had not undertaken any physical work on the ground for a substantial period of time. On the evidence before us, the last site visit by a WalAm employee was in November 2008, when Mr Laing accompanied Geothermal Resources to the area.[373]

[373] Between 12-13 December 2009 SKM and Howard Humphreys (an experienced local engineering company retained to jointly produce an infrastructure report on road conditions and water sources for Suswa, see **[C-024]**, Howard Humphreys (East Africa) Limited and Sinclair Knight Merz, *Suswa Geothermal Concession Report on Access Road Condition and Source of Water for Drilling Programme, Rev. 4*, November 2010, p. 2) conducted a two-day site visit to Suswa to survey road conditions, find a possible access route, and investigate potential water supply sources for the drilling program. It was not suggested by the Claimant that this was physical work on the ground.

430. In closing submissions,[374] counsel for WalAm identified three items of work which were described as "*work* […] *done in 2012*", it being common ground that this was the relevant period to consider whether anything was done "*in and under the land*". No other work was done in the six months before the Notice of Termination. Unless one of these constituted "*work*" within the meaning of Section 11(1)(a) and Clause 7(1)(a), the factual basis for termination is established.

431. The first matter relied on is "*WalAm sends an EOI for the GRMF grant*."[375] The two documents relied on are both dated 2 November 2012, that is, after the date of the Forfeiture Notice. No doubt some preparatory work was done before that, but we have no evidence about that.

432. The second matter relied on is: "*WalAm works with SKM on updates to the Development Plan*".[376] In April 2012 WalAm reported to Mr Nyoike that it had engaged SKM "*to bring capital expenditures up to date*"[377]. Version 9 of the SKM Development Plan[378] is dated 18 April 2013. While this document was clearly developed over time, the Claimant relied only on the fact that it was instructing SKM to update it and did not suggest that any "*work*" proposed on this Plan had actually been undertaken during the six months before the forfeiture. On the contrary, the Development Plan showed that in terms of feasibility study, exploration and drilling preparation, that was all still to come.[379]

433. The third matter relied on is: "*WalAm engages in discussions with KPLC to conclude a PPA*".[380] Two documents are referred to. The first is an email chain between 27 July 2012

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[374] Transcript D6:P1628-P1629 (Benson).

[375] Claimant's Closing Presentation, slide 26.

[376] Claimant's Closing Presentation, Slide 26.

[377] **[C-074(C)]/[KE-61]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending various documents, 16 April 2012.

[378] **[C-017]/[KE-99]**, Sinclair Knight Merz, *Suswa Geothermal Power Plant – Development Plan (Version 9)*, 16 April 2013.

[379] Section 8 of Development Plan, p. 58 (**[C-017]/[KE-99]**, SKM Report).

[380] Claimant's Closing Presentation, Slide 26.

and 7 September 2012.[381] It concerns the provision by KPLC of a draft PPA. The second is Mr Walji's email of 1 November 2012 to Mr Njoroge, two days after forfeiture[382] reporting that he had spoken to Ms Meso who had said that feedback on the mark-up of the draft PPA was scheduled to be done.

434. It is certainly the case, as appears from our detailed chronology in Section IV, WalAm was, still in 2012, trying to progress the discussion of the PPA. As the Claimant accepted in closing submissions in relation to all the matters relied on as having been done in 2012 "*none of this work has anybody out on the Suswa property; that is clear*."[383] The relevant facts are not in contention.

(5) The meaning of "*in or under the land*" and "*in or under the license area*"

435. The determination of the issue posed by the Claimant's contentions in this regard turns on the interpretation of the words "*in or under the land*" in Section 11(1)(a) of the GRA and "*in or under the license area*" in Clause 7(1)(a) of the Licence.

436. Kenya contends that either formulation requires physical acts at the land. Communications and drafting offsite involving applications for funds, development of plans or negotiations for sale of electricity are not of that character. The Claimant argues that the phrase "*in or under the land*" loosely refers to the resource and that "*the point of the License is to develop that resource and exploit it.*"[384] The Claimant says that this does mean that the licensee must "*do whatever is necessary to develop that resource*" and that the land is to be exploited meaning that the resource "*needs to be taken out of the ground and used to generate electricity.*" [385]

437. The Claimant's interpretation is less precise and might still comprehend the need for physical work but could allow for the work required to vary from time to time. That

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[381] **[C-79(A)]/[KE-75]**, Email from Ms Beatrice Meso (KPLC) to Mr Maherab Walji (WalAm), attaching KPLC and WalAm's comments to Draft PPA and PPA Schedules, 7 September 2012.

[382] **[C-82(A)]/[KE-79]**, Emails from Mr Maherab Walji (WalAm) to Mr Joseph Njoroge (KPLC) and Ms Beatrice Meso (KPLC), re-attaching WalAm's updated comments to Draft PPA and Schedules, 1 November 2012.

[383] Transcript D6:P1630:L1-2 (Benson).

[384] Transcript D6:P1631:L10-11 (Benson).

[385] Transcript D6:P1632:L1-2 (Benson) and Transcript D6:P1631:L16-17 (Benson).

uncertainty and vagueness, and the fact that there might be no visibility to the licensor of development weighs against that construction.

438. On the other hand the textual basis for Kenya's submission is compelling. The references to "*land*" and "*licence area*" strongly indicate a physical dimension. Similarly, the propositions "*in*" and "*under*" involve a physical relationship between the conduct and land. This cannot be understood to be satisfied by a general association, as would be the case if a formulation such as "*in relation to*" had been adopted.

439. This conclusion is reinforced by the identity between the Clause 7(1)(a) formulation of "*in or under the licence area*" and the Clause 1(1) statement of the "*exclusive rights*", which the licence confers. That is expressed to be a right to conduct various physical acts "*in and under the land*". Those acts are: "*to enter, explore, drill for and extract, produce, utilize and dispose geothermal steam and associated geothermal resources*". The "*rights*" conferred by the licence under Section 8 of the GRA are also referable to physical activity occurring in the licence area or with respect to ancillary operations, water supply and transport to the area: "*to enter upon the land*" "*to bore and extract*" "*to drill and construct*" etc.

440. The licence so conferred, renders lawful physical acts which would otherwise be illegal as a trespass or as an infringement of the property rights in geothermal resources, vested in the Government of Kenya by Section 3 of the GRA. There is therefore a strong reason to interpret the forfeiture condition in Section 11(1)(a) of the GRA as dependent on a failure to exercise the rights granted by the licence; in other words to read Section11(1)(a) consonantly with Section 8(1). It would be consistent with the object and purpose of the Act and of the grant of the licence, that a failure to exploit the licence could give rise to forfeiture in specified circumstances, and on a proper interpretation of those provisions, such exploitation is contemplated as necessarily involving physical activity.

441. The Claimant says that this interpretation is narrow and literal. It is not – it is an interpretation which reads the forfeiture provision in the context of, and consistent with, the object and purpose of the licence and the rights granted thereunder. The formulation "*in and under the land*" in Clause 7 (1)(a) and the cognate formulation in Section 11(1)(a) require physical activity at the site – the right to forfeit arises where there has been a failure

for six months on the part of the licensee to do anything in exercise of the right and for which it required the authority of the licence to do.

442. Furthermore, we have set out above the facts in support of the Respondent's contention that no relevant work was carried out during the six-month period (see paragraphs above). The Claimant accepted that if the Tribunal adopted the Respondent's interpretation, the Claimant could not contend that the condition was satisfied.[386]

443. This conclusion is reinforced by the statement in the Forfeiture Notice alleging a breach of Clause 9 of the Licence. Although that is not said to be the basis for the forfeiture decision, it is relevant to the stated basis under Clause 7(1)(a). Clause 9 requires periodic written reports, some daily, some monthly and some quarterly.

444. Although WalAm provided information on what it had done from time to time, the detail required by Article 9 was never provided in the form requested, let alone at the times required.

445. We uphold the interpretation advanced by the Respondent. On this basis, the factual foundation for the decision to exercise the discretion to forfeit has been established. We reject the Claimant's contention that it was not.

(6) The Exercise of the Discretion

446. The Claimant challenges the Minister's decision to forfeit the Licence on a number of overlapping grounds. The relevant common law principles of administrative law are reinforced by Article 47 of the Constitution of Kenya, which provides:

> *Article 47*
>
> *(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right … of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

[386] Transcript D6:P1634:L11-14 (Benson) ("[I]*f their construction of 'in and under the land' is right, I lose this whole point, so I'm not suggesting that this would satisfy their test.*").

447. The parties did not rely on the provisions of the *Fair Administrative Action Act 2015*. It was not in force at the date of forfeiture.

448. The following general statement of the principles of judicial review of executive discretion under the Kenyan Constitution, and the common law of Kenya, provides an overview:

> *It is however trite that discretion must be exercised in good faith and reasonably. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can therefore intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable.*[387]

(7) Good Faith

449. One of the grounds for the Claimant's challenge can be dealt with shortly. In the pleadings it asserted that the decision to terminate was not made in good faith. No such proposition was put to any witness. Mr Nyoike gave evidence about the process by which the decision was reached by the Minister, Mr Nyoike's own involvement and the taking of advice from the Attorney-General. Any allegation of lack of good faith would have had to be put to him. It was not. The Tribunal does not, in any event, consider that any aspect of the evidence before us could have supported a suggestion of bad faith. We have set out the relevant facts above.

450. The Ministry had expressed its frustration with the lack of progress under the Licence on a number of occasions. It is sufficient to refer to the MOE response to the 2011 Work Program and the attendant discussions. We have found that this process occurred after the

[387] **[CL-113]**, *Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd* High Court at Nairobi, Judicial Review Cause No. 470 of 2016, Judgement, 13 January 2017, ⁋ 51 per Judge G V Odunga, referring with approval to Nyamu, J (as he then was) in *Republic v Minister for Home Affairs and Others ex Parte Sitamze Nairobi* HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.

MOE had indicated dissatisfaction with the lack of work on the ground and Mr Nyoike had threatened loss of the Licence.

451. After requiring that the first draft of the document be amended to add timelines and budgets, the revised work plan was approved. However, that approval was subject to an express condition that the Program, including the timetable, must be "*strictly adhered to*". The breach subsequently relied on in the Forfeiture Notice was already apparent. This further indulgence on the part of the MOE is inconsistent with the allegation of bad faith.

452. There is no basis for a finding that the decision to forfeit under Section 11(1)(a) and Clause 7(1)(a) was not made in good faith. We reject this ground.

(8) Reasonableness/Proportionality

453. The factual inquiries relevant to these two forms of illegality are closely related. It is convenient to treat them together.

454. The relevant principles are not in contention. It is only necessary to refer to two of the authorities to which the Claimant drew the Tribunal's attention.

455. In *Patrick Kariungi v Commissioner of Police & Another,* High Court at Nairobi, JR Misc. Civil Application No. 193 of 2012, Judgment, 15 July 2014,[388] the High Court at Nairobi referred with approval at paragraph 32 to the following:

> *In* Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi *HCMA No. 285 of 2006, the Court held:*
>
> *"If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity … Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law … It is*

[388] [**CL-107**], *Patrick Kariungi v Commissioner of Police & Another,* High Court at Nairobi, JR Misc. Civil Application No. 193 of 2012, Judgment, 15 July 2014, ¶ 32.

> *axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."*[389]

456. In *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & Another,* High Court at Nairobi, Misc. Application No. 328 of 2015, Judgment, 20 January 2016,[390] the High court at Nairobi stated, with reference to the facts of that case:

> *It appears on the authorities to which we are referred, that the Kenyan concept of 'reasonableness' in administrative law requires a finding that the Ministerial action was 'arbitrary or capricious'. This is an objective test which does not involve review of the events, an important demarcation in the principles of judicial review of administrative decision making.*[391]

457. The Tribunal has set out the significance of projects such as that under consideration to the people of Kenya in our section on Geothermal Development in Kenya. We have referred to a number of official reports, including *Least Cost Power Development Plan 2010-2030, Kenya Vision 2030 Strategy,* and the first *Medium Term Plan 2012-2016.* The development of public policy over a period of time, culminating in these plans, highlights the significant national interest involved in the ambitious plan for expanding geothermal capacity twenty-fold, to fill what is described as an electricity deficit in the nation. This is the background against which the reasonableness of the decision to terminate the Licence in this case must be assessed. Over a period of more than five years the Claimant had spent a significant amount of money on consultants and had developed the outline of a project. It had not done anything to implement that project. It had manifested an inability to raise the funds required to progress the project beyond the project outline stage and, indeed, had not paid its last consultant because it couldn't.

458. The process of growing frustration on the part of Kenya, is best expressed in Mr Nyoike's internal note of 7 March 2011, with respect to an application for a VAT exemption: "[t]*his*

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[389] Emphasis omitted.

[390] **[CL-111]**, *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & Another,* High Court at Nairobi, Misc. Application No. 328 of 2015, Judgment, 20 January 2016.

[391] See **[CL-129]**, *Zachariah Wagunza & Another v Office of the Registrar Academic Kenyatta University & 2 Others,* High Court at Nairobi, Judicial Review Application No. 155 of 2013, Judgment, 18 December 2013, ¶¶ 23-24.

is another delaying tactic. It is not prudent to have WalAm sit on this area doing virtually nothing." As we have noted in Section IV, he explained in his witness statement that his concern and frustration was based on Kenya's twenty-year rolling plan to make geothermal energy a major source of electricity for sale to the national grid.

459. The key events leading to the MOE losing confidence in WalAm's capacity to deliver are set out in the Section IV, including:

a. Mr Nyoike asked Mr Walji before the licence was granted to affirm WalAm's capacity to deliver and see the project through and received that assurance.

b. The approval of the original Work Program on 7 September 2007 required a "*two phased exploration program*", with the second phase consisting of two exploration wells. The proposed condition that drilling would occur after a memorandum of understanding for a PPA with KPLC – only a memorandum of understanding not a PPA – was expressly removed by the MOE from the Authority as issued. Mr Walji noticed that that had occurred. The undertaking to drill two exploration wells was unconditional.

c. The GeothermEx report proposed a number of full diameter wells to establish feasibility of the project. This increased the funds required for the exploratory phase significantly. In the subsequent discussion in and after March 2009, WalAm said it required a "*mutually agreed PPA*" to raise the requisite funds. In response Mr Nyoike wrote on 29 September 2009:

> *Walam obtained the license … on full understanding that the Company has the necessary financial and technical capability to fulfill the power development.*
>
> and
>
> *The Ministry cannot therefore determine the project costs for WalAm or engage in entering Power Purchase Agreement (PPA) with Walam unless steam wells have been drilled.*
>
> *WalAm will need to drill at least three (3) geothermal wells which will provide the required information on the capacity of power to be generated and therefore making it possible to negotiate fruitfully for PPA with* [KPLC].

d. The next significant communication from WalAm was a letter to the Minister of 30 August 2010 – almost a year later. Mr Walji acknowledged: "[i]*t may seem that WalAm has not been doing much work in Kenya.*" But he assured the Minister that the work of the consultants "*will now lead to WalAm being able to drill as per schedule*".

e. In and around March 2011, WalAm presented its new Work Program. The MOE sent back the first draft in order to specify timetables and budgets for the phases proposed. During this period Mr Nyoike warned or threatened that the Licence would be withdrawn because WalAm had not done enough "*work on the ground*". Subsequently, he explained to a WalAm representative that what he had in mind at that stage was infrastructure in roads and water that were a prerequisite for exploratory drilling rather than drilling itself.

f. On 23 March 2011, Mr Nyoike approved an amended Work Program with separate timelines for water and road development by December 2011 and split program for drilling three wells, the first of which was by December 2011 and the next two by July 2012. He stated expressly that the approval was based on "*the understanding that the schedule will be strictly adhered to.*" The letter advised WalAm to pursue PPA negotiations with KPLC.

460. Far from adhering to its own proposed timetable, nothing of the character required for work on the ground occurred before the forfeiture. WalAm's inability to deliver was reinforced by its failure to engage in a competent manner with KPLC.

461. We have set out in Section IV the inability of WalAm to raise the US$3 million which it thought necessary to negotiate a final PPA. We have also set out the inability of WalAm to provide KPLC with the information which was essential for the critical commercial components of a PPA. The evidence of the witnesses from KPLC before us was an indictment of WalAm's commercial competence.

462. Ms Njagi stated that the key elements were project specific and of a kind that only the developer could provide. As Mr Shibuyanga pointed out, KPLC practice required an applicant to provide a tariff proposal together with its financial model, so that the proposal

could be tested. That required the developer to identify its infrastructure requirements, timeline for construction and associated costs.[392] As we have noted, Ms Njagi affirmed that KPLC never received a financial model. Indeed, she noted that it had never received the SKM Report.[393] As late as 28 August 2012 Ms Meso wrote pointing out that KPLC could not enter the "*specific details describing your plant*". The key components of the formula in the schedule for the computation of the tariff, notably the capacity charge, could only be provided by WalAm. It alone had, or should have had, information on the costs of the development, including the power plant. Mr Walji accepted that this information was necessary. Over a period of months of exchanges with KPLC, between the Show Cause Notice and the Forfeiture Notice, nothing was provided.

463. In view of this long history of inability to deliver, or to establish that it could acquire the financial resources to do so, Kenya's decision to terminate the Licence was not unreasonable.

464. The alternative test of "*proportionality*" does not involve a clearly distinct test. The same range of facts referred to above on "*reasonableness*" are relevant. It was entirely open to the Government of Kenya to decide that the Claimant would not be able to develop this resource within a reasonable time, if at all. In view of the significance of such development in the national interest and the opportunities that Kenya had given WalAm to show that it could deliver, termination was a proportionate response to that failure.

(9) Irrelevant Considerations

465. It is well established that the exercise of a Ministerial discretion may be found to have miscarried if the Minister took into account irrelevant considerations or failed to take into account relevant considerations. The position is the same if the Minister asks himself the wrong question, as may appear from the reasons given.[394]

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[392] Shibuyanga Second Witness Statement, ¶¶ 6-7, 13-17.

[393] Transcript D4:P1151:L15-18 (Njagi cross-examination).

[394] **[CL-111]**, *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & Another,* High Court at Nairobi, Misc. Application No. 328 of 2015, Judgment, 20 January 2016*,* ¶ 63.

466. The Kenyan authorities to which we were referred include *Wagunza*[395] where the Court referred, at paragraph 26, with approval, to the judgment in *Republic v The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC,* Application No. 123 of 1998, to the following effect:

> *The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a strait jacket … Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality … The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations …*

467. The Court went on to state at paragraph 40:

> *Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration.*

468. The Court concluded on the facts of that case at paragraph 43:

> *Therefore in meting out punishment the Respondent was expected to exercise its discretion reasonably and not arbitrarily and capriciously or in bad faith. The law is that in the ordinary way and particularly in cases, which affect life liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons. Similarly where the reason given is not one of the reasons upon which they are legally entitled to act, the Court is entitled to intervene since their action would then be based an irrelevant matter. In this case the Respondents gave no reason at all for imposing different sentences on the applicants from those imposed on fellow "key suspects" and in default of such*

[395] **[CL-129]**, *Zachariah Wagunza & Another v Office of the Registrar Academic Kenyatta University & 2 Others,* High Court at Nairobi, Judicial Review Application No. 155 of 2013, Judgment, 18 December 2013.

> *reasons this Court is properly entitled to infer that there were no good reasons for imposing such sentences on the applicants or that the sentences were based on irrelevant matters.*

469. It is relevant to point out that the case before this Tribunal does not involve the human rights dimension in *Wagunza.*

470. As we have indicated, in dealing with the *ultra vires* arguments above, Kenya did not terminate for failure to build a power plant within five years. It did make reference to the power plant aspect which had been the focus of the Show Cause letter. That this was a matter in the mind of the Minister's closest advisor, Permanent Secretary Nyoike, is shown by the prominence of that matter in his Show Cause letter.

471. However, the way in which the power plant was referred to in the Forfeiture Notice was quite different to the Show Cause latter. It said "*ultimately to construct a power plant*". The reason for the forfeiture, as we have determined, was the fact that "*no apparent efforts to explore and exploit the geothermal resources*" had been made. The fact that "*ultimately*" that would have led to a power plant reflects the final purpose of the Licence. In this context it is not an irrelevant consideration.

472. There is a further exception to invalidity based on a finding that the irrelevant consideration "*played no significant part in the decision-making exercise*"[396]. If we had found that the refence to the power plant was an irrelevant consideration, we would have applied this exception. Our interpretation of the Forfeiture Notice leads to the conclusion that the reference to building a power plant within five years played no significant part in the decision to forfeit under Section 11(1)(a). This conclusion is reinforced by the background context of communications between WalAm and the MOE as well as the internal documentation of the MOE. Many aspects of WalAm's actual and proposed conduct were considered, especially in the communications about the two Work Programs of 2007 and 2011. On no occasion was there any reference to the construction of the power plant. Perhaps the best example is the series of exchanges in February/March 2011 in the context of the Work Program. There was an express threat of termination of the Licence on the

[396] **[RL-158]**, *R(FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444, ¶ 67.

basis of inadequate work on the ground, where the sole focus was water and road infrastructure and drilling.

473. Kenya invoked authority which suggests that the existence of an irrelevant consideration does not result in a miscarriage of the discretion, if the result would have been the same, on the basis of the relevant considerations that were taken into account.[397]

474. One of the relevant cases on this basis of exclusion expresses the applicable test with stringency "*probability is not enough …* [t]*he defendant would have to show that the decision would inevitably have been the same*".[398] In a later case, one judge expressed the test in terms of whether the decision maker "*would necessarily have reached the same result*"[399] a second adopted the same formulation without the word "*necessarily*"[400] and the third agreed with them both. A text writer adopts a similar level of conviction by adopting the word "*undoubtedly*" and adds an additional criterion "*and there is clear countervailing public interest in not quashing the decision*".[401]

475. However, these alternative formulations should now be understood in the light of the most recent survey of this line of authority by the Court of Appeal in *R(FDA)* supra. Neuberger MR (as his Lordship then was) emphasised that this exclusion was "*exceptional*"[402] and adopted the formulation; "*it would be pointless to require the decision-maker to reconsider the question afresh, because he would reach the same answer*."[403] His Lordship suggested that this may be "*a theoretical point*" if the Secretary of State could not show that the irrelevant consideration was "*not a significant factor*".[404]

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[397] See **[RL-157]**, *R v Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1153, ⁋ 1177; **[RL-158]**, *R(FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444.

[398] **[CL-178]**, *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, ⁋ 10.

[399] **[RL-159]**, *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1989] 54 P & CR 306 (CA), p. 327 per Purchas LJ.

[400] *Id.* at p. 329 per Staughton LJ.

[401] **[RL-162]**, Lewis, *Judicial Remedies in Public Law*, ⁋ 12-029.

[402] **[RL-158]**, *R(FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444, ⁋ 68.

[403] *Id.* at ⁋ 69.

[404] *Id.*

476. His Lordship's reasoning, when finally disposing of the case is pertinent for present purposes:

> [78] … *this is one of those relatively rare cases, when the court could properly (and therefore should) conclude, that even though the decision-maker took a legally irrelevant factor into account, and it was a " substantial" (as opposed to an "insignificant") factor, it is a factor which can be "disentangled" from the other, valid, reasons for the decision, and in the light of those reasons, the decision should stand as it plainly would have been the same if the factor had not been taken into account.*

477. It is common ground that there is no Kenyan authority that adopts this limited exception to the usual conclusion of invalidity, when an irrelevant consideration has been taken into account. Nevertheless, as the Respondent submits, Kenyan administrative law makes frequent reference to English precedent.

478. The Claimant drew our attention to one authority which stated, in a natural justice context, that it is not material that the same decision would have been made.[405] The elements are different in a context where irrelevant considerations have been taken into account, where a balancing exercise may be appropriate. There is no equivalent balancing consideration in the procedural fairness context.

479. The Respondent has reinforced its submission with reference to the process of reconsideration of the decision to terminate in this case. Again, it is common ground that there is no Kenyan authority directly in point. The Respondent does refer to a natural justice case where reconsideration was relied on.[406] Again that context is quite different, as procedural fairness always requires an assessment of the full course of conduct.

480. In the present case, as the Respondent points out, the Claimant's request for reconsideration of 5 December 2012 made no reference to the failure to construct a power plant within five

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[405] **[CL-182]**, *Republic v District Commissioner Machakos & Another Ex-Parte Kakui Mutiso*, High Court of Kenya at Nairobi, JR Misc. Civil Application No. 304 of 2013, Judgement, 25 July 2014, ⁋ 53 and **[CL-181]**, *Republic v County Director of Education, Nairobi & 4 Others Ex Parte Abdukadir Elmi Robleh*, High Court of Kenya at Nairobi, JR Misc Application No.61 of 2018, Judgement, 27 February 2018, ⁋ 31.

[406] **[CL-078]**, *Garissa County Government v National Land Commission & 3 Others*, High Court at Nairobi, Petition No. 401 of 2014, Judgement, 9 August 2016, ⁋ 93.

years. Nor, does the point by point rejection by the Respondent of that request make any such reference.[407] This documented process does enable the Tribunal to draw the inference that the Claimant understood that the irrelevant consideration was not their real problem. More significantly, it enables the Tribunal more confidently to reach the conclusion that the same decision would have been made, even on an "*inevitably*" or "*undoubtedly*" test.

481. The Claimant contends that the reconsideration was not "*meaningful*". We see no evidence of that. Each point made was addressed. In any event, no such proposition was put to Mr Nyoike in cross-examination. A proposition which challenged his integrity, should have been put.

482. It is clear that the Ministry of Energy had long been concerned with the failure of WalAm to pursue the development of the Licence. The reliance on the failure to do so in the six months prior to the Forfeiture Notice – the period stipulated in Section 11(1)(a) – is consistent with this concern.

483. Perhaps the clearest statement of the concern is found in the letter of 23 March 2012, by which Mr Nyoike accepted the commitment to the detailed timetable set out in the Work Plan put forward by WalAm. He emphasised that he accepted the implicit assurance that WalAm had the necessary resources and the promised dates – which he marginally amended – to be achieved. The tone of this letter is "*This is your last chance*". There is nothing in this correspondence placing any reliance on any obligation to build a power plant within five years. Indeed, as further explained in oral evidence, it is quite inconsistent with any such factor being regarded as significant.

484. If it were necessary to do so, the Tribunal would find that, even if the power plant reference was a significant relevant consideration, without it the result would have been the same.

(10) Relevant Considerations

485. The obverse of the irrelevant considerations ground is the failure to take into account relevant considerations. Similar principles apply.

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[407] See [**C-084]/[KE-84]**, Letter from Mr Maherab Walji (WalAm) to Hon Minister Kiraitu Murungi (MOE), 5 December 2012 and **[C-086]/[KE-87]**, Email from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), attaching Letter dated 19 December 2012, 21 December 2012.

486. The Claimant invokes that ground on the basis that the Minister failed to take into account the legitimate expectations of the Claimant. They refer to two cases in support of the content of relevant considerations, *Keroche Industries Limited v Kenya Revenue Authority* [2007] eKLR[408] and *Republic v The Agriculture Fisheries and Food Authority* [2017] eKLR,[409] the latter applying the former. In *Keroche*,[410] the Court said:

> [F]*ailure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.*

487. Whether there was an "*expectation*" which can be described as "*legitimate*" is an issue of fact. The expectation on which the Claimant now relies arises from its repeated statements that it needed a PPA before it could raise the funds for the infrastructure required to progress the project.

488. We have set out the entire litany of these statements in Section IV. It is unnecessary to repeat them. We rely on the findings made several times in that section to the effect that WalAm had no basis for any expectation that Kenya agreed to any such connection. That was the point of the frequent repetition.

489. As we have pointed out none of the references asserted that there was an agreement, until the lawyers became involved. The only reference to an "*agreement*" is in the response of 23 April 2012 to the Show Cause letter. Subsequent references are to an "*understanding*", as in the letter of 26 July 2012 to KPLC.

490. Originally the demand was for an memorandum of understanding, then for a Term Sheet and finally for a PPA often referred to as "*bankable*". The MOE expressly rejected this condition in Mr Nyoike's letter of 29 September 2009, as the project costs could not be determined until WalAm had drilled exploratory wells. This reason is reflected in the later explanation by KPLC officers that no tariff structure could be negotiated until the costs of

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[408] **[CL-089]**, *Keroche Industries Limited v Kenya Revenue Authority & 5 Others*, High Court at Nairobi, Misc. Civ. Application No. 743 of 2006, Judgment, 6 July 2007 ("*Keroche*").

[409] **[CL-179]**, *Republic v Agriculture Fisheries and Food Authority Ex Parte: Mshale Commodities Limited*, High Court of Kenya at Nairobi, JR Miscellaneous Civil Appl. No. 458 of 2016, Judgement, 10 January 2017.

[410] **[CL-089]**, *Keroche*, p. 27.

the project had been determined, including the power plant. On these matters the ball was in WalAm's court. It remained there throughout.

491. The MOE removed WalAm's reference to a PPA condition in its Application, when issuing the original Authority to Explore. As we have found, Mr Walji was well aware that this had happened. Similarly when approving the 2011 Work Program, Mr Nyoike did not adopt WalAm's timetable reference to a PPA, but simply referred it to KPLC for negotiations. Far from accepting any such relationship, he required "*strict adherence*" to a timetable of works which made no provision for any interconnection with a PPA.

492. On no occasion did any arm of the Government of Kenya give any indication that WalAm did not have to proceed with physical activity in or under the land until a PPA had been concluded. There was no basis for any expectation that it could. Indeed, on the evidence it is clear that WalAm had no such expectation, let alone a legitimate one, that it could proceed without undertaking any substantial work pending finalisation of a PPA and the subsequent raising of funds.

493. The inability of WalAm to raise the necessary risk capital to advance the project was its own inadequacy. The Minister was under no obligation to take into account its aspiration that KPLC would enable it to overcome that deficiency.

494. The Tribunal rejects the Claimant's case that the Minister failed to take into account a relevant consideration.

(11) Reliance On Own Wrong

495. This is an unusual administrative law basis for challenging a Ministerial decision. It appears to involve the proposition that WalAm's failure to perform was caused by Kenya. The cases relied on for the proposition are civil cases, not public law cases. The principle is stated, for example, in the terms that a contracting party cannot take advantage of its own breach. This line of authority has no relevance to this case, which turns on public law.

496. Insofar as such a consideration is relevant, it turns on the assertion that there was inexcusable delay on the part of Kenya with respect to the finalisation of a PPA and, as originally pleaded, a lack of good faith in negotiations for a PPA.

497. We have referred above to the evidence of the witnesses from KPLC. We accept their evidence that WalAm approached the negotiations without any understanding of the key elements of the tariff structure. Specifically, they never put forward the detail of the costs of the project which were essential for computing the capacity charge in the tariff formula. As we have found in Section IV, WalAm did not have the funds that it believed were required–US$3 million, to finalise a PPA.

498. Although the Claimant had originally asserted a claim that Kenya did not negotiate in good faith, it failed to include any such relief in its final request for relief, which was introduced on the final day of the hearing, after discussions during the Claimant's closing submissions.[411] After further discussion during the Respondent's closing submissions about whether the good faith case had been abandoned, counsel for the Claimant informed the Tribunal: "[y]*ou do not have to decide whether the KPLC negotiated in good faith or not*."[412] Any negotiations for a PPA, on the part of Kenya, had to be conducted with KPLC. Accordingly, the Tribunal finds that the allegation of failure to negotiate in good faith had been abandoned. In any event, the Tribunal has heard the KPLC witnesses and reviewed their communications with WalAm. We find that their dealings with WalAm was entirely appropriate and there was no "*wrong*" on which Kenya now relies.

(12) Procedural Fairness

499. The requirements of procedural fairness are not a fixed body of rules. What is required in relation to the object of administrative action will depend upon the statutory context in each case and the nature of the action. We do not find it necessary to set out the authorities to which we were referred. The basic principles are well established and well known. The statutory context of the authorities varies widely and the focus must be on the particular statutory framework under consideration.

500. The Claimant placed great reliance on cases which emphasised the need for notice, in the sense of giving the person an opportunity to remedy the defect. The Tribunal accepts this

[411] Counsel for the Claimant said: "[w]*e are not alleging--and our case doesn't turn on having to show bad faith negotiations*". Transcript D6:P1729:L7-9 (Benson).

[412] Transcript D7:P1908:L22-P1909:L1 (Benson).

principle. The assessment of procedural fairness requires attention to the course of interaction between the Ministry and KPLC with WalAm. We have set out the facts above. The Tribunal determines that, over the period of more than five years between grant of the Licence and Forfeiture, the Claimant had sufficient notice of the MOE requirement that it had to conduct work on the ground and sufficient opportunity to remedy its failure. At first the required work was drilling exploration wells. Later, the work required was commencement of preparatory infrastructure in the form of roads and a water pipeline. Furthermore, WalAm knew over 18 months before forfeiture, that its Licence was at risk if it did not deliver.

501. The events of particular relevance for this finding are:

a. The Authority to Explore of 3 September 2007 stated: "[t]*he company will carry out a two phased exploration program*". The second phase was the drilling of two exploration wells.

b. On 29 September 2009 Mr Nyoike wrote expressly stating that it would not be possible to conclude a PPA unless three wells had been drilled. He also stated that the Licence had been granted on the understanding that WalAm had the financial capacity to carry out the project.

c. On 30 August 2010 Mr Walji wrote to the Minister acknowledging: "[i]*t may seem that WalAm has not been doing much work in Kenya*". After referring to the consultant reports he concluded: "*which will now lead to Walam being ready to drill as per schedule*".

d. In February/March 2011 discussions occurred between WalAm and the MOE over its new Work Program. The MOE asked for the first version to be rewritten to include timetables and budget allocations for each activity in the Program, including the drilling of three exploration wells.

e. On 8 March 2011 Mr Walji wrote to the Minister saying that at a meeting on 21 February Mr Nyoike had said: "*Walam has not done enough 'work on the ground'*." Mr Walji accepted that this referred to physical work such as a road a pipeline or drilling.

f. In the subsequent conversation between Mr Nyoike and Mr Mugambi Gituru on what the former had meant by "*work on the ground*", he referred to roads and water, but not to drilling. The need for physical work at the site was clearly emphasised. The concern about the lack of such activity was clear.

g. Approval of the Work Program was given by letter from Mr Nyoike of 23 March 2011. The express basis of that approval was that the Program would be "*strictly adhered to*". This included provision for both road and water pipeline development as well as drilling of one exploratory well before the end of the year.

h. During these discussions in early 2011, as Mr Laing testified, Mr Nyoike threatened to withdraw WalAm's Licence on the basis that it had not yet drilled a well. This is over a year before the Show Cause letter and over 18 months before forfeiture. WalAm was on notice of this risk from this time, as reinforced by the "*strictly adhered to*" condition.

502. Before the Show Cause letter WalAm understood the grounds on which the ultimate forfeiture would be made. It had received clear notice of that risk. There was no denial of procedural fairness.

(13) Consent and Estoppel

503. The Claimant contends that Kenya consented to WalAm not performing work in or under the land until it had a PPA. Section 11(1)(a) excludes conduct for which there was written consent.

504. The Claimant first relies in this regard on Mr Nyoike's letter to Mr Walji of 23 March 2011[413] whereby approval of the work plan set out was granted "*with the understanding that the schedule will be strictly adhered to*" and on the fact that Kenya "*continued to accept reports of WalAm's work including by* [that letter]".[414] The letter went on to advise WalAm to seek direct audience with the Managing Director of KPLC to negotiate a PPA.

[413] **[C-019]/[KE-46]**, Letter from Mr Patrick Nyoike (MOE) to Mr Maherab Walji (WalAm), 23 March 2011.

[414] See Claimant's Reply, ⁋ 82 and Appendix A.

505. The Claimant seeks to argue that this letter evidences either the consent of the Ministry to no work being done in or under the land until a PPA was obtained or while negotiations for a PPA were proceeding (as directed by Mr Nyoike in the last paragraph) alternatively that based on Mr Nyoike's comments to that effect Kenya should be estopped from relying on the failure to perform work in or under the land.

506. The Tribunal cannot accept that argument for the reasons below.

507. That letter is more fully set out and discussed at paragraphs 256 to 261 above. The meaning and suggested legal effect of this letter must be considered in the context of WalAm's proposals for a Work Program of which it sought approval starting with Mr Walji's letter of 9 December 2010 discussed in paragraph 248 and following.

508. First it should be noted that there is nothing express in the letter which can be regarded as a statement of consent to WalAm not performing work in or under the land.

509. Second there is nothing by way of express representation that could found an estoppel to that effect.

510. Third the context in which the Work Program was proposed and to which Mr Nyoike responded was that WalAm had been made aware of the Minister's dissatisfaction with the lack of progress and specifically lack of work on the ground and that the licence was under threat of forfeiture (see paragraphs 252-253 above). That is significant because:

    a. From WalAm's side the Work Program proposed must have been directed at allaying the Minister's concerns, reassuring that work on the ground would be done; and

    b. From Kenya's side there was no prospect (or expectation) of Mr Nyoike now telling WalAm that it did not need to do work on the ground and that the Licence was at no risk.

511. As first submitted, the Work Program did not contain timelines for when work would be carried out. Nor did it provide cost estimates. The MOE required those to be supplied.[415] It is for that reason that the Work Program set out timelines which included dates for work

[415] **[R-035]/[KE-44]**, Letter from Mr Maherab Walji (WalAm) to Mr Kiraitu Murungi (MOE), 8 March 2011.

on the ground running effectively immediately. Thus the workplan proposed by WalAm and approved by Mr Nyoike's letter provided for "*Infrastructure Development*" including roads and water pipelines in the period February to December 2011 and the drilling programme to commence in the period April-December 2011 with a view to first well spud in December 2011.

512. Item 9 on the Work Program proposed stated:

appropriate			
9. Work with MOE and KPLC to conclude the "TERM SHEET" for Power Purchase Agreement (PPA). Project development of net 75 Mwe. Power rate (Tariff) to be discussed and finalized and based on Capital costs borne by WalAm.	March 7 to March 31,2011	$65,000.00	Ongoing
a. Finalize PPA			

513. WalAm places reliance on this aspect of the proposal as indicative of the importance to it of obtaining a PPA, which it did. But it does not assist its consent and estoppel argument for three reasons.

a. First the reference to concluding a Term Sheet was a recognition that WalAm was nowhere near being in a position to negotiate let alone conclude a PPA within any short period of time. It did not have the information ready, the professional support or the financial resources to be able to do so by the end of March (the Work Program having been proposed in February), see paragraph 253 above.

b. Second WalAm proposed a timeline for the Term Sheet (7 March to 31 March 2011) in parallel with the other timeliness in the Work Program. Infrastructure work was proposed to commence in February 2011. There was no suggestion that other line items in the work program were conditional or to be delayed or deferred dependent on the conclusion of a Term Sheet , let alone a PPA.

c. Third and most importantly Mr Nyoike's response to the proposal was clear in approving the Work Plan "*with the understanding that the schedule will be strictly adhered to*". That was a reference to those matters in the table set out in the letter (see paragraph 256 above) so there is no doubt about which of the timelines was being referred to including the February to December 2011 Infrastructural Development work which was work on the ground. Mr Nyoike had carefully considered each element of the Work Plan proposed because he made two significant changes to what had been proposed when setting out what was required

in the table in his letter. He reduced expenditure on drilling from US$21 million to US$6.5 million with only one well, which would be drilled in 2011, not five, and the others in 2012. He specifically approved the separate line item for constructing access roads, to cost US$2.7 million, and a water pipeline, to cost US$4.96 million. Both were to be completed before the first well was spudded.[416]

514. But significantly Mr Nyoike did not include in his table the line item 9 from the Work Program proposed, the Term Sheet. He responded to that by his last paragraph of his letter "*you are advised to seek direct audience with the Managing Director,* [KPLC] *for negotiations on a Power Purchase Agreement (PPA) as per the regulations.*"

515. Importantly therefore no conditionality was sought and none approved in response and it is clear, in view of the disquiet that had been made known to WalAm about lack of progress, that the Ministry would not have consented to any such deferral of work on the ground, even if it had been asked for. Bearing in mind the nature of the discussions and concerns in February, Mr Nyoike's "*strictly adhered to*" language carried, as we have said above in paragraph 483 a tone of "*last chance*" for WalAm to get on and show progress on the land.

516. Mr Nyoike's 23 March 2011 letter cannot therefore support either an argument that it expressly or impliedly consented to WalAm doing no work on the ground or that it otherwise expressly or impliedly represented that WalAm need not do so until a PPA was concluded or otherwise.

517. The Claimant relies also on WalAm's repeated emphasis on its need for a PPA and statements that a PPA would have to be in place before they would do the high capital intensive drilling work.[417] The fact of that emphasis by WalAm and its significance has already been discussed. Far from giving rise to agreement or consent from the Ministry, it simply confirmed the difference of view between WalAm and the Ministry. In response to a letter from WalAm asserting the need to have a PPA before raising capital, Mr Nyoike replied on 29 September 20 in firm language that there could not be meaningful

[416] See Transcript D3:P840-844 (Nyoike cross-examination).

[417] Transcript D6:P1642 (Claimant's Closing Submissions).

negotiations on a PPA until project costs had been determined after exploration wells had been drilled.[418] The MOE never resiled from that position.

518. Mr Nyoike accepted in cross-examination that WalAm had, each time it submitted a document, said that they needed a PPA but he had never accepted that anything was conditional on that, and he denied that Mr Walji had said at the 11 March meeting presenting the Work Plan that WalAm needed to have a PPA in place before they were going to spend US$30 million on drilling.[419] He said that WalAm had told him that work and the obtaining of the PPA "*was running concurrently*".[420] He expected the PPA negotiations to take two or three months.[421]

519. The Claimant relied as a further example of Mr Walji's statements on his letter to Mr Nyoike of 12 April 2011[422] referring to Mr Nyoike's letter of 23 March 2011 and saying "[w]*e would like to advice you and re-affirm that, as stated in our 2011 Work Program, all of the proposed tasks timelines are contingent on WalAm concluding an* ***acceptable*** *PPA prior to the end of May 2011*".[423] But in view of the exchanges that had already taken place, and the absence of any accepting response from Mr Nyoike, that assertion cannot be taken as evidencing consent or agreement from the Ministry. On the contrary, the absence of any reference by Mr Walji to having obtained any agreement or acceptance of that contingency from Mr Nyoike rather suggests that he well understood that he had not obtained it. Mr Nyoike did not respond, and in view of the fact that he had made his position clear, did not need to – Mr Walji could not unilaterally change the terms of the approval given by Mr Nyoike.

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[418] See the Tribunal's discussion of this letter and findings at paragraphs 231 and 232 (g) and (h) above.

[419] Transcript D3:P854 (Nyoike cross-examination).

[420] Transcript D3:P860 (Nyoike cross-examination).

[421] Transcript D3:P857:L13 (Nyoike cross-examination).

[422] **[C-020]/[KE-47]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), 12 April 2011.

[423] Emphasis in original.

520. The Claimant made a similar argument by reference to Mr Walji's letter of 7 November 2011[424] telling Mr Nyoike that WalAm was still awaiting a draft PPA from KPLC and that upon conclusion of a PPA the drilling programme would proceed, to which letter Mr Nyoike did not respond. But again the absence of reference to any agreement to that effect in the letter cuts against the Claimant's argument that consent had been given.

521. The Claimant cannot establish consent on the basis of WalAm's assertions nor can it contend that there is any procedural unfairness in circumstances where Mr Nyoike's letters made sufficiently clear that the Ministry expected the Work Plan (which included physical activity on the land) to be adhered to. Indeed the frequency of the repetition of the point by Mr Walji and the absence of any acceptance of it, let alone agreement not to forfeit, might be said to count against WalAm – Mr Walji clearly felt it necessary to restate it precisely because he did not have agreement or even a basis of mutual understanding.[425]

522. The Claimant alternatively contends that even if there was no agreement or consent on the part of the Ministry that WalAm did not need to do work in or under the land prior to concluding a PPA, nevertheless the right to forfeit for failure to do such work was waived or Kenya is estopped from relying on it by reason of Mr Nyoike's conduct. The Claimant relies on the same evidence in this regard and the waiver and estoppel arguments must fail for the same reasons. The Claimant is unable to show any clear representation by or on behalf of the Minister that the Claimant need not do work in or under the land until it had a concluded PPA.

523. It is apparent that there was no acceptance on these occasions of WalAm's wish to have some form of general agreement about the terms of a PPA before incurring capital expenditure on infrastructure. This is reinforced by the evidence from KPLC which we discuss at paragraphs 321-327 of Section IV.

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[424] **[C-028]/[KE-53]**, Letter from Mr Maherab Walji (WalAm) to Mr Patrick Nyoike (MOE), appending REDPLAN Consultants Ltd., *Environmental and Social Impact Assessment (ESIA) Mount Suswa Geothermal Concession*, 7 November 2011.

[425] Mr Walji's evidence on this point was somewhat inconsistent but he accepted that he did not obtain any understanding that the Work Programme was contingent on a PPA from Mr Nyoike's letter of 23 March 2011 (Transcript D2:P436:L11-13 (Walji cross-examination) and Transcript D2:P437:L20-22 (Walji cross-examination)). In any event consent would have to be established by objective assessment of something said or done by or on behalf of the Minister.

524. There was a great deal of evidence in this case on whether WalAm should, or could, have drilled exploratory wells. It is not necessary to conclusively determine that issue. There were other, less expensive matters that it could have performed at the site, specifically, the road and water infrastructure required for the first well.

525. There was no consent by Kenya to the cessation of physical activities. There was no conduct by Kenya that could form the basis of an estoppel or waiver as alleged.

(14) Legitimate Expectations

526. The Claimant also argues that it had a legitimate expectation that it would not be required to begin drilling before a PPA was in place and that the failure to take that legitimate expectation into account infects the Minister's exercise of discretion. That contention raises two questions. First did the Claimant have a legitimate expectation to that effect, and second, if so, is the Minister's decision to be set aside for failing to take it into account.

527. The Claimant's argument fails on the first question. For the Claimant to have a legitimate expectation in the public law sense requires it to be shown that statements were made by or on behalf of the Minister inducing a reasonable expectation. As the authority relied on by the Claimant states "[a] *legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage*."[426] But as shown by a review of the same evidence as is relied on by the Claimant to support its consent argument (see Section VIII.B(13) above), there was never any representation from Mr Nyoike that could be said to have induced such an expectation. Certainly Mr Walji wanted to elicit such a representation, but he signally failed to obtain it, and he was conscious that he had not done so (as evidenced by his repetition of WalAm's position). There was nothing in Kenya's conduct which could be said to create an unfairness in relying on the absence of work in and under the land as a basis for forfeiture.

[426] **[CL-111]**, *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & Another,* High Court at Nairobi, Misc. Application No. 328 of 2015, Judgment, 20 January 2016, ¶ 78.

528. In reaching this conclusion, the Tribunal does not place reliance on the Ministry's letter to Mr Walji of 29 September 2009[427] which stated in terms in section 6.0 that "*WalAm will need to drill at least three (3) geothermal wells which will provide the required information on the capacity of power to be generated and therefore making it possibly to fruitfully negotiate for PPA with* [KPLC]". That letter is not insignificant in showing that WalAm did not have, at the outset, any understanding that Kenya would not require some exploratory drilling at an early stage – after all that letter was in specific response to questions and queries raised by WalAm for the Chief Geologist on 27 March 2009. WalAm had informed him that "*WalAm expects to award the drilling contract prior to December 31,2009 and to commence drilling at Suswa before the end of the 1st Qtr 2010.*"[428] But the Tribunal accepts that the position taken by Mr Nyoike in 2009 was not a position expressly taken by Mr Nyoike in 2011 or 2012 and the Tribunal rejects the Respondent's submission that this letter answers the Claimant's legitimate expectation case. But even focusing on the 2011 and 2012 period the Claimant fails to establish the necessary evidential basis and support for its legitimate expectation argument.

[427] **[R-007]/[KE-29]**, Letter from Mr Paul Ngatia (MOE) to Mr Maherab Walji (WalAm) attaching WalAm Suswa Concession Development dated 27 March 2009, 29 September 2009. Mr Nyoike said that this was his letter through signed by one of his officers on his behalf.

[428] *Id.* at p. 3 of WalAm Suswa Concession Development.

IX. INTERNATIONAL LAW ISSUES

A. POSITIONS OF THE PARTIES

(1) Claimant's Position

(a) Expropriation

529. The Claimant submits that the Respondent's declaration of forfeiture constitutes an unlawful expropriation under both international law and Kenyan law, which incorporates the general rules of international law.[429]

530. The Claimant's primary submission is that the principles of customary international law are "*memorialize*[d]" in Article 40(3) of the Kenyan Constitution.[430] Alternatively, it submits if there is any divergence, then the application of Article 2(5) of the Kenyan Constitution, which incorporates the "*general rules of international law*" into Kenyan law, operates to fill any "*gap or inconsistency*" between the two.[431]

531. The Claimant notes that the Parties do not disagree on the articulation of the legal standard for unlawful expropriation under customary international law.[432]

532. According to the Claimant, the Respondent expropriated its investment in Kenya because any one of the following factors was present:

> *(i) Respondent failed to provide fair and effective compensation for the expropriation of the License; (ii) the License was not taken for a public purpose; (iii) Respondent failed to accord WalAm basic principles of due process; or (iv) Respondent's expropriation was discriminatory*.[433]

533. The Claimant disputes the Respondent's defense that the taking of the Licence cannot constitute an unlawful expropriation because it was done in accordance with the terms of

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[429] Claimant's Memorial, ¶ 136; Claimant's Reply, ¶ 89.

[430] Claimant's Memorial, ¶ 136.

[431] Claimant's Reply, ¶ 90, note 348.

[432] Claimant's Reply, ¶ 91

[433] Claimant's Reply, ¶ 90. See also Claimant's Memorial, ¶¶ 135, 138.

the Licence, the GRA and the GRR. According to the Claimant, and as explained above, the forfeiture of the Licence "*had no basis in the terms of the License and the statutory framework*".[434]

534. The Claimant also adds that GDC, the entity to which it alleges WalAm had been asked by the Minister to hand over its Licence, three years before, sought to exercise the right to develop Suswa. GDC advertised its decision to develop the Suswa project in partnership with a private company and proposed to deliver Suswa's steam to an international partner, who would be responsible for building and operating the power plant. GDC sold this proposed partnership to international investors as "*low-hanging fruit ready for takeoff*".[435]

(b) Minimum Standard of Treatment

535. The Claimant argues that the Respondent violated its duty to accord the Claimant the minimum standard of treatment under customary international law and under Article 47 of the Kenyan Constitution as a result of the Respondent's "*wrongful and obstructive conduct during WalAm's performance of the License, in particular its refusal to negotiate the PPA and its wrongful declaration of forfeiture of the License*."[436] The Claimant articulates the legal standard as follows:

> [I]*n considering whether the minimum standard of treatment has been breached, a tribunal must be guided by the overarching principle that foreign investments should be protected from 'all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.' The minimum standard of treatment can be distilled into several basic elements, any one or combination of which is sufficient to demonstrate a breach, including unreasonableness, arbitrariness, failure to act in good faith, lack of transparency and candor in an administrative process, disregard of due process of law, discrimination, and the frustration of legitimate*

[434] Claimant's Reply, ¶ 91.

[435] Claimant's Memorial, ¶ 8. See also **[C-045]/[KE-123]**, Geothermal Development Company, *Suswa Geothermal Project*, http://www.gdc.co.ke/suswa.html (last visited 21 October 2016).

[436] Claimant's Reply, ¶ 92. See also Claimant's Memorial, ¶¶ 147-157.

expectations of the investor based on representations made at the time of investment.[437]

536. At the Hearing, the Claimant explained that the "*Respondent undermined the very reasonably held and legitimate expectations of the Claimant* [that] *there would be a mutually agreeable Memorandum of Understanding for Power Purchase Agreement before exploration drilling commences, and that the tariff rate would be based on an after-tax IRR of 18.5 percent. That was established right at the outset*."[438]

537. The Claimant argues that there is no requirement under customary international law to show that the Respondent's conduct was egregious or in bad faith to establish a breach of minimum standard of treatment however given the circumstances, the "*Respondent's acts meet this higher threshold*."[439]

538. According to the Claimant, the Respondent's actions for the duration of the Licence were "*unfair, arbitrary, discriminatory, incomplete disregard of due process, and undermined WalAm's legitimate expectations*."[440] In particular, the Claimant highlights, *inter alia,* the following:

a. The Respondent's obstructive conduct preventing WalAm from enjoying its investment and realising the goal of bringing Suswa into production;

b. The Respondent's delays and refusal to act in good faith to negotiate a PPA with the Claimant despite knowing that without a PPA no investor could finance the substantial capital expenses required to move forward with the project;

c. The Respondent delaying PPA discussions with WalAm only to wrongfully declare the Licence forfeited for WalAm's alleged failure to build a power plant within five years of geothermal resource exploration;[441]

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[437] Claimant's Memorial, ¶ 144 (footnote omitted).

[438] Transcript D1:P137:L20-P138:L12 (Moloo).

[439] Claimant's Memorial, ¶¶151-152 and 158.

[440] Claimant's Memorial, ¶ 146.

[441] Claimant's Memorial, ¶¶ 147-150.

d. The Respondent's wrongful declaration of forfeiture;[442]

e. The Respondent's failure to reinstate or reissue the Licence;[443] and

f. The Respondent's and GDC's reliance on the work of WalAm to market Suswa.[444]

(2) Respondent's Position

539. As a preliminary point, the Respondent argues that the merits of the Claimant's unlawful expropriation and unfair treatment claims should be determined under Kenyan law for the reasons set out above.[445] However, if the Tribunal were to determine that customary international law was applicable, as the Claimant contends, the Respondent's position is that these claims would also fail.[446]

(a) Expropriation

540. The Respondent argues that the forfeiture of the Licence is not an unlawful expropriation. The Respondent submits that the rights under the Licence were contractual in nature, as the Claimant itself suggested. It was, therefore, subject to the terms of the instrument by which the contract was created.[447] It argues that:

> *The present dispute relating to the forfeiture of the Licence likewise does not engage any constitutional protection against expropriation; it is a dispute that must be determined in accordance with the terms of the Licence and the statutory framework under which it was issued. As explained in the preceding sections, the declaration of forfeiture was made in accordance with those terms and was thus lawful.*[448]

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[442] Claimant's Memorial, ¶¶ 151-152.

[443] Claimant's Memorial, ¶¶ 153-155.

[444] Claimant's Memorial, ¶ 157.

[445] Respondent's Counter-Memorial, ¶¶ 183 and 189.

[446] Respondent's Counter-Memorial, ¶¶ 189-191.

[447] Respondent's Counter-Memorial, ¶ 185; Respondent's Rejoinder, ¶ 93.

[448] Respondent's Counter-Memorial, ¶ 188.

541. The Respondent concludes that if the forfeiture was lawful under the terms of the Licence and its legal framework, as they argue it was, such forfeiture cannot engage constitutional protection and there can be no unlawful expropriation.[449]

542. For the same reasons, the Respondent submits, it would fail under international law.[450] The forfeiture did not constitute an expropriation at all.

(b) Minimum Standard of Treatment

543. The Respondent contends that the Claimant has incorrectly stated the content of the minimum standard of treatment under customary international law. It contends that the Claimant has wrongly equated that standard with the fair and equitable standard in investment treaties. The latter is "*a more generous standard*".[451]

544. The Respondent submits that its conduct did not violate any protection against unfair treatment. It argues that the Claimant has not established any breach of the minimum standard of treatment under customary international law, however interpreted, for the same reasons that there has been no breach of the principle of fair administration and natural justice under Kenyan law.[452]

545. At the Hearing the Respondent submitted that "[t]*he Claimant has fallen a very long way short of establishing the proposition that legitimate expectations form part of the customary international law minimum standard as established by State practice and opinio juris*."[453]

546. The Respondent claims that to the extent that the Claimant's allegations of unfair treatment rely on acts and/or omissions of KPLC and GDC, the Claimant must establish that those acts are attributable to the Respondent which it fails to do.[454]

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[449] Respondent's Counter-Memorial, ¶¶ 188 and 191.

[450] Respondent's Counter-Memorial, ¶¶ 189-190.

[451] Respondent's Counter-Memorial, ¶¶ 208-210.

[452] Respondent's Counter-Memorial, ¶ 211.

[453] Transcript D7:P2070:L11-16 (Juratowitch).

[454] Respondent's Rejoinder, ¶¶ 95-99. See also Respondent's Skeleton argument, ¶ 24.

547. The Respondent also rejects the Claimant's claims that the Respondent violated the minimum standard of treatment under customary international law, as well as its duty to act fairly under Article 47 of the Kenyan Constitution. As pointed out by the Respondent, the Claimant's claims under Kenyan law and customary international law turn largely on the question of whether the Licence was forfeited in accordance with its terms and the statutory framework (GRR and GRA).[455] The Respondent submits that it was and hence, that the Claimant's claims are without factual or legal basis.[456]

B. TRIBUNAL'S ANALYSIS

(1) Expropriation

548. As mentioned above, Article 40(3) of the Kenyan Constitution makes express provision prohibiting expropriation of interests in property. The Tribunal is not satisfied that there is any scope for the operation of international law in this respect. The Claimant reserved its position in this regard if there was a "*gap or inconsistency*". Even accepting that that was the relevant test, no such factor has been identified.

549. In any event, the reasons for which the Tribunal dismissed the Claimant's reliance on Article 40(3) apply to the claim based on customary international law. The Tribunal accepts the Respondent's submission that there was no expropriation at all. For the reasons set out above in the Section on The Validity of the Forfeiture, the Licence was forfeited in accordance with its terms and the statutory framework under which it was issued. Most relevantly, the Tribunal has rejected the Claimant's case that there was no factual basis for the forfeiture; that it constituted unjust enrichment; that it was unreasonable or disproportionate; or that the discretion miscarried in a number of respects.

550. Once forfeiture occurred, the State was entitled to re-issue the licence. The fact that it was re-issued to a government agency which proposed to have ultimate development undertaken by private investors does not constitute expropriation. The Claimant's

[455] Respondent's Rejoinder, ¶ 101.

[456] Respondent's Rejoinder, ¶ 104.

suggestion that there was some kind of underlying plan to cause this to happen was not established on the evidence. As we have noted in Section IV, and in particular paragraph 330 above, Mr Nyoike denied it and Mr Bloomquist expressly abandoned any suggestion that the conversation with the CEO of GDC, that it would like to develop Suswa, represented a policy position. It was just a personal view.

(2) Minimum Standard of Treatment

551. Each of the elements said by the Claimant to be capable of constituting unfair treatment in breach of the international law standard have been considered above in the discussion of Kenyan administrative law principles. The Tribunal has rejected the Claimant's case on *ultra vires*; unjust enrichment; good faith; unreasonableness; proportionality; improper purpose; duty to act fairly; relevant and irrelevant considerations; procedural fairness; consent; estoppel and reliance on own wrong. We reject the Claimant's reliance on many of these elements in its case on minimum standard of treatment, for the same reasons.

552. With respect to the legitimate expectations element, the Claimant relies on the same evidence considered above in Section IX.A(1)(b) for its submission that there has been a breach of the minimum standard of treatment under international law. It accepts that this contention is based on the same legitimate expectations arguments and there is, in this regard, no difference with Kenyan law.[457] It must also fail for the same reasons as we rejected the legitimate expectations submissions under Kenyan law.

553. In closing submissions, the Claimant noted that there may not be the same overlap with regard to other elements and referred to the pleadings, mentioning the example of arbitrary conduct.[458] Legitimate expectations had been emphasised in the oral opening submissions, but with added reference to lack of transparency, arbitrariness of the forfeiture and the acquisition of an interest by GDC.[459]

554. For the reasons set out in the Validity of Forfeiture Section, as briefly summarised in the third last paragraph, there was nothing arbitrary about Kenya's conduct. Nor was it

[457] Transcript D6:P1689-1690 (Claimant's Closing Submissions).

[458] Transcript D6:P1689-1690 (Claimant's Closing Submission).

[459] Transcript D1:P139:L17-P145:L1 (Moloo).

"*unfair*", or "*discriminatory*" or made "*in disregard of due process*", as also alleged in the Claimant's Memorial. As noted above, the rejection of the Claimant's cognate submissions on Kenyan administrative law principles, leads to the rejection of its case on minimum standard of treatment.

555. GDC was asked by the Minister, on 1 November 2012, the day after the Forfeiture, expressly in the context of WalAm's non-performance, to undertake a resource assessment of Suswa.[460] At that time the Government of Kenya had developed a policy for GDC to undertake the high risk investment of establishing the resource, including exploratory drilling, before involving private investors in further development.[461] GDC proceeded to seek funding to explore the resource.

556. The Respondent denied the Claimant's contention that GDC made use of expert reports commissioned by WalAm after it acquired an interest in Suswa. It adduced evidence that GDC commissioned and paid for its own ESIA study from Redplan and did not use any WalAm reports.[462] Mr Ngugi repeated his evidence in the course of cross-examination and was not challenged.[463]

557. The Claimant placed particular emphasis on its failure to obtain a PPA. As set out in the Facts and applied above in the analysis of legitimate expectations in Kenyan law, WalAm never had an expectation, let alone a legitimate expectation, that a PPA would be negotiated before money could be raised and any substantial work done. Even if there was any relevant expectation, the Claimant failed to undertake the preparatory work needed to place a coherent proposal before KPLC for consideration of the key commercial terms of a PPA. Indeed, it never had the financial capability to do so. KPLC did not cause the delay. It was

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[460] **[R-022]/[KE-83]**, Letter from Hon Minister Kiraitu Murungi (MOE) to Dr Silas M Simiyu (GDC), 1 November 2012.

[461] **[C-085]/[KE-86]**, Alexander Richter, GDC to develop Suswa geothermal fields under new model, THINKGEOENERGY, 14 December 2012, http://www.thinkgeoenergy.com/gdc-to-develop-suswa-geothermal-fields-under-new-model/ (last visited 27 February 2017); Transcript D4:P964:L1-P967:L22 (Ngugi cross-examination).

[462] Ngugi Witness Statement, ¶¶ 13, 15. Respondent's Counter-Memorial, ¶ 105, note 213 and ¶ 207. Respondent's Rejoinder, ¶ 103 (c).

[463] Transcript D4:P945:L5-P946:L18 (Ngugi cross-examination).

never provided with information, that could only be known to WalAm, to proceed with any meaningful negotiation.

558. The Claimant relied on cases in which international arbitral tribunals have held that absence of objections or silence may give rise to an expectation on the part of a claimant.[464] However, those cases cannot be stretched to support a suggestion that mere silence on the part of the State can give rise to a preclusion from relying on the statutory framework under which an investor acquired an interest.

559. In any event, as discussed in Section IV, there was not silence on the part of Kenya. For example, as has been discussed, by his letter of 29 September 2009, Mr Nyoike expressly rejected WalAm's suggestion that a PPA should precede WalAm obtaining funding. That position never changed, perhaps most clearly stated in the 23 March 2011, approval of the Work Plan which, in the form set out in that letter, had to be "*strictly adhered to*", without any linkage to the timetable for a PPA as originally proposed (see further the discussion in relation to Consent and Estoppel in Section VIII.B(13) above).

560. As the Claimant cannot succeed on the facts, it is unnecessary to determine whether the development of legitimate expectations principles in the investment treaty context has become part of customary international law.

561. The Tribunal rejects the Claimant's case based on the minimum standard of treatment.

X. REMEDIES

562. In view of the Tribunal's decisions on the claims above, the question of remedies does not arise and it is unnecessary for the Tribunal to consider what remedies would have been appropriate had the Claimant established either the invalidity of the forfeiture or any of its other claims.

[464] For example **[CL-081]**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 578-579.

XI. COSTS

A. CLAIMANT'S COST SUBMISSIONS

563. In its submission on costs, the Claimant argues that the Respondent should bear the total arbitration costs incurred by the Claimant, including legal fees and expenses as well as US$400,000 of advances paid to ICSID totalling US$11,393,718.41. The Claimant has broken down its fees as follows:

Summary of All Costs

Merits Phase[3]		
	Gibson Dunn Fees	US$ 6,780,772.62
	J.Miles&Co. and Oraro & Company Advocates Fees	US$ 245,332.18
	ICSID Fees[4]	US$ 275,000.00
	Disbursements[5]	US$ 2,828,893.53
	Subtotal	US$ 10,129,998.33
Jurisdiction Phase[6]		
	Gibson Dunn Fees	US$ 997,332.20
	J.Miles&Co. and Oraro & Company Advocates Fees	US$ 18,895.00
	ICSID Fees	US$ 125,000.00
	Disbursements	US$ 122,492.88
	Subtotal	US$ 1,263,720.08
Grand Total		**US$ 11,393,718.41**

564. The Claimant argues that awarding it its costs if it prevails "*is consistent with the general principle underlying Claimant's Request for Relief in this Arbitration more generally*—i.e., *Claimant is entitled to be put in the position it would have been in but for Respondent's unlawful conduct*."[465]

[465] Claimant's Statement of Costs, ¶ 2.

B. RESPONDENT'S COST SUBMISSIONS

565. The Respondent argues that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses which it presents as follows:

a. Legal fees and expenses (including VAT where applicable) in the amount of:

i. €3,411,875.24 for Freshfields Bruckhaus Deringer LLP; and

ii. €886,249.16 for Coulson Harney LLP

b. Experts' fees and expenses in the amount of:

i. €435,611.26 for Charles River Associates;

ii. US$40,112.00 for ISOR;

iii. €47,650.05 for Verkis; and

c. Party expenses incurred by the Republic of Kenya in the amount of:

US$296,238.43.[466]

566. The Respondent has also submitted a claim for advances on costs paid to ICSID in the amount of US$500,000. In total, the Respondent requests an order of costs from the Tribunal for €4,761,385.71 and US$40,112.00.[467]

567. The Respondent argues that if the Tribunal finds in favour of the Respondent on liability, the Respondent should be awarded all of its costs incurred in defending itself in this arbitration. It argues that such costs should include the Respondent's costs for the jurisdictional phase as well as the merits phase of this arbitration.[468]

[466] Respondent's Statement of Costs, ¶ 11.

[467] Respondent's Statement of Costs, ¶ 13.

[468] Respondent's Statement of Costs, ¶ 5.

568. The Respondent adds that if the Claimant succeeds on liability, however, the Claimant should not be awarded all of its costs because (i) the Claimant should not be awarded costs that exceed the Respondent's own costs (ii) the costs of the jurisdictional phase should be borne by the party that incurred them because "*the objections made were serious objections that needed to be determined by the Tribunal for these claims to proceed*"[469] (iii) the Respondent should not bear the costs related to remedies sought by the Claimant that are not ultimately awarded.[470]

569. Finally, the Respondent argues that even if the Claimant does prevail on liability, "*there should additionally be some apportionment of costs to the Respondent to reflect the unnecessary costs of the proceedings caused by the Claimant's conduct of the case*."[471]

C. TRIBUNAL'S DECISION ON COSTS

570. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

571. This provision together with ICSID Arbitration Rule 28 gives the Tribunal the widest discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

572. The Tribunal is of the view that in principle the Claimant should bear the costs of the arbitration having brought claims which have failed on the merits. In this case there is no reason to depart from a general approach that the unsuccessful party should pay the successful party its costs and bear the arbitration costs.

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[469] Respondent's Statement of Costs, ¶ 8 citing Decision on the Respondent's Preliminary Objections to Jurisdiction, 27 March 2017, ¶ 245.

[470] Respondent's Statement of Costs, ¶ 9.

[471] Respondent's Statement of Costs, ¶ 10.

573. However the Respondent raised Preliminary Objections which, as a result of the bifurcation of the proceedings to enable those objections to be heard and determined, have the costs of a distinct phase of the proceedings associated with them. The Respondent's objections were dismissed. While the Tribunal accepts that those objections were, as the Respondent contends, "*serious objections that needed to be determined by the Tribunal*", they only required determination because they were raised by the Respondent. The Tribunal considers it appropriate therefore to make an adjustment to the general approach to make allowance for the Claimant's success and the Respondent's failure in the Preliminary Objections phase. Taking a necessarily broad brush approach, the Tribunal determines that the Claimant should pay 75% of the Respondent's legal costs and of the costs of the arbitration including the fees and expenses of the tribunal and ICSID's administrative fees and direct expenses.

574. The Tribunal notes that the Respondent's legal costs are very substantially lower than the Claimant's legal costs and, while that fact is not determinative of reasonableness, the Tribunal considers that the Respondent's legal costs are reasonable in amount, taking into account the size and significance of the case.

575. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mr Joe Smouha QC	US$418,572.72
Mr Swithin J. Munyantwali	US$281,834.61
The Honourable James Spigelman AC QC	US$256,865.25
ICSID's administrative fees	US$190,000
Direct expenses	US$150,442.92
Total	**US$1,297,715.50**

576. The above costs have been paid out of the advances made by the Parties in equal parts.[472] The deposits were held in trust for the paying party and the balances will be returned to

each party pro rata to the amounts paid. The Tribunal would have preferred to be able to take into account by way of adjustment to the amount of costs awarded any residual balance held at ICSID but understands that it is not empowered to do so because of the terms on which such sums are held.

577. Accordingly, the Tribunal orders the Claimant to pay the Respondent US$648,857.75 for the Respondent's portion of the arbitration costs and the sums of €3,586,039.28 and US$252,262.82 to cover 75% of the Respondent's legal fees and expenses.

578. The Tribunal incorporates by reference into this Award, the Decision on Jurisdiction dated 27 March 2017 which dismissed the Respondent's objections to jurisdiction.

XII. DISPOSITIVE

579. For the reasons set forth above, the Tribunal decides as follows:

(1) All of the Claimant's claims are dismissed; and

(2) The Claimant shall bear its own legal fees and expenses and the entirety of the costs of the arbitration. The Claimant shall pay the Respondent US$648,857.75 corresponding to its share of the costs of the arbitration. The Claimant shall also reimburse 75% of the Respondent's legal fees and expenses in the amount of €3,586,039.28 and US$252,262.82.

Mr Swithin J. Munyantwali
Arbitrator

Date: 9 July 2020

The Honourable James Spigelman AC QC
Arbitrator

Date:

Mr Joe Smouha QC
President of the Tribunal

Date:

Mr Swithin J. Munyantwali
Arbitrator

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