INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

CORTEC MINING KENYA LIMITED,
CORTEC (PTY) LIMITED AND
STIRLING CAPITAL LIMITED

Applicants

and

REPUBLIC OF KENYA

Respondent

ICSID Case No. ARB/15/29 – Annulment Proceeding

DECISION ON APPLICATION FOR ANNULMENT

Members of the *ad hoc* Committee
Mr. D. Brian King, President
Mr. Cavinder Bull, SC, Member
Ms. Dorothy Ufot, SAN, Member

Secretary of the *ad hoc* Committee
Mr. Paul-Jean Le Cannu

Date of dispatch to the Parties: 19 March 2021

REPRESENTATION OF THE PARTIES

Representing Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited:

Mr. Audley Sheppard QC
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and

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and

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Representing the Republic of Kenya:

Hon. Paul Kihara Kariuki
Mr. Kennedy Ogeto
Ms. Njeri Wachira
Mr. Emmanuel Bitta
Ms. Christine K. Omwakwe
Ms. Kanini Nthiga
Mr. Charles Wamwayi
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and

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Applicants (in this annulment proceeding), or Claimants (in the Arbitration)	Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited
Applicants' PHM	Applicants' Post-Hearing Memorial dated 30 October 2020
Application for Annulment	Application for Annulment of the Award dated 21 July 2017, submitted by the Applicants on 15 February 2019
Arbitration	Arbitration proceedings between Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya in ICSID Case No. ARB/15/29
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award rendered by the Arbitral Tribunal on 22 October 2018 in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29)
BIT or Treaty	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999
Committee	The *ad hoc* Committee composed of Mr. D. Brian King (President), Mr. Cavinder Bull, S.C. and Ms. Dorothy Ufot, SAN
Counter-Memorial on Annulment	Respondent's Counter-Memorial on Annulment dated 12 December 2019, resubmitted 6 January 2020 pursuant to the Committee's letter dated 23 December 2019
Ex. A-[#]	Factual exhibits filed by the Applicants
Ex. ALA-[#]	Legal authorities filed by the Applicants
Ex. R-[#]	Factual exhibits filed by the Respondent

Ex. RL-[#]	Legal authorities filed by the Respondent
ICSID Convention, or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
ICSID, or Centre	International Centre for Settlement of Investment Disputes
Memorial on Annulment	Applicants' Memorial on Annulment dated 19 September 2019, corrected on 20 March 2020
Rejoinder on Annulment	Respondent's Rejoinder on Annulment dated 7 May 2020, resubmitted on 12 May 2020
Reply on Annulment	Applicants' Reply on Annulment dated 5 March 2020, corrected on 20 March 2020
Respondent or Kenya	The Republic of Kenya
Respondent's PHM	Respondent's Post-Hearing Memorial dated 30 October 2020
Secretariat	Secretariat of ICSID
SML 351	Special Mining License 351 dated 7 March 2013
SPL 256	Special Prospecting License 256 dated 4 April 2008
Tr. Day [#], [page:line]	Verbatim transcript of the Hearing on Annulment (as corrected by the Parties on 5 October 2020 and circulated by the Secretariat on 13 October 2020)
Tribunal	Arbitral Tribunal composed of Judge Ian Binnie, Mr. Kanaga Dharmananda, S.C., and Prof. Brigitte Stern
Vienna Convention	Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980)

I. INTRODUCTION AND PARTIES

1. This proceeding concerns the application for full or partial annulment (the ***Application for Annulment***) of the Award rendered on 22 October 2018 (the ***Award***) in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) (the ***Arbitration***). The Award resulted from a dispute submitted to the International Centre for Settlement of Investment Disputes (***ICSID*** or the ***Centre***) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999 (the ***BIT*** or ***Treaty***), as well as 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*** or ***Convention***).

2. The parties are, on the one hand, the Republic of Kenya (the ***Respondent*** or ***Kenya***), and, on the other hand, the Claimants in the original arbitration proceedings: Cortec Mining Kenya Limited (***CMK***), Cortec (Pty) Limited (***Cortec***), and Stirling Capital Limited (***Stirling***) (together, the ***Applicants*** or the ***Claimants***). CMK is organized under the laws of Kenya, whereas Cortec and Stirling are organized under the laws of England and Wales.

3. The Applicants and the Respondent will be referred to collectively as the ***Parties***, and individually as a ***Party***. The Parties' representatives and their addresses are listed on page (i) above.

4. The Arbitration arose out of a mining project at an area called Mrima Hill in Kenya, which the Claimants alleged to be "home to one of the world's largest undeveloped niobium and rare earth deposits."[1] The Claimants asserted that they owned four investments in connection with the project, the primary one being an assertedly valuable mining license – Special Mining License 351 (***SML 351***) – which was granted by Mining Commissioner Moses Masibo on 7 March 2013. Shortly thereafter, in August 2013, this license was

[1] Award, ¶ 1; *see also* **Ex. A-002**, Claimants' Memorial of Claim, ¶ 1.

revoked following a change of government in Kenya.[2] The Claimants argued before the Arbitral Tribunal composed of Judge Ian Binnie, Mr. Kanaga Dharmananda, S.C., and Prof. Brigitte Stern (the ***Tribunal***) that the revocation violated multiple provisions of the BIT, including those on expropriation, fair and equitable treatment (***FET***), and unreasonable and discriminatory measures.

5. The Tribunal declined jurisdiction in the Award, reasoning that "SML 351 was issued contrary to the laws of Kenya and international law and does not qualify as an investment protected by the Treaty or the ICSID Convention."[3] The Award ordered the Applicants to pay the Respondent US $3,226,429.21 in legal costs and US $322,561.14 in arbitration costs.[4]

6. The Applicants seek the annulment of the Award, in whole or in part, under Article 52(1)(b) and (e) of the ICSID Convention. They argue that the Award is *infra petita*, inconsistent with the plain terms of the BIT, and rendered in disregard of key evidence presented by the Claimants. The Respondent, for its part, contends that no annullable error occurred and that the Applicants' case is an impermissible attempt to appeal findings that went against them.

7. For the reasons set out in the present Decision, the Committee finds that the Applicants have not succeeded in demonstrating a manifest excess of powers by the Tribunal or a failure to state reasons. Accordingly, the Application for Annulment will be denied.

II. PROCEDURAL HISTORY

8. On 15 February 2019, the Secretary-General of ICSID received the Application for Annulment – together with exhibits A-001 through A-015 and legal authorities ALA-001

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2 Award, ¶ 2; **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 3, 81-104.

3 Award, ¶ 12.

4 Award, ¶¶ 401, 403-405. This was 50% of the amount claimed by the Respondent as its legal costs. *See* Award, ¶ 401.

through ALA-011 – seeking the partial annulment of the Award and requesting that enforcement of the Award be stayed until the Application for Annulment was decided.

9. On 19 March 2019, the Secretary-General registered the Application. The Parties were notified of the registration and that enforcement of the Award would be provisionally stayed pursuant to Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the ***Arbitration Rules***).

10. After an exchange of correspondence between the Parties and the ICSID Secretariat (the ***Secretariat***),[5] the present *ad hoc* Committee (the ***Committee***) was constituted on 3 May 2019, in accordance with Article 52(3) of the ICSID Convention. Its members are Mr. D. Brian King (U.S.), serving as President, Mr. Cavinder Bull, SC (Singapore) and Ms. Dorothy Ufot, SAN (Nigeria). All members were appointed by the Chairman of the Administrative Council of ICSID. In its letter of 3 May 2019, the Secretariat informed the Parties that the Committee was constituted, that the annulment proceeding was deemed to have commenced in accordance with Rules 6 and 53 of the Arbitration Rules, and that Ms. Aïssatou Diop, Legal Counsel, ICSID, would serve as Secretary of the Committee.

11. On 29 May 2019, the Applicants filed a Request for Continued Stay of Enforcement of Award (the ***Request for Continuance***), along with exhibits A-016 through A-018 and legal authorities ALA-012 through ALA-020.

12. On 2 June 2019, the Committee, through its Secretary, informed the Parties that the Provisional Stay was extended pending a further order of the Committee, and invited the Parties to confer on a schedule for the briefing of the Request for Continuance.

13. On 6 June 2019, the Committee, through its Secretary, circulated a Draft Agenda for the first session of the Committee (the ***First Session***) and a Draft Procedural Order No. 1, both in preparation for the First Session.

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5 *See* communications of 4, 18, 24, 25 and 26 April 2019.

14. On 21 June 2019, the Respondent sent to the Committee the Parties' agreed briefing schedule in respect of the Request for Continuance, which included one round of written submissions and oral arguments at the First Session.

15. By letter of the same date, the Applicants requested that ICSID appoint a new Secretary of the Committee, on the ground that Ms. Diop had served as Secretary of the Tribunal in the underlying Arbitration. On the same date, the Parties were informed of the appointment of Mr. Paul-Jean Le Cannu, Team Leader/Legal Counsel, ICSID, to serve as Secretary of the Committee in this proceeding.

16. On 23 June 2019, the Respondent filed its Observations on the Applicants' Request for Continuance, accompanied by exhibit R-247 and legal authorities RL-223 through RL-230 (the ***Observations on the Request***).

17. On 24 June 2019, the Parties submitted their comments on the Draft Agenda for the First Session and on Draft Procedural Order No. 1.

18. On 27 June 2019, the Committee held the First Session. The Parties' counsel and the Members of the Committee discussed the material aspects of Draft Procedural Order No. 1. The Parties also presented oral arguments on the Request for Continuance. An audio recording was made of the First Session and provided to the Parties and the Committee via the BOX platform.

19. On 2 July 2019, further to the Committee's invitation of 27 June 2019, the Applicants submitted a detailed description of the intellectual property and materials they were offering to pledge, in the event the Committee was minded to continue the stay of enforcement but conditioned on the provision of security.

20. On 5 July 2019, and likewise further to the Committee's invitation, the Respondent filed its observations on the Applicants' submission of 2 July 2019.

21. On 22 July 2019, the Committee issued Procedural Order No. 1 (***PO1***), which recorded the agreements of the Parties on procedural matters and the decisions of the Committee on certain disputed issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules are

the ICSID Arbitration Rules in force as of 10 April 2006, that the procedural language is English, and that the place of the proceeding would be Dubai, United Arab Emirates. Annex A to Procedural Order No. 1 sets forth the procedural calendar.

22. On 23 August 2019, the Committee issued its Decision on Stay of Enforcement of the Award (the ***Decision on Stay***), which granted a continuation of the stay pending the Committee's decision on annulment, conditioned on the Applicants providing security in the form of a pledge on intellectual property and related materials compiled by the Applicants in connection with the mining project that formed the basis of the Arbitration (the ***IP Materials***).

23. On 6 September 2019, in accordance with that Decision, the Applicants provided a draft pledge of the IP Materials to the Respondent.

24. On 19 September 2019, the Applicants filed their Memorial on Annulment (the ***Memorial on Annulment***), along with exhibits A-001 through A-026 and legal authorities ALA-001 through ALA-025.

25. By letter of 21 November 2019, Mr. Théobald Naud informed the Secretariat that both DLA Piper France LLP and Iseme, Kamau & Maema Advocates had withdrawn from Kenya's representation.

26. By email of 3 December 2019, the Secretary of the Committee confirmed receipt of correspondence from the Respondent, namely letters dated 1 March and 8 November 2019, and emails dated 11 and 27 November and 3 December 2019.[6] In its letter of 8 November 2019, the Respondent informed the Secretary-General of ICSID that "due to exceptional circumstances that render[ed] it untenable to continue retaining the services of its current defence team on record, a decision had been made to terminate the services of: M/s Iseme Kamau & Maema Advocates … [and] M/s DLA Piper France LLP …." The Respondent also notified the Secretary-General in the same letter that it had appointed Mr. Michael Sullivan QC of One Essex Court "as the person authorized to act on behalf of the

[6] The earlier correspondence had not been received by the Secretary on the date of initial sending due to an inadvertent typographical error in the Secretary's email address.

Respondent for purposes of the annulment proceedings …." The Respondent requested that Mr. Sullivan, Dr. Henry Forbes Smith (likewise of One Essex Court) and Ms. Sheila Mammet of the Attorney-General's Office be included in the list of contacts for the Republic of Kenya. By email of 10 December 2019, the Respondent indicated that it was also represented by Mr. Smith in this proceeding.

27. On 12 December 2019, the Respondent filed its Counter-Memorial on Annulment (the ***Counter-Memorial on Annulment***). After an exchange of correspondence between the Respondent and the Committee regarding the Respondent's filing,[7] the Respondent resubmitted its Counter-Memorial on Annulment, along with a revised Consolidated Index of Respondent's Factual Exhibits, on 6 January 2020.

28. On 8 January 2020, the Parties jointly submitted a revised procedural calendar containing their proposal of new dates for the remaining written submissions. On 9 January 2020, the Committee approved these amendments to the procedural calendar on the basis of the Parties' agreement.

29. After a further exchange of correspondence to address outstanding issues regarding the Counter-Memorial on Annulment,[8] the Secretariat confirmed receipt on 7 February 2020 of a revised version of the Counter-Memorial on Annulment. Submitted with it were exhibits R-256 through R-292, exhibits from the Arbitration as listed in the Index of Respondent's Factual Exhibits,[9] legal authorities RL-231 through RL-269, and legal authorities RL-089, RL-104, RL-109, RL-115, RL-118 and CL-91 from the Arbitration, as listed in the Revised Index of Respondent's Legal Authorities.

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7 Email from the Secretariat dated 14 December 2019; email from the Respondent dated 17 December 2019; letter from the Secretariat dated 23 December 2019; email from the Respondent dated 24 December 2019.

8 Email from the Secretariat dated 10 January 2020; email from the Respondent dated 13 January 2020; email from the Secretariat dated 21 January 2020; email from the Respondent dated 23 January 2020; email from the Secretariat dated 28 January 2020; email from the Respondent dated 29 January 2020.

9 Exhibits C-007 through C-009, C-011, C-037 through C-039, C-042, C-047, C-048, C-068, C-071, C-079, C-094, C-118, C-135, C-141, C-145, C-179, C-193, C-207, C-212, C-217, C-219, C-221, C-224, C-229, C-236, C-237, C-241, C-242, C-249 through C-251, C-268, C-273, C-289, R-003 through R-013, R-042, R-045, R-049, R-051, R-056, R-057, R-060, R-064, R-066, R-067, R-072 through R-074, R-076, R-114, R-123, R-152, R-153, R-166 through R-168, R-180, R-213, and R-243.

30. On 24 February 2020, the Committee informed the Parties that one of its members was unfortunately no longer available on the existing hearing dates due to a conflicting professional commitment. In light of this, the Committee proposed new dates for the hearing on annulment (the ***Hearing***). It invited the Parties to confirm their availability and to indicate whether they would be amenable to holding the Hearing at an alternative location.

31. On 27 and 28 February 2020, the Parties confirmed their availability on the proposed hearing dates and informed the Committee of their agreement to hold the Hearing in London.

32. On 5 March 2020, the Applicants filed their Reply on Annulment (the ***Reply on Annulment***), accompanied by exhibit A-027, exhibit C-017 from the Arbitration, and legal authorities ALA-023 (resubmitted), ALA-025A through ALA-026, and CL-093 from the Arbitration. After an exchange of correspondence between the Applicants and the Secretariat regarding the Applicants' filing,[10] the Secretariat confirmed receipt on 24 March 2020 of corrected versions of the Applicants' Memorial on Annulment dated 19 September 2019 and the Applicants' Reply on Annulment dated 5 March 2020.

33. On 16 March 2020, the Secretariat wrote to the Parties, with the Committee's approval, to invite them to cease providing ICSID with hard copies and USB drives for individual submissions, as had previously been required by paragraph 13.2 of Procedural Order No. 1.

34. On 31 March 2020, in light of the uncertainties created by the Covid-19 pandemic, the Committee invited the Parties to indicate whether they (*i*) wished to confirm the 22-24 June 2020 booking for the Hearing at the IDRC in London, or (*ii*) would, instead or in addition, consider exploring virtual hearing options with the Committee and the Secretariat.

35. On 3 and 7 April 2020, the Respondent and the Applicants submitted their respective responses to the Committee's communication of 31 March. On 10 April 2020, the

[10] Emails from the Applicants dated 5 and 9 March 2020; email from the Secretariat dated 16 March 2020; email from the Applicants dated 20 March 2020.

Respondent filed observations on the Applicants' response, to which the Applicants responded on 13 April 2020.

36. On 15 April 2020, the Committee informed the Parties that it was considering two options in respect of the Hearing, as follows:

> (A) Hold the hearing as scheduled in June 2020 via Webex, the virtual system currently recommended by ICSID, but over the longer period from 22-25 June, with 26 June in reserve.
>
> (B) Adjourn the hearing until September 2020, presumptively to take place in person, but on the understanding that if this proves not to be feasible due to ongoing health concerns, then to hold the hearing by Webex (or a similar virtual service) at that time.
>
> …
>
> With respect to option (A), the Committee invites the parties to consult and provide the Committee with an agreed provisional hearing schedule, or failing that their separate proposals. With respect to Option (B), the Committee invites the parties to agree on one of the available weeks identified above,[11] and in addition to provide a joint, or failing that separate proposed schedules, on the alternative assumptions that the hearing takes place (i) in person, or (ii) by virtual means.

37. By emails of 25 and 26 April 2020, the Parties informed the Committee that they had agreed, subject to certain conditions, "to Option B, whereby the hearing is adjourned until September 2020, presumptively to take place in person, but if this proves to be impracticable due to the ongoing health crisis, then to hold the hearing virtually."

38. On 4 May 2020, the Committee issued Procedural Order No. 2 (***PO2***) concerning the format of the Hearing. The Committee accepted the Parties' agreement to adjourn the Hearing then scheduled for 22-23 June 2020 and decided, *inter alia*, that the Hearing would instead take place either:

> On 14-15 September 2020, in the event of an in-person hearing, with 16 September in reserve; or

11 These were the weeks starting 22 June, 31 August, 7 September and 14 September 2020.

On 10, 11, 14 and 15 September 2020, in the event of a virtual hearing, with 16 September in reserve.[12]

39. The question of whether the Hearing ought to take place in person or by virtual means was left to be decided at a later stage.[13] The Committee invited the Parties to reach consensus on that matter by 24 July 2020.[14]

40. On 7 May 2020,[15] the Respondent filed its Rejoinder on Annulment (the ***Rejoinder on Annulment***), accompanied by exhibits R-293 through R-295 and legal authorities RL-270 through RL-294. After an exchange of correspondence between the Respondent and the Secretariat,[16] the Respondent re-submitted its Rejoinder on Annulment, with certain corrections, on 12 May 2020. On 13 May 2020, the Secretariat confirmed receipt of the resubmitted version of the Rejoinder on Annulment, along with exhibits R-293 through R-295, exhibits from the Arbitration C-007, R-061, R-088 and R-219, legal authorities RL-270 through RL-294, and legal authorities from the Arbitration RL-033, RL-054, RL-064, RL-081, RL-185 (RL-273), CL-3, CL-52 and CL-54. On 15 May 2020, the Respondent submitted a document showing the differences between the original and resubmitted versions of its Rejoinder on Annulment.

41. Pursuant to paragraph 16 of PO2, the Secretariat conducted tests of the Webex virtual platform on 16 July (with the Applicants) and 22- 23 July 2020 (with the Respondent).

42. On 23 and 24 July 2020, pursuant to the Committee's instruction in PO2, the Parties informed the Committee of their positions as to whether the Hearing should be held virtually.

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12 PO2, ¶ 13.

13 PO2, ¶ 16.

14 PO2, ¶ 16.

15 With the Applicants' consent, the Respondent applied on 29 April 2020 for an extension of the deadline to file its Rejoinder on Annulment, which the Committee granted on the same date.

16 Emails from the Respondent dated 7 and 8 May 2020; emails from the Secretariat dated 8 and 12 May 2020.

43. On 29 July 2020, the Committee through its Secretary circulated to the Parties a draft agenda for the pre-Hearing conference, already scheduled for 31 July 2020, and encouraged the Parties to reach agreement on as many points as possible.

44. On 30 July 2020, the Parties requested that the pre-Hearing conference be postponed. On the same date, the Committee confirmed the postponement to 7 August 2020.

45. On 6 and 7 August 2020, the Parties circulated their views on the draft agenda, including the points agreed and those to be discussed.

46. On 7 August 2020, the Committee held the pre-Hearing conference with the Parties by telephone. An audio recording of the conference call was provided to the Parties and the Committee via BOX on 11 August 2020.

47. On 12 August 2020, the Committee issued Procedural Order No. 3 (***PO3***) concerning the organization of the Hearing and the order of presentations by the Parties.

48. By email of 21 August 2020, the Applicants requested that the Committee reconsider its decision with respect to the order of presentations at the Hearing. The Respondent submitted a response to the Applicants' request on the same date.

49. On 21 August 2020, pursuant to paragraph 24 of PO3, the Committee sent a list of questions to the Parties to be addressed in their oral submissions at the Hearing. The Committee cautioned that these questions were intended to clarify the issues in the proceeding and did not reflect any view on the Committee's part.

50. On 24 August 2020, the Committee through its Secretary informed the Parties of its decision to deny the Applicants' request for reconsideration dated 21 August 2020.

51. Further to paragraph 45 of PO3, the Applicants and the Respondent each circulated a list of their Hearing participants on 21 and 29 August 2020, respectively. On 3 and 4 September 2020, and pursuant to the Committee's invitation, both Parties confirmed that they had no further comments on the Hearing schedule.

52. On 4 and 5 September 2020, the Parties informed the Committee of their agreement on 5 September as the cut-off date to file additional legal authorities. On that date, the Applicants filed the following additional legal authorities: ALA-007 (resubmitted), ALA-027 through ALA-041, and RL-295.

53. On 7 September 2020, the Parties, the Committee and the ICSID Secretariat ran a test with the Webex platform in preparation for the Hearing. During the test, the Parties were informed that one of the Committee members was no longer available on 15 September (originally Hearing Day 4). By email of the same date, the Parties were invited to confirm their availability on Wednesday, 16 September 2020 (originally the reserve day), which would now be Hearing Day 4, and Thursday, 17 September 2020, which would now be the reserve day. By emails dated 8 September 2020, the Parties confirmed their availability on those dates.

54. On 10, 11, 14, 16 and 17 September 2020, the Committee held the Hearing remotely using the Webex platform. In addition to the Members of the Committee and the Secretary of the Committee, the following persons attended the Hearing:

For the Applicants:

Counsel

Mr. Audley Sheppard QC	Clifford Chance
Dr. Sam Luttrell	Clifford Chance
Dr. Romesh Weeramantry	Clifford Chance
Ms. Clementine Packer	Clifford Chance
Ms. Amelia Hirst	Clifford Chance
Mr. Dominic Afzali	Harbour Litigation Funding
Mr. Chris Lalor	Cortec Mining Kenya

For the Respondent:

Counsel

Ms. Njeri Wachira	Office of the Attorney General & Department of Justice
Mr. Emmanuel Bitta	Office of the Attorney General & Department of Justice
Ms. Christine K. Omwakwe	Office of the Attorney General & Department of Justice

Mr. Charles Wamwayi	Office of the Attorney General & Department of Justice
Ms. Sheila Mammet	Office of the Attorney General & Department of Justice
Mr. Michael Sullivan QC	One Essex Court Chambers
Dr. Henry Forbes Smith	One Essex Court Chambers

Court Reporters:

Mr. Trevor McGowan
Ms. Georgina Vaughn

ICSID Secretariat/World Bank Group:

Ms. Lamiss Al-Tashi	ICSID Hearings & Events Organizer
Ms. Michelle Lemus	ICSID Hearings & Events Assistant
Ms. Ayling Kocchiu	ICSID Paralegal
Mr. Jeremy Stephen Myers	World Bank Webex Technician / Team People
Ms. Maria Das Gracas Mendes De Souza	World Bank Webex Technician / Team People

55. On 18 September 2020, the Committee issued its Procedural Order No. 4 (***PO4***). This Order addressed the filing of Post-Hearing Memorials (***PHMs***) and Statements of Costs by the Parties, as well as the procedure for correcting the Hearing transcripts.

56. On 25 September 2020, in accordance with paragraph 6 of PO4, the Committee circulated a list of questions for the Parties to address in their PHMs.

57. On 13 October 2020, the Secretary circulated the revised versions of the Hearing transcripts reflecting the corrections agreed on by the Parties.

58. On 14 October 2020, following exchanges between the Parties regarding the PHMs to be submitted, the Committee through its Secretary informed the Parties of following decisions:

(a) the overall page limit for the PHMs would be of 50 pages in total;

(b) the Committee considered its questions to be sufficiently clear as formulated;

(c) as to the possibility of submitting new legal authorities in response to the Committee's questions, the Applicants were directed to submit a request identifying the new legal authorities on which they wished to rely and in what respect, following which the Respondent was invited to comment on the Applicants' request and/or seek leave to introduce responsive authorities; and

(d) by agreement of the Parties, the due date for the PHMs was extended to 30 October 2020.

59. On 19 October 2020, the Applicants submitted the new legal authorities that would accompany their PHM, as well as an index identifying the context in which those would be relied upon by reference to the Committee's list of questions.

60. On 22 October 2020, following the Respondent's comments on the Applicants' submission of 19 October, the Committee informed the Parties that, in its view, the Applicants had sufficiently specified the respect in which they sought to rely on the new authorities. The Respondent was invited to indicate, by 27 October 2020, whether it would wish to put forward any new authorities in response, on the assumption that the Applicants' authorities were admitted.

61. On 29 October 2020, having received no communication from the Respondent regarding any new authorities that it wished to put forward in response, the Committee admitted the new legal authorities submitted by the Applicants to the record.

62. On 30 October 2020, in accordance with paragraph 5 of PO4 as amended, each Party filed a PHM. On 9 November 2020, each Party filed a Submission on Costs.

63. The Committee declared the proceedings closed on 31 December 2020, in accordance with Rules 38(1) and 53 of the Arbitration Rules.

III. THE AWARD IN THE ARBITRATION

A. THE PROCEEDINGS BEFORE THE TRIBUNAL

64. The Committee will begin by briefly summarizing certain aspects of the arbitral proceedings, insofar as relevant to the arguments made by the Parties in this annulment proceeding. The Tribunal itself recited the full procedural history of the Arbitration in paragraphs 16-41 of the Award.

65. The Claimants submitted their Memorial on the Merits in the Arbitration on 5 May 2016, accompanied by supporting witness statements, exhibits and legal authorities. No expert evidence on damages was submitted by the Claimants with their Memorial.

66. The Respondent wrote to the Tribunal on 23 May 2016, noting this omission and proposing that quantum be considered in a separate phase after the merits phase. The Claimants, in response, submitted that this question should be deferred pending a decision on the possible bifurcation of jurisdiction and the merits. The Tribunal resolved the question in its Procedural Order No. 3, ruling that "at the conclusion of the merits phase, depending on the outcome, there [will] be (if it proves to be necessary and permitted by the Tribunal) 'a separate loss of profits phase to commence after the hearing on the merits has concluded.'"[17]

67. On 5 July 2016, the Respondent filed a notice of its jurisdictional objections. That notice confirmed that the Respondent did not seek bifurcation of the proceeding with respect to jurisdiction.

68. As a result, the Parties proceeded to file written pleadings addressing both jurisdiction and the merits. These were: the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction;[18] the Claimants' Counter-Memorial on Preliminary Objections;[19] the Claimants' Reply on the Merits;[20] the Respondent's Reply on Preliminary Objections to

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17 **Ex. R-295**, Procedural Order No. 3 in the Arbitration, ¶ 5 (*see also* ¶ 6); Award, ¶ 23.

18 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction.

19 **Ex. A-004**, Claimants' Counter-Memorial on Preliminary Objections.

20 **Ex. A-005**, Claimants' Reply on the Merits.

Jurisdiction;[21] the Respondent's Rejoinder on the Merits;[22] and the Claimants' Rejoinder on Preliminary Objections.[23]

69. Following the filing of the written submissions, on 20 November 2017, the Claimants applied to the Tribunal for an order requiring the Respondent to produce certain witnesses to testify at the hearing. These were Mr. Masibo, the former Commissioner of Mines who had granted the mining license at issue; Mr. Jajib Balala, a Cabinet Secretary in the government; and Mr. Benjamin Langwen, a former Director of Kenya's environmental agency. Subsequently, on 27 November and 8 December 2017, the Claimants filed additional applications seeking leave to submit into evidence a witness statement of Mr. Masibo that they had meanwhile obtained.

70. The Tribunal ruled on these matters in its Procedural Order No. 8, dated 15 December 2017. It dismissed the Claimants' application in respect of Messrs. Balala and Langwen but admitted the witness statement of Mr. Masibo into evidence. As noted in the Award, Mr. Masibo's witness statement appeared to be at odds with the characterization of SML 351 advanced by the Claimants in their pre-hearing written memorials. Specifically, while the Claimants' case up to that point had been that the prospecting license issued to them in 2008 – Special Prospecting License 256 (***SPL 256***) – was a separate legal instrument from SML 351, Mr. Masibo declared in his witness statement that SML 351 was in fact a "re-grant" of SPL 256 and a "conditional" mining license.[24]

71. The hearing was held from 15 to 23 January 2018 in Dubai, United Arab Emirates. Among the witnesses heard were Mr. Masibo; Professors Torgbor and Mumma, the respective experts of the Parties on Kenyan law; and Dr. Rigby, a technical expert put forward by the Respondent, who testified regarding what the Claimants had (or had not) established with respect to the existence of mineral resources at Mrima Hill.[25] Mr. Masibo, for his part,

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21 **Ex. A-007**, Respondent's Reply on Preliminary Objections to Jurisdiction.

22 **Ex. A-006**, Respondent's Rejoinder on the Merits.

23 **Ex. A-008**, Claimants' Rejoinder on Preliminary Objections.

24 **Ex. R-265**, Witness Statement of Moses Masibo, ¶¶ 73, 76-79.

25 Award, ¶ 39; *see also* **Ex. R-270**, Expert Report of Neal Rigby.

testified consistently with his witness statement, *i.e.*, that SML 351 was a "re-grant" of SPL 256.[26]

72. On 9 February 2013, following the conclusion of the hearing, the Tribunal submitted questions to the Parties to be addressed in their post-hearing memorials. Among these were questions to the Claimants asking for clarification of their position on the proper legal characterization of SPL 256 (in light of Mr. Masibo's testimony) and whether any claims were being asserted in respect of SPL 256.[27]

73. On 11 April 2018, the Claimants and Kenya filed their respective post-hearing memorials and submissions on costs. They responded to the Tribunal's questions in those memorials, as discussed further below.

B. THE CLAIMANTS' POSITION BEFORE THE TRIBUNAL

74. The Claimants' case before the Tribunal was that, starting in 2007, they had invested approximately US$ 45 million in three exploratory drilling programs and other activities at the Mrima Hill site in Kenya.[28] Through these expenditures, they purportedly de-risked mining operations at the site.[29]

75. The Claimants submitted that the Respondent validly issued SPL 256 to them on 4 April 2008. SPL 256 was twice renewed, such that its ultimate expiration date was in November 2014.

76. Elections were held in Kenya on 4 March 2013, resulting in a change of government. According to the Claimants, on 7 March 2013 – before the new President was sworn in – Commissioner Masibo issued SML 351 to Claimant CMK. The Claimants acknowledged

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26 **Ex. R-259**, Tribunal Hearing, Tr. Day 4, 60:10-19; *see also* **Ex. R-265**, Witness Statement of Moses Masibo, ¶ 97.

27 **Ex. A-010**, Letter from the Tribunal to the Parties, 9 February 2018, questions 10 ("[T]he Respondent suggests SML 351 is distinct and separate from SPL 256 and not a 'continuance' as suggested by Mr. Masibo. Do the Claimants agree?") and 32 ("If SML 351 was void ab initio or revoked, what was the status of SPL 256 after 5 August 2013? In any event, what claim relying upon SPL 256 is made and advanced by the Claimant?").

28 **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 2, 146; Award, ¶¶ 2, 293; Memorial on Annulment, ¶ 199(f).

29 *See* Application for Annulment, ¶ 4.

before the Tribunal that one or more of the pre-conditions to the issuance of a mining license under Kenyan law had not been met at that time, but they argued that Commissioner Masibo nonetheless had the authority to issue SML 351, at least so long as the pre-conditions were satisfied before any actual mining operations took place.[30]

77. The Claimants proceeded to allege that in July 2013 the new Cabinet Secretary, Mr. Balala (***CS Balala***), attempted to solicit a bribe from the Claimants, which they refused. Thereafter, on 5 August 2013, CS Balala appeared on Kenyan national television and announced that a large number of licenses issued during the prior administration's term were being revoked – a group that included SML 351.[31]

78. The Memorial of Claim in the Arbitration listed four investments that the Claimants alleged to have made in Kenya. These were: (i) SML 351; (ii) SPL 256; (iii) the shares of the local investment vehicle, CMK; and (iv) certain intellectual property rights allegedly belonging to the Claimants.[32]

79. The primary claim advanced in the Arbitration was for the revocation of SML 351 on 5 August 2013, which was said to constitute an unlawful direct and/or indirect expropriation of the Claimants' rights under that instrument.[33] The revocation of SML 351 was further alleged to constitute an indirect expropriation of the shares of CMK (the ***CMK shares***) and the Claimants' intellectual property (the ***IP***).[34] In addition, the Claimants asserted a claim under the FET provision of the BIT, arguing that the revocation of SML 351 "unlawfully depriv[ed] CMK of its exclusive right to mine Mrima Hill for 21 years."[35] An unjust

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30 Award, ¶¶ 146, 355-356, 363.

31 Award, ¶¶ 200-201.

32 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 133.

33 **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 4, 155-173.

34 **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 155, 174-176.

35 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 191(a). Article 2(2) of the BIT reads as follows:

"Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

enrichment argument was also put forward as part of the FET claim, as well as an assertion that the State's actions amounted to "unreasonable or discriminatory measures"[36] in violation of that provision.[37]

80. With respect to SPL 256, and in response to the post-hearing questions posed by the Tribunal, the Claimants adopted Mr. Masibo's "re-grant" theory, *i.e.*, that SPL 256 and SML 351 were *not* separate legal instruments.[38] On that basis the Claimants said, in paragraph 61 of their PHM, that they had a claim for direct expropriation of SPL 256, because it was necessarily revoked when SML 351 was on 5 August 2013.[39] In a footnote accompanying paragraph 61, the Claimants added that if the "re-grant" theory were rejected by the Tribunal, then the revocation of SML 351 would not have affected SPL 256, such that the Claimants "*would* have claims for indirect expropriation … and breach of the FET standard" in respect of SPL 256.[40] No further explanation was provided.

81. Based on the factual and legal arguments surveyed above, the Claimants sought the following relief in the arbitration:

> (a) a **DECLARATION** that, by unlawfully expropriating the Claimants' investments, the State has violated Article 5 of the BIT and international law and an **ORDER** that the State pay monetary damages to the Claimants;
>
> (b) a **DECLARATION** that, in its treatment of the Claimants and their investments, the State has violated the FET standard at Article 2(2) of the BIT and an **ORDER** that the State pay monetary damages to the Claimants;
>
> (c) a **DECLARATION** that the State has violated its obligation under Article 2(2) of the BIT by impairing the Claimants' investments

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36 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 193; **Ex. C-017**, BIT, Article 2(2).

37 *See* **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 193-199 (arbitrariness and unreasonableness claim); ¶¶ 205-208 (unjust enrichment claim).

38 **Ex. A-011**, Claimants' PHM, ¶ 14.

39 **Ex. A-011**, Claimants' PHM, ¶ 61. The Claimants added that they also had an FET claim in respect of SPL 256 under the "re-grant" theory, on the ground that "the legitimate expectations generated by SLP 256 ha[d] clearly been frustrated" by the revocation of SML 351.

40 **Ex. A-011**, Claimants' PHM, n. 307 (emphasis added).

through unreasonable or discriminatory measures and an **ORDER** that the State pay monetary damages to the Claimants;

(d) an **ORDER** that the State pay the Claimants' costs of these proceedings; and

(e) any other relief as may be deemed just and appropriate by the Tribunal.[41]

C. THE RESPONDENT'S POSITION BEFORE THE TRIBUNAL

82. The Respondent's case before the Tribunal, in summary, was that the Claimants had never acquired any protected or lawful investment, and therefore the claims must fail as a matter of jurisdiction, admissibility, or the merits.

83. With respect to jurisdiction, the Respondent submitted, *inter alia*, that the Tribunal lacked subject matter jurisdiction under the BIT and the ICSID Convention because the Claimants' purported investment was unlawful under Kenyan and/or international law.[42] With respect to the Kenyan law element, the Respondent relied on a 20 March 2015 judgment of the Kenyan High Court, subsequently affirmed by the Court of Appeal, which held that SML 351 was void *ab initio* due to the Claimants' failure to fulfill pre-conditions to its issuance, and because Commissioner Masibo acted *ultra vires*.[43] With respect to the international law element, the Respondent contended that the Claimants' purported investment was (*i*) tainted by corruption – on the part of Commissioner Masibo and Mr. Jacob Juma, a businessman who acted as an intermediary between the Claimants and Commissioner Masibo – and (*ii*) acquired in violation of the international law principle of good faith.[44]

84. As an alternative to its jurisdictional arguments, the Respondent submitted to the Tribunal that the Claimants' claims were inadmissible. This was said to be on essentially the same

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41 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 301 (emphasis in original).

42 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 188, 205-282.

43 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 220-228.

44 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 229-282.

grounds invoked in relation to subject matter jurisdiction, *i.e.*, the alleged illegality of SML 351.[45]

85. Finally, on the merits, the Respondent submitted that no direct or indirect expropriation had occurred, including on the basis that SML 351 was void *ab initio* and therefore incapable of being expropriated. The Respondent further argued that the Claimants had failed to establish any FET violation in respect of legitimate expectations, unjust enrichment, or unreasonable and discriminatory measures.[46] With respect to the alleged investments other than SML 351, Kenya argued that SPL 256 had expired by its own terms on 1 December 2014 without government interference, and that the Claimants had freely given the IP at issue to the State.[47]

86. On these grounds, the Respondent asked the Tribunal to dismiss all of the Claimants' claims for lack of jurisdiction, or alternatively as inadmissible, or alternatively on the merits. The Respondent also requested an award of its legal costs.[48]

D. THE TRIBUNAL'S AWARD

87. The Tribunal's Award runs to 144 pages. In the course of its analysis, the Tribunal declined to accept either the Claimants' or the Respondent's allegations of corruption.[49]

88. The first 85 pages of the Award are largely devoted to a detailed evaluation of the factual evidence concerning the Claimants' activities in Kenya from approximately 2007 onwards. By the time of the hearing, it was common ground between the Parties that SPL 256 had been validly issued; and that it gave CMK certain prospecting rights, but no present entitlement to mine or extract minerals for sale.[50]

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45 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 367-370.

46 **Ex. A-006**, Respondent's Rejoinder on the Merits, ¶¶ 11-46, 83-129, 139-157.

47 **Ex. A-013**, Respondent's Post-Hearing Submissions, ¶ 109; **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 516-519.

48 **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 642-643.

49 Award, ¶¶ 183-185, 197-203.

50 Award, ¶¶ 74-78.

89. The Tribunal rejected the Claimants' contention that Clause 22 of SPL 256 gave CMK a right to be issued a mining license for Mrima Hill in due course.[51] Instead, the Tribunal interpreted SPL 256 as establishing several conditions precedent to the valid issuance of any mining license. Among these were requirements on the Claimants to conduct a "mine feasibility report" and an "Environmental Impact Assessment Study" (the ***EIA Study***) prior to applying for a mining license (such as SML 351). These preconditions, the Tribunal found, were imposed by the Kenyan Mining Act and other regulations.[52] They had to be satisfied by the Claimants to receive a valid mining license, and "[n]o amount of frustration with the bureaucracy excused CMK from non-performance of these legal conditions …."[53]

90. The Tribunal went on to find that the Claimants failed to comply with the mandatory pre-conditions, including the provision of the EIA Study and obtaining "de-gazettement" of Mrima Hill as a forest and nature reserve.[54] Furthermore, the Claimants were aware of these deficiencies, in particular because they had earlier received a "roadmap" setting out "the prerequisites for a special mining licence" from Commissioner Masibo, which listed the relevant requirements.[55]

91. Notwithstanding this, the Claimants applied for a mining license on 7 March 2013 – two days after elections in Kenya had gone against the incumbent government. To this end, the Claimants engaged an intermediary, Mr. Juma, who met with Commissioner Masibo on that date. Commissioner Masibo proceeded to issue SML 351 the next day.[56] The Tribunal found that this sequence of events constituted a "political end-run around the statutory requirements with Mr. Juma's assistance."[57]

92. Subsequently, on 5 August 2013, CS Balala, a member of the new government, announced that all licenses issued in the period 14 January to 15 May 2013 would be suspended. This

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51 Award, ¶¶ 77-78.

52 Award, ¶ 104.

53 Award, ¶ 105.

54 *See* Award, ¶¶ 345-347. As to "de-gazettement," *see* n. 271, *infra*.

55 Award, ¶¶ 116 (heading); *see also* ¶¶ 117-119.

56 Award, ¶¶ 159-165.

57 Award, ¶ 222.

group of licenses included SML 351. The government proceeded to set up a task force that would afford the affected license holders (approximately 253 in number) an opportunity to have their licenses evaluated and, if appropriate, re-issued. CMK did not participate in this process and instead brought suit against the government in the Kenyan courts.[58]

93. That lawsuit resulted in the Kenyan court judgments referenced above.[59] Consistent with the Respondent's case, the Tribunal read the Kenyan judgments to hold that SML 351 was void *ab initio*.[60] The "application of international law reaches the same conclusion," the Tribunal found, for reasons explained later in the Award.[61]

94. Having surveyed the facts, the Tribunal proceeded to its jurisdictional analysis.[62] It first concluded, consistent with the Claimants' case and against the Respondent's, that CS Balala had indeed revoked and not just suspended SML 351, with the result that "the Claimants' mining activities and aspirations were effectively terminated on 5 August 2013."[63] The main question therefore became, in the Tribunal's view, whether SML 351 (or any other relevant assets of the Claimants) constituted a "protected investment."[64] The Tribunal noted that the Claimants accepted that they bore the burden of proof on that issue.[65]

95. After quoting the relevant provisions of the BIT and the ICSID Convention in respect of the existence of a qualifying "investment," the Tribunal, citing to the *Phoenix Action* award, held that it "is accepted jurisprudence that in order to be protected an investment

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58 Award, ¶¶ 200-212.

59 *See* ¶ 83, *supra*.

60 Award, ¶¶ 213-221.

61 *See* Award, ¶ 222. The Tribunal there explained that the Claimants' alleged investment was a mining license, *i.e.*, a "creature of Kenyan domestic law." In the Tribunal's view, "neither the BIT nor the ICSID Convention can be construed to protect an investment (SML 351) prohibited by Kenyan law especially in circumstances where, in the Tribunal's view, the Claimants knew that they had no such entitlement but attempted a political end-run around the statutory requirements with Mr. Juma's assistance." *See also id*., ¶ 333.

62 Award, ¶¶ 232 *et seq*.

63 Award, ¶ 244.

64 Award, ¶ 244.

65 Award, ¶ 245; *see also id*., ¶ 250.

has to be in accordance with the laws of the host State and made in good faith. This requirement can be analyzed at the jurisdictional or the merits level."[66]

96. The Tribunal then proceed to adopt and apply the test for a protected "investment" as set out in that earlier award, writing as follows:

> The formulation of this requirement can be found in the summary given in *Phoenix*:
>
> > To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:
> >
> > 1 – a contribution in money or other assets;
> >
> > 2 – a certain duration;
> >
> > 3 – an element of risk;
> >
> > 4 – an operation made in order to develop an economic activity in the host State;
> >
> > 5 – assets invested in accordance with the laws of the host State;
> >
> > 6 – assets invested *bona fide*.[67]

97. Applying this test, the Tribunal found in paragraphs 298-308 of the Award that the Claimants succeeded as to elements 1-4 and 6 above. The remaining question was therefore element 5 – *i.e.*, whether any relevant investments were lawful.

98. The Tribunal held against the Claimants on this score in paragraphs 319-365 of the Award. It began by affirming as a matter of law that for an investment to qualify for protection under the BIT and the ICSID Convention,[68] it must be made in substantial compliance with the material laws of the host State:

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66 Award, ¶ 260. This conclusion was consistent with the Respondent's case. *See, e.g.,* **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶¶ 206-207, 257.

67 Award, ¶ 261, *quoting* **Ex. CL-027**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 19 April 2009 (Stern (P), Bucher, Fernández-Armesto) (***Phoenix Action***), ¶ 114.

68 *See* ¶¶ 131-134, *infra*.

> 319. The Tribunal concludes that for an investment such as a licence, which is the creature of the laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State. The claims do not relate to bricks and mortar, as earlier observed. The claimed rights flow from a document which has no legal existence or effect, and cannot therefore give rise to compensable rights.
>
> 320. The Tribunal endorses the application of the *Kim* principle of proportionality to an assessment of the impact of alleged illegalities. Omission of a minor regulatory requirement, such as the act of Mr. Langwen on 8 July 2013 to issue an ordinary letter rather than use Form 3 of Schedule 1 of the Environmental (Impact Assessment and Audit) Regulations, or inadvertent misstatements, will not have the same impact as an investment "created" in defiance of an important statutory prohibition imposed in the public interest.
>
> 321. The Tribunal concludes that for an investment to be protected on the international level, it has to be in substantial compliance with the significant legal requirement[s] of the host state.[69]

99. The Tribunal then proceeded to assess whether the "investments" made by the Claimants – asserted to be SML 351, SPL 256, the IP and the CMK shares – met this test and/or otherwise qualified for protection under the BIT and the ICSID Convention.[70]

100. The Tribunal began its analysis by addressing SPL 256 and the IP.[71] Paragraphs 328-331 of the Award read as follows:

> (iii) The Tribunal's Ruling on SPL 256
>
> 328. The special prospecting licence was not itself a licence to make money. It was a licence to spend money. Prospecting, as such, involves cost not revenue.
>
> 329. Prospecting may be a stepping stone to a profitable mine but not necessarily so, and in Dr. Rigby's opinion (which the Tribunal accepts), the Claimants never established the economic viability of the Mrima Hill mine (a conclusion echoed, according to Dr. Rigby, by Mr. Townsend of PAW in his statement of 29 July 2013).

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69 Award, ¶¶ 319-321 (emphasis omitted).

70 Award, ¶¶ 328-333.

71 The CMK shares are not mentioned in this or the other analytical sections referred to below, save for the reference in paragraph 331 to CMK's (former) ownership of the IP.

> 330. If the Claimants had proceeded to fulfill the conditions precedent to a mining licence (assuming they were ever in a position to do so), the prospecting work might have led eventually to the wealth the Claimants describe, but the wealth would in that case flow from work under the mining licence not the prospecting licence.
>
> 331. There is no doubt CMK generated and submitted considerable data about the minerals of Mrima Hill, but the data was freely given by the Claimants to the Government in the hopes of – but with no entitlement to – a mining licence. The data was not disclosed on the basis it was to remain the property of CMK. There was no protected investment in intellectual property. It will be recalled that the Claimants made extensive use of the data generated by the exploratory work of earlier prospectors as well as the Kenyan Mines and Geological Department.[72]

101. Having reached those conclusions, the Tribunal considered that "the sole surviving subject matter of the arbitration is the alleged special mining licence, SML 351."[73] With respect to that instrument, the Tribunal found that the legality condition implicit in the BIT and the ICSID Convention was not met:

> 333. In the Tribunal's view, SML 351 was *void ab initio* under international law and the Tribunal is without jurisdiction:
>
> (a) for the reasons already outlined, ICSID and the BIT protects only "lawful investments." The text and purpose of the BIT and the ICSID *Convention* are not consistent with holding host governments financially responsible for investments created in defiance of their laws protecting [fundamental] public interests such as the environment. The *explicit* language to the effect that protected investments must be made "in accordance with the laws of Kenya" is therefore unnecessary to secure the objects and purpose of the BIT;
>
> (b) in any event, SML 351 is a piece of paper whose value, if any, lies exclusively in the consequences attached to it by Kenyan law. In this case, as the Kenyan Courts have said, Kenyan law attached no consequences to the piece of paper;
>
> (c) Mining Commissioner Moses Masibo lacked jurisdiction even to consider issuance of a special mining licence in light of the status of Mrima Hill as a nature reserve, a forestry reserve and a national monument encircled by layers of statutory protection under the *Forests Act, The Environmental (Impact Assessment and Audit)*

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72 Award, ¶¶ 328-331.

73 Award, ¶ 332.

Regulations 2003, the *Antiquities and Monuments Act* and the *Mining Act* and reinforced by the conditions attached to SPL 256;

(d) although this Tribunal is applying international law rather than Kenyan law, the Tribunal agrees with the Kenyan Courts that SML 351 as issued was void *ab initio*.[74]

102. Having found that SML 351 was unlawfully issued, the Tribunal proceeded to apply the proportionality test set out in *Kim v. Uzbekistan*[75] – a precedent relied upon by the Claimants – to determine whether the illegality attaching to SML 351 was substantial enough to warrant denying protection to it under international law. The Tribunal concluded, after an analysis of each of the three *Kim* elements, that

> the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form) from NEMA concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.[76]

103. Having found no protected "investment," the Tribunal proceeded, in paragraphs 366-378 of the Award, to render what it described as an alternative ruling on the merits. This analysis is introduced as follows: "The Tribunal's analysis of the illegalities attending the birth of SML 351 is equally applicable to a situation if the onus were to switch to the Government to establish that SML 351 is not a protected investment."[77]

104. The Tribunal proceeded to find that it had been established that Commissioner Masibo "purported to exercise a discretion he did not possess,"[78] and failed to "perform[] his statutory functions in good faith and for their intended purpose."[79] In the latter regard, the

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74 Award, ¶ 333 (emphasis in original).

75 **Ex. RL-185**, *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6), Decision on Jurisdiction, 8 March 2017 (Caron (P), Fortier, Landau) (***Kim***).

76 Award, ¶ 365.

77 Award, ¶ 366; *see also* Award, ¶ 12.

78 Award, ¶ 369.

79 Award, ¶ 370.

Tribunal relied, in part, on the views of the Claimants' legal expert.[80] The Tribunal then concluded as follows:

> Accordingly, because Mr. Masibo:
>
> (a) purported to exercise a discretion he did not possess; and
>
> (b) ignored statutory requirements he had no authority to ignore,
>
> the Tribunal concludes on the merits that the Government has demonstrated that SML 351 is not in any event a protected investment.[81]

105. Lastly, on the question of costs, the Tribunal awarded the Respondent 50% of its claimed arbitration costs and its share of the ICSID costs. This yielded a monetary award to the Respondent of US $3,226,429.21 plus US$ 322,561.14 in ICSID costs.[82]

IV. THE ASSERTED ANNULMENT GROUNDS

106. In this proceeding, the Applicants argue for full or partial annulment of the Award under two provisions of the ICSID Convention: Article 52(1)(b), manifest excess of powers; and Article 52(1)(e), failure to state reasons. The Applicants put forward multiple claims under each of these provisions.

A. ARTICLE 52(1)(B): MANIFEST EXCESS OF POWERS

107. Article 52(1)(b) of the ICSID Convention provides that an award may be annulled if a party demonstrates that "the Tribunal has manifestly exceeded its powers." The Applicants put forward four alleged grounds for annulment under this provision. The Committee will address each in turn below, albeit in a slightly different order than as presented by the Applicants for ease of comprehension.

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80 Award, ¶¶ 379-384.

81 Award, ¶ 387.

82 Award, ¶ 405.

1. Ground 1C: Alleged failure to apply the definition of "investment" in the BIT to SML 351

a) The Applicants' case

108. As noted above, the Applicants acknowledge that their claims in the Arbitration were founded, at least primarily, on the government's revocation of SML 351.[83] The Tribunal's finding that SML 351 was not a protected investment therefore assumes particular importance in this annulment proceeding.

109. The Applicants point out that this finding stemmed from the Tribunal's interpretation of the BIT as containing an implied "legality" requirement. Having determined that SML 351 was not legally valid – indeed, void *ab initio* – under the governing law, the Tribunal concluded that SML 351 was not a protected investment under the BIT.[84]

110. According to the Applicants, the Award represents the first instance of a tribunal reading a "legality" requirement into a bilateral investment treaty without support in the text of the treaty or the *travaux*.[85] The Tribunal did so by relying on portions of the *Phoenix Action* award that the Applicants characterize as *dicta*, stressing as well that *Phoenix Action* is distinguishable, because the underlying treaty there contained a legality provision in its text.[86]

111. The Applicants go on to note that the Tribunal addressed the legality issue at page 114 of the Award, under the heading "Purposive Interpretation: Does the BIT Contain an Implicit Limitation to Lawful Investments." This heading is, however, a *non sequitur* in the Applicants' view, because that section of the Award in fact focuses primarily on an interpretation of Kenyan law, and in particular the Mining Act.[87]

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83 *See* ¶ 79, *supra*; *see also* **Ex. R-256**, Tribunal Hearing, Tr. Day 1, 65:24 – 66:1 (Claimants' counsel) ("[I]t is the revocation by Minister Balala which is the act which gives rise to our claims.").

84 Memorial on Annulment, ¶¶ 72, 76-89. *See also* Award, ¶ 333(a).

85 Memorial on Annulment, ¶ 80.

86 Memorial on Annulment, ¶¶ 80, 82.

87 Memorial on Annulment, ¶ 81.

112. Indeed, the Applicants submit, no credible analysis of the BIT's terms under the Vienna Convention on the Law of Treaties (the ***Vienna Convention***) can be found in the Award. The sole candidate is paragraph 333(a) (quoted in paragraph 101 above), but in the Applicants' submission, this is an entirely perfunctory analysis. It contains no mention of the dispositive provision of the BIT, Article 1(a)(v).[88]

113. Citing the *Malaysian Historical Salvors* annulment decision, the Applicants argue that a tribunal's failure to apply the applicable BIT is an annullable error.[89] Here, they say, the Tribunal did just that, reading in a jurisdictional legality requirement that the BIT does not contain.

114. The Applicants recognize that some annulment committees have applied the "reasonably tenable" test advocated by the Respondent in assessing an alleged manifest excess of powers.[90] Nonetheless, they argue that jurisdictional rulings deserve a higher level of scrutiny, such that a tribunal's erroneous failure to exercise jurisdiction may be annulled so long as the error is capable of making a difference to the result (as it was here).[91] In any event, say the Applicants, the Tribunal's error in declining jurisdiction over SML 351 was annullable under either version of the test.[92]

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88 Memorial on Annulment, ¶¶ 85-86. The text of Article 1(a)(v) is set out in n. 99, *infra*.

89 Memorial on Annulment, ¶ 91.

90 Applicants' PHM, ¶ 67 (*citing* **Ex. ALA-022**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.* (ICSID Case No. ARB/81/2), Decision on the Application for Annulment submitted by Klöckner, 3 May 1985 (Lalive (P), El-Kosheri, Seidl-Hohenveldern) (***Klöckner I***), ¶ 52; **Ex. ALA-021**, *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee, 14 June 2010 (Schwebel (P), Ajibola, McLachlan) (***Helnan***), ¶ 55; **Ex. RL-246**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on the Application for Annulment of Fraport, 23 December 2010 (Tomka (P), Hascher, McLachlan), ¶ 44.

91 Applicants' PHM, ¶¶ 65-66 (*citing* **Ex. ALA-001**, *Compania de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux/Vivendi Universal S.A v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Fortier (P), Crawford, Fernandez Rozas) (***Vivendi I***), ¶ 86; **Ex. ALA-002**, *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009 (Schwebel (P), Shahabuddeen, Tomka) (***MHS***), ¶¶ 80-81); **Ex. RL-231**, *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment, 15 January 2016 (Bernardini (P), Khan, van Haersolte-van Hof), ¶ 105).

92 Applicants' PHM, ¶ 68.

115. In answer to the Respondent's argument that the text of Article 1(a)(v) of the BIT supports the existence of a legality requirement,[93] the Applicants say that while the Respondent argued that construction of the BIT in the Arbitration, it appears nowhere in the reasoning of the Award.[94]

116. Finally, answering an argument further developed by the Respondent during the Hearing, the Applicants deny that the Tribunal's jurisdictional ruling on SML 351 was based on the ICSID Convention, as opposed to the BIT alone. In this regard they point in particular to paragraph 302 of the Award,[95] and to the fact that the heading appearing at Part 27(a) of the Award is: "Does the BIT Contain an Implicit Limitation to Lawful Investments."[96] Based on the foregoing, the Applicants contend that the Award as a whole, or alternatively multiple sections of it, should be annulled.[97]

b) The Respondent's case

117. The Respondent characterizes Ground 1C as nothing more than a disguised appeal. The Applicants' basic argument, the Respondent submits, is that the Tribunal made a mistake of law in interpreting the BIT as containing a legality requirement. Even if that were so, a mistake of law provides no ground for annulment – at least so long as the Tribunal's conclusion is "tenable" or "reasonably susceptible to argument," as it is here.[98]

118. In fact, the Respondent says, the Tribunal's interpretation of the BIT was correct. Pointing to the *chapeau* of the Treaty, the Respondent contends – as it did in the Arbitration – that

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93 *See* ¶ 118, *infra*.

94 Reply on Annulment, ¶¶ 59-61.

95 Award, ¶ 302 ("If the Claimants had fulfilled the requisites of a lawful investment, *other* requirements of the ICSID Convention, whether or not viewed through the lens of *Salini*, would have been satisfied.") (emphasis in original).

96 Applicants' PHM, ¶ 52.

97 Memorial on Annulment, ¶ 92; Applicants' response to Committee Question B.11, 15 September 2020.

98 Counter-Memorial on Annulment, ¶¶ 273-274, 305-308, 312 (*citing, inter alia,* **Ex. ALA-022**, *Klöckner I*, ¶ 52(e); **Ex. RL-238**, *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005 (Brower (P), Hwang, Williams), ¶ 41; **Ex. RL-258**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Decision of the *ad hoc* Committee, 25 March 2010 (Schwebel (P), McLachlan, Silva Romero) (***Rumeli***), ¶ 96; **Ex. RL-264**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Annulment, 1 February 2016 (Zuleta (P), Cheng, Castellanos) (***Total***), ¶ 185).

the words "conferred by law" in Article 1(a)(v) must be construed as referring to "rule of law" (*i.e.*, legal) investments.[99] As the Tribunal found, SML 351 was not legally obtained, and therefore it fell outside the definition of "investment" in the BIT.

119. The Tribunal committed no error in analyzing legality as a matter of jurisdiction, the Respondent asserts. At the hearing in the arbitration, the Claimants submitted that the question of an investment's legality was "probably" one of admissibility as opposed to jurisdiction, but they never suggested that this was the only view or that it was not subject to debate.[100]

120. Nor, says the Respondent, was the Tribunal's reliance on the award in *Phoenix Action* improper, even assuming that the parts of the award relied upon were *dicta*. The proposition for which the case was cited – that interpreting treaties in good faith, investments to be protected are lawful and not unlawful ones – is reasonable and certainly not an annullable error.[101]

121. During the Hearing in this proceeding, the Respondent placed emphasis on the submission that the Tribunal denied jurisdiction in relation to SML 351 under both the BIT *and* the ICSID Convention.[102] This would imply that Ground 1C fails even if the Applicants were correct that the Tribunal manifestly exceeded its powers in construing the BIT.[103]

122. In sum, the Respondent submits that the Tribunal's decision on SML 351 was reasonable and tenable, such that it cannot be annulled; and was in fact the correct decision.[104] Further, and in any event, Kenya argues that (*i*) any excess of powers in relation to the BIT was harmless, because the Tribunal also founded its legality ruling on the Convention; and (*ii*)

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99 Rejoinder on Annulment, ¶¶ 280-303. Article 1(a) of the BIT provides, in relevant part: "'[I]nvestment' means every kind of asset and in particular, though not exclusively, includes: … (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

100 Rejoinder on Annulment, ¶ 314.

101 Counter-Memorial on Annulment, ¶ 314.

102 Tr. Day 4, 10:25 – 25:1; *see also* Respondent's PHM, ¶¶ 109-130.

103 The Applicants did not raise any argument of manifest excess of powers in relation to the Tribunal's interpretation or application of the ICSID Convention in any of their pre-hearing submissions.

104 Counter-Memorial on Annulment, ¶ 316.

the Tribunal was entitled to deny protection to unlawful investments on the merits, which is what it did in the final section (Part 28) of the Award.

c) The Committee's analysis

i. The legal test for a manifest excess of powers

123. The key issue that the Committee must decide in relation to Ground 1C is whether the Tribunal's reading of a legality requirement into the BIT and/or Article 25 of the ICSID Convention – with the result that SML 351 was not a protected investment – constituted a manifest excess of powers. The Applicants strenuously argue that it was, while the Respondent equally strenuously contends that it was not.

124. The Parties are largely in agreement on the test to be applied to this question under Article 52(1)(b) of the ICSID Convention. They agree that this provision conditions annulment on the excess of powers being "manifest," meaning in substance that it must be "obvious," "clear on the face of the award," and "self-evident rather than the product of elaborate interpretation one way or the other."[105]

125. The Parties also agree that a tribunal's failure to apply the applicable law, as opposed to a mere misapplication of it, can constitute a manifest excess of powers. But the standard is high. A tribunal's interpretation or application of the law will not be disturbed if it is reasonably tenable.[106]

126. The Committee endorses the Parties' views on these points, which are consistent with the jurisprudence of earlier ICSID annulment committees. To cite one example, the committee in *Duke Energy v. Peru* put it as follows:

> An *ad hoc* committee will not therefore annul an award if the tribunal's disposition on a question of law is *tenable*, even if the committee considers

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105 *See* Memorial on Annulment, ¶¶ 49-51; Counter-Memorial on Annulment, ¶¶ 56, 266-267, 270-271; Reply on Annulment, ¶¶ 8, 74; Rejoinder on Annulment, ¶¶ 73-75. *See also* **Ex. RL-265**, *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment, 3 July 2002 (Kerameus (P), Bucher, Orrego Vicuña) (***Wena***), ¶ 25; **Ex. RL-234**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (Griffith (P), Ajibola, Hwang), ¶ 68; **Ex. RL-258**, *Rumeli*, ¶ 96.

106 Tr. Day 4, 56:2-3 ("THE PRESIDENT: Or you could say 'not reasonably tenable'? MR SHEPPARD: Yes.").

> that it is incorrect as a matter of law…. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. *Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments?* A debatable solution is not amenable to annulment, since the excess of powers would not then be "manifest."[107]

127. The finding of the Tribunal impugned here was that it lacked jurisdiction in relation to SML 351, and the Parties have debated whether the *Duke* standard fully applies to alleged jurisdictional errors, or whether an annulment committee should instead conduct a more searching analysis. In their PHM, the Applicants, relying largely on commentary, argue that a jurisdictional error by itself can be a "manifest" excess of powers,[108] because, *inter alia*, this "protects consent."[109] The Respondent disagrees, arguing on the basis of the text and legislative history of Article 52(1)(b), as well as a number of earlier annulment decisions, that there is no more lenient standard for assessing alleged jurisdictional errors.[110]

128. The Committee agrees with the Respondent on this point. Article 52(1)(b) requires that to warrant annulment an excess of powers must be "manifest," and it provides no carve-out for particular kinds of errors.[111] While the Applicants are correct that jurisdictional issues

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107 **Ex. RL-243**, *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision of the *ad hoc* Committee, 1 March 2011 (McLachlan (P), Hascher, Tomka) (***Duke***), ¶ 99 (emphasis added; internal citation omitted). *See also* **Ex. ALA-022**, *Klöckner I*, ¶ 52; **Ex. ALA-021**, *Helnan*, ¶ 55.

108 Applicants' PHM, ¶¶ 63-66.

109 Applicants' PHM, ¶ 64 (*citing* **Ex. ALA-047**, Philippe Pinsolle, *"Manifest" Excess of Power and Jurisdictional Review of ICSID Awards*, in F. Ortino *et al*. (eds), Investment Treaty Law 51 (BIICL 2006), pp. 54, 57).

110 Respondent's PHM, ¶¶ 134-135 (*citing* **Ex. RL-244**, *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/13), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (Griffith (P), Robinson, Tresselt) (***Enron***), ¶ 69; **Ex. RL-243**, *Duke*, ¶ 99; **Ex. RL-260**, *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd. (TANESCO)* (ICSID Case No. ARB/10/20), Decision on the Application for Annulment, 22 August 2018 (von Wobeser (P), Schreuer, Cooper-Rousseau), ¶ 183 ("the 'manifest' requirement will not be satisfied if 'reasonable minds' differ as to whether or not the tribunal issued a correct decision")).

111 **Ex. RL-287**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Annulment, 19 May 2014 (Zuleta (P), Yusuf, Oreamuno), ¶ 114 ("This Annulment Committee considers that there is no difference in the standard of review applicable to a claim of manifest excess of powers on the basis of jurisdiction or on the merits. Under Article 41 of the ICSID Convention, the

relate to the parties' consent, that is true of all errors encompassed by Article 52(1)(b), since an excess of powers is, by definition, an act by which the tribunal goes outside of its mandate – *i.e.*, outside the scope of the parties' consent. The weight of prior annulment decisions supports the Respondent's position, and the Committee had understood the Applicants to accept it in their oral submissions at the Hearing.[112]

129. Accordingly, we will apply the test set out in paragraphs 124-125 above in analyzing Ground 1C. Annulment will be justified only if the Tribunal's interpretation of the BIT as containing a legality requirement is "not reasonably tenable," in the sense that it cannot be supported by any reasonable arguments. Before applying that test, however, we will address the Respondent's contention that the alleged excess of powers was, in any event, immaterial here.

ii. Was the Tribunal's ruling on SML 351 made under the BIT alone?

130. In assessing Ground 1C, it is appropriate to begin with the Respondent's contention that the Tribunal made its "legality" finding with respect to both the BIT and the ICSID Convention.[113] If that is so then Ground 1C would necessarily fail, they say, because the Applicants did not seek annulment on the ground of misapplication of Article 25 of the ICSID Convention.[114]

Tribunal shall be the judge of its own competence, and thus its decision on the scope of its jurisdiction cannot be reviewed *de novo* by an Annulment Committee. This Committee agrees with others that have stated that nothing in the ICSID Convention indicates that a different standard shall be applied to issues of jurisdiction, and therefore an award can only be annulled if the lack or excess of jurisdiction was manifest."); **Ex. RL-264**, *Total*, ¶ 176.

112 Tr. Day 4, 56:2-14.

113 The Applicants accept the validity of the so-called "double-barreled test," whereby a claimant in an ICSID Convention arbitration must establish the existence of a protected investment under both the applicable investment treaty and Article 25(1) of the ICSID Convention. *See* Tr. Day 3, 58:22-25.

114 *See* Tr. Day 4, 10:25 – 11:6; 29:22 – 30:2. The Applicants, in their PHM, suggest that Ground 1C could survive even if the Tribunal's legality ruling were made under the ICSID Convention as well, on the ground that the Tribunal would then have committed an excess of powers by misinterpreting the Convention. Applicants' PHM, ¶¶ 54-62. However, the Applicants did not raise any annulment ground in respect of the Tribunal's application of the ICSID Convention in their Application for Annulment or in any subsequent pleading prior to the PHM. In the Committee's judgment, it is far too late for the Applicants to add this claim. *See* **Ex. RL-291**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 8 January 2020 (Knieper (P), Angelet, Zhang), ¶¶ 728-741. Furthermore, even if admissible, this claim would fail on the grounds set out in paragraphs 136-144, *infra*.

131. Based on a careful review of the Award, it is clear to this Committee that the Tribunal made its legality ruling in respect of SML 351 under both the BIT and the ICSID Convention. Thus:

- In paragraph 222 of the Award, under a subheading entitled "The Tribunal's Ruling," the arbitrators wrote as follows: "In the Tribunal's view, neither the BIT *nor the ICSID Convention* can be construed to protect an investment (SML 351) prohibited by Kenyan law especially in circumstances where, in the Tribunal's view, the Claimants knew that they had no such entitlement but attempted a political end-run around the statutory requirements with Mr. Juma's assistance."[115]

- At paragraph 333 in Part 27 of the Award (entitled "Jurisdiction Issues on which the Claimants Fail"), and under a subheading reading "The Tribunal's Ruling on the Legality of SML 351," the arbitrators held that "for the reasons already outlined, *ICSID* and the BIT protect[] only 'lawful investments.' The text and purpose of the BIT *and the ICSID Convention* are not consistent with holding host governments financially responsible for investments created in defiance of their laws … protecting public interests such as the environment."[116]

- And in paragraph 365, the final paragraph in Part 27 of the Award, the Tribunal concluded

> that the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form) from NEMA concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection *under the BIT and the ICSID Convention*.[117]

That the Tribunal founded its jurisdictional ruling on both instruments is therefore patent.

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115 Award, ¶ 222 (emphasis added).

116 Award, ¶ 333 (emphasis added).

117 Award, ¶ 365 (emphasis added).

132. Opposing this conclusion, the Applicants cite to certain other paragraphs in the Award, but this effort is unavailing:

- The Applicants refer to the words "the essential jurisdictional requirements under the BIT" appearing in paragraph 259; but the same sentence goes on to add that those requirements "overlap with the requirements of the ICSID Convention."[118]

- They cite to paragraph 302 of the Award, but the text there – "[i]f the Claimants had fulfilled the requisites of a lawful investment, *other* requirements of the ICSID Convention … would have been satisfied" – suggests the opposite of what the Applicants contend, as made clear by the italicization of the word "other" by the Tribunal.

- The Applicants refer to the heading on page 114 of the Award ("Does the BIT Contain an Implicit Limitation to Lawful Investments") and to paragraph 313 in the introductory section under that heading, which states that "[t]he issue here is whether the BIT extends protection to a mining licence [SML 351] not issued 'in accord with the laws of Kenya' …." However, the Tribunal's decision – set out later in that same section, at paragraph 321 – is broader and refers to legality as a prerequisite "for an investment to be protected on the international level," which appears to be a reference to both the BIT and the ICSID Convention.[119]

- That understanding is confirmed by paragraph 333(a) of the Award, also cited by the Applicants and already quoted above,[120] where the Tribunal expressly framed its holding as being under "the BIT and the ICSID Convention."[121]

133. The Applicants go on to insist that the paragraph 333(a) contains insufficient analysis and reads like a decision *ex aequo et bono*.[122] The Committee cannot agree. The Tribunal

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118 Award, ¶ 259.

119 Award, p. 114 and ¶¶ 313, 321.

120 *See* ¶ 101, *supra*.

121 Award, ¶ 333(a) (emphasis omitted).

122 Applicants' PHM, ¶ 53.

included analysis in support of its conclusion regarding the legality requirement in other parts of the Award,[123] and it undeniably based its conclusion on an interpretation of the BIT and the ICSID Convention under international law. Whether that ruling was right or wrong is not a matter within the competence of this Committee under Article 52(1).

134. In sum, the Committee concludes that the Tribunal rendered the ruling challenged by the Applicants under both the BIT and the ICSID Convention. Accordingly, even if the Applicants were right that the Tribunal committed a manifest excess of powers through its interpretation of the BIT, annulment would not be warranted because that same ruling was based on an alternative ground not challenged in the Application for Annulment.[124]

135. In any event, however, the Applicants are not correct in suggesting that the Tribunal committed a manifest excess of powers in relation to the BIT, as we proceed to explain.

iii. Did the Tribunal Commit a Manifest Excess of Powers?

136. The legal test for determining whether a tribunal has manifestly exceeded its powers through its interpretation of a legal instrument has been set out above.[125] Simply stated, this Committee should not disturb the Tribunal's interpretation of the BIT as containing an implicit legality requirement unless the Applicants show that interpretation to be "so untenable that it cannot be supported by reasonable arguments."[126] In the Committee's view, the Applicants have not made the requisite showing here.

137. To recall, the Tribunal held that for SML 351 to constitute a protected investment under the BIT, it "has to be in substantial compliance with the significant legal requirement[s] of the host state."[127] The Tribunal further concluded that "explicit language" in the BIT "to

123 *See*, *e.g.*, Award, ¶¶ 222, 260-261, 313, 319-321.

124 *See* n. 114, *supra*.

125 *See* ¶¶ 124-125, *supra*.

126 **Ex. RL-243**, *Duke*, ¶ 99.

127 Award, ¶ 321.

the effect that protected investments must be made 'in accordance with the laws of Kenya' is therefore unnecessary to secure the objects and purpose of the BIT."[128]

138. The Committee has already noted that in reaching these conclusions, the Tribunal purported to apply the correct law – international law. It quoted the relevant text of the BIT and framed its analysis by reference to the Treaty's "object and purpose," as the international law rule on the interpretation of treaties requires.[129] The Tribunal also relied heavily on the earlier decision in the *Phoenix Action* case, from which the Tribunal took its six-part test for assessing the existence of a protected investment (with part five being the legality requirement).[130]

139. The *Phoenix Action* award does indeed provide direct support for the conclusion the Tribunal reached. At paragraph 102, that tribunal wrote as follows:

> The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction. Or, the fact that the investment is in violation of the laws of the host State can only appear when dealing with the merits, whether it was not known before that stage or whether the tribunal considered it best to be analyzed a[t] the merits stage, like in the case of *Plama*.[131]

140. The Applicants object that (*i*) the above-quoted statements from *Phoenix Action* are technically *dicta*, because the Israel-Czech Republic treaty contained an express legality requirement; and (*ii*) the Tribunal's holding is otherwise unprecedented absent an express reference to legality in the relevant investment treaty or its *travaux*.[132] The former assertion

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128 Award, ¶ 333(a). Notably, there is some textual support in Article 1 of the BIT for the existence of a legality condition. Section 1(a)(v) includes, within the definition of "investment", "business concessions conferred by law …." Kenya argued before the Tribunal that "conferred by law" implied a legality requirement. **Ex. A-007**, Respondent's Reply on Preliminary Objections to Jurisdiction, ¶¶ 31-32. The Tribunal did not make any express finding to this effect in the Award, however.

129 **Ex. ALA-011**, Vienna Convention, Article 31(1). While, as the Applicants note, Part 27 of the Award contains considerable analysis of Kenyan law, that is understandable: having concluded that the BIT contains an implicit legality requirement, the Tribunal proceeded to analyze whether the requirement was met in this case in light of the arguments raised by the parties. *See*, *e.g.*, Award, ¶¶ 333, 334-346.

130 See ¶ 96, *supra*.

131 **Ex. CL-027**, *Phoenix Action*, ¶ 102.

132 Memorial on Annulment, ¶ 80.

appears to be correct, and might be persuasive in the context of an appellate proceeding, but we do not view it as dispositive in the far more limited confines of an annulment application under Article 52(1)(b). As to the latter assertion, the Tribunal's conclusion that a legality requirement can be implied in a treaty's text is hardly novel. Examples include: *Mamidoil v. Albania*, at paragraph 359 ("As stated in the preliminary remarks, the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State.");[133] *Hamester v. Ghana*, at paragraphs 123-124 (An investment "will also not be protected if it is made in violation of the host State's law (as elaborated, e.g. by the tribunal in *Phoenix*) …. These are general principles that exist independently of specific language to this effect in the Treaty.");[134] and *Kardassopoulos v. Georgia*, at paragraph 182 ("'Protection of investments' under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State.").[135]

141. This is not to suggest that the Tribunal's interpretation of the BIT (or the ICSID Convention) is the correct one. It is an expansive interpretation, and some arbitrators – perhaps many – would likely disagree. But that is not the question before this Committee. As the committee in *Helnan v. Egypt* put it, rightly in our view:

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133 **Ex. RL-090**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015 (Knieper (P), Banifatemi, Hammond), ¶ 359 (referred to in **Ex. A-007**, Respondent's Reply on Preliminary Objections, ¶ 41). The *Mamidoil* tribunal added that this conclusion applies even "when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality." *Id*., ¶ 360.

134 **Ex. RL-286**, *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 (Stern (P), Cremades, Landau), ¶¶ 123-124.

135 **Ex. RL-272**, *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007 (Fortier (P), Orrego Vicuña, Watts), ¶ 182. *See also* **Ex. RL-074**, *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012 (Armesto (P), Hanotiau, Tomuschat), ¶ 308 (referred to in **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶ 209); **Ex. RL-086**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Award, 18 November 2014 (Armesto (P), Álvarez, Vinuesa), ¶ 132 (referred to in **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶ 210); **Ex. RL-275**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12), Award, 14 December 2014 (Bernardini (P), Alexandrov, van den Berg), ¶ 332; *Álvarez y Marín Corporación S.A. and others v. Republic of Panama* (ICSID Case No. ARB/15/14), Award, 12 October 2018 (Armesto (P), Grigera Naón, Álvarez), ¶¶ 132-137.

> An *ad hoc* committee will not annul an award if the Tribunal's disposition is tenable, *even if the Committee considers that it is incorrect as a matter of law*.[136]

142. The Applicants rely heavily on the decision in *Malaysian Historical Salvors v. Malaysia (**MHS**)*, where the committee, over the strenuous dissent of Judge Shahabuddeen, annulled an award that had denied jurisdiction under the ICSID Convention on the ground that the investment in question did not "contribut[e] to the economic development of the host State."[137] While accepting that the underlying tribunal's decision in that case may well have been incorrect, we consider that the *MHS* committee took a broader view of its corrective function, given in particular the word "manifest" in Article 52(1)(b), than this Committee is comfortable taking. We decline to follow the *MHS* majority's approach here.[138]

143. Finally, we note that in paragraph 333(b) of the Award, the Tribunal included an alternative basis for concluding that SML 351 was not a protected investment: "in any event, SML 351 is a piece of paper whose value, if any, lies exclusively in the consequences attached to it by Kenyan law. In this case, as the Kenyan Courts have said, Kenyan law attached no consequences to [this] piece of paper."[139] The Committee understands the Tribunal to be saying that while international law protects property rights, the existence and scope of those rights are determined by municipal law; and in this case no such rights existed to protect. Whether right or wrong, that is also a reasonably arguable conclusion.[140]

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136 **Ex. ALA-021***, Helnan*, ¶ 55 (emphasis added).

137 **Ex. ALA-002**, *MHS*, ¶ 80.

138 While not necessary to the Committee's finding, we note that the *MHS* annulment decision has been criticized in the literature. *See, e.g.,* Antonio Crivellaro, *Annulment of ICSID Awards: Back to the "First Generation"?*, *in* Liber Amicorum – Mélanges en l'Honneur de Serge Lazareff 160–62 (Laurent Levy & Yves Derains eds., 2011); Paul D. Friedland and Paul Brumpton, 'Rabid Redux: The Second Wave of Abusive ICSID Annulments', (2012) 27 Am. U. Int'l L. Rev. 727 n. 59; D. Bishop, S. Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2012), ¶ 6.80.

139 Award, ¶ 333(b); *see also* Award, ¶¶ 222, 319.

140 **Ex. RL-271**, *EnCana Corporation v. Republic of Ecuador*, LCIA, Award, 3 February 2006 (Crawford (P), Grigera Naón, Thomas), ¶ 184 ("[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them."); **Ex. ALA-038**, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment, 9 March 2017 (Berman (P), Abraham, Knieper), ¶¶ 168-170.

144. Accordingly, we conclude that the Tribunal's interpretation of the BIT in this case was not so untenable that it cannot be supported by reasonable arguments. It follows that no *manifest* excess of powers was committed by the Tribunal.

145. For the reasons stated in subsections (ii) and (iii) above, Ground 1C does not succeed.

2. Ground 1A: Alleged failure to decide the Claimants' claims concerning SPL 256 and other investments

a) The Applicants' Case

146. We move now to the first annulment ground pleaded by the Applicants, which relates to their alleged investments in Kenya other than SML 351 – *i.e.*, SPL 256, the IP and the CMK shares.[141] Like Ground 1C, Ground 1A is an *infra petita* claim, positing that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction that it possessed.[142]

147. With respect to SPL 256, which is the focus of Ground 1A, the Applicants begin by arguing that the Tribunal found that personal jurisdiction, consent, temporal jurisdiction and subject matter jurisdiction had been established under the ICSID Convention.[143] Further, the Tribunal rejected the Respondent's argument that the Claimants were not good faith investors.[144]

148. It follows, in the Applicants' submission, that the dispositive question for the Tribunal became whether SPL 256 (and the other claimed assets) qualified as "investments" under the BIT. The Tribunal expressly addressed SPL 256 in paragraphs 328-330 of the Award (quoted above at paragraph 100). The Tribunal stated, *inter alia,* that SPL 256 "was not

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141 The Applicants initially framed Ground 1A around SPL 256 alone. *See* Application for Annulment, p. 3, Heading A ("Manifest excess of powers: Failure to decide the Claimants' claims concerning SPL 256"). However, the Memorial on Annulment, while continuing to focus on claims allegedly asserted in respect of SPL 256, also included the CMK shares and (in part) the IP under this Ground. *See* Applicants' Memorial on Annulment, ¶¶ 35-54. The Respondent had, and made use of, a full opportunity to respond in respect of the CMK shares and the IP. *See*, *e.g.*, Respondent's PHM, ¶¶ 28-104.

142 In support of this argument, the Applicants cite to **Ex. ALA-001**, *Vivendi I*, ¶ 86; **Ex. ALA-002**, *MHS*; **Ex. ALA-021***, Helnan*.

143 Memorial on Annulment, ¶ 36.

144 Memorial on Annulment, ¶ 37.

itself a licence to make money" (but rather "to spend money"),[145] and that had the Claimants fulfilled the prerequisites for a mining license (which the Tribunal found they had not), then any financial returns would have flowed "from work under the mining licence not the prospecting licence."[146]

149. The Applicants submit that this is not a negative ruling on jurisdiction, because the cited paragraphs contain no express or implied decision that SPL 256 was not a protected "investment" within the meaning of the BIT. Instead, on their case, the Tribunal found that the Claimants' claims in relation to SPL 256 were worth nothing, which was improper given that quantum had effectively been bifurcated.[147]

150. The Applicants go on to note that the Tribunal did not find that SPL 256 suffered from any of the infirmities that (it found) afflicted SML 351 – namely that the latter instrument was void *ab initio*, having been obtained in violation of Kenyan law, and would also have been denied protection under a merits analysis.[148] As such, the Award cannot be interpreted as finding a lack of jurisdiction over disputes related to SLP 256. Further, say the Applicants, to the extent that the Award were interpreted as containing a negative jurisdictional ruling, it would have to be annulled under ICSID Convention Article 52(1)(e) for failure to state reasons.[149]

151. Moving to the other two alleged investments besides SML 351, the Applicants argue that the Tribunal implicitly found jurisdiction over the CMK shares in paragraphs 282-303 of the Award, but then "did not rule on the Claimants' claims in respect of these investments."[150] As to the Claimants' IP, the Applicants argue that the Tribunal wrongly denied jurisdiction over those property rights by ignoring clear evidence that the Claimants had asserted ownership of them – an assertion developed in alleged annulment Ground 2B

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145 Award, ¶ 328.

146 Award, ¶ 330.

147 Memorial on Annulment, ¶¶ 41-42.

148 Memorial on Annulment, ¶ 44.

149 Reply on Annulment, ¶ 26.

150 Memorial on Annulment, ¶ 47.

– and say that if the latter Ground is accepted, then the Award is *infra petita* in respect of the IP as well.[151]

152. Responding to arguments put forward in the Respondent's Counter-Memorial (*see* paragraph 158 below), the Applicants submit that Kenya's textual analysis of the Award is flimsy and unfounded.[152] Regarding the arguments put forward in Kenya's Rejoinder, the Applicants argue, in particular, that an application under Article 49(2) of the Convention is not a prerequisite to applying for annulment on *infra petita* grounds, and that their Application for Annulment should be read as claiming annulment in respect of the IP and the CMK shares as well.[153]

153. A question that received substantial attention during the Hearing was whether the Claimants had in fact asserted any claims based on SPL 256 (or the CMK shares and the IP). In response to arguments from the Respondent and questions from the Committee, the Applicants accepted that if no claims independent of the revocation of SML 351 had been made in respect of SPL 256, then Ground 1A would necessarily fail as to SPL 256, because the Tribunal would not have neglected to decide any claims put to it.[154] However, the Applicants proceeded strenuously to argue, at the Hearing and in their PHM, that independent claims had been put in respect of SPL 256 (as well as the IP and the CMK shares).

154. A further issue that the Respondent stressed heavily in its Rejoinder, and at the Hearing, was whether *infra petita* is actually a ground for annulment at all. In response, the Applicants contend that an award can be annulled for manifest excess of powers on that basis.[155] They further argue that the Article 49(2) remedy of a supplementary award is "additional" to that offered by Article 52 of the ICSID Convention, and that several cases

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151 Memorial on Annulment, ¶ 48.

152 Reply on Annulment, ¶¶ 18-25. *See also id*., ¶¶ 27-35.

153 Tr. Day 1, 52:21 – 54:9; Tr. Day 2, 55:25 – 57:12; Tr. Day 4, 131:3 – 132:7.

154 Tr. Day 3, 25:15-24.

155 Tr. Day 2, 55:25 – 57:12.

have confirmed that *infra petita* awards and/or a tribunal's failure to exercise jurisdiction that it possesses fall within Article 52(1)(b).[156]

155. On these bases, the Applicants contend that the Award as a whole, or alternatively multiple sections of it, should be annulled.[157]

b) The Respondent's case

156. While accepting that jurisdictional decisions, or other decisions by a tribunal regarding its own powers, are susceptible to annulment for a manifest excess of powers, the Respondent reiterates that the standard for "manifest" error is high: so long as a tribunal's analysis is "tenable" or "susceptible to debate,"[158] the tribunal's ruling must stand.

157. The Respondent denies that any annullable error has occurred in respect of Ground 1A and advances several arguments in support of that thesis. *First*, and most broadly, Kenya contends that *infra petita* is not a ground for annulment under Article 52(1)(b); instead, the remedy for a tribunal's omission to deal with a claim is to request a supplementary decision under Article 49(2) of the Convention, which the Applicants failed to do.[159]

158. *Next*, the Respondent submits that the Award is not in fact *infra petita*. On the contrary, the Tribunal dismissed all of the Applicants' claims.[160] In this regard, the Respondent notes that the Tribunal expressly stated in paragraph 300(a) of the Award that "the Claimants' investments (though not protected) had existed for more than five years before the dispute arose."[161] The use of the plural "investments," combined with the timeframe cited, shows in the Respondent's submission that the Tribunal made a negative jurisdictional ruling in respect of all "investments" alleged by the Claimants.[162]

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156 Tr. Day 2, 56:5-8.

157 *See* Memorial on Annulment, ¶ 54; Applicants' response to Committee Question B.11, 15 September 2020.

158 Counter-Memorial on Annulment, ¶ 273.

159 Rejoinder on Annulment, ¶ 446. *See also id.*, ¶¶ 37-42.

160 Rejoinder on Annulment, ¶ 447.

161 Counter-Memorial on Annulment, ¶ 328(2).

162 Counter-Memorial on Annulment, ¶ 328(3).

159. *Third,* the Respondent argues that there were, in any event, no claims advanced by the Claimants that were independent of the existence of SML 351 as a protected investment. Accordingly, the Tribunal's finding that SML 351 was not a protected investment necessarily resolved the case as a whole.[163] Furthermore, even if claims had been asserted in relation to SPL 256, the CMK shares or the IP, those claims would have been "tiny" and "hopeless," in light of the Tribunal's finding that the Claimants had no entitlement to a mining license.[164]

160. *Fourth,* the Respondent notes that the Tribunal expressly included a ruling in respect of SPL 256 in paragraphs 328-330 of the Award.[165] Whether the Tribunal's reasoning in those paragraphs is compelling or not, an alleged error of law (or fact) is no basis for annulment.[166]

161. *Finally*, in respect of the CMK shares and the IP, the Respondent submits that no annulment grounds in respect of those two "investments" were put forward in the Application for Annulment, and so they cannot properly form part of the Applicants' annulment case.[167] In addition, the Respondent notes that even on the Applicants' case, the *infra petita* argument on the IP is dependent on the Applicants prevailing on alleged annulment Ground 2B, which the Respondent says they cannot.[168]

c) The Committee's analysis

162. The Applicants' primary argument under Ground 1A is that the Tribunal committed an excess of powers by failing to decide claims over which it had jurisdiction.[169] For present purposes, the alleged investments at issue are SPL 256 and the CMK shares. As the

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163 Rejoinder on Annulment, ¶ 447.

164 Rejoinder on Annulment, ¶ 449.

165 Counter-Memorial on Annulment, ¶ 328(5).

166 Rejoinder on Annulment, ¶ 83.

167 Rejoinder on Annulment, ¶ 445.

168 Rejoinder on Annulment, ¶ 450.

169 *See* Applicants' PHM, p. 1, Heading I ("Ground 1A: Manifest Excess of Powers (Infra Petita) – Failure to Decide the Applicants' Claims Concerning SPL 256, the IP and the CMK Shares") (footnote omitted).

Applicants recognize, the applicability of Ground 1A to the IP depends upon the Applicants prevailing on Ground 2B.[170]

163. The Respondent, for its part, argues in summary that the Claimants advanced no claim in the Arbitration that was independent of the revocation of SML 351 – such that in finding that SML 351 was void *ab initio*, and therefore could not be "revoked," the Tribunal rightly dismissed the claims as a whole. Kenya also says that a claim of *infra petita* – which is how the Applicants characterize Ground 1A – is not cognizable on annulment.[171]

164. In assessing the Parties' positions, we begin with the Applicants' primary argument.

i. Did the Tribunal fail to decide claims concerning SPL 256 or the CMK shares over which it had jurisdiction?

165. As noted in paragraph 153 above, the Applicants accept that if no claims were advanced in the Arbitration that were independent of the revocation of SML 351, then Ground 1A cannot succeed. This was the subject of an express colloquy at the Hearing:

> THE PRESIDENT: [L]et me ask you something on the point you just made. So would you accept that if Mr Sullivan were right that there were no independent claims made in respect of SPL 256 -- and I know you disagree with that, and you've just told me why -- but assuming he was correct, would you accept that ground 1A would fail because essentially there were no claims that the Tribunal failed to decide?
>
> DR LUTTRELL: I think I would have to accept that, sir, because that would mean that the Award would not be infra petita, and that is the essence of the claim in ground 1A.[172]

166. The Applicants were of course right to make that admission. Simply as a matter of logic, unless there were claims in the arbitration that were independent of – and thus could survive – the Tribunal's ruling in respect of SML 351, then the Tribunal cannot have omitted to decide something that it was required to decide. This was indeed the position of the

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170 *See* ¶ 253, *infra*.

171 Rejoinder on Annulment, ¶¶ 446-447; Counter-Memorial on Annulment, ¶¶ 330-331.

172 Tr. Day 3, 25:13-24.

annulment committee in *Vivendi I*,[173] upon which the Applicants have placed primary reliance here.[174] The same conclusion follows from Article 48(3) of the ICSID Convention, which provides in relevant part that "[t]he award shall deal with every question submitted to the Tribunal …."[175] The term "question" in Article 48(3) has typically been interpreted as meaning a head of claim.[176]

167. As a result, there was considerable debate at the Hearing and in the PHMs regarding precisely what claims had been advanced by the Claimants in the Arbitration. It is common ground between the Parties that the primary claims arose out of the government's actions in relation to SML 351. As the Claimants put it in on the first day of the hearing before the Tribunal: "it is the revocation by Minister Balala which is the act which gives rise to our claims."[177] The Parties disagree strongly, however, as to whether any independent claims were advanced in respect of SPL 256 or the CMK shares.[178]

168. The difficulty in relation to this issue stems in part from the manner in which both sides pleaded – and, over time, revised – their cases before the Tribunal. The Respondent, for example, initially contested the legal validity of SPL 256 but had abandoned that position by the time of the hearing.[179] Meanwhile, as already noted,[180] the Claimants retooled their case on SPL 256 in a substantial way. The sequence can be summarized as follows:

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173 **Ex. ALA-001**, *Vivendi I*, ¶ 115 (manifest excess of powers found where "the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims").

174 Application for Annulment, ¶ 14; Memorial on Annulment, ¶¶ 49-50.

175 **Ex. RL-266,** ICSID Convention, Article 48(3).

176 *See* **Ex. RL-254**, *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, 10 July 2014 (Hanotiau (P), Böckstiegel, Khan) (***Alapli***), ¶¶ 111-129; **Ex. RL-242**, *Daimler Financial Services AG v. Republic of Argentina* (ICSID Case ARB/05/1), Decision on Annulment, 7 January 2015 (Zuleta (P), Feliciano, Khan) (***Daimler)***, ¶ 88; **Ex. ALA-043**, Eduardo Silva Romero *et al*., 'Article 48', in J. Fouret *et al*. (eds). *The ICSID Convention Regulations and Rules: A Practical Commentary* (Elgar Commentaries 2019), Sec. 4.723.

177 **Ex. R-256**, Tribunal Hearing, Tr. Day 1 at 65:24 – 66:1.

178 Applicants' PHM, ¶¶ 14-36; Respondent's PHM, ¶¶ 30, 43, 49-58, 77.

179 Award, ¶ 75.

180 *See* ¶¶ 70, 80, *supra*.

- From the Request for Arbitration through the last written pleading prior to the hearing, the Claimants' case had been that SML 351 was a separate legal instrument from SPL 256.[181]

- After the close of the pleadings but before the hearing, the Claimants submitted a witness statement from former Commissioner Masibo, in which he testified that SML 351 was actually a "re-grant" of SPL 256, *i.e.*, that they were *not* separate legal instruments.[182] The Respondent disputed this "re-grant" theory.[183]

- During the hearing before the Tribunal, the President asked the Claimants to explain, in due course, what the jurisdictional consequences would be if SML 351 were found to be void *ab initio*.[184]

- Subsequent to the hearing, on 9 February 2018, the Tribunal transmitted questions to be addressed in the post-hearing briefs. Question 10 asked the Claimants to clarify their position on the "re-grant" theory. Question 32 then asked (*i*) what the status of SPL 256 would be in the Claimants' submission if SML 351 were found to be void or revoked, and (*ii*) "[i]n any event, what claim relying upon SPL 256" was being made.[185]

- The Claimants answered these questions in their post-hearing brief. In summary, they adopted Mr. Masibo's "re-grant" theory in paragraph 14 of that brief; and specified in paragraph 61 that on that basis, they were asserting a claim for direct expropriation of SPL 256 (on the ground that the revocation of SML 351 on 5 August 2013 would necessarily also have revoked SPL 256), as well as an associated FET claim.[186]

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181 **Ex. A-001**, Claimants' Request for Arbitration, ¶ 3.2(f); **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 77, 133; **Ex. A-004**, Claimants' Counter-Memorial on Preliminary Objections, ¶¶ 63, 83-95, 105; **Ex. A-008**, Claimants' Rejoinder on Preliminary Objections, ¶¶ 59-60.

182 *See* Award, ¶ 35; **Ex. R-265**, Witness Statement of Moses Masibo, ¶¶ 76-78.

183 **Ex. A-013**, Respondent's PHM, ¶¶ 66-67.

184 **Ex. R-262**, Tribunal Hearing, Tr. Day 7, 32:13 – 33:13

185 **Ex. A-010**, Letter from the Tribunal to the Parties, 9 February 2018.

186 **Ex. A-011**, Claimants' PHM, ¶¶ 14, 61.

- Then, in footnote 307 following paragraph 61 of their post-hearing brief, the Claimants suggested that if the "re-grant" theory were rejected, they "would have claims" for indirect expiration and an FET breach in respect of SPL 256.[187]

169. The Committee understands from the foregoing that the Claimants changed the legal theory of their case at a late stage, prompting the Tribunal to ask for clarity on what their claims actually were. Notwithstanding this, the Claimants never amended or updated the very generally framed request for relief that had appeared in their Memorial of Claim.[188]

* * *

170. In assessing whether the Claimants asserted any claims in the Arbitration that were independent of the revocation of SML 351 – and therefore of the status of SML 351 as a protected investment or not – this Committee has carefully examined the references to the underlying record provided by the Applicants during the Hearing and in their PHM.[189] The fact that such a searching inquiry was necessary already suggests that no manifest excess of powers occurred. The decision of the *ad hoc* committee in *Daimler Financial Services AG v. Argentina*, dismissing the application for annulment in that case, is instructive:

> As stated by the *Wena* annulment committee: "The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest." If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal, as Daimler suggests, and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal.[190]

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187 **Ex. A-011**, Claimants' PHM, n. 307.

188 *See* ¶ 81, *supra*.

189 The Committee's post-hearing question A.2 to the Parties reads as follows: "Please identify where in their pleadings before the Tribunal the Claimants put forward a claim or claims in respect of SPL 256, the CMK shares or the IP, that were: (*i*) independent of the SML 351 claim; and/or (*ii*) did not rest on the State's act of revoking SML 351 as the challenged measure." The Applicants began their response to that question by noting that "[a]t the core of the State's case in these annulment proceedings is the argument that the only case the Claimants advanced was for the revocation of SML 351 and that the Claimants did not bring an alternative case in the event that SML 351 was not revoked because it never existed." Applicants' PHM, ¶ 13.

190 **Ex. RL-242**, *Daimler*, ¶ 186.

171. In any event, having carried out the exercise, this Committee concludes, consistent with the Respondent's case, that save in one potential but immaterial respect, no claims were put forward in the Arbitration that could survive the Tribunal's ruling that SML 351 was not a protected investment – such that its "revocation" could not give rise to any claim.

172. We will proceed by assessing the claims that the Applicants say were asserted before the Tribunal.

i. *The "revocation":* As a preliminary point,[191] the Applicants suggest that the Tribunal found that the project as a whole was terminated by government action in August 2013, citing to the panel's statement in paragraph 244 of the Award that "the Claimants' mining activities and aspirations were effectively terminated on 5 August 2013."[192] This, they say, equates to a finding that SPL 256 and the CMK shares were effectively "taken" on that date.

We disagree. A close reading of paragraph 244 establishes that it refers only to SML 351, and in particular to the rejection of the State's argument that SML 351 was merely "suspended" and not revoked. Paragraph 244 does not suggest a finding that measures were taken against the Claimants' other alleged investments in August 2013. On the contrary, with respect to SPL 256, the Tribunal expressly found that it "expired (after two renewals) according to its own terms on 1 December 2014, without Government intervention."[193]

ii. *Fair and Equitable Treatment*: The Applicants say that the Claimants asserted FET claims based on SPL 256; and specifically, that it gave rise to legitimate expectations that (*i*) they had an entitlement to be issued a mining license, and (*ii*) their application

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191 The Applicants also note, correctly, that the Tribunal acknowledged that they were relying on four alleged investments – SML 351, SPL 256, the CMK shares and the IP. *See* Applicants' Demonstrative Exhibit Day 2, 11 September 2020, Slides 2-3; Award, ¶ 290. That does not advance their case on annulment, however. The question being examined is whether any claims were asserted that did not depend on the allegedly wrongful revocation of SML 351.

192 Applicants' PHM, ¶ 13.

193 Award, ¶ 10.

for such a license would be processed in good faith.[194] As to the first point, the Claimants had based the alleged expectation on Clause 22 of SPL 256, but the Tribunal interpreted that provision to the contrary;[195] and as to the second point, the Tribunal expressly concluded that the Claimants knew that they had no entitlement to a mining license and no legitimate expectation that SML 351 was valid.[196] These findings ruled out any possible FET claim, independent of the allegedly wrongful revocation of SML 351.[197]

iii. *Unjust Enrichment*: The Applicants argue that a claim for unjust enrichment was advanced in the Arbitration.[198] A review of the pleadings they cite shows, however, that this claim was based on "the Claimants' IP and know-how contributions"[199] – which the Tribunal found not to be a protected investment on the ground that these materials had been freely given to the State in the hope of receiving, but with no entitlement to, a mining license.[200] Further, this argument, too, was directly tied to the revocation of SML 351,[201] and thus could not survive the Tribunal's rulings on that instrument.

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194 Applicants' Demonstrative Exhibit Day 2, 11 September 2020, Slides 4-8. The Applicants further assert in their PHM that they had "an FET-based claim" arising from CS Balala's alleged solicitation of a bribe. Applicants' PHM, ¶¶ 19-20. However, the paragraph of the Claimants' Reply on the Merits to which the Applicants refer expressly ties this allegation to the "revocation of SML 351" as the impugned measure. *See* **Ex. A-005**, Claimants' Reply on the Merits, ¶ 164 ("The *revocation of SML 351* in these circumstances is undoubtedly arbitrary and unreasonable treatment in violation of the FET standard.") (emphasis added). The Committee has not been pointed to any indication in the record before the Tribunal that an independent claim was asserted on the basis of the alleged bribe – which allegation, in any event, appears to have been implicitly rejected by the Tribunal in finding that it had no cause to make an express ruling on that question. *See* Award, ¶ 203.

195 Award, ¶ 222.

196 Award, ¶ 223.

197 Award, ¶¶ 11, 222.

198 Applicants' PHM, ¶¶ 22-24.

199 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 207.

200 Award, ¶ 331. *See also* ¶ 239, *infra*.

201 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 208 ("*By summarily and unlawfully revoking SML 351*, the state destroyed the basic *quid pro quo* of its bargain with the Claimants, the core of which was that CMK would tell the State what it discovered and, in return, CMK would have the exclusive right to mine for 21 years ….") (emphasis added).

iv. *Non-Impairment Clause*: The Applicants contend that the "Claimants brought a claim for breach of the non-impairment undertaking [in Article 2(2) of the BIT] with respect to all of their investments in Kenya."[202] The references cited by the Applicants make clear, however, that the measure complained of in that respect was "unlawfully revoking SML 351."[203]

v. *Indirect Expropriation*: According to the Applicants, the Claimants asserted claims for indirect expropriation of the CMK shares and the IP. Once again, however, the portions of the pleadings cited show that the only measure complained of in this regard was "the expropriation" – *i.e.*, "the revocation of SML 351."[204] As already noted above, the situation is somewhat different with respect to SPL 256.[205] The Committee will return to this below.

vi. *Damages*: The Applicants assert, but have not demonstrated, that their various damages claims (lost profits, loss of a chance, or sunk costs) were independent of the allegedly wrongful revocation of SML 351. On the contrary, in their Memorial of Claim in the Arbitration, the Claimants wrote: "At their root, the Claimants' losses stem from the State's unlawful revocation of SML 351, which – by stripping CMK of its exclusive right to mine [Mrima Hill] – destroyed the value of the Claimants' other investments in the Mrima Hill Project."[206] Further, the Committee has seen no persuasive indication in the record of the Arbitration that any separate damages claims were asserted in respect of the alleged investments other than SML 351.

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202 Applicants' PHM, ¶ 30.

203 **Ex. A-001**, Claimants' Request for Arbitration, ¶ 5.2; *see also* **Ex. A-002**, Claimants' Memorial of Claim, ¶ 4 ("the revocation [of SML 351] … also violated the BIT's prohibition against unreasonable measures that impair the use or enjoyment of UK-owned investments in Kenya"). The IP issue is addressed further in Section IV.B.2, *infra*.

204 Applicants' Demonstrative Exhibit Day 2, 11 September 2020, Slides 13-14. *See also* **Ex. A-002**, Claimants' Memorial of Claim, ¶¶ 175-176 ("In this case, there has been an indirect expropriation …. Cortec UK and Stirling each owned (and own) 35% of the shares of CMK, the holder of SML 351 (and, as a result, the holder of the exclusive right to mine). When SML 351 was directly expropriated, the value of the equity that Cortec UK and Stirling held in CMK was destroyed.").

205 *See* ¶ 171, *supra*.

206 **Ex. A-002**, Claimants' Memorial of Claim, ¶ 211.

173. We now return to footnote 307 of the Claimants' post-hearing brief in the Arbitration. There, the Claimants appeared to announce an alternative (in the event the "re-grant" theory was rejected) and conditional claim ("would have claims") in respect of SPL 256. The Committee concludes that the Tribunal could not be faulted for not expressly addressing such a potential claim, buried as it was in a footnote to the Claimants' post-hearing brief. If the Claimants wished to pursue such a claim, it was incumbent upon them to set out their position clearly at an earlier stage of the proceedings – or at least to raise it to the Tribunal's attention in a post-Award application.[207] Annulment is an extraordinary remedy reserved for cases involving "egregious violations of certain basic principles."[208] Nothing of the kind has been shown by the Applicants: the high standard for manifest error cannot be met in the circumstances here.

174. In any event, the Tribunal did at least indirectly address the potential SPL 256 claim in paragraphs 328-333 of the Award. As noted earlier,[209] the Tribunal there concluded that the Claimants had not established the economic viability of the Mrima Hill site and, even if this were otherwise, that any returns would "flow from work under [a] mining licence not the prospecting licence."[210] While not a model of clarity, these paragraphs can reasonably be read as saying that there was, and could be, no claim in respect of SPL 256 that was independent from the validity (and allegedly wrongful revocation) of SML 351. Notably, those paragraphs follow immediately after the Tribunal's description of the Respondent's position, which was that the

> Claimants[']case stands or falls on the validity of SML 351. The prospecting licence, SPL 256, expired as a result of the terms of the second renewal ending 1 December 2014. No government action was taken against it.[211]

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207 *See* ¶¶ 177-187, *infra*.

208 **Ex. ALA-008**, *Tulip Real Estate Investment v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015 (Tomka (P), Booth, Schreuer) (***Tulip***), ¶ 39.

209 *See* ¶ 100, *supra*.

210 Award, ¶¶ 329-330. *Compare* **Ex. A-004**, Claimants' Counter-Memorial on Preliminary Objections, ¶ 105 (arguing that a "mining licence is very different (legally and commercially) to a prospecting right or prospecting licence: while prospecting rights and licences concern the process of searching for minerals, a mining lease or mining licence concerns the extraction of minerals").

211 Award, ¶ 327.

175. Indeed, and contrary to the Applicants' submissions, Part 27 of the Award follows a logical course. The Tribunal determined that SPL 256 and the IP were effectively not at issue: SPL 256 because there was no independent claim, and no adverse governmental action against it;[212] and the IP because it had been "freely given" to the State and thus could not support a claim either.[213] While the CMK shares are not expressly mentioned by the Tribunal, we have concluded above that no claim independent of the revocation of SML 351 was put in respect of them either. And so, consistent with the Respondent's position, the Tribunal concluded that "the sole surviving subject matter of this arbitration is the alleged special mining licence, SML 351" – which the Tribunal proceeded to find was unlawfully issued and therefore not a protected investment under the BIT and the ICSID Convention.

176. Accordingly, the Applicants have not shown that the Tribunal failed to decide any claim over which it had jurisdiction. Nor, to the extent relevant,[214] did the Tribunal fail to provide reasons for its conclusions in this regard. It follows that Ground 1A must be rejected.

ii. *Infra petita* and Article 49(2) of the ICSID Convention

177. In the Committee's view, Ground 1A fails for a second reason as well. As noted earlier, the Respondent has argued that the admitted basis of Ground 1A – *infra petita* – is not a ground for annulment under Article 52(1)(b). The Respondent recalls that Article 48(3) of the ICSID Convention consists of two clauses separated by a comma: it provides that "[t]he award shall deal with every question submitted to the Tribunal, *and* shall state the reasons upon which it is based."[215] Kenya submits that Article 49(2) of the Convention constitutes the remedy for any violation of the first clause of Article 48(3), by providing that "[t]he Tribunal upon the request of a party … may … decide any question which it had omitted to decide in the award." The second clause in Article 48(3), the Respondent says, finds its sanction under Article 52(1)(e). It follows in Kenya's submission that a violation

212 Award, ¶ 10 (finding that SPL 256 "expired … according to its own terms on 1 December 2014, without Government intervention").

213 Award, ¶ 331.

214 *See* ¶ 150, *supra*.

215 **Ex. RL-266,** ICSID Convention, Article 48(3) (emphasis added).

of the first clause of Article 48(3) – which is what an *infra petita* claim is – does not constitute a ground for annulment.

178. The Applicants dispute the Respondent's position. Citing to the *Amco* and *Vivendi I* annulment decisions, the Applicants contend that Article 49(2) offers a remedy only for "unintentional omissions to decide" any question, but where the omission to decide would (if corrected) affect the main reasoning of the award, then annulment may be sought under Article 52(1) without first submitting an Article 49(2) application.[216] The Applicants continue by arguing that none of the annulment grounds they have raised could have effectively been addressed under Article 49(2): "this is not a case where there is a simple gap in the Award that could be filled through a supplemental award."[217]

179. The Committee considers that the negotiating history of the Convention lends considerable support to the Respondent's position. It reflects that Chairman Broches proposed that a tribunal's failure to comply with the duty imposed by the first clause of Article 48(3) – *i.e.*, to deal with every question submitted to it – should be a ground for annulment, but this was rejected by a vote of 8-6.[218] Instead, only the second part of Article 48(3), dealing with providing reasons, was ultimately incorporated into Article 52(1) as an annulment ground.[219] This is noted in the 2016 ICSID Background Paper on Annulment, which states that "[w]hile a tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment."[220]

180. There are sound reasons why this would be so. Where a tribunal has omitted to decide a "question" – for present purposes, a claim – it makes practical sense to give it the opportunity to do so before invoking the extraordinary remedy of annulment. Indeed, the present case illustrates the complexity that may be encountered when an *ad hoc* committee

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216 *See* Applicants' PHM, ¶¶ 2-7.

217 Applicants' PHM, ¶ 9.

218 **Ex. RL-268**, ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Vol. I-IV (1968), at Vol. II(1), p. 849.

219 Rejoinder on Annulment, ¶ 57.

220 **Ex. RL-235**, ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016 (***ICSID Background Paper on Annulment***), ¶ 103.

is asked to trawl through the cold record of the underlying proceedings to see what was actually claimed – a difficulty the original tribunal would not face.

181. That said, the Applicants are correct that the decided cases are more nuanced and, indeed, perhaps not entirely consistent.[221] It is, however, possible to discern three principles from them.

182. *First*, where Article 49(2) is an available and sufficient remedy, the failure to invoke it will preclude a later annulment application on the same point.[222]

183. *Second*, there may be circumstances in which Article 49(2) will not be an adequate remedy for a tribunal's failure to decide a question – specifically, where the defect complained of would require reconsideration of the reasoning of the award as a whole. In that event, recourse under subsections (b), (d) or (e) of Article 52(1) may be available.[223]

184. *Third*, Article 49(2) will often be an adequate remedy where a tribunal has failed to rule on a particular claim. As the annulment committee in *MINE v. Guinea* put it:

> The Committee has considered whether Article 49(2) constitutes the only remedy for non-compliance with the obligation to deal with every question submitted to the tribunal. It has concluded that Article 49(2) provides a satisfactory remedy for the case of a tribunal having failed to exercise its jurisdiction in full. For example, in the present case the Tribunal failed to rule on MINE's claim to be reimbursed for the costs and expenses incurred in the United States District Court and in arbitration before the American Arbitration Association in earlier stages of its conflict with Guinea. Article

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221 *See* **Ex. RL-235**, ICSID Background Paper on Annulment, ¶ 104.

222 **Ex. ALA-010**, *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Application by Guinea for Partial Annulment, 14 December 1989 (Sucharitkul (P), Broches, Mbaye) (***MINE***), ¶ 5.12. The *ad hoc* committee in *MINE* went on to annul the award before it in part under Article 52(1)(e), because it found that the tribunal's wholesale failure to address critical aspects of its damages calculus affected the "very basis" of the award. *Id.*, ¶ 6.105.

223 **ALA-025**, *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision by the *ad hoc* Committee on the Application for Annulment submitted by the Republic of Indonesia, 16 May 1986 (Seidl-Hohenveldern (P), Feliciano, Giardina), ¶¶ 34-36; **Ex. ALA-010**, *MINE*, ¶¶ 5.11-5.13; **Ex. RL-265**, *Wena*, ¶¶ 100-101; **Ex. RL-252**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, 19 October 2009 (Hascher (P), Danelius, Tomka), ¶¶ 66-69; **Ex. RL-243**, *Duke*, ¶¶ 162, 228; **Ex. ALA-009**, *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011 (Griffith (P), Söderlund, Ajibola) (***Continental Casualty***), ¶¶ 98-99.

> 49(2) would have provided a specific remedy and, not having invoked it, MINE could not have relied on that failure for purposes of annulment.[224]

185. This Committee considers that, to the extent an *infra petita* argument can constitute a ground for annulment, the present case would fall into the third category described above. The Applicants' complaint under Ground 1B is that the Tribunal failed to decide a claim or claims made in relation to SPL 256 and the CMK shares. Article 49(2) was a remedy available to them to request that the Tribunal decide those purported claims.

186. Contrary to the Applicants' submission, the Committee is not convinced that addressing such an application would have required the Tribunal to reconsider or change the basic reasoning of the Award. Rather, it is likely that the Tribunal would have reiterated the rationale noted in paragraphs 174-175 above.

187. Accordingly, the Applicants' failure to raise the issue now characterized as Ground 1A to the Tribunal, through a timely Article 49(2) application, constitutes an independent reason why that Ground fails.

3. Ground 1B: Alleged failure to apply the BIT definition of "investment" to SPL 256

a) The Applicants' case

188. The Applicants put annulment Ground 1B forward only in relation to SPL 256, and in the alternative to Ground 1A in respect of that alleged investment. They argue that if the Award were read as declining jurisdiction over SPL 256, then the Tribunal committed a manifest excess of powers by failing to apply the BIT definition of "investment."[225] Relying principally on the *Malaysian Historical Salvors* case once again,[226] the Applicants contend that where a tribunal fails to apply the applicable BIT, that constitutes a manifest excess of powers and the award is subject to annulment.[227]

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224 **Ex. ALA-010**, *MINE*, ¶ 5.12.

225 Memorial on Annulment, ¶ 55.

226 **Ex. ALA-002**, *MHS*. *See also* ¶ 113, *supra*

227 Memorial on Annulment, ¶ 64.

189. The Applicants begin by noting that Article 1(a)(v) of the BIT defines the term "investment" as including "business concessions conferred by law or under contract, including concessions to *search for*, cultivate, extract or exploit natural resources."[228] The italicized language, the Applicants say, makes clear that a concession does not need to be cash generating to be protected by the BIT.

190. The Applicants argue that on any view, SPL 256 was a "business concession" within the meaning of Article 1(a)(v) of the BIT. In particular, it: (*i*) was "conferred by law," as shown by the fact that its preamble cites to Section 17(2)(b) of the Kenyan Mining Act; and (*ii*) granted CMK "full and exclusive liberty and license to prospect and explore for ALL MINERALS" in a defined area.[229]

191. On the Applicants' case, it is apparent on the face of the Award that the Tribunal "overlook[ed]" and failed to apply Article 1(a)(v) of the BIT.[230] Citation to that provision is absent from the paragraphs in the Award containing the Tribunal's "ruling" on SPL 256.[231] Further, say the Applicants, the text of Article 1(a)(v) makes clear that intangible investments such as "business concessions" are protected, thereby undermining the Tribunal's apparent distinction between "bricks and mortar" investments and less tangible ones.[232]

192. On these grounds, the Applicants seek annulment of the Award in its entirety, as was done in *Malaysian Historical Salvors,* or alternatively seek annulment of multiple sections of it.[233]

b) The Respondent's case

193. The Respondent denies that the Applicants have established any annullable error under Ground 1B.

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228 Memorial on Annulment, ¶ 56 (emphasis added).

229 Memorial on Annulment, ¶ 58.

230 Memorial on Annulment, ¶ 61.

231 Memorial on Annulment, ¶ 61.

232 Memorial on Annulment, ¶ 63, n. 75, *quoting* Award, ¶¶ 222, 319.

233 Reply on Annulment, ¶ 39; Applicants' response to Committee Question B.11, 15 September 2020.

194. According to the Respondent, jurisdiction under the BIT and the ICSID Convention is not established over an investment, as the Applicants contend, but rather over a "legal dispute" in respect of an investment. The Respondent cites the *Joy Mining* case[234] in support of that principle.[235]

195. In this case, the Respondent says, the legal dispute that the Claimants submitted to arbitration concerned the revocation of SML 351: all claims were predicated on that allegedly unlawful governmental action.[236] Therefore, in ruling that SML 351 was not a protected investment, and indeed legally non-existent, the Tribunal necessarily ruled out any other claims. This was the correct result, or at least not one that was obviously wrong, and therefore no annullable error occurred. The Respondent cites to the *Churchill Mining* case,[237] in particular, in support of its submission.

196. The Respondent further notes the Tribunal's conclusion that SPL 256 "expired (after two renewals) according to its own terms on 1 December 2014, without Government intervention."[238] According to the Respondent, this is a factual finding that there was no interference with SPL 256.

c) The Committee's analysis

197. The disposition of Ground 1B follows inevitably from the Committee's rejection of Ground 1A above.

198. It is common ground between the Parties, and in any event clear, that to constitute a manifest excess of powers, the decision of the tribunal that is impugned must be capable of making a difference to the outcome.[239] We have concluded above that the Claimants

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234 **Ex. RL-033**, *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004 (Orrego Vicuña (P), Craig, Weeramantry), ¶¶ 41-42.

235 Rejoinder on Annulment, ¶ 460.

236 Counter-Memorial on Annulment, ¶¶ 214-219; Rejoinder on Annulment, ¶¶ 344-345, 461.

237 Rejoinder on Annulment, ¶ 461, *citing* **Ex. RL-239**, *Churchill Mining plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case Nos. ARB/12/14 and ARB/12/40), Decision on Annulment, 18 March 2019 (Hascher (P), Böckstiegel, Kalicki) (***Churchill***).

238 Counter-Memorial on Annulment, ¶ 227 and Rejoinder on Annulment, ¶ 145, both *quoting* Award, ¶ 10.

239 *See* **Ex. ALA-001**, *Vivendi I*, ¶ 86; Applicants' PHM, ¶ 65.

presented no independent claim in respect of SPL 256 that the Tribunal was required to address. Therefore, even if the Tribunal had manifestly exceeded its powers in interpreting the BIT with respect to SPL 256, there would be no harm because this would not have affected the outcome.

199. For completeness, the Committee notes that even if that were otherwise, Ground 1B would fail for the additional reasons given in respect of Ground 1A, above.[240]

4. Ground 1D: Alleged failure to apply the law of state responsibility

a) The Applicants' case

200. In Ground 1D, the Applicants contend that in making its finding that SML 351 was not a protected investment, the Tribunal failed to apply the proper law – being international law, and in particular the international law of state responsibility as reflected in Article 7 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ***ILC Articles***).[241] Citing *MTD v. Chile*,[242] they say that as a result, the Award reflects a complete failure to apply the law to which the Tribunal was directed by Article 42(1) of the ICSID Convention; and was therefore a manifest excess of powers.[243]

201. The Applicants begin by recalling that the Tribunal found that in issuing SML 351 as he did, former Commissioner Masibo "violated the statutory protections accorded the forest and nature reserve and … the explicit prohibition under s. 4(2) of the EIA [Environmental]

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240 *See* ¶¶ 177-187, *supra*.

241 Memorial on Annulment, ¶¶ 109-114. Article 7 of the ILC Articles provides as follows:

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

242 Memorial on Annulment, ¶ 115, *quoting* **Ex. ALA-024**, *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 (Guillaume (P), Crawford, Ordóñez Noriega), ¶ 44.

243 *See* **Ex. RL-266,** ICSID Convention, Article 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. 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."

regulations," thereby acting "*ultra vires*"[244] and as a "rogue official."[245] The Tribunal also found, with respect to the actions of other Kenyan officials, that Commissioner Masibo "did what he was told by his bureaucratic and political masters."[246] At the same time, however, the Tribunal found "no lack of good faith" on the part of the Claimants.[247] In these circumstances, the Applicants contend, it was incumbent upon the Tribunal to apply the law of state responsibility to determine whether any illegality should be attributed to the Claimants, or instead to the Respondent. The Tribunal noted the issue in paragraph 231(a) of the Award but then failed to address it,[248] notwithstanding its potentially outcome-determinative nature. Indeed, according to the Applicants, applying Article 7 of the ILC Articles would necessarily "have resulted in a finding that the State could not rely on its own breach in the licensing process and its own law to challenge ICSID jurisdiction or avoid substantive responsibility [o]n the merits."[249]

202. Finally, in response to points made by the Respondent, the Applicants note that the Claimants referred to the ILC Articles in their pleadings in the Arbitration, citing footnote 220 of their post-hearing memorial[250] and certain other references in their pre-hearing memorials.[251] Based on the above, the Applicants seek annulment of the entire Award, or alternatively multiple sections of it.[252]

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244 Memorial on Annulment, ¶ 103, *quoting* Award, ¶ 385.

245 Memorial on Annulment, ¶ 104, *quoting* Award, ¶ 343.

246 Applicants' PHM, ¶ 92, *quoting* Award, ¶ 375(a).

247 Memorial on Annulment, ¶ 105, *quoting* Award, ¶ 303.

248 Memorial on Annulment, ¶ 106; Award ¶ 231(a) (noting the Claimants' argument that "the State cannot invoke its own law to avoid its international obligations, especially considering that most of the State's complaints [regarding legality] relate to the alleged acts and omissions of its own officials").

249 Applicants' PHM, ¶ 92 (*citing* **Ex. ALA-032**, *Balkan Energy (Ghana) Limited v. Republic of Ghana* (PCA Case No. 2010-7), Award on the Merits, 1 April 2014 (Orrego Vicuña (P), Schwebel, Mensah); **Ex. ALA-039**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), Award, 22 August 2017 (Derains (P), Edward, Grigera Naón); **Ex. ALA-035**, *George Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 26 July 2018 (Pryles (P), Alexandrov, Thomas)).

250 Reply on Annulment, ¶ 63.

251 Applicants' PHM, ¶¶ 96-97 (*citing* **Ex. A-004**, Claimants' Counter-Memorial on Preliminary Objections, ¶ 108; **Ex. A-005**, Claimants' Reply on the Merits, ¶ 54; **Ex. A-008**, Claimants' Rejoinder on Preliminary Objections, ¶ 136(e); **Ex. A-011**, Claimants' PHM, ¶ 22, 39, n. 220).

252 Reply on Annulment, ¶ 75; Applicants' response to Committee Question B.11, 15 September 2020.

b) The Respondents' case

203. The Respondent disputes the Applicants' submissions on Ground 1D. It accepts that the Tribunal was required to apply international law but says that this is exactly what the Tribunal did in analyzing SML 351. The Tribunal was not, however, required to "expressly refer to and apply the part of international law that Applicants wanted applied, still less that it should do so in the manner for which they contended."[253]

204. According to the Respondent, the Tribunal expressly or impliedly ruled on the Applicants' state responsibility argument by concluding that SML 351 was not a protected investment, and by finding that the Claimants not only had no entitlement to a mining license, but also knew that they were not so entitled.[254] As such, the argument goes, they were complicit in the violations of Kenyan law that the Tribunal found.

205. The Respondent relies in particular on the *Churchill Mining* annulment decision.[255] In that case, the Respondent notes, the tribunal had dismissed all claims on the ground that the entire investment at issue was tainted by forgery, even though the tribunal made no finding of fraud or forgery against the claimants themselves. The annulment committee upheld the award against essentially the same state responsibility argument offered in the present case. The same result, the Respondent submits, should obtain here.[256]

c) The Committee's analysis

206. The Parties are agreed that the Tribunal had to apply international law in its analysis of SML 351 – in particular, to decide whether SML 351 was a protected investment under the BIT (and the ICSID Convention). The Committee is likewise in accord on this point.

207. Having carefully examined the Award, we find that the Tribunal did indeed apply international law to that question. Three of the passages demonstrating that have already

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253 Rejoinder on Annulment, ¶ 323.

254 Rejoinder on Annulment, ¶ 323.

255 Rejoinder on Annulment, ¶¶ 324-325, *quoting* **Ex. RL-239**, *Churchill*, ¶¶ 232-236.

256 Rejoinder on Annulment, ¶¶ 324-326.

been quoted in paragraph 101 above. To those can be added paragraphs 319-321 of the Award, which read in relevant part as follows:

> (iii) The Tribunal's Ruling
>
> 319. The Tribunal concludes that for an investment such as a licence, which is the creature of the laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State….
>
> 320. The Tribunal endorses the application of the *Kim* principle of proportionality to an assessment of the impact of alleged illegalities. Omission of a minor regulatory requirement ... or inadvertent misstatements, will not have the same impact as an investment "created" in defiance of an important statutory prohibition imposed in the public interest.
>
> 321. The Tribunal concludes that for an investment to be protected on the international level, it has to be in substantial compliance with the significant legal requirement of the host state.

208. Thus, while appearing in several different parts of the Award, the flow of the Tribunal's analysis is clear. The Tribunal: (*i*) concluded as a matter of international law that the BIT and the ICSID Convention protect only lawful investments; (ii) found that SML 351 was not lawfully issued; (iii) applied the proportionality analysis set out in *Kim v. Uzbekistan* (as the Claimants had advocated) to assess whether the severity of the illegality warranted denying protection to SML 351 under international law; and (iv) concluded that it did.[257]

209. The Applicants contend that the Claimants placed considerable reliance on Article 7 of the ILC Articles, but that the Tribunal gave no or insufficient consideration to it. The Committee finds neither aspect of this assertion sustainable. With respect to the first, the Applicants have identified only four references to Article 7 in the hundreds of pages of memorials that they filed before and after the hearing before the Tribunal,[258] and these are primarily in relation to their estoppel argument (which was directly addressed by the Tribunal).[259]

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257 Award, ¶¶ 222, 260-261, 319, 333, 343-365.

258 Applicants' PHM, ¶¶ 96-97.

259 *See* ¶¶ 269-279, *infra*.

210. With respect to the second aspect, the Tribunal took note of Article 7 of the ILC Articles in the Award;[260] and, consistent with the Claimants' own position,[261] said that it would consider that principle in the context of its *Kim* analysis.[262] And so the Tribunal did, at least implicitly. At paragraphs 348-351 of the Award, the Tribunal found that the Claimants were complicit in the legal violations surrounding the issuance of SML 351 by Commissioner Masibo.[263] While not expressly mentioning Article 7, this passage considers and rejects the Claimants' argument under international law that any illegality in relation to SML 351 could not be attributed to them.[264]

211. The question thus becomes whether the Tribunal's legal analysis in relation to SML 351 was "so untenable that it cannot be supported by reasonable arguments."[265] The Committee concludes that it was not. Having found the Claimants to be complicit in the violations of Kenyan law that occurred, it was open to the Tribunal to conclude that these violations could be attributed to the Claimants, Article 7 notwithstanding.

212. In this regard, the present case resembles the situation faced by the annulment committee in *Churchill Mining v. Indonesia*.[266] There, the applicants argued that the tribunal had committed a manifest excess of powers by failing to apply Article 7 of the ILC Articles, in circumstances where the claimants in the underlying arbitration claimed not to be involved in the forgery scheme that afflicted the investment (and resulted in the dismissal of their claims on the ground of inadmissibility).[267] The *ad hoc* committee rejected the argument, reasoning as follows:[268]

> The Committee is not insensitive to the question of whether, and to what extent, the widespread scheme of forgery might have involved the support of

260 *See* Award, ¶¶ 231(a), 317, n. 328.

261 **Ex. A-008**, Claimants' Rejoinder on Preliminary Objections, ¶ 136(e).

262 Award, ¶ 317, n. 328.

263 *See, e.g.,* Award, ¶ 349 (finding an "attempt by the Claimants to use Mr. Juma's assistance to by-pass statutory requirements and obtain a purported mining licence").

264 For a summary of the Claimants' position, *see* Award, ¶ 317, n. 328.

265 **Ex. RL-243**, *Duke*, ¶ 99.

266 **Ex. RL-239**, *Churchill*.

267 **Ex. RL-239**, *Churchill*, ¶ 234.

268 **Ex. RL-239**, *Churchill*, ¶ 235.

> one or more State officials. However, it was for the Tribunal, and not the Committee, to determine the relevance of this issue. The Tribunal concluded that the widescale use of forgeries to obtain EKCP licenses rendered any claims for interference with the EKCP investment inadmissible, as a fundamental matter of international law. Although the Tribunal did not expressly discuss in this context the implications of its finding about the involvement of a [government official] insider, evidently the Tribunal did not consider that finding sufficient for it to ignore the sweeping illegalities on which it found the entire EKCP investment to have been based. In this sense the Tribunal appears to have implicitly considered issues of comparative responsibility and rejected the Applicants' arguments in this regard. The Committee views the Applicants' insistence that the Tribunal nevertheless should have addressed the State responsibility arguments expressly rather than by implication, as essentially a challenge to the Tribunal's approach to admissibility. This is not within the Committee's remit to entertain. A finding of inadmissibility is not a manifest excess of powers, and based on the Tribunal's approach to inadmissibility, there was no requirement that it go further to expressly apply doctrines of State responsibility or Article 7 of the ILC Articles.

213. Although the circumstances in *Churchill Mining* were not precisely the same as here, the Committee finds that the same principle applies. The Tribunal considered the "comparative responsibility" for the unlawful issuance of SML 351, found the Claimants to be culpable, and rejected their position on state responsibility. Whether that decision was legally right or wrong is not within the mandate of this Committee to decide.

214. It remains to address the Applicants' argument that the Tribunal's finding of "no lack of good faith" on the Claimants' part somehow made its legal conclusion irrational. We reject this submission. A reading of the relevant paragraph of the Award shows that the Tribunal's finding was made in the specific context of addressing the sixth *Phoenix Action* factor ("assets invested *bona fide*") and not the fifth ("assets invested in accordance with the laws of the host State").[269] On the fifth factor, the Tribunal plainly concluded that the Claimants behaved badly and were complicit in the legal violations that led the Tribunal to deny protection to SML 351.[270]

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269 *See* Award, ¶¶ 261, 303.

270 *See*, *e.g.*, Award, ¶ 222. *Compare* Tr. Day 4, 94:14-21.

215. For the foregoing reasons, the Committee rejects alleged annulment Ground 1D.

B. ARTICLE 52(1)(E): FAILURE TO STATE REASONS

216. Article 52(1)(e) of the ICSID Convention provides that an award may be annulled if it "fail[s] to state the reasons on which it is based." The Applicants put forward five alleged grounds for annulment under this provision. The Committee will address each in turn.

1. Ground 2A: Allegedly ignoring evidence that the Ministry of Forestry and Wildlife consented to the issuance of SML 351

a) The Applicants' case

217. Alleged annulment Ground 2A relates to the Tribunal's factual findings that the Mrima Hill site needed to be de-gazetted as a forest reserve and/or a nature reserve prior to the issuance of SML 351,[271] and that this had not occurred.[272] The Applicants contend that in making these findings, the Tribunal ignored critical evidence showing that de-gazettement was not in fact required.[273]

218. The Applicants begin by summarizing the case they put to the Tribunal, which was that CMK had the necessary consents from the Ministry of Forestry and Wildlife (the ***Ministry***) and the Kenyan Forest Service (the ***KFS***), and that in the circumstances de-gazettement was not legally required before a mining license could be issued. Part of the evidence relied upon by the Claimants was the so-called "Wa-Mwachai Letter" sent to CMK by the Permanent Secretary of the Ministry in August 2012, which on the Claimants' case showed that de-gazettement was not necessary and that consent of the Ministry/KFS was present.[274] The Applicants say that the Wa-Mwachai Letter was discussed during the hearing and note

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271 De-gazettement is a process by which an area – here, the Mrima Hill site – is declassified as a forest/nature reserve and/or a national monument in order to permit mining activities. *See* **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶ 46; *see also id.*, ¶¶ 44-45; Award, ¶ 345, n. 357. The Applicants argue that it was not necessary to degazette the Mrima Hill area before a mining license could be issued. *See* Memorial on Annulment, ¶¶ 120-121. They also note that they disputed (*inter alia*) the State's argument that Mrima Hill was designated as a national monument. *See* Memorial on Annulment, ¶ 126.

272 Award, ¶¶ 172, 178.

273 Memorial on Annulment, ¶ 120.

274 **Ex. A-015**, Letter from Wa-Mwachai, Permanent Secretary of the Ministry of Forestry and Wildlife to CMK, 30 August 2012.

that one of the Tribunal's post-hearing questions related to it.[275] The Claimants then relied on the Letter, along with other exhibits, in their post-hearing submission.[276]

219. In the Award, the Tribunal rejected the submission that the Ministry/KFS had consented to the Mrima Hill project or acknowledged that de-gazettement was not necessary.[277] In particular, the Tribunal found that there was not "any persuasive evidence that KFS … ever consented to the issuance of a mining licence in respect of the Mrima Hill forestry and nature reserve."[278]

220. The Applicants argue that in reaching this conclusion – which was one of the grounds on which the Tribunal found SML to be unlawful and void[279] – the Tribunal ignored the substantial evidence on this point put forward by the Claimants, and specifically the Wa-Mwachai Letter. They note that the Letter is nowhere discussed or cited in the Award.[280]

221. Relying on the *TECO v. Guatemala* annulment decision,[281] the Applicants argue that when a tribunal fails to address or ignores highly relevant evidence, that constitutes a failure to state reasons within the meaning of Article 52(1)(e) of the Convention. They say that the Wa-Mwachai Letter was plainly important evidence on which significant emphasis had been placed, as reflected in the fact that the Tribunal asked a post-hearing question about it. By then ignoring that evidence, the Applicants contend, the Tribunal committed an annullable error, and multiple paragraphs of the Award should be annulled as a result.[282]

b) The Respondent's case

222. Kenya begins its response by submitting that the Applicants' allegations are not capable of establishing a violation of Article 52(1)(e). A claim that a tribunal has ignored evidence

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275 Memorial on Annulment, ¶¶ 120-124.

276 Memorial on Annulment, ¶¶ 124-125.

277 Memorial on Annulment, ¶ 127, *quoting* Award, ¶¶ 171-172.

278 Memorial on Annulment, ¶ 127, *quoting* Award, ¶ 178.

279 Award, ¶ 365.

280 Memorial on Annulment, ¶ 128.

281 Memorial on Annulment, ¶¶ 127-132*, quoting* **Ex. ALA-006**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016 (Hanotiau (P), Oyekunle, Sachs) (***TECO***), ¶¶ 131, 135-136, 138.

282 Applicants' response to Committee Question B.11, 15 September 2020.

"has nothing to do" with the requirement to state reasons.[283] If cognizable at all, such a claim would have to be pleaded under some other provision of Article 52(1).[284]

223. The Respondent goes on to submit that the Arbitration Rules, and in particular Rule 47, provide tribunals with wide discretion in how they express their reasoning.[285] Tribunals must give reasons for their *decisions*, but there is no requirement that a panel give "reasons for its reasons."[286] In this case, the Tribunal made a clear factual finding against the Claimants on the question of whether the Ministry or KFS had consented to the issuance of SML 351, and that factual finding cannot be second-guessed on annulment. There is, moreover, no requirement that a tribunal address every piece of evidence put before it, or indeed any particular piece of the evidence submitted.[287]

224. The *TECO* case relied upon by the Applicants is, the Respondent says, entirely distinguishable. There, the tribunal dismissed a claim for loss of value on the basis that there was "no sufficient evidence" to sustain it.[288] The problem was that the parties had submitted four expert reports, running to 1,200 pages, on that question. As such, *TECO* is a case, not of ignorance of specific pieces of evidence out of a mass of other evidence, but rather of a tribunal failing to explain the reasoning for its decision, which could not be followed in view of the evidentiary record.[289]

225. The situation is wholly different in the present case, the Respondent says, where the allegation is essentially that the Tribunal ignored one document, the Wa-Mwachai Letter. That submission is in the first place incorrect, because the Tribunal implicitly dealt with the Letter by finding that KFS had not consented to the issuance of SML 351. Furthermore,

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283 Rejoinder on Annulment, ¶ 112.

284 Specifically, either sub (d) or possibly sub (b). *See* Rejoinder on Annulment, ¶ 112.

285 Rejoinder on Annulment, ¶ 114.

286 Rejoinder on Annulment, ¶ 117 (*citing* **Ex. RL-244**, *Enron*, ¶ 222).

287 Rejoinder on Annulment, ¶ 327.

288 **Ex. ALA-006**, *TECO*, ¶ 130.

289 Rejoinder on Annulment, ¶ 116.

even if the alleged error in fact-finding occurred, it could not justify annulment under Article 52(1)(e) or otherwise.[290]

226. Finally, in response to a question from the Committee, the Respondent submits that there was "overwhelming" evidence in the record supporting the Tribunal's finding that the Ministry and KFS did not give consent with respect to SML 351 and that de-gazettement was required.[291]

c) The Committee's analysis

i. <u>The Applicable Legal Standard</u>

227. The Parties are largely in agreement on the legal standard applicable to challenges under Article 52(1)(e). Both have referred to the classic formulation of the "minimum requirement" imposed by subsection (1)(e) in the *MINE v. Guinea* annulment decision:

> 5.08 The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that.…
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> 5.09 … [T]he requirement to state reasons is satisfied so long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.…[292]

228. To this may be added the following precepts that emerge from prior ICSID annulment decisions, with which the present Committee agrees:

a. There is no appeal in the ICSID system, and it is not within the province of an annulment committee to review the adequacy of a tribunal's reasoning.[293] Nor is it "the role of an annulment committee to conduct a re-evaluation of the record before the

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290 Counter-Memorial on Annulment, ¶ 332; Rejoinder on Annulment, ¶ 117.

291 Respondent's PHM, ¶ 154.

292 **Ex. ALA-010**, *MINE*, ¶¶ 5.08-5.09.

293 **Ex. RL-266,** ICSID Convention, Article 53(1); **Ex. RL-265**, *Wena*, ¶ 79 ("The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE*, this ground for annulment refers to a 'minimum requirement' only.").

tribunal. Pursuant to Arbitration Rule 34(1), a tribunal is the judge of the admissibility and probative value of any evidence adduced before it."[294]

b. The ICSID Convention and the Arbitration Rules do not prescribe the manner in which a tribunal must state its reasons. The reasoning on a particular issue or issues need not be expressly stated, so long as it can reasonably be inferred from the award as a whole.[295]

c. A tribunal is not required to address every argument raised by a party.[296] There is likewise no requirement to address any particular piece of evidence produced by a party, or to give reasons for preferring some evidence over other evidence.[297]

d. Where possible, an annulment committee should interpret an award in a manner that validates its reasoning.[298] The committee itself may, if needed, explain the reasons supporting the tribunal's conclusion.[299]

e. Annulment may not be sought in respect of matters not put before the original tribunal. As the *Wena* annulment committee held, "[t]he award cannot be challenged under Article 52(1)(e) for a lack of reasons in respect of allegations or arguments, or parts thereof, that have not been presented during the proceeding before the Tribunal."[300] To this the present Committee would add the gloss that the allegations or arguments must

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294 **Ex. ALA-006**, *TECO*, ¶ 126.

295 **Ex. RL-265**, *Wena*, ¶ 81; **Ex. ALA-006**, *TECO*, ¶ 124.

296 **Ex. RL-258**, *Rumeli*, ¶ 104; **Ex. RL-289**, *Mr. Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Annulment, 12 February 2015 (Hascher (P), McRae, Hobér) (***Tza Yap Shum***), ¶ 119.

297 **Ex. RL-289**, *Tza Yap Shum*, ¶ 110.

298 **Ex. ALA-006**, *TECO*, ¶ 102 ("[I]f possible, an annulment committee should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions"). *See also* W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (quoted in **Ex. RL-258**, *Rumeli*, ¶ 138) (stating that annulment committees should "actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding that its reasoning is insufficient").

299 **Ex. RL-265**, *Wena*, ¶ 83 ("If the award does not meet the minimal requirements as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself."); **Ex. RL-239**, *Churchill*, ¶¶ 242, 249.

300 **Ex. RL-265**, *Wena*, ¶ 82. *Compare* ¶ 173, *supra*.

have been presented with reasonable clarity to the underlying tribunal in order to provide a potential basis for a later annulment application under Article 52(1)(e).

229. The Committee will apply the principles of law above to alleged annulment Ground 2A, as well as to the other Grounds that rest on the claim of absent or incoherent reasons.

ii. Application of the Legal Standard

230. Through Ground 2A, the Applicants attack the Tribunal's factual findings that the Ministry and KFS did not consent to the issuance of SML 351, and that the de-gazettement of Mrima Hill as a protected forest and/or nature reserve was required before a mining license could lawfully be issued.[301] The Applicants argue that in making these findings, the Tribunal ignored contrary evidence that the Claimants had presented, in particular the Wa-Mwachai Letter.[302]

231. As reflected in the summary of the applicable legal principles above, in the ICSID system, the tribunal is the judge of the admissibility and the probative value of evidence adduced by the parties.[303] It follows that a tribunal's factual findings are unassailable on annulment, at least so long as they are not arbitrary.[304]

232. Here, the Applicants appear to be correct that the Tribunal did not cite to the Wa-Mwachai Letter in reaching its conclusion on the lack of Ministry/KFS consent and the need for de-gazettement. But there was no requirement that the Tribunal expressly address that, or any other, piece of evidence proffered by the Parties before it.

233. Furthermore, as pointed out by the Respondent, there was other evidence in the record that appeared to support the conclusions that the Tribunal reached.[305] The Tribunal was fully

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301 Award, ¶¶ 171-172, 178, 345, 365.

302 Memorial on Annulment, ¶ 128.

303 **Ex. RL-266,** ICSID Arbitration Rules, Rule 34(1).

304 **Ex. ALA-006**, *TECO*, ¶ 317.

305 For example, **Ex. R-008**, Letter from Director General of National Museums of Kenya to Permanent Secretary for National Heritage and Culture, 9 February 2010; **Ex. R-012**, Letter from KFS to CMK Re Permission to Prospect, 25 January 2010; **Ex. R-168**, TAC Report for NEMA Re CMK EIA Report, 10 May

entitled to prefer that evidence over the Wa-Mwachai Letter or other documents relied upon by the Claimants, and it is not within the scope of this Committee's remit to second-guess or re-evaluate the Tribunal's choice.

234. In any event, we find that the Tribunal did at least implicitly address the Wa-Mwachai Letter. It did so by rejecting the Claimants' factual submissions and making the findings that it did in the Award at paragraphs 171-172, 345 and 365. Furthermore, the Applicants acknowledged at the Hearing that the Tribunal's finding on the unlawfulness of SML 351 was based on the de-gazettement issue *and* the absence of an EIA Study;[306] as such, even if the Tribunal erred in respect of the Wa-Mwachai Letter and de-gazettement, that error had no effect on the result.

235. The decision of the annulment committee in *TECO v. Guatemala*, heavily relied upon by the Applicants, is not to the contrary.[307] There, the committee concluded that the tribunal had entirely ignored some 1,200 pages of evidence submitted by both parties' experts on a particular issue,[308] leaving the committee "left guessing as to the Tribunal's actual line of reasoning," if any.[309] Here, by contrast, the Tribunal's reasoning is sufficiently clear: it credited the Respondent's evidence on the Ministry/KFS and de-gazettement issues in preference to the Claimants' evidence. The Tribunal was fully entitled to do so.

236. For these reasons, the Committee dismisses alleged annulment Ground 2A.

2. Ground 2B: Allegedly ignoring evidence that the Claimants asserted ownership of IP transferred to the State

a) The Applicants' case

237. Alleged annulment Ground 2B is related to Ground 1A, already discussed above. The Applicants' case is that if they succeed on Ground 2B, then the Award is *infra petita* in

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2012; **Ex. C-068**, Letter from NEMA to CMK on Review of EIA Report, 19 July 2012; **Ex. C-236**, Letter from Director-General of NEMA to CMK, 2 January 2013. *See* Respondent's PHM, ¶ 154 (citing these and other exhibits from the underlying record).

306 Tr. Day 3, 111:22 – 112:2.

307 **Ex. ALA-006**, *TECO*.

308 **Ex. ALA-006**, *TECO*, ¶ 130.

309 **Ex. ALA-006**, *TECO*, ¶ 137.

respect of the Applicants' IP claims, and multiple sections of the Award should be annulled as a result.[310]

238. The Applicants begin by asserting that the Claimants made specific claims in the Arbitration – including indirect expropriation and unjust enrichment – in respect of the IP that they generated or compiled during their six years of work at Mrima Hill.[311] The Respondent's defense was that the IP had no value, and in any event had been freely transferred to the government "to satisfy [CMK's] reporting obligations under SPL 256."[312] The Claimants responded by adducing evidence allegedly demonstrating that they did assert ownership over the IP. In particular, the "Stage 1 Final Feasibility Study" submitted to the government by CMK in September 2012 – said to comprise a compilation of the Claimants' IP – stated as follows on its first page: "Information contained within this document is wholly owned by Cortec Mining Kenya Ltd. Distribution of information is the explicit right of Cortec Mining Kenya Ltd."[313]

239. The Tribunal found the Claimants' IP not to be a protected investment in paragraph 331 of the Award. It wrote there:

> There is no doubt CMK generated and submitted considerable data about the minerals of Mrima Hill, but the data was freely given by the Claimants to the Government in the hopes of – but with no entitlement to – a mining licence. The data was not disclosed on the basis it was to remain the property of CMK. There was no protected investment in intellectual property. It will be recalled that the Claimants made extensive use of the data generated by the exploratory work of earlier prospectors as well as the Kenyan Mines and Geological Department.[314]

240. The Applicants submit that the factual findings in paragraph 331 could only have been made by ignoring the "Stage 1 Final Feasibility Study," which is nowhere mentioned therein. Furthermore, they submit, the reasons given for the finding are contradictory: it

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310 Memorial on Annulment, ¶¶ 136, 146-147; Applicants' response to Committee Question B.11, 15 September 2020.

311 Memorial on Annulment, ¶ 137.

312 Memorial on Annulment, ¶ 138, *quoting* **Ex. A-003**, Respondent's Counter-Memorial on the Merits and Memorial on Objections to Jurisdiction, ¶ 517.

313 Memorial on Annulment, ¶ 139, *quoting* **Ex. A-017**, Stage 1 Final Feasibility Study, September 2012.

314 Memorial on Annulment, ¶ 142, *quoting* Award, ¶ 331.

cannot be that the Claimants "generated … considerable data" and "provided technology" to Kenya but did not have an IP investment under Article 1(a)(iv) of the BIT.[315] Citing *TECO v. Guatemala*[316] and *MINE v. Guinea*,[317] the Applicants argue that paragraph 331 of the Award must be annulled on those grounds.

241. In answer to the Respondent's argument regarding Special Condition 10 of SPL 256,[318] the Applicants say that this point was not raised in the Arbitration and is likewise absent from the reasoning of the Award.[319]

242. Lastly, in answer to a question from the Committee, the Applicants acknowledged in their PHM that at least some of the data contained in the "Stage 1 Final Feasibility Study" had earlier been disclosed to the State as part of CMK's reporting obligations under SPL 256.[320] While they assert that other information in that document had not previously been disclosed, they have provided no citations to the record in the Arbitration in support of that position.[321]

b) The Respondent's case

243. The Respondent first submits that the Applicants' claim for annulment in respect of the IP (and the CMK shares) is inadmissible, because it was only raised in the Memorial on Annulment and not in the Application for Annulment.[322] The scope of an annulment application, the Respondent says, cannot be expanded after the 120-day deadline for the submission of an annulment application.[323]

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315 Memorial on Annulment, ¶¶ 144-145, *quoting* Award, ¶¶ 331, 301.

316 Memorial on Annulment, ¶ 146, *citing* **Ex. ALA-006**, *TECO*, ¶¶ 131, 135-136, 138.

317 Memorial on Annulment, ¶ 147, *quoting* **Ex. ALA-010**, *MINE*, ¶ 5.09.

318 *See* ¶ 247, *infra*.

319 Reply on Annulment, ¶ 50.

320 Applicants' PHM, ¶¶ 112-113.

321 Applicants' PHM, ¶ 113.

322 The Respondent makes the same point regarding the Applicants' annulment request in respect of the CMK shares. *See* Rejoinder on Annulment, ¶¶ 31, 445.

323 Rejoinder on Annulment, ¶ 445.

244. On the substance of Ground 2B, the Respondent argues that there has plainly been no failure to state reasons. Paragraph 331 of the Award provides a reason for the Tribunal's decision: that the data was not disclosed on the basis that it was to remain the property of CMK.[324]

245. Nor, the Respondent submits, can the Applicants' argument that the Tribunal ignored the "Phase 1 Final Feasibility Study" succeed. In the first place, the Tribunal found that document not to be a feasibility study at all. Further, and in any event, the Applicants have asserted no more than an alleged error of fact – which, even if manifest, is not a basis for annulment. There is, moreover, no requirement that a tribunal discuss every piece of evidence put before it.[325]

246. In response to a question from the Committee, the Respondent submits in addition that the Claimants' practice during the course of the Mrima Hill project had been to "flood" the government with data and information on its prospecting activities,[326] with the result that, based on the record before the Tribunal, "it appears very likely there was nothing, or at any rate nothing material, new in the [feasibility report]."[327]

247. Finally, the Respondent notes that under Special Condition 10 of SPL 256, the Claimants were required to provide the government with detailed reports on all prospecting results, which would "remain confidential" only so long as CMK "retains any rights over the area to which the reports relate."[328] SPL 256 expired by its own terms in December 2014, and the Claimants were never entitled to or obtained a mining license. Therefore, Kenya was entirely free to use that prospecting information as from December 2014, before the Arbitration even began. This, the Respondent submits, further supports the Tribunal's finding in paragraph 331 of the Award.

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324 Rejoinder on Annulment, ¶ 453.

325 Rejoinder on Annulment, ¶ 455.

326 Respondent's PHM, ¶ 139 (*citing* the First Witness Statement of Professor Geoffrey Wahungu, ¶ 20).

327 Respondent's PHM, ¶ 140.

328 Counter-Memorial on Annulment, ¶ 231, *quoting* **Ex. C-006**, Special Prospecting Licence No. 256, 4 April 2010.

248. For these reasons, the Respondent says, Ground 2B must be dismissed.

c) The Committee's analysis

249. The Committee's analysis of Ground 2B proceeds in a similar fashion to the analysis of Ground 2A above. Once again, the Applicants seek to challenge a factual finding of the Tribunal: that the data comprising the Claimants' IP was "freely given" to the government in the hope of obtaining, but with no entitlement to, a mining license.[329] On the basis of that finding, the Tribunal logically concluded that there was no protected investment because the Claimants had no remaining property right in the IP, at least vis-à-vis the State.[330]

250. The Committee has already concluded above that a tribunal's factual findings are in principle unassailable on annulment, and so it is here. The Applicants point to two sentences on the first page of the "Stage 1 Final Feasibility Study" to argue that the Tribunal got it wrong; but it is not the function of this Committee to correct factual errors allegedly committed in the underlying Arbitration. While there is arguably a tension between paragraph 331's statement that the data was "not disclosed on the basis it was to remain the property of CMK," on the one hand, and the cited sentences in the Feasibility Study, on the other, the Committee does not see that as establishing a willful ignorance of evidence. The Tribunal was entitled to reject the Claimants' evidence on this point, as it at least implicitly did.

251. Indeed, as noted above, the Applicants admit in this proceeding that the Tribunal's finding in paragraph 331 of the Award was at least partially correct, in that some of the information in the Stage 1 Final Feasibility Study had earlier been disclosed to the government.[331] That admission is consistent with the Tribunal's finding in paragraph 331 that the Claimants had freely disclosed their IP "in the hopes of" qualifying for a mining license. Furthermore, the Applicants have failed to establish here – as apparently the Claimants failed to do before

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329 Award, ¶ 331.

330 Award, ¶ 331.

331 *See* ¶ 242, *supra*. *See also* **Ex. A-005**, Claimants' Reply on the Merits, ¶ 177 (acknowledging "the fact that the IP and know-how was provided to the State pursuant to reporting obligations").

the Tribunal – to what extent potentially protected IP remained after those prior voluntary disclosures.[332]

252. The Applicants further argue there is a contradiction between the Tribunal's conclusion that no protected IP investment existed and its finding that the Claimants had "generated … considerable data" and "provided technology" to Kenya. The Committee sees no such contradiction, however. The Tribunal simply concluded, on the evidence before it, that this data and technology had been "freely given" to the government. Whether that factual finding was right or wrong is not for this Committee to say.

253. In sum, the "minimum requirement" imposed by Article 52(1)(e) is that the Claimants must be able to understand why they lost on the IP issue.[333] The Award can be followed – indeed, is clear – on that point, and therefore alleged annulment Ground 2B fails.

254. In light of this disposition, it is not necessary for the Committee to address the Respondent's argument that Ground 2B has been asserted out of time or its other submissions in defense.

3. Ground 2C: Allegedly incoherent application of the *Kim* test in declining jurisdiction over SML 351

a) The Applicants' case

255. In Ground 2C, the Applicants contend that in applying the test set out in *Kim v. Uzbekistan*[334] to conclude that SML 351 should be denied protection under the BIT, the Tribunal rendered an incoherent and inconsistent decision that violates the "reasons" requirement of Article 52(1)(e).[335]

256. The Applicants begin by recalling that their case in the Arbitration was that if the BIT contained an implicit legality requirement (as the Tribunal ultimately found), the effect of that requirement should be determined in accordance with the *Kim* test. That case, the

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332 *See* ¶ 242, *supra*.

333 **Ex. ALA-010**, *MINE*, ¶ 5.09.

334 Memorial on Annulment, ¶¶ 148-150, *citing* **Ex. RL-185**, *Kim*, ¶¶ 384-409.

335 Memorial on Annulment, ¶¶ 151-170.

Applicants say, established a three-part proportionality test for deciding when a violation of national law will justify the denial of treaty protection. As explained in *Kim* itself, the test must be applied on a case-by-case basis, taking all relevant factors into account. Specifically, the test requires a tribunal to consider: (*i*) the significance of the obligation with which the investor has not complied; (*ii*) the seriousness of the investor's conduct; and (*iii*) whether the combination of the investor's conduct and the importance of the legal obligation at issue justifies the sanction of denying treaty protection to the investment.[336]

257. Having found that the BIT contains an implicit legality requirement, the Tribunal conducted its *Kim* analysis at paragraphs 343-365 of the Award. On the Applicants' case, that analysis is incoherent and internally inconsistent. In particular, they complain that the Tribunal did not identify any "regulatory obligations" of "fundamental importance" that the Claimants breached, or at least any obligations that rested on the Claimants and not on the State itself.[337] Moreover, say the Applicants, the Tribunal's finding that protection would be denied under the *Kim* test is irreconcilable with its earlier finding that the Claimants had invested in "good faith."[338]

258. Citing *MINE v. Guinea*[339] and *Tidewater v. Venezuela*,[340] the Applicants submit that the application of the *Kim* test performed by the Tribunal does not allow the reader to follow "how the tribunal proceeded from Point A. to Point B."[341] That is tantamount to an absence of reasons, the Applicants assert, and on that basis the Award should be annulled in full, or alternatively multiple sections of the Award, including paragraphs 343-365, should be annulled.[342]

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336 Memorial on Annulment, ¶ 149.

337 Memorial on Annulment, ¶¶ 152-165.

338 Applicants' PHM, ¶¶ 86-87.

339 Memorial on Annulment, ¶ 166, *quoting* **Ex. ALA-010**, *MINE*, ¶¶ 5.08-5.09.

340 Reply on Annulment, ¶¶ 84-85, *quoting* **Ex. RL-263**, *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment, 27 December 2016, ¶ 169.

341 Memorial on Annulment, ¶ 166, *quoting* **Ex. ALA-010**, *MINE*, ¶ 5.09.

342 Memorial on Annulment, ¶ 170; Applicants' response to Committee Question B.11, 15 September 2020.

b) The Respondent's case

259. The Respondent submits that Ground 2C is simply an effort to appeal from a ruling the Applicants do not like, which is not a cognizable complaint on annulment.

260. The Respondent denies that there was any incoherence in the Tribunal's ruling on the *Kim* issue: the Tribunal identified the correct law (international law), attempted to apply it, and reached a result that was, at minimum, reasonable and tenable.[343] The Respondent adds that the result reached is, in fact, entirely proper. The U.K. and Kenya cannot have intended to afford treaty protection to investments that were made in contravention of important statutory regimes designed to protect the environment and national monuments (like Mrima Hill).[344]

261. At the Hearing, the Committee pointed out to the Respondent that the arguments in its memorials appeared more directed at Article 52(1)(b) of the Convention rather than Article 52(1)(e), which is the ground invoked by the Applicants. In answer to this, the Respondent submitted, in summary, that SML 351 was issued in violation of important environmental requirements of Kenyan law, and that the Claimants were complicit in those violations.[345] In particular, the Claimants knew they were not entitled to a mining license when they applied, and they subverted the applicable legal regime with Commissioner Masibo's connivance. The Claimants were thus hardly "innocent bystander[s],"[346] the Respondent says, which is what the Tribunal found in the Award and based its *Kim* analysis upon.

c) The Committee's analysis

262. Having found that the BIT (like the ICSID Convention) contains an implied legality requirement, and that SML 351 was not lawfully issued, the Tribunal tempered these rulings by applying the *Kim* proportionality test to determine whether jurisdiction over SML 351 should be denied. The Applicants accept that the Tribunal identified the correct law – international law, and in particular the *Kim* test, for which the Claimants themselves

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343 Rejoinder on Annulment, ¶ 321. The Respondent inadvertently refers to Ground 1C instead of Ground 2C.

344 Rejoinder on Annulment, ¶¶ 320-322.

345 Tr. Day 3, 155:8 – 157:7.

346 Tr. Day 3, 156:20. *See also* n. 270, *supra*.

had advocated.[347] It also appears to be accepted, and in any event is clear to the Committee, that the Tribunal attempted to apply the applicable law in reaching the result that it did.

263. The Applicants nevertheless insist that the Tribunal's application of the *Kim* test in paragraphs 343-365 of the Award is (*i*) incoherent and (*ii*) contradicted by other findings in the Award. The Committee disagrees.

264. Beginning with point (*i*), we consider that the Tribunal's reasoning can be followed. The Tribunal quoted the three elements of the *Kim* test and applied them to the facts as it found them to be:

a. With respect to the first element of the *Kim* test – the significance of the legal obligation at issue – the Tribunal considered that "the regulatory obligations on which the Claimants defaulted were of fundamental importance in an environmentally vulnerable area" like Mrima Hill.[348] These included Kenya's environmental regulations, as well as the restrictions imposed by virtue of Mrima Hill's designation as a forest and nature reserve.[349]

   The Applicants object that the Tribunal failed to identify any "regulatory obligations" that the Claimants *themselves* breached. But as noted above, the Tribunal had already found the Claimants to be complicit in the violations of Kenyan environmental law that occurred through the improper issuance of SML 351.[350]

b. With respect to the second *Kim* element, being "the seriousness of the investor's conduct," the Tribunal found that the Claimants had used the assistance of a questionable intermediary, Mr. Juma, "to by-pass statutory requirements and obtain a purported mining licence … despite such non-compliance."[351] This, the Tribunal concluded, was "a serious matter" that "showed serious disrespect for the fundamental

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347 *See* Award, ¶ 344.

348 Award, ¶ 346.

349 Award, ¶ 345.

350 *See* ¶ 210, *supra*.

351 Award, ¶ 349.

public policies of the host country in relation to the environment" and constituted "a serious breach of the 'investors' obligations."[352]

c. Finally, on the third *Kim* element – the proportionality analysis – the Tribunal, over the course of several pages, considered and rejected a theory put forward by the Claimants' legal expert seeking to mitigate or justify the Claimants' non-compliance with the Kenyan legal regime.[353] Then, after recalling its earlier finding that the environmental regulations at issue were "of considerable weight," such that non-compliance resulted in "significant" prejudice to the host State, the Tribunal concluded as follows:

> [T]he Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an [Environmental Impact Assessment] licence (or approval in any valid form) from NEMA concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.[354]

265. It is not the province of this Committee to say whether the Tribunal's application of the *Kim* test was right or wrong, persuasive or unpersuasive, or indeed whether the *Kim* test itself is correct as a matter of law.[355] The only question that we are empowered to address in relation to Ground 2C is whether it is possible to follow the Tribunal's reasoning in conducting that analysis.[356] As reflected in the summary above, we consider that it is.

266. Put another way, it is sufficiently clear to the Claimants why they lost on the *Kim* point. The Tribunal concluded that they had disregarded and actively sought to circumvent important environmental protections contained in Kenyan law. Again, whether that conclusion was right or wrong is of no moment in the present context.

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352 Award, ¶¶ 348-349, 351.

353 Award, ¶¶ 352-361.

354 Award, ¶ 365.

355 **Ex. RL-254**, *Alapli*, ¶ 210 ("An award is not to be annulled merely because an annulment Committee forms the view that, on the same facts and evidence, it would have reached a different conclusion.").

356 *Compare* **Ex. RL-239**, *Churchill*, ¶ 244.

267. The Applicants proceed to argue (in their point (*ii*), set out above in paragraph 263 above) that the Tribunal's *Kim* analysis contradicts its earlier finding that the Claimants' investments were "made in good faith,"[357] with the result that the Tribunal's reasoning on these points cancels itself out. The Committee has already addressed the scope of the Tribunal's "good faith" finding above: it relates to the sixth *Salini* factor, and to that alone.[358] We see no direct contradiction between that finding and the Tribunal's conclusion, in the context of the *Kim* analysis, that the Claimants' conduct led to the wrongful issuance of a mining license in violation of important legal requirements of the host State, justifying the denial of treaty protection to SML 351. We stress, again, that even if those conclusions of fact or law were wrong – and the Applicants have succeeded in arguing with some force in that respect – the disposition of Ground 2C would be the same. The Tribunal's reasoning can be followed and is not directly contradictory, and that is the end of the matter.[359]

268. For these reasons, alleged annulment Ground 2C fails.

4. Ground 2D: Allegedly absent or incoherent reasons for rejecting the Claimants' estoppel claim

a) The Applicants' case

269. In Ground 2D, the Applicants assert that the Tribunal failed to state reasons for its decision that the Claimants could not invoke estoppel against the State's allegations of illegality.[360]

270. The Applicants begin by asserting that estoppel was a major part of their case in the Arbitration. They note that, among other things, the Claimants argued that "to the extent the State establishes the existence of any local-law defect in … SPL 256 or SML 351, the State is estopped from invoking that defect as an objection to jurisdiction or merits

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357 Award, ¶ 303; *see also id*., ¶ 308.

358 *See* ¶ 214, *supra*.

359 *See* **Ex. ALA-006**, *TECO*, ¶ 102 ("[I]f possible, an annulment committee should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions.").

360 Memorial on Annulment, ¶ 171.

defence."[361] The estoppel was said to arise from the fact that the Claimants had operated at Mrima Hill for six years in full sight of the government, and with no complaints regarding "illegality."[362] The Applicants go on to note that the Tribunal asked three post-hearing questions related to estoppel, thereby showing that this was a significant issue of which the Tribunal was aware.[363]

271. According to the Applicants, the Tribunal dismissed the Claimants' estoppel arguments with two sentences in paragraph 222 of the Award, as follows:

> There is no plausible argument that the Government is estopped by the Claimants' "reliance" on SML 351 as a valid investment under Kenyan law. If estoppel was available to the Claimants, they have failed to establish the prerequisites for its application.[364]

272. This reasoning is wholly inadequate, the Applicants say, and in any event deals only with one issue: the validity of SML 351 once it was issued (and not, for example, SPL 256). Accordingly, paragraph 222 of the Award cannot count as reasons for dismissing the other estoppel arguments put forward by the Claimants in the Arbitration. These are said to have included:

> (a) the Claimants' general argument that "principles of fairness" should prevent the [host] government from raising "violations of its own law as a jurisdictional defence when [it] knowingly overlooked them and [effectively] endorsed the investment which was not in compliance with its law";
>
> (b) the Claimants' specific argument that estoppel (amongst other rules of international law) provided the legal basis on which the words and deeds of government officials may bind other Ministries as matter of international law; and

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361 Memorial on Annulment, ¶ 173, *quoting* **Ex. A-004**, Claimants' Counter-Memorial on Preliminary Objections, ¶ 116.

362 Memorial on Annulment, ¶ 172.

363 Memorial on Annulment, ¶ 174.

364 Memorial on Annulment, ¶ 176, *quoting* Award, ¶ 222.

(c) the Claimants' specific argument that estoppel provides the legal basis on which a written or verbal representation by a government official will prevail even where a statutory direction is mandatory.[365]

273. Quoting Professor Schreuer's treatise, the Applicants submit that pursuant to Article 48(3) of the Convention, a tribunal must "address all arguments made by the parties that were rejected and which, had they been accepted, would have changed the decision's outcome."[366] In the present case, they say, the Tribunal failed to deal with several of the important estoppel arguments made by the Claimants. Accordingly, the Committee should annul the Award in full, or alternatively multiple sections of it, including paragraph 222.[367]

b) The Respondent's case

274. The Respondent submits that Ground 2D must be dismissed for three principal reasons. *First*, in the Respondent's view, there was no "estoppel claim" requiring either a decision under Article 48(3) of the Convention or reasons for such a decision. The Tribunal was merely required to decide the heads of claim – here, jurisdiction and/or the merits of the claims asserted – and that the Tribunal did, giving reasons for its holdings. What was said about estoppel in the Award was simply "reasons for reasons" and, as such, unassailable on annulment.[368]

275. *Second*, the Respondent argues that even if the Tribunal were required to give reasons for its decision on the "estoppel claim" or "estoppel arguments," it did so. Paragraphs 222-223 of the Award are fully sufficient in that respect: the Tribunal there found that the Claimants knew that they were not entitled to a mining license; nonetheless engaged in an end-run around Kenyan law to obtain one; as a result, had no legitimate expectation that SML 351 was valid; and accordingly could not "rely" on SML 351 as a valid investment – which, the Respondent says, eliminated a necessary element of any estoppel.[369]

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365 Memorial on Annulment, ¶ 178, *quoting* **Ex. A-008**, Claimants' Rejoinder on Preliminary Objections, ¶ 22, and **Ex. A-011**, Claimants' Post-Hearing Brief, ¶ 39; *see also* Applicants' PHM, ¶¶ 11, 102.

366 Memorial on Annulment, ¶ 180, *quoting* **Ex. ALA-023**, Christoph H. Schreuer *et al*., *The ICSID Convention: A Commentary* (Cambridge University Press 2013) (extract) (***Schreuer***), p. 824.

367 Memorial on Annulment, ¶ 183; Applicants' response to Committee Question B.11, 15 September 2020.

368 Rejoinder on Annulment, ¶ 329.

369 Rejoinder on Annulment, ¶ 329.

276. *Finally,* the Respondent criticizes the Applicants' position as ignoring the Tribunal's express findings relevant to the estoppel issue. In addition to the points noted immediately above, the Respondent recalls the Tribunal's findings that SPL 256, and in particular Clause 22 thereof, gave rise to no expectation that a mining license would be granted at a future point;[370] and that the legally mandated prerequisites for obtaining a mining license were, objectively, not met.[371]

c) The Committee's analysis

277. The Committee begins by noting that no estoppel "claim" was advanced in the Arbitration. Rather, the Claimants advanced defensive arguments based on the principle of estoppel.[372]

278. Assuming without deciding that the Tribunal was required to address those arguments, as the Applicants contend,[373] the Committee finds that the Tribunal gave comprehensible reasons for rejecting them. In particular, the Tribunal found that:

a. reasonable reliance by the aggrieved party is an element of estoppel[374] (as, in fact, the Applicants accept);[375]

b. Clause 22 of SPL 256 gave the Claimants no right to a mining license, nor any legitimate expectation that they would receive one;[376]

c. the Claimants were aware that they were not entitled to a mining license when they applied for it, and therefore had no legitimate expectation that SML 351 was valid;[377] and

370 Rejoinder on Annulment, ¶ 381; Respondent's PHM, ¶ 145; Award, ¶¶ 78, 222-223.

371 Respondent's PHM, ¶ 145; Award, ¶¶ 222-223.

372 *See* Applicants' Demonstrative Exhibit Day 2, 11 September 2020, Slides 39-40, 42, 44-45, 47-49, 55-57.

373 **Ex. ALA-023**, Schreuer, p. 824.

374 Award, ¶¶ 77, 222.

375 Tr. Day 2, 80:20 – 81:4.

376 Award, ¶¶ 77-78.

377 Award, ¶ 223.

d. as a result, the Claimants could not establish the "reliance" element of an estoppel.[378]

279. The Tribunal's reasoning is sufficiently clear. The Claimants could not reasonably rely on SPL 256, SML 351 or anything else as giving them a legitimate entitlement to mine, and therefore an essential element of their estoppel argument was not established. Put differently, it is clear to the Claimants why they lost on this point, and that is all that Article 52(1)(e) requires.

5. Ground 2E: Allegedly incoherent and contradictory reasons for the alternative ruling on the merits

a) The Applicants' case

280. Ground 2E relates to Part 28 of the Award, entitled "Even If Not *Void Ab Initio*, The Tribunal Would Nevertheless Deny Protection To SML 351 On The Merits."[379] The Applicants argue that this section of the Award is contradictory and "frivolous" and should be annulled as a result, along with certain additional paragraphs of the Award.[380]

281. The Memorial on Annulment begins by noting that after dismissing the Claimants' claims on the basis that it lacked jurisdiction, the Tribunal went on to provide an alternative merits ruling in Part 28. That section of the Award, the Applicants argue, is exclusively concerned with Commissioner Masibo's discretion and whether his grant of SML 351 was a valid exercise of regulatory power. Finding that it was not, the Tribunal held in paragraph 387 as follows: "the Tribunal concludes on the merits that the Government has demonstrated that SML 351 is not in any event a protected investment."[381]

282. The Memorial on Annulment proceeds to argue that the conclusion in paragraph 387 of the Award is "incoherent and contradictory,"[382] because whether a protected investment exists is a matter of jurisdiction, not the merits. In the alternative, paragraph 387 is said to

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378 Award, ¶ 222.

379 Part 28 comprises paragraphs 366-387 of the Award.

380 Memorial on Annulment, ¶¶ 189-192; Applicants' response to Committee Question B.11, 15 September 2020.

381 Memorial on Annulment, ¶ 187, *quoting* Award, ¶ 387.

382 Memorial on Annulment, ¶ 188.

articulate an unintelligible conclusion, because it gives a jurisdictional reason for a merits ruling.[383] Citing *Continental Casualty v. Argentina*, the Memorial contends that on the basis of this contradictory reasoning, the Award as a whole should be annulled.[384]

283. The Applicants modified their submission somewhat in the Reply on Annulment. There, they deny that the Claimants ever submitted in the Arbitration that illegality could defeat the existence of a protected investment. To this they added that if (as the Tribunal held) there was no jurisdiction, then it was not open to the Tribunal to issue a merits ruling, with the result that the ruling would constitute a manifest excess of powers.[385] Finally, they submitted that in any event, Part 28 is solely concerned with SML 351 and does not constitute a ruling on SPL 256 or the other alleged investments.[386]

284. At the Hearing, in response to questions from the Committee, the Applicants generally maintained their arguments but further clarified their position. In particular, their PHM confirmed that the only legal basis invoked in respect of Ground 2E is Article 52(1)(e).[387]

b) The Respondent's case

285. The Respondent denies that the Applicants have established any annullable error. According to the Respondent, the Tribunal gave reasons for its alternative merits ruling: SML 351 was void or voidable; the Claimants knew the requirements of the law had not been complied with; they had no legitimate expectation that SML 351 was valid; and they procured it in a political end-run maneuver. Moreover, even if Commissioner Masibo had discretion to issue SML 351, which he did not, he abused that discretion. These reasons, the Respondent submits, were sufficient to justify dismissal of the claims as a matter of either jurisdiction, admissibility or the merits.[388]

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383 Memorial on Annulment, ¶¶ 181-192.

384 Memorial on Annulment, ¶¶ 189-190, *quoting* **Ex. ALA-009**, *Continental Casualty*, ¶ 103.

385 Reply on Annulment, ¶¶ 99-102.

386 Reply on Annulment, ¶ 35(a).

387 Applicants' PHM, ¶ 123.

388 Rejoinder on Annulment, ¶¶ 334-335.

286. The Respondent goes on argue that the Tribunal acted reasonably in framing Part 28 of the Award around the concept of the onus of proof. This, the Respondent avers, was entirely logical: the burden was on the Applicants to prove jurisdiction, but on the Respondent to establish, on the merits, that dismissal was warranted because the investment at issue was unlawful.[389] The latter is precisely what the Tribunal found in its alternative merits ruling.

c) The Committee's analysis

287. The Committee sees no reason in principle why an ICSID tribunal would lack the power to include an alternative ruling on the merits as part of an award dismissing a claim on jurisdictional grounds. We are aware of one ICSID tribunal that has done so, albeit in unusual procedural circumstances,[390] and other tribunals have taken arguably analogous approaches.[391] We need not reach any firm conclusion on that matter, however, given the Applicants' clarification in their PHM that Article 52(1)(e) is the only basis on which Part 28 of the Award is challenged.[392]

288. Nor does the Applicants' remaining complaint under Article 52(1)(e) require decision in the circumstances here. We have already rejected the other annulment grounds put forward by the Applicants in the earlier sections of this Decision. Where, as in the present case, an award is supported by two lines of reasoning, annulment is possible only if the *ad hoc* committee finds annullable error in both lines: otherwise the error, if any, is harmless.[393] Here, even if, *arguendo*, the Tribunal failed to meet the minimum standard of Article 52(1)(e) in respect of its alternative line of reasoning in Part 28 of the Award, the disposition reached in the Award would still stand.

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389 Rejoinder on Annulment, ¶ 336.

390 *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (Mason (P), Mikva, Fortier), ¶¶ 1-2, 29, 137, 217, 241-242.

391 *See* **Ex. RL-054***, Plama Consortium Ltd v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award, 27 August 2008 (Salans (P), van den Berg, Veeder), ¶¶ 146-147; **Ex. ALA-048**, *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06), Award, 27 June 2016 (Griffith (P), Newcombe, Reisman), ¶¶ 16(iii), 252. *See also Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, ¶ 252; *Tulip Real Estate Investment v. Republic of Turkey* (ICSID Case No. ARB/11/28), Award, 10 March 2014 (Griffith (P), Jaffe, Knieper), ¶¶ 327, 361, 366-367, and p. 138; **Ex. ALA-008**, *Tulip*, ¶¶ 171-201.

392 *See* ¶ 284, *supra*.

393 *Compare* **Ex. ALA-008**, *Tulip*, ¶ 111; **Ex. RL-242**, *Daimler*, ¶ 135. *See also* ¶ 198, *supra*.

C. THE PARTIES' OTHER ARGUMENTS

289. The Parties advanced several other arguments in their memorials and at the Hearing. The Respondent argued, for example, that some elements of the alleged annulment grounds had been asserted out of time; and that the Committee should exercise its discretion not to annul the Award even if an annulment ground were found to exist.[394] Meanwhile, the Applicants argued that the Award contains many formal and substantive errors, reflecting a "low quality of decision making," and is unjust in its result.[395] The Committee need not address the substance of these arguments: the Respondent's, because it has already prevailed in this proceeding; and those of the Applicants because, as they appear to recognize, the pleaded points do not constitute annulment grounds.[396]

290. We pause, however, to note a submission made by the Applicants in their PHM, to the effect that the Tribunal's jurisdictional ruling on SML 351, if followed by other tribunals, would have negative consequences "for the ICSID system" and prejudice mining sector claimants.[397] That argument is colorable; but this Committee is not a policy-making body. As repeatedly underscored above, our role in this proceeding is far more circumscribed: we are charged only with deciding whether the Tribunal committed a *manifest* excess of powers, or provided reasoning so inadequate that it cannot be understood by the Parties. For the reasons given above, we conclude that the Applicants have not satisfied the heavy burden of establishing either circumstance. It follows that the Application for Annulment must be dismissed in its entirety.

V. COSTS

291. On 9 November 2020, both Parties filed their respective Submissions on Costs pursuant to Arbitration Rules 28(2) and 53, paragraph 20 of Procedural Order No. 1, and paragraph 7 of Procedural Order No. 4 as amended.

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394 Counter-Memorial on Annulment, ¶¶ 337-338; Rejoinder on Annulment, ¶¶ 12(2), 24-35, 462.

395 Memorial on Annulment, ¶¶ 193-200.

396 *See*, *e.g.*, Memorial on Annulment, ¶ 198.

397 Applicants' PHM, ¶ 60; *see also id*., ¶¶ 61-62.

292. The Applicants and the Respondent each submit that this Committee should order the other Party to pay all costs associated with this annulment proceeding. The Applicants quantify their total costs at US$ 1,019,160.00, plus interest, broken down as follows:

CATEGORY	AMOUNT
ICSID fees and advance payments[398]	US$ 555,000.00
Legal fees	US$ 463,680.00
Disbursements	US$ 480.00

293. The Respondent, meanwhile, sets out the amounts it claims as follows:

CATEGORY	AMOUNT
Legal fees and expenses (from 27 June 2019 to 15 November 2019)	US$ 121,112.00
Legal fees and expenses (from 27 November 2019 forward)	GBP 775,209.39
Party expenses incurred by the Republic of Kenya	US$ 20,326.29

294. The costs of this annulment proceeding, including the fees and expenses of the Committee members, ICSID's administrative fees, and direct expenses (the ***ICSID/Committee Costs***), amount to US$ 415,304.97:

398 The advance payments made by the Applicants amount to US$ 530,000.

CATEGORY	AMOUNT
Committee's fees and expenses	US$ 305,634.84
ICSID's administrative fees	US$ 84,000.00
Direct expenses	US$ 25,670.13
Total	US$ 415,304.97

295. Article 61(2) of the ICSID Convention provides, in relevant part, that

> 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.

296. By virtue of Article 52(4) of the ICSID Convention, Article 61(2) applies *mutatis mutandis* to annulment proceedings. As its text reflects, Article 61(2) provides the Committee with broad discretion in allocating the costs of an annulment proceeding and the parties' legal costs and other expenses.[399]

297. The recent trend in ICSID annulment proceedings, with which this Committee agrees, is to apply the "costs follow the event" principle and apportion costs based upon the relative success of the parties to the proceeding[400] – tempered, however, by the exercise of the Committee's broad discretion in the particular circumstances of a given case. Here, the Respondent fully prevailed on the merits of the Application for Annulment. On that basis,

399 *See* **Ex. RL-239**, *Churchill*, ¶ 262.

400 *See* **Ex. RL-235**, ICSID Background Paper on Annulment, ¶ 65.

the Committee decides that the Applicants alone shall bear the ICSID/Committee Costs, which they have already advanced in full.[401]

298. The Committee reaches a different decision with respect to the Parties' legal fees, expenses and disbursements, however. Though ultimately unsuccessful, the Applicants' arguments for annulment were colorable and asserted in good faith. Furthermore, the Applicants prevailed on their application to continue the stay of enforcement.[402] In these circumstances, and exercising its discretion, the Committee declines to make any award in respect of the Parties' legal fees and other costs.

401 A copy of the final financial statement in this case will be provided to the Parties separately. The remaining balance will be reimbursed to the Applicants.

402 Decision on Stay of Enforcement, ¶ 67.

VI. DECISION

299. For the foregoing reasons, the Committee unanimously decides as follows:

a) The Application for Annulment of the Award of 22 October 2018 rendered in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) is dismissed;

b) The costs of this proceeding (*i.e.*, the ICSID/Committee Costs as defined above) shall be borne by the Applicants and have already been paid by them alone. The Committee makes no other award in respect of the Parties' legal or other costs;

c) The continuation of the stay of enforcement of the Award granted by the Committee on 23 August 2019 is lifted; and

d) All other claims or contentions of the Parties are rejected.

Ms. Dorothy Ufot, SAN
Member of the *ad hoc* Committee

Date:

Mr. Cavinder Bull, SC
Member of the *ad hoc* Committee

Date:

Mr. D. Brian King
President of the *ad hoc* Committee

Date: 12 March 2021

VI. DECISION

299. For the foregoing reasons, the Committee unanimously decides as follows:

a) The Application for Annulment of the Award of 22 October 2018 rendered in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) is dismissed;

b) The costs of this proceeding (*i.e.*, the ICSID/Committee Costs as defined above) shall be borne by the Applicants and have already been paid by them alone. The Committee makes no other award in respect of the Parties' legal or other costs;

c) The continuation of the stay of enforcement of the Award granted by the Committee on 23 August 2019 is lifted; and

d) All other claims or contentions of the Parties are rejected.

Ms. Dorothy Ufot, SAN
Member of the *ad hoc* Committee

Date:

Mr. Cavinder Bull, SC
Member of the *ad hoc* Committee

Date: 16 March 2021

Mr. D. Brian King
President of the *ad hoc* Committee

Date:

VI. DECISION

299. For the foregoing reasons, the Committee unanimously decides as follows:

a) The Application for Annulment of the Award of 22 October 2018 rendered in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) is dismissed;

b) The costs of this proceeding (*i.e.*, the ICSID/Committee Costs as defined above) shall be borne by the Applicants and have already been paid by them alone. The Committee makes no other award in respect of the Parties' legal or other costs;

c) The continuation of the stay of enforcement of the Award granted by the Committee on 23 August 2019 is lifted; and

d) All other claims or contentions of the Parties are rejected.

Ms. Dorothy Ufot, SAN
Member of the *ad hoc* Committee

Date: 19/3/2021

Mr. Cavinder Bull, SC
Member of the *ad hoc* Committee

Date:

Mr. D. Brian King
President of the *ad hoc* Committee

Date: