

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH  
THE AGREEMENT BETWEEN THE UNITED REPUBLIC OF TANZANIA AND THE  
ITALIAN REPUBLIC ON THE PROMOTION AND PROTECTION OF INVESTMENTS,  
DATED 21 AUGUST 2001**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW, 1976**

**PCA CASE NO. 2018-9**

**-between-**

**SUNLODGES LTD and  
SUNLODGES (T) LIMITED  
(the “Claimants”)**

**-and-**

**THE UNITED REPUBLIC OF TANZANIA  
(the “Respondent,” and, together with the Claimants, the “Parties”)**

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**AWARD**

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**The Arbitral Tribunal**

*Dr Veijo Heiskanen (Presiding Arbitrator)*

*Sir David A R Williams QC*

*Dr Ucheora Onwuamaegbu*

**Secretary to the Tribunal**

*Mr José Luis Aragón Cardiel*

Permanent Court of Arbitration

**20 December 2019**

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## DEFINED TERMS

<b>(Amended) GimcoAfrica Valuation Report</b>	Valuation report prepared by GimcoAfrica in October 2011 (excluding moveable assets)
<b>Application</b>	The Claimants' application to vacate the Quantum Hearing, dated 29 July 2019
<b>Assessment Regulations</b>	Land (Assessment of Value for Compensation) Regulations, 2001
<b>BIT</b>	Bilateral Investment Treaty
<b>Business Plan</b>	Business plan submitted by the Claimants before the TIC together with their first application for a Certificate of Incentives
<b>Certificates of Incentives</b>	Two documents issued by the TIC to Sunlodges Tanzania in May 2003 (the " <b>First Certificate of Incentives</b> ") and in September 2006 (the " <b>Second Certificate of Incentives</b> ") granting certain tax and tariffs incentives "to diversify the Estate into cattle ranch and maize farm
<b>Claimants</b>	Sunlodges Ltd and Sunlodges (T) Limited
<b>Claims Regulations</b>	Land (Compensation Claims) Regulations, 2001
<b>Company Shares</b>	Head of loss claimed in the alternative to the value of the Estate and corresponding to the value of Sunlodges Tanzania's shares
<b>Comparator Investors</b>	According to the Claimants, domestic investors in like circumstances to the Claimants (i.e. nationals of Tanzania who are engaged in agricultural activities in Tanzania)
<b>Conditions of Rights of Occupancy Regulations</b>	Land (Conditions of Rights of Occupancy) Regulations, 2001
<b>Daily Reports</b>	Reports recording the daily activity in the Estate between 2003 and 2011
<b>Dangote Industries</b>	Dangote Industries Limited, a Nigerian company ultimately owned by Mr Aliko Dangote, a Nigerian national
<b>Denmark-Tanzania BIT</b>	Agreement between the Government of the United Republic of Tanzania and the

Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments, signed on 22 April 1996

<b>Disturbance Allowance</b>	The Claimants' head of claim under section 3(1)(g) of the Land Act and Regulation 10 of the Assessment Regulations
<b>DRC</b>	Depreciated replacement cost
<b>Estate</b>	Agricultural estate situated on the east coast of Tanzania in the Mtwara region and known as the Mikindani or the Kabisela Estate
<b>FET</b>	Fair and equitable treatment
<b>Fifth Notice of Revocation</b>	Notice of revocation dated 7 June 2011 in relation to EP 585b (one of the land plots covered by one of the three Rights of Occupancy under Certificate of Title No. 3985)
<b>First Contempt Application</b>	Application filed by Sunlodges Tanzania before the High Court of Tanzania on 17 November 2011 requesting a declaration that the District Executive Director of Mtwara Council was in contempt of the Interim Injunction
<b>First Notice of Revocation</b>	Notice of revocation dated 9 May 2011 and served to Sunlodges Tanzania on 12 May 2011, in relation to right of occupancy 7877 (under Certificate of Title No. 2769) and right of occupancy 21272 (under Certificate of Title No. 15501)
<b>Fourth Notice of Revocation</b>	Notice of revocation dated 7 June 2011 in relation to EP 585a (one of the land plots covered by one of the three Rights of Occupancy under Certificate of Title No. 3985)
<b>FPS</b>	Full protection and security
<b>Gazette</b>	Official Gazette of the United Republic of Tanzania
<b>GimcoAfrica</b>	GimcoAfrica Limited



<b>GimcoAfrica Valuation Report</b>	Valuation report prepared by GimcoAfrica in October 2011
<b>Government Valuation Reports</b>	Two valuation reports dated 27 August 2012 and prepared by the Valuation Section of Mtwara District Council
<b>ICJ</b>	International Court of Justice
<b>High Court</b>	High Court of Tanzania
<b>Inspection Report of May 2011</b>	Inspection report allegedly produced as a result of the Prior Inspection on the Estate
<b>Interim Injunction</b>	Order for the maintenance of the <i>status quo</i> dated 13 October 2011 and issued by the Tanzanian judge assigned to the Judicial Review Proceedings
<b>Interim Relief Application</b>	Application by Sunlodges Tanzania for an interim prohibition to prevent its eviction from the Estate pending the Judicial Review Proceedings
<b>Italy-Tanzania BIT</b>	Agreement between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments, signed on 21 August 2001 and entered into force on 25 April 2003, also referred to as the Treaty
<b>Judicial Review Judgement</b>	Judgement issued on 23 July 2012 by the High Court of Tanzania in the Judicial Review Proceedings
<b>Judicial Review Proceedings</b>	Proceedings before the High Court of Tanzania captioned <i>Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development &amp; Ors</i> , Miscellaneous Land Cause No. 6 of 2011
<b>Land Acquisition Act</b>	Land Acquisition Act, 1967
<b>Land Act</b>	Land Act, 1999
<b>May 2011 Inspection</b>	Inspection that allegedly took place in the Estate on 2 May 2011 by an Authorized Officer of Mtwara District Council

<b>MFN</b>	Most favoured nation
<b>Notice of Dispute</b>	Letter dated 1 March 2017 from the Claimants to the High Commission of Tanzania in the United Kingdom and the Attorney General of Tanzania
<b>Notices of Revocation</b>	Together, the First, Second, Third, Fourth and Fifth Notices of Revocation
<b>Oral Hearing</b>	Hearing held on 3 to 6 June 2019 at the Peace Palace, The Hague, the Netherlands
<b>PCA</b>	Permanent Court of Arbitration
<b>Progress Reports</b>	Two progress reports submitted by the Claimants to the TIC on 15 December 2003 and 24 May 2006 in connection with the First Certificate of Incentives
<b>Quantum Hearing</b>	Hearing scheduled on 24 September 2019 and vacated on 19 September 2019
<b>Rebutter</b>	Respondent's Rebutter, dated 3 May 2019
<b>Receiver</b>	The Receiver of Karimjee Agriculture Limited (Coopers & Lybrand), who held title over the Estate until its transfer to Sunlodges Tanzania
<b>Rejoinder</b>	The Respondent's Statement of Rejoinder, dated 22 February 2019
<b>Reply</b>	The Claimants' Statement of Reply, dated 18 December 2018
<b>Reply Submissions on Costs</b>	The Claimants' Reply Submission on Costs and the Respondent's Reply Submission on Costs, both dated 17 October 2019
<b>Request for Interim Measures</b>	The Claimants' request for interim measures, dated 21 August 2019
<b>Respondent</b>	United Republic of Tanzania
<b>Request for Interim Measures</b>	The Claimants' request for interim measures, dated 21 August 2019
<b>Revocation Decision</b>	Decision by the President of Tanzania on 6 September 2011 whereby Certificates of Title Nos. 15501, 2769, 3550, and 3985 were revoked

“due to violation against terms and conditions of ownership”

**Second Contempt Application**

Application filed by Sunlodges Tanzania before the High Court of Tanzania on 9 February 2012 requesting a declaration that the Regional Commissioner of Mtwara Region was in contempt of the Interim Injunction

**Second Notice of Revocation**

Notice of revocation dated 7 June 2011 in relation to right of occupancy 2662 (one of the three Rights of Occupancy under Certificate of Title No. 3985)

**Special Committee**

Special Committee appointed by the Permanent Secretary for the Ministry of Lands, Housing and Human Settlement tasked with inspecting the development of the Estate in July 2011

**Special Committee Inspection Report**

Inspection report allegedly prepared by the Special Committee as a result of its inspection in the Estate in July 2011

**Statement of Claim**

The Claimants’ Statement of Claim, dated 22 June 2018

**Statement of Defence**

The Respondent’s Statement of Defence and Counter Claim, dated 26 October 2018

**Submissions on Costs**

The Claimants’ Submission on Costs and the Respondent’s Submission on Costs, both dated 10 October 2019

**Sunlodges BVI**

The First Claimant, Sunlodges Ltd, a company incorporated in the British Virgin Islands

**Sunlodges BVI Loan**

Several loans from Sunlodges BVI to Sunlodges Tanzania meant to fund the operating costs of the Estate

**Sunlodges Tanzania**

The Second Claimant, Sunlodges (T) Limited, a company incorporated in Tanzania

**Surrejoinder**

The Claimants’ Surrejoinder, dated 10 April 2019

**Switzerland-Tanzania BIT**

Agreement between the Swiss Confederation and the United Republic of Tanzania on the Promotion and Reciprocal Protection of

Investments, signed on 8 April 2004 and which entered into force on 6 April 2006

**Tanzania**

The Respondent, the United Republic of Tanzania

**Tanzania Investment Act**

Tanzania Investment Act, 1997

**Third Notice of Revocation**

Notice of Revocation dated 7 June 2011 in relation to right of occupancy 2664 (one of the three Rights of Occupancy under Certificate of Title No. 3985)

**TIC**

Tanzania Investment Centre

**TRA**

Tanzania Revenue Authority

**Treaty**

Agreement between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments, signed on 21 August 2001 and entered into force on 25 April 2003, also referred to as the Italy-Tanzania BIT

**DRAMATIS PERSONAE**

- Ms Evelyn Baruti Mugasha** Chief Government Valuer in the Ministry of Lands, Housing and Human Settlements Development  
She has submitted two witness statements in this arbitration (**RWS-3** and **RWS-6**)
- Ms Rexella D Hodge** Managing Director of Vistra (BVI) Limited and a director of Vistra Nominees (BVI) Ltd, two companies that provide nominee shareholder services to Sunlodges BVI  
She has submitted one witness statement in this arbitration (**CWS-4**)
- Mr Gasper Vitallis Luanda** Assistant Commissioner for Lands for Southern Zone at Mtwara  
He has submitted two witness statements in this arbitration (**RWS-2** and **RWS-5**)
- Mr Ali Maawiya** Shareholder and director of Sunlodges Tanzania and Mr Paglieri's assistant
- Mr Sultan Mundeme** Together with Mr James Swilla, author of GimcoAfrica Ltd Valuation of Mikindani Estate (**C-194**)
- Mr Oscar Anthony Ng'itu** Director of Nanyamba Town Council in Tanzania and former Council Solicitor and Head of Legal Unit of Mtwara District Council. He acted as District Executive Director of Mtwara District Council on several dates between 2011 and 2014  
He has submitted two witness statements in this arbitration (**RWS-1** and **RWS-4**)
- Mr Franco Paglieri** According to the Claimants, an Italian national that has always directed, managed and controlled Sunlodges BVI and Sunlodges Tanzania  
He has submitted three witness statements in this arbitration (**CWS-1**, **CWS-2** and **CWS-5**)
- Ms Sally Perry** Shareholder and director of Sunlodges Tanzania  
She has submitted one witness statement in this arbitration (**CWS-3**)
- Mr James Swilla** Together with Mr Sultan Mundeme, author of GimcoAfrica Ltd Valuation of Mikindani Estate (**C-194**)

## **I. INTRODUCTION**

### **A. THE PARTIES**

1. The Claimants are (i) Sunlodges Ltd, a company incorporated under the laws of the territory of the British Virgin Islands (“**Sunlodges BVI**”); and (ii) Sunlodges (T) Limited (“**Sunlodges Tanzania**”), a company incorporated under the laws of Tanzania (together, the “**Claimants**”).
2. The Claimants are represented in this arbitration by:

Mr Matthew Coleman  
Mr Thomas Innes  
Steptoe & Johnson LLP  
5 Aldermanbury Square  
London EC2V 7HR  
United Kingdom

3. The Respondent in this arbitration is the United Republic of Tanzania (“**Tanzania**” or the “**Respondent**”).
4. The Respondent is represented in this arbitration by:

Dr Clement Mashamba, Solicitor General  
Mr Gabriel Malata, Deputy Solicitor General  
Mr George Mandepo, Acting Director of Arbitration  
Mr Vicent Tangoh, Acting Assistant Director of International Arbitration  
Mr Michael Luena, Director of Legal Service  
Ms Neisha Shao, State Attorney  
Ms Consesa Kahendaguza, State Attorney  
Ms Rehema Mtulya, State Attorney  
10 Kivukoni Road  
P.O. Box 17554  
Dar es Salaam  
United Republic of Tanzania

### **B. THE DISPUTE**

5. The dispute arises out of the Respondent’s decision in September 2011 to revoke the Claimants’ title to an agricultural estate situated on the east coast of Tanzania in the region of Mtwara, referred to as the Mikindani Estate or the Kabisela Estate (the “**Estate**”).<sup>1</sup>

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<sup>1</sup> Statement of Claim, paras 4, ; *also* Google Earth Map of the Estate and surrounding area, undated, **C-102**.

6. The Claimants contend that the Respondent's decision to revoke the title amounts to an unlawful expropriation of their investments in Tanzania and to other breaches of the Agreement Between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments (the "**Treaty**" or the "**Italy-Tanzania BIT**"),<sup>2</sup> and seek compensation for the losses they allegedly sustained as a result of these breaches.<sup>3</sup>
7. The Respondent characterizes its decision to revoke the Claimants' title over the Estate as a termination of their Rights of Occupancy and denies that it qualifies as an expropriation.<sup>4</sup> According to the Respondent, the decision was taken in the wake of the Claimants' failure to comply with the terms and conditions of occupancy of the Estate<sup>5</sup> and denies having breached Tanzanian law, customary international law or the Treaty.<sup>6</sup>

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<sup>2</sup> Statement of Claim, paras 3-5; Italy-Tanzania BIT, 21 August 2001, **CLA-14A** and **CLA-14B**.

<sup>3</sup> Statement of Claim, para. 401.

<sup>4</sup> Statement of Defence, para. 237.

<sup>5</sup> Statement of Defence, para. 52.

<sup>6</sup> Statement of Defence, para. 343.

## **II. PROCEDURAL HISTORY**

### **A. NOTICE OF DISPUTE**

8. By letter dated 1 March 2017, the Claimants informed the High Commission of Tanzania in the United Kingdom and the Attorney General of Tanzania of their claims under the Treaty and invited Tanzania to initiate settlement negotiations (the “**Notice of Dispute**”).<sup>7</sup>

### **B. COMMENCEMENT OF THE ARBITRATION**

9. By a Notice of Arbitration dated 5 September 2017 and received by the Respondent on the same date, the Claimants commenced arbitration proceedings against the Respondent pursuant to Article 8 of the Treaty and the Arbitration Rules of the United Nations Commission on International Trade Law (1976) (the “**UNCITRAL Rules**”).

### **C. CONSTITUTION OF THE TRIBUNAL**

10. In their Notice of Arbitration, the Claimants appointed Sir David A. R. Williams QC, a national of New Zealand, as the first arbitrator.
11. On 18 October 2017, the Claimants requested the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) to designate an appointing authority pursuant to Article 7(2)(b) of the UNCITRAL Rules.
12. On 8 November 2017, the Secretary-General of the PCA designated Professor Fabien G linas, a national of Canada, as appointing authority for all purposes under the UNCITRAL Rules.
13. On 30 November 2017, Professor G linas appointed Mr Ucheora Onwuamaegbu, a dual Nigerian and British national, as the second arbitrator.
14. On 2 January 2018, the co-arbitrators appointed Dr Veijo Heiskanen, a Finnish national, as the presiding arbitrator.

### **D. ADOPTION OF THE TERMS OF APPOINTMENT AND PROCEDURAL ORDER NO. 1**

15. On 20 January 2018, the Tribunal wrote to the Parties, proposing that an organizational meeting be held with the Parties to discuss and agree on a first procedural order as well as a procedural timetable for the arbitration. The Parties were invited to confer and inform the Tribunal of any agreement reached on the date of such meeting by 29 January 2018. The Tribunal indicated that

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<sup>7</sup> Statement of Claim, para. 161; Letter from Steptoe & Johnson to Tanzania, 1 March 2017, **C-2**.



it intended to prepare and circulate a draft Terms of Appointment of the Tribunal as well as a draft of the first procedural order for the Parties' review and comment.

16. On 23 January 2018, the Tribunal circulated draft Terms of Appointment and a draft of Procedural Order No. 1. The Tribunal encouraged the Parties to liaise and seek agreement on any proposed amendments to the drafts and, to the extent the Parties were unable to agree, set out their proposed amendments separately.
17. On 29 January 2018, the Respondent wrote to the Tribunal, requesting that the arbitration proceedings be suspended to allow the Parties to enter into settlement negotiations.
18. On 6 February 2018, the Claimants replied to the Respondent's letter of 29 January 2018, requesting that the Respondent's request for suspension be dismissed.
19. On 13 February 2018, the Tribunal denied the Respondent's request for suspension, noting that the evidence indicated that the Claimants had invited the Respondent to engage in negotiations during the six-month cooling-off period under the Treaty, but the Respondent had failed to respond. The Tribunal indicated that its decision was without prejudice to the Respondent's right to raise any preliminary objections it might wish to raise, if supported with additional evidence.
20. On 19 February 2018, the Tribunal held a procedural meeting by telephone conference call to discuss procedural details, including draft Terms of Appointment and a draft Procedural Order No. 1. Counsel for the Claimants participated in the telephone conference, while the Respondent, although duly invited, did not participate.
21. On 22 February 2018, the Tribunal circulated revised draft Terms of Appointment. The Claimants provided written comments on the draft on 13 March 2018, and the Respondent submitted its comments on 6 March and 13 April 2018.
22. On 4 May 2018, the Tribunal circulated a revised draft of Procedural Order No. 1, incorporating the results of the procedural meeting held on 19 February 2018, and invited further comments from the Parties on the revised draft.
23. On 15 May 2018, the Tribunal issued Procedural Order No. 1, establishing the timetable for the proceedings and setting out the rules of procedure of the arbitration.
24. On 30 May 2018, the Tribunal circulated the Terms of Appointment as executed by the Parties and the members of the Tribunal.

**E. WRITTEN SUBMISSIONS**

25. On 22 June 2018, the Claimants submitted their Statement of Claim (the “**Statement of Claim**”).
26. On 26 October 2018, the Respondent submitted its Statement of Defence and Counter Claim (the “**Statement of Defence**”). A revised version of the Statement of Defence was filed on 30 October 2018.
27. On 18 December 2018, the Claimants submitted their Statement of Reply (the “**Reply**”).
28. On 22 February 2019, the Respondent submitted its Statement of Rejoinder (the “**Rejoinder**”).
29. On 15 March 2019, the Claimants requested leave to reply to certain evidence and arguments which, in their view, had been filed out of time by the Respondent in its Rejoinder or, in the alternative, requested their exclusion from the record.
30. On 22 March 2019, the Respondent provided its comments on the Claimants’ request of 15 March 2019.
31. On 26 March 2019, the Tribunal decided on the Claimants’ request of 15 March 2019 and invited further submissions from the Parties.
32. On 29 March 2019, the Respondent produced certain Italian statutory texts.
33. On 10 April 2019, the Claimants submitted their Surrejoinder (the “**Surrejoinder**”).
34. On 3 May 2019, the Respondent submitted its Rebutter (the “**Rebutter**”).

**F. THE ORAL HEARING**

35. On 15 May 2019, the Parties and the Tribunal held a telephone conference in preparation for the Oral Hearing scheduled for 3-7 June 2019 (the “**Oral Hearing**”).
36. On 17 May 2019, the Tribunal issued Procedural Order No. 2, convening the Oral Hearing, establishing its place, time, agenda, and other technical and ancillary aspects thereof.
37. The Oral Hearing was held on 3-6 June at the Peace Palace, The Hague, the Netherlands. The following persons attended:

**The Tribunal**

Dr Veijo Heiskanen (Presiding Arbitrator)  
Sir David A R Williams QC  
Mr Ucheora Onwuamaegbu

**The Claimants**

Mr Franco Paglieri  
Ms Sally Perry  
(*Representatives and Fact Witnesses*)

Mr Matthew Coleman  
Mr Thomas Innes  
Ms Yuliya Luy  
(*Steptoe & Johnson LLP*)

**The Respondent**

Hon Dr Clement Mashamba, Solicitor General  
Mr George Nathaniel Mandepo  
Mr Michael Luena  
Mr David Zacharia Kakwaya  
Mr Arnold Ainory Gesase  
Ms Consesa Kahendaguza  
Ms Neisha Shao  
Ms Rehema Mtulya  
Ms Hellen Njau  
Mr Festo Nyakunga  
(*State Representatives and Counsel*)

H.E. Ambassador Irene F. M. Kasyanju  
Ms Naomi Z. Mpemba  
(*Embassy of the United Republic of Tanzania in the Kingdom of the Netherlands*)

Mr Oscar Ng'itu  
Mr Gasper Luanda  
(*Fact Witnesses*)

**Permanent Court of Arbitration**

Mr José Luis Aragón Cardiel, Legal Counsel  
Ms Elena Laura Álvarez Ortega, Assistant Legal Counsel  
Ms Marihu Paola Contreras Medina, Assistant Legal Counsel

**Court Reporter**

Mr David Kasdan  
(*Worldwide Reporting LLP*)

38. During the Oral Hearing, the fact witnesses were examined in the following order:

**For the Claimants**

Mr Franco Paglieri  
Ms Sally Perry

**For the Respondent**

Mr Oscar Ng'itu  
Mr Gasper Luanda

**G. POST-HEARING PROCEEDINGS**

39. On 6 June 2019, the Tribunal invited the Parties' comments on whether post-hearing submissions would be necessary. The Respondent submitted its comments on the issue on 10 June 2019, and the Claimants provided their comments on 14 June 2019.
40. On 17 June 2019, the Tribunal called Mr James Swilla and Mr Sultan Mundeme of GimcoAfrica (authors of GimcoAfrica Ltd Valuation of Mikindani Estate, C-194) and Ms Evelyne Baruti Mugasha (Chief Government Valuer of Tanzania and author of witness statements RWS-3 and RWS-6) for questioning at a one-day hearing (the "**Quantum Hearing**"). The Tribunal also noted that the Parties would have an opportunity to examine these individuals at the Quantum Hearing on the evidence provided in response to the Tribunal's questioning, and that it would identify issues or topics that it wished to explore at the hearing.
41. On 26 June 2019, following consultations with the Parties, the Tribunal fixed the date (i.e. 24 September 2019) and venue of the Quantum Hearing (The Hague).
42. On 29 July 2019, the Claimants informed the Tribunal that Messrs Mundeme and Swilla were unwilling to attend the Quantum Hearing and submitted an application requesting the Tribunal to vacate the Quantum Hearing (the "**Application**").
43. On 15 August 2019, the Respondent submitted its comments on the Application.
44. On 16 August 2019, the Claimants requested leave to reply to the Respondent's comments of 15 August 2019, which the Tribunal granted on the same day. The Tribunal also requested the Claimants to indicate whether Messrs Mundeme and Swilla would be available to answer questions from the Tribunal in writing instead of attending the Quantum Hearing.
45. On 21 August 2019, the Claimants submitted their reply to the Respondent's comments, which included a request for interim measures of protection (the "**Request for Interim Measures**").
46. On 28 August 2019, the Respondent submitted its comments on the Claimants' reply of 21 August 2019.
47. On 3 September 2019, the Tribunal informed the Parties that it had decided to vacate the date reserved for the Quantum Hearing, reserving its decision on whether to hold a hearing on certain matters of valuation and quantum until a later stage.
48. On 4 September 2019, the Respondent invited the Tribunal to summon all valuation witnesses.

49. On the same date, the Claimants filed two communications addressed by Mr Mundeme to the Claimants' representatives (C-338 and C-339), confirming that he was "willing and ready to answer questions from the Tribunal in writing instead of attending the [Quantum Hearing]." The Claimants also provided comments on Mr Mundeme's communications.
50. On 6 September 2019, the Respondent submitted additional comments on the Claimants' Application and Request for Interim Measures.
51. On 19 September 2019, the Tribunal issued Procedural Order No. 3. whereby the Tribunal (i) decided to vacate the Quantum Hearing; (ii) rejected the Claimants' Request for Interim Measures; (iii) reminded the Parties of their ongoing duty not to aggravate the dispute and to arbitrate in good faith; (iv) reserved its decision on costs relating to the Claimants' Application and Request for Interim Measures; and (v) rejected all other requests made in connection with the Claimants' Application and Request for Interim Measures. In connection with the Application, the Tribunal concluded, *inter alia*, as follows:

39. The Tribunal notes that, while Mr Mundeme has recently indicated to the Claimants' counsel that he would be available to answer questions from the Tribunal in writing, he would not be available to attend a hearing, due to his "poor and failing health." Mr Swilla, the other author of the GimcoAfrica Report, has not confirmed his availability for either purpose. It is therefore clear that neither Mr Mundeme nor Mr Swilla is available to attend the Quantum Hearing, and while Mr Mundeme has indicated that he would be willing to provide answers to the Tribunal's questions in writing, Mr Swilla has not articulated any reason why he would not be able to appear and has repeatedly failed to communicate with the Claimants' counsel on this matter. In the circumstances, the Tribunal decides to vacate the Quantum Hearing. In reaching this conclusion, the Tribunal does not find it necessary to make any determinations regarding the reasons for Messrs Swilla and Mundeme's unavailability. The Tribunal merely notes that it is satisfied, based on the evidence before it, that the unavailability of Messrs Swilla and Mundeme is not due to the Claimants' lack of effort to procure their attendance at the Quantum Hearing. In the circumstances, the Tribunal need not address the Respondent's argument that the Tribunal lacks jurisdiction to deal with human rights issues.

40. The remaining issue is whether the Tribunal should put questions to Mr Mundeme and Ms Mugasha in writing. The Tribunal considers that this would not be appropriate in the circumstances. First, according to the GimcoAfrica report, it was prepared "for and on behalf of GimcoAfrica Limited by" Mr James Swilla and "certified by" Mr Mundeme. Mr Swilla is therefore at least a co-author if not the main author of the report, and it would be inappropriate for the Tribunal to question only one of the two co-authors of a report that does not appear to indicate any division of labour between them. In the circumstances, the value of any additional evidence that could be obtained by further questioning of Mr Mundeme would be of limited, if any, value. As to Ms Mugasha, while it appears that she would be available to respond to the Tribunal's written questions, the unavailability of Messrs Mundeme and Swilla raises issues of due process and equal treatment of the Parties. The Tribunal is also concerned that written questions would not allow testing of the evidence as would occur during an oral hearing.

52. By letter dated 26 September 2019, the Tribunal invited the Parties to file submissions on the costs incurred in this arbitration.

53. On 10 October 2019, the Parties simultaneously filed their submissions on costs (the “**Submissions on Costs**”).
54. On 17 October 2019, the Parties simultaneously filed their comments on the other side’s submission on costs (the “**Reply Submissions on Costs**”).

### III. FACTUAL BACKGROUND

55. This section summarizes the factual background of the dispute based on the Parties' submissions. It provides the context to the Tribunal's decision and is not intended to set out in full the Parties' submissions on the facts or the supporting evidence. Also, as the Parties' characterizations of key events differ in significant respects, these differences are noted as they arise.

#### A. THE PARTIES AND RELATED INDIVIDUALS AND ENTITIES

56. This section identifies the key actors and State instrumentalities involved in the present dispute.

##### 1. The Claimants and Mr Paglieri

57. The Claimants contend that they have been directed and controlled since their incorporation by Mr Franco Paglieri ("**Mr Paglieri**"), an Italian national<sup>8</sup> born in Genoa (Italy) in 1946 to Italian parents.<sup>9</sup> According to the Claimants, Mr Paglieri has exercised control through his ownership of all of the issued capital of Sunlodges BVI through a professional nominee company,<sup>10</sup> with Sunlodges BVI owning in turn 75% of the issued capital of Sunlodges Tanzania.<sup>11</sup> Mr Paglieri also claims to own 0.002% of Sunlodges Tanzania directly.<sup>12</sup>

58. The First Claimant, Sunlodges BVI, was incorporated in the British Virgin Islands on 29 November 1996 by Mr Paglieri.<sup>13</sup>

59. The Second Claimant, Sunlodges Tanzania, was incorporated in Tanzania on 1 October 1997<sup>14</sup> for the purpose of acquiring the Estate.<sup>15</sup> According to the Claimants, Sunlodges Tanzania has never held any assets other than the Estate and other ancillary assets (such as livestock, farm machinery and vehicles) used in the Estate's business.<sup>16</sup>

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<sup>8</sup> Statement of Claim, para. 6; Franco Paglieri's birth certificate with English translation (extract dated) 24 April 1992, **C-6**; Franco Paglieri's Italian passport, issued 26 July 2012, **C-7**.

<sup>9</sup> Statement of Claim, para. 6; First Witness Statement of Mr. Franco Paglieri, 21 June 2018, **CWS-1** ("**Paglieri I**"), para. 4.

<sup>10</sup> Statement of Claim, paras 6, 11; Sunlodges BVI's Share Register, 20 June 2018, **C-28**; Paglieri I, paras 11-14.

<sup>11</sup> Statement of Claim, para. 6; Paglieri I, para. 1.

<sup>12</sup> Statement of Claim, para. 6; Paglieri I, para. 1.

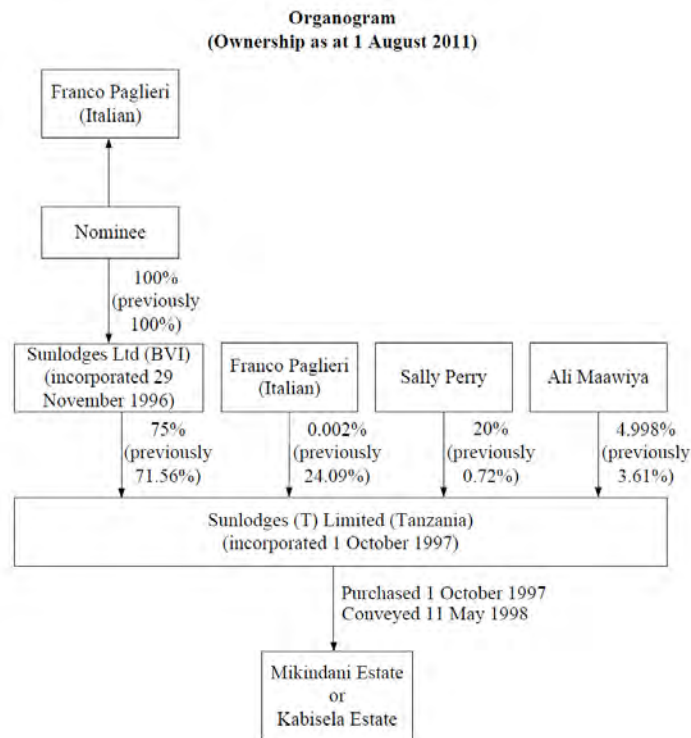
<sup>13</sup> Statement of Claim, para. 11; Sunlodges BVI's Certificate of Incorporation, 29 November 1996, **C-10**; Paglieri I, para. 10.

<sup>14</sup> Statement of Claim, para. 12; Sunlodges Tanzania's Certificate of Incorporation, 1 October 1997, **C-29**; Paglieri I, para. 16; Statement of Defence, para. 24.

<sup>15</sup> Statement of Claim, para. 12; Paglieri I, para. 16.

<sup>16</sup> Statement of Claim, para. 15; Paglieri I, para. 21.

60. Ms Sally Perry (“**Ms Perry**”) is a shareholder and director of Sunlodges Tanzania, and Mr Paglieri’s partner since 1994.<sup>17</sup>
61. Mr Ali Maawiya (“**Mr Maawiya**”) is also a shareholder and director of Sunlodges Tanzania, and Mr Paglieri’s assistant.<sup>18</sup>
62. The Claimants have provided the organogram below which represents the Claimants’ structure and ownership as at 1 August 2011.<sup>19</sup> According to the Claimants, it is still valid.<sup>20</sup>



[Statement of Claim, para. 10]

63. The Respondent denies that (i) Mr Paglieri holds Italian nationality as required by the Treaty to bring a treaty claim; and (ii) Mr Paglieri holds a managerial position in Sunlodges BVI.<sup>21</sup>

<sup>17</sup> Statement of Claim, paras 9, 12; Sunlodges (T) Limited Register of Members & Share Ledger – Sally Perry, 9 April 2013, **C-51**; Paglieri I, para. 17.

<sup>18</sup> Statement of Claim, paras 12-13; Maawiya Ali Abdallah’s Supplementary Affidavit in Misc. Land Cause No. 6 of 2011 (exhibits omitted), 3 February 2012, **C-188**; Sunlodges (T) Limited Register of Members & Share Ledger – Ali Maawiya, 9 April 2013, **C-50**; Paglieri I, paras 18-20..

<sup>19</sup> Statement of Claim, para. 10; Paglieri I, paras 10-22.

<sup>20</sup> Statement of Claim, para. 13; Paglieri I, para. 20; Sunlodges (T) Limited Register of Members & Share Ledger – Ali Maawiya, 9 April 2013, **C-50**; Sunlodges (T) Limited Register of Members & Share Ledger – Sally Perry, 9 April 2013, **C-51**; Sunlodges (T) Limited Register of Members & Share Ledger – Franco Paglieri, 9 April 2013, **C-53**.

<sup>21</sup> Statement of Defence, para. 75-77. *See infra* paras 248 *et seq.*



## 2. The Respondent and related Entities

64. The following emanations of the Respondent are referred to in the Parties' submissions as being involved in this dispute:
- (a) The Mtwara District Council is the local governmental entity with jurisdiction over the area where the Estate is located,<sup>22</sup> and is headed by a Chairman, with a District Executive Director acting as secretary;<sup>23</sup>
  - (b) The Commissioner for Lands is "the principal administrative and professional officer of, and adviser to, the Government [of Tanzania] on all matters connected with the administration of land;"<sup>24</sup> and is assisted by a Deputy Commissioner for Lands and one or more Assistant Commissioners;<sup>25</sup>
  - (c) The Tanzania Investment Centre (the "TIC") is defined in the Tanzania Investment Act, 1997 (the "**Tanzania Investment Act**") as a "one-stop centre for investors [that] shall be the primary agency of Government to co-ordinate, encourage, promote and facilitate investment in Tanzania and to advise the Government on investment policy and related matters,"<sup>26</sup> and is empowered, *inter alia*, to grant certificates of incentives to investors<sup>27</sup> entitling them to tax and tariffs incentives;<sup>28</sup>
  - (d) The Special Committee appointed by the Permanent Secretary for the Ministry of Lands, Housing and Human Settlement Development (the "**Special Committee**") was tasked with inspecting the development of the Estate in July 2011<sup>29</sup> following allegations from several Tanzanian state instrumentalities that the Claimants were in breach of the conditions stipulated in the Certificates of Title and Rights of Occupancy covering the Estate;<sup>30</sup>

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<sup>22</sup> Statement of Claim, paras 17, 28.

<sup>23</sup> See, *inter alia*, Statement of Claim, para. 71; Statement of Defence, paras 7, 175; Local Government (District Authorities) Act, ss. 35(2), 36 (1), **RLA-15**.

<sup>24</sup> Land Act, s. 10(1), **CLA-10**.

<sup>25</sup> Land Act, s. 11(1), **CLA-10**.

<sup>26</sup> Tanzania Investment Act, s. 5, **CLA-9**.

<sup>27</sup> Tanzania Investment Act, s. 17(1), **CLA-9**.

<sup>28</sup> Tanzania Investment Act, s. 19(1), **CLA-9**.

<sup>29</sup> Statement of Claim, para. 99; Letter from M.S. Mgwali (District Executive Director of Mtwara District Council) to Sunlodge Tanzania, 22 July 2011, **C-169**; Statement of Defence, para. 212.

<sup>30</sup> Statement of Claim, paras 71 *et seq.*; *cf. infra* paras 72 *et seq.*

- (e) Tanzania’s Chief Valuer is responsible, *inter alia*, for verifying “every assessment of the value of land and unexhausted improvement for the purposes of payment of compensation by Government or Local Government authority;”<sup>31</sup> and
- (f) The High Court of Tanzania (the “**High Court**”) holds “jurisdiction to hear every matter” where the “Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose;”<sup>32</sup> and section 167(1) of the Land Act includes the High Court among the courts vested with exclusive jurisdiction to hear and determine all manner of disputes, actions and proceedings concerning land.<sup>33</sup>

### 3. **Dangote Industries Limited**

65. Dangote Industries Limited (“**Dangote Industries**”) is a Nigerian company<sup>34</sup> ultimately owned by Mr Aliko Dangote,<sup>35</sup> a Nigerian national<sup>36</sup> and one of the world’s largest cement producers.<sup>37</sup> Following the revocation of the Claimants’ title over the Estate in 2011, Dangote Industries leased a large portion of the Estate from the Tanzania Investment Centre<sup>38</sup> on 30 July 2012<sup>39</sup> and completed building a cement factory on its grounds in 2015.<sup>40</sup>
66. According to the Claimants, Dangote Industries had been interested in building a cement factory in the Estate since 2008<sup>41</sup> owing to the existence of limestone on its grounds<sup>42</sup> (which is a key input for cement production).<sup>43</sup> In the Claimants’ submission, Tanzania was aware of that interest and had granted a prospecting license to Dangote Industries covering part of the Estate.<sup>44</sup> The

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<sup>31</sup> Statement of Claim, para. 310.3; Land (Assessment of the Value of Land for Compensation) Regulations, 2001, reg. 6, **CLA-12**.

<sup>32</sup> Constitution of the United Republic of Tanzania, 1977, s. 108(2), **CLA-7**.

<sup>33</sup> Land Act, s. 167(1), **CLA-10**.

<sup>34</sup> Statement of Claim, para. 4.

<sup>35</sup> Statement of Claim, para. 24.

<sup>36</sup> Statement of Claim, para. 83.

<sup>37</sup> Statement of Claim, para. 83; Extract from Dangote Cement’s Website, downloaded on 11 June 2018, **C-129**.

<sup>38</sup> The Tanzanian Investment Centre was allocated a portion of the Estate on 30 July 2012, following the decision to revoke the Claimants’ title to the Estate. Statement of Defence, para. 248; Government Gazette No. 41 of 2012 for designation of land in dispute for investment purpose, 16 January 2012, **R-8**.

<sup>39</sup> Statement of Defence, paras 248, 263.

<sup>40</sup> Statement of Claim, para. 110; Photographs of Dangote’s completed cement factory, undated, **C-109**; Extract from Dangote Cement’s website, downloaded on 11 June 2018, **C-129**.

<sup>41</sup> Statement of Claim, paras 4, 24, 83.

<sup>42</sup> Statement of Claim, para. 108; Email from Mr Vidya Sagar Dixit (Dangote) to Franco Paglieri, 29 November 2011, **C-176**; Paglieri I, para. 105.

<sup>43</sup> Statement of Claim, para. 29.

<sup>44</sup> Statement of Claim, para. 83; Email from Mr Vidya Sagar Dixit (Dangote) to Franco Paglieri, 29 November 2011, **C-176**.

Claimants argue that the revocation of their Rights of Occupancy over the Estate was a pretext to allocate the Estate to Dangote Industries.<sup>45</sup> The Respondent denies the Claimants' allegation.<sup>46</sup>

## B. THE ESTATE

### 1. Location and Characteristics of the Estate

67. The Claimants have provided the following map of the region surrounding the Estate:<sup>47</sup>



68. The Estate is located on the east coast of Tanzania, in the region of Mtwara, which is the southern region closest to the border with Mozambique.<sup>48</sup> Part of the eastern boundary of the Estate extends to the shore of Mikindani Bay and the Indian Ocean.<sup>49</sup> It covers an area of 5,277 hectares (52.77 km<sup>2</sup>).<sup>50</sup>

<sup>45</sup> Statement of Claim, paras 4, 24, 83; Reply, paras 5, 140.

<sup>46</sup> Statement of Defence, paras 191, 221, 248.

<sup>47</sup> Statement of Claim, para. 25; Map showing the regions of Tanzania and its East Coast, undated, C-101.

<sup>48</sup> Statement of Claim, para. 28.

<sup>49</sup> Statement of Claim, para. 28; Photograph of Mikindani Bay and the ocean, 3 June 2017, C-103.

<sup>50</sup> Statement of Claim, para. 28.

69. The closest town to the Estate is Mikindani, which is located two kilometres to the south east.<sup>51</sup> Mtwara is a larger town with a deep harbour port and is located seven kilometres to the south east.<sup>52</sup> The town of Lindi is located 98 kilometres to the north of the Estate, and the sealed public road between Lindi and Mtwara runs through the southern portion of the Estate.<sup>53</sup>
70. There are limestone deposits below the surface of the Estate.<sup>54</sup> According to the Claimants, this is the main reason behind Dangote Industries' interest in the Estate as the 500 tonnes of limestone reserves in the Estate could maintain a cement factory for 149 years.<sup>55</sup>
71. The area off the Mtwara and Lindi coasts is rich in natural gas and has garnered interest from several international oil companies.<sup>56</sup> A gas pipeline connecting Dar es Salaam and Mtwara was completed in April 2015.<sup>57</sup> Exploration for oil and gas was conducted on the Estate and its surrounding area in 2007 by a company called Ndovu.<sup>58</sup>

## 2. The Claimants' title to the Estate

72. According to the Claimants, the Estate "is comprised of contiguous parcels of land covered by the Certificates of Title, Rights of Occupancy and what are known as 'Eps'."<sup>59</sup> They are listed in the following table:<sup>60</sup>

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<sup>51</sup> Statement of Claim, para. 28.

<sup>52</sup> Statement of Claim, para. 28.

<sup>53</sup> Statement of Claim, para. 28.

<sup>54</sup> Statement of Claim, para. 29.

<sup>55</sup> Statement of Claim, para. 29; Extract from Dangote Cement's website, downloaded on 11 June 2018, **C-129**.

<sup>56</sup> Statement of Claim, para. 43.

<sup>57</sup> Statement of Claim, para. 44; Pipelines International, "Tanzania gas pipeline complete", 2 April 2015, **C-116**.

<sup>58</sup> Statement of Claim, para. 29; Letter from the Tanzanian Petroleum Development Corporation to British High Commissioner in Tanzania, 26 September 2007, **C-153**; Paglieri I, 30.

<sup>59</sup> Statement of Claim, para. 28; EPs refers to "Enemy Property" or "Ex-enemy property" which is "the designation given by the British to land titles that had been created by the German Colonial Administration" (Statement of Claim, fn 53).

<sup>60</sup> Statement of Claim, para. 21; Reply, para. 19.

Table 1 – Titles to the Estate

	Certificate of Title	Right of Occupancy	Term	Area ha (acres)
1.	2769 <sup>36</sup>	7877	99 years from 13 August 1934 (expires 12 August 2033)	823.11 (2,034)
2.	3550 <sup>37</sup>	8543	99 years from 15 August 1936 (expires 14 August 2035)	321.3 (794)
3.	3985 <sup>38</sup> (encompassing EPs <sup>39</sup> : 585a; 585b; 587; 1059; 1064)	311, 2662, 2664	99 years from 1 July 1963 (expires 30 June 2062)	3,043.16 (7,519.96)
4.	15501 <sup>40</sup>	21272	99 years from 1 January 1963 (expires 31 December 2062)	1,090.2 (2,694)

[Statement of Claim, para. 21, footnotes omitted]

73. The Rights of Occupancy (but not the Certificates of Title) stipulate that the land be used solely for “agricultural purposes.”<sup>61</sup>
74. On 1 October 1997, Sunlodges Tanzania entered into an agreement with the Receiver of Karimjee Agriculture Limited (Coopers & Lybrand) (the “**Receiver**”) for the sale and purchase of the business, Rights of Occupancy, and other assets that comprise the Estate for a purchase price of USD 175,000.<sup>62</sup> Mr Paglieri provided the necessary funds for Sunlodges Tanzania for purposes of the transaction.<sup>63</sup>
75. After obtaining approval from the relevant Tanzanian authorities to effect the transaction,<sup>64</sup> on 11 May 1998, the Receiver conveyed to Sunlodges Tanzania, free of any encumbrances, the title

<sup>61</sup> Certificate of Title 2769 and Certificate of Occupancy 7877 (1935), p. 5, **C-87**; Certificate of Title 3550 and Certificate of Occupancy 8543 (1937), p. 7, **C-88**; Certificate of Occupancy 21272 in regard to Certificate of Title 15501 (1964), p. 3, **C-90**; Reply, para. 45. According to the Claimants, the Certificates of Title do not contain any conditions regarding use; they are contained in the Certificates of Occupancy (Oral Hearing Tr., Day 1, 13:4-11).

<sup>62</sup> Statement of Claim, para. 21; Contract between Karimjee Agriculture Limited (in Receivership), Sunlodges Tanzania, 1 October 1997, **C-91**; From this amount, USD 150,000 were paid in exchange for the land and USD 25,000 were paid for the Estate’s machinery (Statement of Claim, fn 32; Transfer of the Right of Occupancy to the Mikindani Estate, 11 May 1998, p. 2, **C-93**); Paglieri I, para. 23. Statement of Defence, para. 133.

<sup>63</sup> Statement of Claim, para. 21; Letter from Coopers & Lybrand (the Receiver) to Franco Paglieri, dated 29 October 1997, **C-146**; Mr. Paglieri’s Credito Italiano bank transfers to the Receiver of Karimjee Agriculture Limited, **C-92**; Paglieri I, para. 23.

<sup>64</sup> Statement of Claim, para. 21; Letter from Coopers & Lybrand (the Receiver) to Franco Paglieri, 29 May 1998, **C-147**; Paglieri I, para. 23.

deeds to the Estate.<sup>65</sup> The relevant entries were made in the Land Registry on 10 July 1998, confirming Sunlodges Tanzania as the registered owner.<sup>66</sup>

76. The Claimants contend that, until the alleged expropriation of the Estate took place, the Respondent had never contested Sunlodges Tanzania's ownership over the Estate as a matter of Tanzanian law<sup>67</sup> (which they consider was also confirmed by Tanzanian courts in local court proceedings).<sup>68</sup>

## C. DEVELOPMENT OF THE ESTATE

### 1. Undisputed Facts

77. After purchasing the Estate, the Claimants undertook several infrastructure projects on its grounds, including building an electric fence surrounding a large portion of the Estate, an airstrip and a 33-kilometre road around the perimeter of the property.<sup>69</sup>
78. Immediately prior to its acquisition by the Claimants, the Estate was being used for the cultivation of sisal<sup>70</sup> and cashew nuts and the rearing of a herd of 450 head of cattle.<sup>71</sup> At the time, the Estate was poorly maintained and underutilized<sup>72</sup> and most of the sisal plants were close to the end of their productive life.<sup>73</sup> The Claimants initially rationalized the sisal corps and grew cashew nuts and maize,<sup>74</sup> but had to discontinue the cultivation of cashew nuts and maize due to the presence of squatters.<sup>75</sup> The cultivation of sisal stopped in 2000 owing to its non-competitive production costs.<sup>76</sup>

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<sup>65</sup> Statement of Claim, para. 21; Transfer of the Right of Occupancy to the Mikindani Estate, 11 May 1998, p. 2, **C-93**; Reply, para. 18.

<sup>66</sup> Reply, para. 18; Statement of Claim, para. 22; Land Registry Search results in regard to the Estate, 11 August 1998, **C-94**.

<sup>67</sup> Statement of Claim, para. 23; Reply, para. 20.

<sup>68</sup> Statement of Claim, para. 23; Judgment of the High Court of Tanzania of 23 July 2012, in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors.*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, p. 6, **C-191**; Paglieri I, para. 25.

<sup>69</sup> Statement of Claim, para. 33.

<sup>70</sup> According to the Claimants, sisal is a plant, the stiff fibres from which are used to make a number of products, including rope, brake pads, paper, carpets and mats (Statement of Claim, fn 51).

<sup>71</sup> Statement of Claim, para. 27.

<sup>72</sup> Statement of Claim, para. 27.

<sup>73</sup> Statement of Claim, para. 27; Paglieri I, para. 29.

<sup>74</sup> Statement of Claim, para. 33.

<sup>75</sup> Statement of Claim, paras 33, 41; Reply, para. 22.

<sup>76</sup> Statement of Claim, para. 35; Reply, para. 32; Rejoinder, para. 71.

79. The Claimants then decided to focus on the breeding and rearing of cattle,<sup>77</sup> and submitted an application to the TIC for a Certificate of Incentives for this purpose,<sup>78</sup> together with a business plan (the “**Business Plan**”).<sup>79</sup> The TIC issued Sunlodges Tanzania the First certificate of incentives (the “**First Certificate of Incentives**”) in May 2003 “[t]o diversify Sisal Estate into cattle ranch and maize farm,” entitling Sunlodges Tanzania to certain tax and tariffs incentives until March 2006.<sup>80</sup> Following submission of two progress reports by the Claimants to the TIC relating to the First Certificate of Incentives (together, the “**Progress Reports**”),<sup>81</sup> a second certificate of incentives was issued in September 2006, extending the incentives for an additional year<sup>82</sup> (the “**Second Certificate of Incentives**”; together with the First Certificate of Incentives, the “**Certificates of Incentives**”).
80. As noted below, the Parties attach different significance to the Business Plan and the Certificates of Incentives, and also disagree as to the extent to which the Claimants’ activities in the Estate until the Claimants’ title was revoked in 2011 complied with the terms of the Rights of Occupancy, the Certificates of Incentives and the Business Plan.<sup>83</sup>

## 2. The Claimants’ Position

81. First, the Claimants note that investors must obtain a certificate of incentives if they wish to receive the benefits that these confer, but they are under no obligation to obtain one.<sup>84</sup> Further, the use of land permitted pursuant to a certificate of incentives continues after its expiry, even if the granting of incentives does not.<sup>85</sup> According to the Claimants, the Business Plan does not contain any promises regarding how the Estate was to be developed; it was merely a plan.<sup>86</sup>
82. Second, the Claimants reject the Respondent’s contention that “what they sought to achieve pursuant to the first and second Certificates of Incentives [] and the [Business Plan] was a failure

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<sup>77</sup> Statement of Claim, paras 34, 35; Paglieri I, paras 35, 36.

<sup>78</sup> Statement of Defence, para. 37; Application for Registration of Certificate of Incentive, 20 March 2003, **R-12**.

<sup>79</sup> Statement of Defence, paras 44-45; Project Profile submitted to TIC together with the Application form for Registration of Certificate of Incentive, 20 March 2003, **R-13**.

<sup>80</sup> Statement of Claim, para. 35; Sunlodges Tanzania’s First Certificate of Incentives, dated 29 May 2003, para. 2, **C-95**; Reply, para. 22.

<sup>81</sup> Statement of Defence, para. 48; A letter from Sunlodges BVI to the Executive Director (TIC), 15 December 2003, **R-14**; A letter from Sunlodges Tanzania Limited to the Executive Director (TIC), 24 May 2006, **R-6**.

<sup>82</sup> Statement of Claim, para. 35; Sunlodges Tanzania’s Second Certificate of Incentives, 13 September 2006, para. 2, **C-96**; Reply, para. 22.

<sup>83</sup> Reply, para. 28; Second Witness Statement of Franco Paglieri, 18 December 2018, **CWS-2 (“Paglieri II”)**, para. 9. Statement of Defence, paras 47-51, 158; Rejoinder, paras 79-83.

<sup>84</sup> Reply, para. 21.

<sup>85</sup> Reply, para. 23.

<sup>86</sup> Reply, para. 24.

or that the conditions (unspecified by Tanzania) of the Certificates of Incentives were not adhered to.”<sup>87</sup> In particular, the Claimants reject the Respondent’s contention that the Estate was in a state of abandonment at the time at which Sunlodges Tanzania’s title to the Estate was revoked.<sup>88</sup>

83. In support of their position, the Claimants rely in particular on a series of daily reports produced between the years 2003 and 2011 (the “**Daily Reports**”)<sup>89</sup> in which they recorded their activity in the Estate for management purposes.<sup>90</sup> According to the Claimants, the Daily Reports show that the cattle operations continued until the Estate was expropriated in 2011,<sup>91</sup> at which time they had increased the herd from 450 to approximately 700 head of cattle<sup>92</sup> and were providing employment for between thirty-five to forty people per day.<sup>93</sup>
84. The Claimants also consider that the Respondent misrepresents the content of the Progress Reports.<sup>94</sup> In their view, the first Progress Report shows that any delays in progress were due to the Respondent’s conduct,<sup>95</sup> while the second Progress Report (of which they claim the Respondent has provided an incomplete copy) “is more upbeat” than Tanzania claims.<sup>96</sup>
85. In the Claimants’ view, the granting of a second Certificate of Incentives by Tanzania in 2006 also confirms that the Respondent was satisfied with Sunlodges Tanzania’s progress in the Estate.<sup>97</sup>
86. The Claimants also contend that their efforts to persuade the Government of Tanzania to permit the development of the Estate for touristic purposes were unsuccessful,<sup>98</sup> and reject the Respondent’s allegation that a game sanctuary was established in the Estate.<sup>99</sup> According to the

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<sup>87</sup> Reply, para. 28.

<sup>88</sup> Statement of Claim, para. 86.

<sup>89</sup> Statement of Claim, para. 26; Daily Reports – Bi-Annual Extract, 2003-2011, **C-130**; exhibits **C-134** to **C-144** (Daily Reports); Paglieri I, para. 28.

<sup>90</sup> Statement of Claim, paras 26, 86.

<sup>91</sup> Statement of Claim, para. 35.

<sup>92</sup> Statement of Claim, para. 34; Daily Report and Fingerprint Payrolls, 1 January 2011, showing total cattle at 727, **C-135**; Daily Report and Fingerprint Payrolls, 1 September 2011, showing total cattle at 642, **C-143**; Reply, para. 28.

<sup>93</sup> Statement of Claim, para. 35; Daily Report and Fingerprint Payrolls, 1 January 2011, showing total labour at 35 persons, **C-135**; Daily Report and Fingerprint Payrolls, 1 September 2011, showing total labour at 41 persons, **C-143**.

<sup>94</sup> Reply, paras 26-27; A Letter from Sunlodges Ltd to the Executive Director (TIC), 15 December 2003, **R-14**.

<sup>95</sup> Reply, paras 26, 28.

<sup>96</sup> Reply, para. 27; Second progress report from Sunlodges Tanzania to the Tanzania Investment Centre, 24 May 2006, **C-249**.

<sup>97</sup> Reply, para. 28.

<sup>98</sup> Statement of Claim, paras 37-38.

<sup>99</sup> Statement of Claim, para. 38; Reply, paras 2, 24, 72-74; A letter from Sunlodges Tanzania to the District Education Officer of Mtwara, 4 February 1999, para. 1, **R-11**; A letter from Sunlodges(T) Limited to the



Claimants, the Estate was used at all material times for agricultural purposes,<sup>100</sup> and, until its expropriation, the Estate had:

...the usual infrastructure that is found on commercial agricultural operations in East Africa, including some irrigation, troughs, boreholes, six windmills imported from South Africa (to distribute water across the farm), a homestead, accommodation for managers and employees, workshops, fencing, roads, vehicles and agricultural equipment[.]<sup>101</sup>

87. The Claimants further allege that their operations in the Estate were hampered at different times by the presence of squatters who stole crops and cattle and sabotaged equipment; and claim that the Mtwara District Council failed to take any effective action against them.<sup>102</sup> The Claimants reject the Respondent's allegation that the previous owner invited the squatters, and argue that there is no evidence on record to support the contention.<sup>103</sup>
88. The Claimants do not deny the presence of wild animals in the Estate, but note that the land forms part of their natural territory. Indeed, it would have been illegal to kill most of the breeds under Tanzanian law and they could not pose a threat to anyone, given that the Estate had been enclosed by an electric fence since 2004.<sup>104</sup>
89. Finally, according to the Claimants, Sunlodges Tanzania's operating costs in the Estate were funded by way of loans from Sunlodges BVI, which in turn received the funds from Mr Paglieri.<sup>105</sup> As of September 2011, the outstanding loan from Sunlodges BVI to Sunlodges Tanzania was TZS 3,061,977,000 (the "**Sunlodges BVI Loan**").<sup>106</sup>

### 3. The Respondent's Position

90. The Respondent asserts that, in acquiring the Certificates of Incentives, the Claimants committed to implement their Business Plan between 2004 and 2010. According to the Respondent, the Business Plan required the Claimants to:

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Regional Commissioner Mtwara, 14 April 1999, para. 4, **R-4**; A letter from Kuwembe Company Advocate to Mtwara District Commissioner(English Translation), 17 June 1999, paras 2, 4, **R-5B**; Paglieri I, para. 39; Letter from Director of Wildlife at the Ministry of Natural Resources and Tourism to Sunlodges Tanzania, 14 March 2007, **C-247**.

<sup>100</sup> Statement of Claim, para. 86.

<sup>101</sup> Statement of Claim, para. 31; Photographs of the Estate, undated, **C-104**.

<sup>102</sup> Statement of Claim, paras 39-41.

<sup>103</sup> Reply, para. 33, 83.

<sup>104</sup> Statement of Claim, para. 86; Paglieri I, para. 61; Reply, para. 89.

<sup>105</sup> Statement of Claim, para. 42.

<sup>106</sup> Statement of Claim, para. 42; Sunlodges Tanzania's Financial Statements (2011), 31 December 2011, **C-85**; Oral Hearing Tr., Day 2, 323:1-18, 336:7-11. According to the Claimants, the amount of the Sunlodges BVI Loan was equivalent to USD 1,908,356.45 at the exchange rate as at the date of the Estate's alleged expropriation (5 September 2011).

[...] increase 300 cattle to 1500 cattle and to produce quality beef; invest heavily in new bulls and implementing an Artificial Insemination Programmes (AIP); completely upgrade the cattle handling equipment and facilities including night bomas, adequate shaded and protected cattle shelters and improve Artificial Insemination facilities of bulls; employ skilled expertise to manage the estate arid and the AIP; establish Game ranching; construct boreholes in dry seasons; construct modern butchery with modern refrigerated cold rooms and stores together with handling facilities; cultivate maize for supplementary feeding program for the cattle; and reforestation of various indigenous species with vegetable improvements.<sup>107</sup>

91. The Respondent contends that the Claimants failed to comply with the conditions attached to the Rights of Occupancy and the Certificates of Incentives, as well as to abide by the commitments they made in the Business Plan,<sup>108</sup> by (i) changing the use of the land into a “game sanctuary;”<sup>109</sup> (ii) failing to grow agricultural crops;<sup>110</sup> and (iii) failing to benefit the local community from the project.<sup>111</sup>
92. The Respondent also points to several excerpts of the Progress Reports<sup>112</sup> which in its view show that the Claimants had failed to commence their project according to the agreed schedule of the Business Plan.<sup>113</sup> In particular, the Respondent argues that, according to the Progress Reports, there was a development of less than 2% of the Estate (planting of grass in 100 hectares out of 5,227.8 hectares) and an admission of inability to grow any crops.<sup>114</sup>
93. The Respondent also notes that under Tanzanian law, an investor is required to submit progress reports to TIC at least every six months during the period of project implementation, while the Claimants only submitted two Progress Reports to TIC during the period 2003 to 2011.<sup>115</sup> Further, the Respondent claims that Tanzania granted an extension of time for Sunlodges Tanzania to

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<sup>107</sup> Statement of Defence, paras 44-45, 51, 60; Project Profile submitted to TIC together with the Application form for Registration of Certificate of Incentive, 20 March 2003, **R-13**.

<sup>108</sup> Statement of Defence, paras 47-51, 158; Rejoinder, para. 68.

<sup>109</sup> Statement of Defence, paras 180-181; A letter from Mikindani Estate to the District Education Officer of Mtwara, 4 February 1999, **R-11**; Letter from Sunlodges Tanzania limited to the Regional Commissioner Mtwara, 14 April 1999, **R-4**; A letter from Kuwembe Company Advocate to Mtwara District Commissioner (English Translation), 17 June 1999, **R-5B**; A letter from Sunlodges (T) to the Executive Director (TIC), 24 May 2006, **R-6**; A letter from Tanzania Revenue Authority (“**TRA**”) to the Solicitor General with supporting documents, 25 September 2018, **R-7**; Rejoinder, paras 64-65.

<sup>110</sup> Statement of Defence, para. 61.

<sup>111</sup> Statement of Defence, para. 158.

<sup>112</sup> Statement of Defence, paras 48-49; A letter from Sunlodges BVI to the Executive Director (TIC), 15 December 2003, **R-14**; A letter from Sunlodges Tanzania Limited to the Executive Director (TIC), 24 May 2006, **R-6**.

<sup>113</sup> Statement of Defence, para. 55; Rejoinder, paras 70-72, 81-82.

<sup>114</sup> Rejoinder, para. 83; A letter from Sunlodges BVI to the Executive Director (TIC), 15 December 2003, **R-14**; A letter from Sunlodges Tanzania Limited to the Executive Director (TIC), 24 May 2006, **R-6**.

<sup>115</sup> Rejoinder, para. 80; Tanzania Investment Act, ss. 17(10)-(11), **CLA-9**; Investment Regulation, G.N No. 381A of 2002, reg. 52, **RLA-41** (“*Every business enterprise registered under the Act shall at least once in every six months during the implementation period file information to the Centre in the prescribed Form No. TIC 3 set out in the Schedule to these Regulations, on the project implementation in conformity with the terms of its registration.*”)

implement the Business Plan in light of its failure to start implementing its project within two years as required by the law and in order to avoid the nullification of the First Certificate of Incentives.<sup>116</sup>

94. The Respondent further claims that the Claimants had abandoned the land and had allowed the proliferation of bushes harbouring wild animals that threatened the villages surrounding the Estate.<sup>117</sup>
95. The Respondent concedes that there were squatters present in the Estate, but notes that they were lawfully invited by the previous owner of the Estate and, in any event, it was the Claimants who had a duty to remove them from their land.<sup>118</sup>
96. As to the loan from Sunlodges BVI to Sunlodges Tanzania, the Respondent argues that there is no evidence on record to show that this loan exists.<sup>119</sup>

#### **D. NOTICES OF REVOCATION**

##### **1. Correspondence prior to the Notices of Revocation**

97. On 18 October 2005, the District Executive Director of Mtwara District Council sent a letter to Sunlodges Tanzania, noting that the Estate had been transferred to the Second Claimant and requesting information regarding its programme and objectives for the Estate.<sup>120</sup>
98. The Claimants state that they are unaware as to whether they replied to that letter.<sup>121</sup> They argue that, in any event, they had no obligation to reply, given that at that time they had already applied for and been granted the First Certificate of Incentives.<sup>122</sup> In the Claimants' submission, pursuant to sections 16(1) and 16(2) of the Tanzania Investment Act, they were not required to do anything further in relation to use of the Estate as a cattle ranch and maize farm.<sup>123</sup>

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<sup>116</sup> Rejoinder, para. 72; Tanzania Investment Act, s. 17(8) (p. 14), **CLA-9**; Second Witness Statement of Mr Oscar Ng'itu, 22 February 2019 (revised version 27 February 2019), **RWS-4** ("Ng'itu II").

<sup>117</sup> Statement of Defence, para. 191; Rejoinder, para. 67; Ng'itu II, para. 11.

<sup>118</sup> Statement of Defence, para. 187.

<sup>119</sup> Oral Hearing Tr., Day 1, 211:10-16.

<sup>120</sup> Reply, para. 75; Letter from the then District Executive Director of Mtwara District Council to Sunlodges Tanzania, 18 October 2005, para. 2, **C-250**. Statement of Defence, para. 183.

<sup>121</sup> Reply, para. 75.

<sup>122</sup> Reply, para. 75; Sunlodges Tanzania's First Certificate of Incentives, 29 May 2003, numbered para. 2, **C-95**.

<sup>123</sup> Reply, para. 75; Tanzania Investment Act, ss. 16(1)-(2), **CLA-9**.

99. In contrast, the Respondent submits that the Certificates of Incentives did not exempt the Claimants from obtaining the necessary approvals and, in particular, from communicating with local governmental authorities where the Estate is located regarding the better use of the Estate.<sup>124</sup>
100. According to the Respondent, on 28 April 2010, a letter was sent to Sunlodges Tanzania concerning a complaint about the presence of dangerous animals in the Estate.<sup>125</sup> The Claimants dispute having received that letter.<sup>126</sup>
101. On 28 December 2010, Sunlodges Tanzania received a letter sent on behalf of the District Executive Director of the Mtwara District Council.<sup>127</sup> The letter referred to the alleged complaint set out in the earlier letter of 28 April 2010 and requested Sunlodges Tanzania to appear in the Director's office on 6 January 2010.<sup>128</sup>
102. On 31 December 2010, Sunlodges Tanzania responded to the letter from the Mtwara District Council of 28 December 2010. In the letter, the Second Claimant denied having received any letter on 28 April 2010 and enquired "what, (if any), article of the Land Act empowers a Land Officer to summon a land owner to his offices."<sup>129</sup>

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<sup>124</sup> Rejoinder, para. 43; Ng'itu II, paras 6-9.

<sup>125</sup> Statement of Defence, para. 183; Rejoinder, paras 66-67.

<sup>126</sup> Statement of Claim, para. 72.

<sup>127</sup> Statement of Claim, para. 71; Letter, in Swahili, on behalf of the District Executive Director of the Mtwara District Council to Sunlodges Tanzania, 28 December 2010, together with an English translation, **C-154A** and **C-154B**. The Respondent contends that the Claimants were aware of the Swahili language and had been communicating with the District Commissioner's Office in such language (Statement of Defence, para. 173; A letter written by Sunlodges Tanzania Ltd to City Municipality, 17 October 2000, **R-9A** and **R-9B**; Ng'itu II, paras 10). The Claimants dispute their ability to understand the original letter, alleging that Tanzanian Kiswahili is very different from Swahili, and claiming that Mr. Maawiya only understands the latter language (Reply, para. 78).

<sup>128</sup> Reply, para. 78; Letter, in Swahili, on behalf of the District Executive Director of the Mtwara District Council to Sunlodges Tanzania, 28 December 2010, together with an English translation, **C-154A** and **C-154B**. Statement of Defence, para. 183.

<sup>129</sup> Statement of Claim, para. 72; Letter from Sunlodges Tanzania to the Mtwara District Council, 31 December 2010, **C-155**; Paglieri I, para. 47. *Cf.* Statement of Defence, para. 183. The Respondent argues that the "District Executive Director may require any person in respect of whom the functions of the council are exercisable to appear before him for any of the purposes of [the Local Government (District Authorities)] Act, and it shall be the duty of every such person when so directed to attend before the Director" (Statement of Defence, para. 176; Local Government (District Authorities) Act, CAP 287, s. 127(1), **RLA-15**; First Witness Statement of Oscar Anthony Ng'itu, 26 October 2018, **RWS-1** ("**Ng'itu I**"), paras 13-14). The Claimants agree that the Respondent's position "is a correct statement of the authority vested in the District Executive Director pursuant to s127(1) (with reference to s122) of the Local Government (District Authorities Act)" (Reply, para. 80).

103. On 7 January 2011, Sunlodges Tanzania received a letter sent on behalf of the District Executive Director, asserting, *inter alia*, that the development of the Estate contravened the condition stipulated in the Certificate of Title to develop the land for agricultural purposes.<sup>130</sup>
104. On 18 January 2011, Sunlodges Tanzania replied to the 7 January 2011 letter from the District Executive Director.<sup>131</sup> In the letter, Sunlodges Tanzania confirmed that it was conducting agricultural activities in the Estate, but also noted that these activities were hampered by thefts and other criminal activity.<sup>132</sup>
105. By letter dated 26 January 2011, the District Executive Director's office noted that it was writing to Sunlodges Tanzania for the third time without response, and requested to visit the Estate before 31 January 2011.<sup>133</sup>
106. By letter dated 31 January 2011, Sunlodges Tanzania replied to the 26 January 2011 letter from the District Executive Director.<sup>134</sup> It requested that matters be resolved by correspondence instead of in-person meetings, given that Sunlodges Tanzania's directors were not present in Tanzania at that time, and enquired again about the legal basis for the District Executive Director to summon a land owner to a meeting.<sup>135</sup>
107. On 18 February 2011, the Acting District Executive Director wrote to the Commissioner for Lands, noting that Dangote Industries was interested in building a cement factory in part of the

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<sup>130</sup> Statement of Claim, para. 74; Letter on behalf of the District Executive Director of the Mtwara District Council to Sunlodges Tanzania (*a better copy of the document at C-90*), dated 7 January 2011, paras 5, 11, **C-244**; Reply, para. 80. The Claimants submit that the summons in the letter of 7 January 2011 lacked the necessary level of detail for Sunlodges Tanzania to determine whether the summons was *intra vires*. According to the Claimants, “[w]ithout the necessary detail, the summons appears to be an arbitrary exercise of power. For such a letter to be valid it would need to identify the relevant functions of the council that were exercisable in regard to Sunlodges Tanzania with cross-referencing to the relevant legislation” (Reply, para. 80).

<sup>131</sup> Statement of Claim, para. 77; Letter from Sunlodges Tanzania to the Mtwara District Council, 18 January 2011, **C-157**; Reply, para. 81. *Cf.* Statement of Defence, para. 183.

<sup>132</sup> Statement of Claim, para. 77; Letter from Sunlodges Tanzania to the Mtwara District Council, 18 January 2011, **C-157**; Reply, para. 81.

<sup>133</sup> Statement of Claim, para. 80; Letter on behalf of the District Executive Director of the Mtwara District Council to Sunlodges Tanzania, 26 January 2011, **C-158**; Statement of Defence, para. 183.

<sup>134</sup> Statement of Claim, para. 82; Letter from Sunlodges Tanzania to the District Executive Director of the Mtwara District Council, 31 January 2011, **C-159**.

<sup>135</sup> Statement of Claim, para. 82; Letter from Sunlodges Tanzania to the District Executive Director of the Mtwara District Council, 31 January 2011, **C-159**. The Respondent argues that the “District Executive Director may require any person in respect of whom the functions of the council are exercisable to appear before him for any of the purposes of [the Local Government (District Authorities)] Act, and it shall be the duty of every such person when so directed to attend before the Director” (Statement of Defence, para. 176; Local Government (District Authorities) Act, CAP 287, s. 127(1), **RLA-15**; Ng’itu I, paras 13-14).

Estate.<sup>136</sup> The letter affirmed that the land “ha[d] not been used in accordance to the law for 47 years” and that this had resulted in the apparition of dangerous animals that threatened and had killed residents.<sup>137</sup> The Acting District Executive Director stated:

[7] Given that the larger portion of the requested land is **C.T. 15501**, we appeal to your office to advise the President to retrieve it (part acquisition).

[8] Furthermore, we recommend to take a section of the land belonging to Sunlodges Tanzania Ltd whose Title deed is dated **09-04-1964**, meant for agriculture.<sup>138</sup>

## 2. The Alleged Prior Inspection of the Estate

108. According to the Respondent, on 2 May 2011, prior to the issuance of the Notices of Revocation, an Authorized Officer of Mtwara District Council conducted an inspection of the Estate to determine the extent of development of the land and compliance with the conditions provided for in the Rights of Occupancy (the “**May 2011 Inspection**”).<sup>139</sup> The Respondent claims that, following the May 2011 Inspection, the Authorized Officer found that the conditions of the Rights of Occupancy of the Estate had been breached,<sup>140</sup> and set out his conclusions in an inspection report (the “**Inspection Report of May 2011**”)<sup>141</sup> that would later be submitted to the Commissioner for Lands together with a proposal for revocation of Sunlodges Tanzania’s Rights of Occupancy of the Estate.<sup>142</sup>
109. The Claimants deny that the May 2011 Inspection ever took place,<sup>143</sup> and dispute the authenticity of the Inspection Report of May 2011.<sup>144</sup>

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<sup>136</sup> Statement of Claim, para. 83; Letter, in Swahili, from the Acting District Executive Director of Mtwara District Council to the Commissioner of Lands at the Ministry of Land, Housing and Human Settlement, 18 February 2011, together with an English translation, **C-160A** and **C-160B**.

<sup>137</sup> English translation of Letter, in Swahili, from the Acting District Executive Director of Mtwara District Council to the Commissioner of Lands at the Ministry of Land, Housing and Human Settlement, 18 February 2011, **C-160A**.

<sup>138</sup> English translation of Letter, in Swahili, from the Acting District Executive Director of Mtwara District Council to the Commissioner of Lands at the Ministry of Land, Housing and Human Settlement, 18 February 2011, **C-160A**. The Respondent asserts that the reference to “*Title deed [] dated 09-04-1964*” should be understood as referring to Certificate of Title 15501, which was issued on 9 April 1964 (Statement of Defence, paras 190-194).

<sup>139</sup> Statement of Defence, paras 8, 10; Rejoinder, paras 13, 45; Second Witness Statement of Gasper Vitalis Luanda, 27 February 2019, **RWS-5 (“Luanda II”)**, para. 19; Inspection Report on Kabisera Farm owned by Sunlodges (T) Limited with C.T. No. 15501, 2769, 3550 and 3985 (English Translation), 04 May 2011, **R-15B**; Rebutter, para. 51; Ng’itu I, para. 9; First Witness Statement of Gasper Vitalis Luanda, 26 October 2018, **RWS-2 (“Luanda I”)**, paras 9-10.

<sup>140</sup> Statement of Defence, paras 8, 10; Ng’itu I, para. 9; Luanda I, para. 10.

<sup>141</sup> Luanda II, para. 19; Inspection Report on Kabisera Farm owned by Sunlodges Tanzania Limited with C.T. No. 15501, 2769, 3550 and 3985 (English Translation), 4 May 2011, **R-15B**.

<sup>142</sup> Luanda II, para. 19.

<sup>143</sup> Surrejoinder, paras 26-44.

<sup>144</sup> Surrejoinder, para. 27. *See infra* para. 176 *et seq.*

### 3. Notices of Revocation

110. On 12 May 2011, Sunlodges Tanzania was served a notice of revocation dated 9 May 2011 in relation to right of occupancy 7877 (under Certificate of Title No. 2769) and right of occupancy 21272 (under Certificate of Title No. 15501) (the “**First Notice of Revocation**”).<sup>145</sup>
111. The First Notice of Revocation was issued under section 48 of the Land Act “for breach of conditions contained in the Certificate of Title namely; (i) Abandonment of the land and failure to develop the farm as per conditions stipulated in the certificate of title.”<sup>146</sup>
112. On 8 June 2011, Sunlodges Tanzania was served with four further notices of revocation (all dated 7 June 2011):
- (a) The second notice of revocation concerned right of occupancy 2662 (one of the three Rights of Occupancy under Certificate of Title No. 3985) (the “**Second Notice of Revocation**”);<sup>147</sup>
  - (b) The third notice of revocation concerned right of occupancy 2664 (one of the three Rights of Occupancy under Certificate of Title No. 3985) (the “**Third Notice of Revocation**”);<sup>148</sup>
  - (c) The fourth notice of revocation concerned EP 585a (one of the land plots covered by one of the three Rights of Occupancy under Certificate of Title No. 3985) (the “**Fourth Notice of Revocation**”);<sup>149</sup> and
  - (d) The fifth notice of revocation concerned EP 585b (one of the land plots covered by one of the three Rights of Occupancy under Certificate of Title No. 3985) (the “**Fifth Notice of Revocation**”, and, together with the First, Second, Third and Fourth Notices of Revocation, the “**Notices of Revocation**”).<sup>150</sup>
113. The Second, Third, Fourth and Fifth Notices of Revocation were issued under section 48 of the Land Act “for breach of conditions contained in the Certificate of Title namely; (i) Abandonment of the land and failure to develop the farm as per conditions stipulated in the certificate of title.”<sup>151</sup>

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<sup>145</sup> Statement of Claim, para. 87; The First Notice of Revocation, 9 May 2011, **C-161**.

<sup>146</sup> Statement of Claim, para. 87; The First Notice of Revocation, 9 May 2011, **C-161**.

<sup>147</sup> Statement of Claim, para. 91; The Second Notice of Revocation, 7 June 2011, **C-162**.

<sup>148</sup> Statement of Claim, para. 91; The Third Notice of Revocation, 7 June 2011, **C-163**.

<sup>149</sup> Statement of Claim, para. 91; The Fourth Notice of Revocation, 7 June 2011, **C-164**.

<sup>150</sup> Statement of Claim, para. 91; The Fifth Notice of Revocation, 7 June 2011, **C-165**.

<sup>151</sup> Statement of Claim, para. 91; The Second Notice of Revocation, 7 June 2011, **C-162**; The Third Notice of Revocation, dated 7 June 2011, **C-163**; The Fourth Notice of Revocation, 7 June 2011, **C-164**; The Fifth Notice of Revocation, dated 7 June 2011, **C-165**.

#### 4. Correspondence following the Notices of Revocation

114. By letter dated 8 June 2011, Sunlodges Tanzania wrote to the Commissioner for Lands objecting to the First Notice of Revocation and requesting its withdrawal.<sup>152</sup>
115. By letter dated 16 June 2011, the Tanzanian lawyers of Sunlodges Tanzania wrote to the Authorised Officer (Land Officer) of Mtwara District.<sup>153</sup> The letter, *inter alia*, (i) denied the alleged abandonment of the Estate; (ii) affirmed that there had been no “land use assessment” nor any warning letter issued prior to the Notices of Revocation; (iii) argued that the revocation procedure had not followed due process and was contrary to article 24 of the Constitution of Tanzania; and (iv) requested that the Notices of Revocation be withdrawn.<sup>154</sup>
116. By letter dated 4 July 2011, the Authorised Land Officer acknowledged receipt of Sunlodges Tanzania’s 16 June 2011 letter and announced that a reply would follow soon.<sup>155</sup> According to the Claimants, no such reply was ever received.<sup>156</sup>
117. By letter dated 22 July 2011, the District Executive Director of Mtwara District Council informed Sunlodges Tanzania that a Special Committee had been appointed to inspect the development of the Estate “as per the conditions stipulated in your title.”<sup>157</sup> Sunlodges Tanzania was informed that the Special Committee would visit the Estate on 25 July 2011 and that they were required to be present and to assist the Committee during the inspection.<sup>158</sup>
118. On 25 July 2011, the Special Committee inspected the Estate.<sup>159</sup> The Parties’ accounts of the inspection and its implications differ in significant respects:
- (a) The Claimants allege that the Special Committee included “people who had been lobbying for Mr Dangote and his companies to be given the Estate.”<sup>160</sup> The Claimants also argue that the Special Committee’s inspection shows that the Notices of Revocation had been

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<sup>152</sup> Statement of Claim, para. 96; Letter from Sunlodges Tanzania to the Commissioner of Lands, 8 June 2011, **C-166**; Reply, paras 115-117. Statement of Defence, paras 210-211.

<sup>153</sup> Statement of Claim, para. 97; Letter from J S Beleko Advocate to Mr Inyasi Msafiri Maiba (the Authorized Officer of Mtwara District Council) [exhibits excluded], 16 June 2011, pp. 2-3, **C-167**; Reply, para. 119.

<sup>154</sup> Statement of Claim, para. 96; Letter from J S Beleko Advocate to Mr Inyasi Msafiri Maiba (the Authorized Officer of Mtwara District Council) [exhibits excluded], 16 June 2011, **C-167**.

<sup>155</sup> Statement of Claim, para. 98; Letter from Mr Inyasi Msafiri Maiba (the Authorised Officer of Mtwara District Council) to J S Beleko Advocate, 4 July 2011, **C-168**.

<sup>156</sup> Statement of Claim, para. 98; Paglieri I, para. 73. Reply, para. 121.

<sup>157</sup> Statement of Claim, para. 99; Letter from M S Mgwali (the District Executive Director of Mtwara District Council) to Sunlodges Tanzania, 22 July 2011, **C-169**.

<sup>158</sup> Statement of Claim, para. 100; Letter from M S Mgwali (the District Executive Director of Mtwara District Council) to Sunlodges Tanzania, 22 July 2011, **C-169**.

<sup>159</sup> Statement of Claim, para. 101.

<sup>160</sup> Statement of Claim, para. 100; Paglieri I, para. 76.



issued absent a prior inspection of the Estate.<sup>161</sup> This is confirmed, in the Claimants' view, by the fact that none of the members of the Special Committee made any reference to the existence of a prior inspection,<sup>162</sup> and that, when confronted about this by Mr Paglieri, one of the members merely replied that "[w]e could have inspected the farm by helicopter."<sup>163</sup> The Claimants also submit that one of the members of the Special Committee spoke with Mr Paglieri at the end of their inspection and told him "[d]o not worry, the farm has not been abandoned. We are together on this one."<sup>164</sup> The Claimants finally complain that they were not given the opportunity to make any submissions to the Special Committee,<sup>165</sup> nor were they provided with any report recording their findings and conclusions.<sup>166</sup>

- (b) In the Respondent's submission, the Special Committee's inspection does not serve as proof that a prior inspection did not take place.<sup>167</sup> The Respondent also considers that the answer given to Mr Paglieri by the Chairman of the Special Committee indicates that a prior inspection was conducted and that it was not necessary for Mr Paglieri or the Claimants to be informed beforehand.<sup>168</sup> The Respondent finally denies that Mr Paglieri received any assurances from any of the members of the Special Committee,<sup>169</sup> and notes that the Special Committee did not have final authority on the matter.<sup>170</sup>

119. Following its inspection of the Estate, the Special Committee prepared a report, which was submitted to the authorized officer for official use (the "**Special Committee Inspection Report**").<sup>171</sup>

120. On 20 September 2011, the Commissioner for Lands informed Sunlodges Tanzania that its Certificates of Title Nos. 15501, 2769, 3550 and 3985 had been revoked following a Presidential

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<sup>161</sup> Statement of Claim, para. 100; Reply, para. 123; Surrejoinder, para. 29.

<sup>162</sup> Surrejoinder, para. 30.

<sup>163</sup> Surrejoinder, para. 30.

<sup>164</sup> Statement of Claim, para. 101; Paglieri I, para. 77; Reply, para. 123.

<sup>165</sup> Statement of Claim, para. 101; Paglieri I, para. 76.

<sup>166</sup> Statement of Claim, para. 102; Judgement of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, p. 8, **C-191**; Paglieri I, para. 77; Reply, para. 123.

<sup>167</sup> Statement of Defence, para. 215.

<sup>168</sup> Rebutter, paras 56, 60.

<sup>169</sup> Statement of Defence, para. 217; Rebutter, paras 57, 81-82.

<sup>170</sup> Statement of Defence, para. 217.

<sup>171</sup> Rejoinder, para. 45; Report of A Special Committee on Site Verification and Inspection of Development Made on Land With CT. No. 15501 with LO No. 21272, CT. No 2769 with Lo No. 7877 in Mtwara Region, (*English Translation*), 5 August 2011, **R-17B**.

declaration on 6 September 2011 “due to violation against terms and conditions of ownership” (the “**Revocation Decision**”).<sup>172</sup>

121. On 23 September 2011, the Official Gazette of the United Republic of Tanzania (the “**Gazette**”) published the revocation of land title ownership over the Mikindani Estate as Government Notice No. 755.<sup>173</sup>

#### **E. JUDICIAL REVIEW PROCEEDINGS**

122. On 10 October 2011, Sunlodges Tanzania applied to the High Court for permission to proceed with an application for judicial review, which in turn would have sought an order of *certiorari* (a quashing order) regarding the Revocation Decision (the “**Judicial Review Proceedings**”).<sup>174</sup> The respondents in the Judicial Review Proceedings were: (i) the Minister of Lands, Housing and Human Settlement Development; (ii) the Commissioner for Lands; (iii) the District Executive Director of Mtwara Council; and (iv) the Attorney General of Tanzania.<sup>175</sup>
123. The grounds put forward by Sunlodges Tanzania in support of its application to the High Court can be summarized as follows: (i) the revocation process was predetermined, given that the Respondent had already resolved to allocate the Estate to a third party;<sup>176</sup> (ii) the ground for revocation invoked by the Respondent was a pretext to achieve a pre-determined decision;<sup>177</sup> (iii) the rules of natural justice were breached during the procedure resulting in the revocation of its Rights of Occupancy;<sup>178</sup> (iv) the President decided to revoke the Rights of Occupancy on 6 September 2011, while the ninety-day period for the Notices of Revocation to come into effect

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<sup>172</sup> Statement of Claim, para. 103; Letter, in Swahili, on behalf of the Commissioner of Lands to Sunlodges Tanzania, 20 September 2011, together with an English translation, **C-170A** and **C-170B**. Statement of Defence, para. 28.

<sup>173</sup> Statement of Claim, para. 106; Gazette Notice in Swahili, 23 September 2011, together with an English translation, **C-171B** and **C-171A**; Paglieri I, para. 81.

<sup>174</sup> Statement of Claim, para. 113; Sunlodges (T) Ltd’s Application in Misc. Land Cause No. 6 of 2011 in the High Court of Tanzania (Land Division), 10 October 2011, **C-182**. The Judicial Review proceeding was captioned as follows: *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Development Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011.

<sup>175</sup> Statement of Claim, para. 113; Sunlodges (T) Ltd’s Application in Misc. Land Cause No. 6 of 2011 in the High Court of Tanzania (Land Division), 10 October 2011, **C-182**.

<sup>176</sup> Statement of Claim, para. 114; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the Application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, pp. 8-9, **C-192**.

<sup>177</sup> Statement of Claim, para. 114; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the Application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, pp. 9-11, **C-192**.

<sup>178</sup> Statement of Claim, para. 114; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, pp. 11-13, **C-192**.

would not have lapsed until 7 September 2011;<sup>179</sup> and (v) the Commissioner for Lands failed to give Sunlodges Tanzania an opportunity to remedy any breach by failing to issue a warning letter before issuing the Notices of Revocation.<sup>180</sup>

124. As part of the first stage of the Judicial Review Proceedings, Sunlodges Tanzania also sought an injunction to prevent its eviction from the Estate while the Judicial Review Proceedings were pending.<sup>181</sup> By order dated 13 October 2011, Mziray J, the judge assigned to the Judicial Review Proceedings ordered that the “[s]tatus quo be maintained” (the “**Interim Injunction**”).<sup>182</sup>
125. By letter dated 30 October 2011, the District Executive Director of Mtwara District Council notified the Revocation Decision to several Ward Executive Officers and village executives.<sup>183</sup> The letter also noted that:

[...] the project for the construction of the Cement Factory has taken off already [...] Surveyors and other land experts from the Ministry of Lands, Housing and Hman [*sic*] Settlements are now engaged in the survey and mapping of the various sites where the envisaged factory is to be constructed.<sup>184</sup>

126. According to the Claimants, through its failure to mention the Interim Injunction, the letter conveyed the wrong impression that the Estate could be freely used and occupied.<sup>185</sup> The Claimants argue that the placement of surveyors in the Estate by the Respondent constituted a breach of the Interim Injunction.<sup>186</sup>

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<sup>179</sup> Statement of Claim, para. 114; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the Application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, pp. 13-14, **C-192**.

<sup>180</sup> Statement of Claim, para. 114; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the Application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, p. 14, **C-192**; Reply, para. 4.

<sup>181</sup> Statement of Claim, para. 115; Sunlodges (T) Ltd’s Application in Misc. Land Cause No. 6 of 2011 in the High Court of Tanzania (Land Division), 10 October 2011, **C-182**; Sunlodges Tanzania’s “Written Submissions in Respect of the application for leave to file for Certiorari and Prohibition, and for the Application for Interim Prohibitory Orders” in Misc. Land Cause No. 6 of 2011, 28 May 2012, pp. 15-18, **C-192**.

<sup>182</sup> Statement of Claim, para. 115; Order of Mziray J in Misc. Land Cause No. 6 of 2011, 13 October 2011, p. 2, **C-183**.

<sup>183</sup> Statement of Claim, para. 116; Letter, in Swahili, from District Executive Director of Mtwara District Council to the Ward Executives Officers of Naumbu, Mayanga and Ndumbwe, and to the Village Executives of Msijute, Hiyari, Imekuwa, Kisiwani, Majengo, Mbuo and Mvundo, 30 October 2011, together with an English translation, **C-172A** and **C-172B**.

<sup>184</sup> Statement of Claim, para. 116; Letter, in Swahili, from District Executive Director of Mtwara District Council to the Ward Executives Officers of Naumbu, Mayanga and Ndumbwe, and to the Village Executives of Msijute, Hiyari, Imekuwa, Kisiwani, Majengo, Mbuo and Mvundo, 30 October 2011, together with an English translation, **C-172A** and **C-172B**.

<sup>185</sup> Statement of Claim, para. 117.

<sup>186</sup> Statement of Claim, para. 118.

127. The Claimants also allege that, following the 30 October 2011 letter, people from the nearby villages entered the Estate, destroying part of its surrounding electric fence, and killed cattle.<sup>187</sup> Sunlodges Tanzania filed a complaint relating to the matter before the High Court.<sup>188</sup> According to Mr Paglieri, the police sometimes refused to record the Claimants' complaints and arrested many people employed at the Estate.<sup>189</sup>
128. By letter dated 1 November 2011, the District Executive Director of Mtwara Council informed Sunlodges Tanzania about (i) the envisaged construction of a road that would pass through the Estate; and (ii) the removal of the electric fence surrounding the Estate, which had been "cut off to ensure safety for the surveying team."<sup>190</sup>
129. On 17 November 2011, Sunlodges Tanzania filed an application before the High Court requesting a declaration that the District Executive Director of Mtwara Council was in contempt of the Interim Injunction (the "**First Contempt Application**").<sup>191</sup>
130. On 23 November 2011, Sunlodges Tanzania informed Dangote Industries about the Interim Injunction and requested that their employees abstain from entering or interfering with the Estate.<sup>192</sup>
131. By letter dated 25 November 2011, the Acting Regional Administrative Secretary of the Mtwara Regional Commissioner Office informed Dangote Industries that "the Regional Commissioner has granted you leave to enter in the said area [the Estate] to undertake preliminary site clearance

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<sup>187</sup> Statement of Claim, para. 117; Photographs of the fence having been pulled down and cows having been injured by locals, undated, **C-106**; Daily Reports and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "MIKINDANI", 2 November 2011, **C-196**; Daily Report and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "Fence", 4 November 2011, **C-197**; Daily Report and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "BREAKING NEWS", 9 November 2011, **C-198**; Daily Report and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "FENCE AND CATTLE", 10 November 2011, **C-199**; Daily Report and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "PEMBA", 2 December 2011, **C-200**; Daily Report and email from Rashid Mashuhuri to Mr. Paglieri and others, with the subject "lost bull", 19 December 2011, **C-201**.

<sup>188</sup> Statement of Claim, para. 117; Affidavit of Rashid Mashuhuri in Misc. Civil Cause No. 6 of 2011 (*exhibits omitted*), 13 November 2011, **C-185**.

<sup>189</sup> Statement of Claim, para. 117; Paglieri I, para. 87.

<sup>190</sup> Statement of Claim, para. 119; Letter, in Swahili, from the District Executive Director of Mtwara District Council to Sunlodges Tanzania, 1 November 2011, together with an English translation, **C-173A** and **C-173B**.

<sup>191</sup> Statement of Claim, para. 120; Certificate of Urgency and Application in Misc. Civil Cause No. 6 of 2011, 17 November 2011, **C-186**.

<sup>192</sup> Statement of Claim, para. 115; Email from Franco Paglieri to Mr Vidya Sagar Dixit of Dangote, attaching the Interim Order, 23 November 2011, **C-174**.

and linked prospecting activities in accordance with to [sic] your Prospecting License issued by the Minister of Energy and Minerals.”<sup>193</sup>

132. On 1 December 2011, Mziray J granted the Respondent’s request for an extension of time to file its Counter Affidavits and ordered that the status quo be extended.<sup>194</sup> According to the Claimants, around the same date, the Respondent placed “land beacons” on the Estate for the benefit of Dangote Industries,<sup>195</sup> and Dangote Industries started to physically subdivide the Estate.<sup>196</sup>
133. On 7 December 2011, the Assistant Commissioner for Lands decided to designate the Estate “for Industrial and Mining purposes only.”<sup>197</sup> This decision was published in the Gazette on 20 January 2012.<sup>198</sup> According to the Claimants, this decision sought to prevent the Claimants from continuing their activities on the Estate and to allow Dangote Industries to build its cement factory, thus constituting a breach of the Interim Injunction.<sup>199</sup>
134. On 9 February 2012, Sunlodges Tanzania filed an application before the High Court requesting a declaration that the Regional Commissioner of Mtwara Region was in contempt of the Interim Injunction (the “**Second Contempt Application**”).<sup>200</sup>
135. On 27 April 2012, the Attorney General sent a letter to the Permanent Secretary of the Ministry of Land, Housing and Housing Development and to the Director of the Mtwara District Council stating that “we agreed that both sides should follow the orders of the Court to leave the area as it was in order to enable the Court proceed with the basic case.”<sup>201</sup>

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<sup>193</sup> Statement of Claim, para. 121; Letter from the Acting Regional Administrative Secretary of the Mtwara Regional Commissioner’s Office to Dangote Industries Limited, 25 November 2011, **C-175**.

<sup>194</sup> Statement of Claim, para. 122; Order of Mziray J in Misc. Civil Cause No. 6 of 2011, 1 December 2011, **C-187**.

<sup>195</sup> Statement of Claim, para. 123; Photographs of land beacons, undated, **C-108**; Maawiya Ali Abdallah’s Supplementary Affidavit in Misc. Land Cause No. 6 of 2011 (*exhibits omitted*), 3 February 2012, para. 11, **C-188**; Affidavit of Sally Perry in Misc. Civil Cause No. 6 of 2011 (*exhibits omitted*), 9 February 2012, para. 11, **C-190**.

<sup>196</sup> Statement of Claim, para. 123; Maawiya Ali Abdallah’s Supplementary Affidavit in Misc. Land Cause No. 6 of 2011 (*exhibits omitted*), 3 February 2012, para. 12, **C-188**; Affidavit of Sally Perry in Misc. Civil Cause No. 6 of 2011 (*exhibits omitted*) 9 February 2012, para. 12, **C-190**; Paglieri I, para. 93.

<sup>197</sup> Statement of Claim, para. 124; Gazette, entry “Taarifa ya Kawaida Na 41”, 20 January 0212, **C-177**; Tanzania’s “Joint Written Submission in Opposition of the Application for leave to Apply for Certiorari and for Interim Prohibitory Orders by the Respondents” in Misc. Land Cause No. 6 of 2011, 11 June 2012, p. 5, **C-193**.

<sup>198</sup> Statement of Claim, para. 124; Gazette entry “Taarifa ya Kawaida Na 41”, 20 January 0212, **C-177**.

<sup>199</sup> Statement of Claim, para. 124; Paglieri I, para. 94.

<sup>200</sup> Statement of Claim, para. 125; Application by Sunlodges Tanzania for contempt proceedings in respect of the Regional Commissioner of Mtwara (Mr Joseph Simbakalia), 9 February 2012, **C-189**.

<sup>201</sup> Statement of Claim, para. 126; Letter, in Swahili, from the Attorney-General of Tanzania to the Permanent Secretary of the Ministry of Land, Housing and Human Development and the Director of the Mtwara District Council, 27 April 2012, together with an English translation, **C-178A** and **C-178B**.

136. According to the Claimants, Sunlodges Tanzania decided to withdraw the First and Second Contempt Applications after the Attorney General purportedly “promised on or about 25 April 2012” that no further acts of contempt would be committed.<sup>202</sup> The Claimants argue that, in its letter of 27 April 2012, the Respondent effectively admitted having breached the Interim Injunction.<sup>203</sup> In contrast, the Respondent denies that the Attorney General would have conceded that the Government was in breach of the Interim Injunction,<sup>204</sup> and considers that the said letter merely advised the parties to adhere to the court orders and advised Sunlodges Tanzania to withdraw the Contempt Applications to allow the court to proceed with the “substantive Application.”<sup>205</sup>
137. On 23 July 2012, the High Court (Mziray J) issued its judgment in the Judicial Review Proceedings (the “**Judicial Review Judgement**”). The Judicial Review Judgement concluded, *inter alia*, that “the applicant’s allegations are hereby found to be plain, hopeless and unmeritorious ones as a result the applicant has miserably failed to sufficiently establish an arguable prima facie case of reasonable suspicion worthy of scrutiny of this court at the second stage.”<sup>206</sup> Accordingly, Sunlodges Tanzania’s application for permission to apply for orders of *certiorari* and prohibition was dismissed.<sup>207</sup>

#### **F. VALUATION OF THE ESTATE**

138. In October 2011, the Claimants commissioned Messrs Sultan Mundeme and James Swilla of GimcoAfrica Limited (“**GimcoAfrica**”) to determine the compensation resulting from the revocation of their Rights of Occupancy over the Estate (the “**GimcoAfrica Valuation Report**”).<sup>208</sup>

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<sup>202</sup> Statement of Claim, para. 126; Letter, in Swahili, from the Attorney-General of Tanzania to the Permanent Secretary of the Ministry of Land, Housing and Human Development and the Director of the Mtwara District Council, 27 April 2012, with an English translation, **C-178A** and **C-178B**; Reply, para. 143.

<sup>203</sup> Statement of Claim, para. 126; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, p. 3, **C-191**: “[...] That actuated the applicant to file an application for contempt proceedings which later on was vacated upon written indication from the respondents through the office of the 4th respondent showing that the respondents would no longer continue to commit contempt acts and had actually started to comply with the court's order of maintenance of status quo [...]”; Reply, para. 143.

<sup>204</sup> Statement of Defence, para. 227; Rejoinder, paras 19, 84. *Cf.* Reply, para. 143.

<sup>205</sup> Statement of Defence, para. 227; Rejoinder, para. 19.

<sup>206</sup> Statement of Claim, para. 128; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors.*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, pp. 10-11, **C-191**.

<sup>207</sup> Statement of Claim, para. 128; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors.*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, p. 11, **C-191**.

<sup>208</sup> Statement of Claim, para. 140.

139. GimcoAfrica inspected the Estate for valuation purposes on 9 October 2011.<sup>209</sup>
140. By letter dated 30 July 2012, the Assistant Commissioner for Lands recalled the dismissal of Sunlodges Tanzania’s application for judicial review and noted that, as per article 49(3) of the Land Act, Sunlodges Tanzania was entitled to compensation.<sup>210</sup> Sunlodges Tanzania was informed that the valuation process was expected to start on 2 August 2012, and that they were to be present and cooperate during the valuation process.<sup>211</sup>
141. On 2 August 2012, Tanzania’s valuers visited the Estate for valuation purposes.<sup>212</sup> According to Mr Paglieri, Tanzania never conveyed to the Claimants any report that may have resulted from this visit.<sup>213</sup>
142. The Claimants presented the GimcoAfrica Valuation Report to Tanzania’s Chief Valuer in 2012. The report was initially rejected because it included a valuation for moveable assets which, according to Tanzania’s Chief Valuer, were not compensable under Tanzanian law.<sup>214</sup>
143. GimcoAfrica then amended its Valuation Report to exclude moveable assets (“**(Amended) GimcoAfrica Valuation Report**”) and it was presented again to Tanzania’s Chief Valuer.<sup>215</sup> The (Amended) GimcoAfrica Valuation Report valued the Estate at TZS 49,695,000,000; according to the same report, this corresponded to USD 30,118,180.<sup>216</sup>
144. On 16 August 2012, Tanzania’s Chief Valuer stamped the (Amended) GimcoAfrica Valuation Report, the stamp stating “valuation accepted.”<sup>217</sup>
145. Following the 2 August 2012 inspection of the Estate, the Valuation Section of Mtwara District Council prepared two valuation reports, dated 27 August 2012 (the “**Government Valuation Reports**”).<sup>218</sup> The Government Valuation Report regarding compensation for the revocation of

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<sup>209</sup> Statement of Claim, para. 140.

<sup>210</sup> Statement of Claim, para. 138; Letter, in Swahili, from the Assistant Land Commissioner, Southern Zone to Sunlodges Tanzania, 30 July 2012, together with an English translation, **C-179A** and **C-179B**.

<sup>211</sup> Statement of Claim, Letter, in Swahili, from the Assistant Land Commissioner, Southern Zone to Sunlodges Tanzania, 30 July 2012, together with an English translation, **C-179A** and **C-179B**.

<sup>212</sup> Paglieri I, para. 100: Rejoinder, paras 55-56.

<sup>213</sup> Statement of Claim, para. 139; Paglieri I, para. 100; Reply, para. 153.

<sup>214</sup> Statement of Claim, para. 140.

<sup>215</sup> Statement of Claim, para. 140; Amended GimcoAfrica Valuation Report, October 2011, **C-194**.

<sup>216</sup> Statement of Claim, para. 141; Amended GimcoAfrica Valuation Report, October 2011, p. 14, **C-194**; Paglieri I, para. 102.

<sup>217</sup> Statement of Claim, para. 141; Amended GimcoAfrica Valuation Report, October 2011, p. 14, **C-194**.

<sup>218</sup> Statement of Defence, para. 14; Valuation Report for Compensation purpose of properties (Building and Crops/Trees only) on revoked Farms with CT No. 3550 and CT No. 3985 Mtwara District, Mtwara Region, August 2012, **R-1**; Valuation report for Compensation purpose of properties (Building and Crops/Trees

Certificates of Title No. 3550 and No. 3985 estimated that the “fair total compensable value for the said unexhausted improvements to the named above titles is [...] TZS 334,397,540.”<sup>219</sup> The Government Valuation Report regarding compensation for the revocation of Certificates of Title Nos. 15501 and 2769 estimated that the “fair total compensable value for the said unexhausted improvements to the named above titles is [...] [TZS] 962,518,960.”<sup>220</sup>

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only) on revoked Farms with CT No. 2769 and CT No. 15501 Mtwara District, Mtwara Region, August 2012, **R-2**.

<sup>219</sup> Valuation Report for Compensation purpose of properties (Building and Crops/Trees only) on revoked Farms with CT No. 3550 and CT No. 3985 Mtwara District, Mtwara Region, August 2012, p. 5, **R-1**.

<sup>220</sup> Valuation report for Compensation purpose of properties (Building and Crops/Trees only) on revoked Farms with CT No. 2769 and CT No. 15501 Mtwara District, Mtwara Region, August 2012, p. 5, **R-2**.



#### IV. THE DOMESTIC LEGAL BACKGROUND

##### A. RIGHTS OF OCCUPANCY UNDER TANZANIAN LAW

146. This Section provides an overview of the Tanzanian regulations concerning Rights of Occupancy and summarizes the Parties' divergent positions regarding the extent to which the revocation of the Claimants' title over the Estate complied with those regulations.

##### 1. Undisputed Legal Background

###### (a) Introduction

147. Pursuant to the Freehold Titles (Conversion) and Government Leases Act (1963), all freehold titles were converted into leasehold titles for a term of ninety-nine years. Such leasehold titles were known as "Government leases."<sup>221</sup>

148. The Government Leaseholds (Conversion to Rights of Occupancy) Act (1969) extinguished all Government leases.<sup>222</sup> Pursuant to this Act, leaseholders would hold the land previously held under a Government lease under a right of occupancy for a term equal to the unexpired Government lease.<sup>223</sup>

149. The two main Acts regulating the question of ownership of land in Tanzania are the Land Act, 1999 (the "**Land Act**") and the Village Land Act No. 5, 1999.<sup>224</sup>

150. Section 32 of the Land Act fixes the term for which a right of occupancy may be granted.<sup>225</sup> The holder of a right of occupancy is required to pay annual rent.<sup>226</sup> Pursuant to the Land Act, persons

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<sup>221</sup> Freehold Titles (Conversion) and Government Leases Act, 1963, s. 5(1), **CLA-1**, which provides as follows: "*All land, which immediately before the appointed day is vested in any person of full age for an estate of fee simple in possession shall, on the appointed day, vest in such person for a term of ninety-nine years from the appointed day, and thereupon such estate in fee leases simple shall be extinguished.*"

<sup>222</sup> Government Leaseholds (Conversion to Rights of Occupancy) Act, 1969, s. 3(1), **CLA-3**, which provides as follows: "*Every Government lease shall, with effect from the appointed day, be extinguished.*"

<sup>223</sup> Government Leaseholds (Conversion to Rights of Occupancy) Act, 1969, s. 3(2), **CLA-3**, which provides as follows: "*On or after the appointed day the leaseholder shall hold the land which, immediately prior to the appointed day, was held for a Government lease under a right of occupancy which shall be deemed to have been duly granted to such leaseholder under section -6 of the Lands Ordinance for a term equal to the unexpired term of the Government lease for which the land was held immediately before the appointed day, and, except as varied by this Act, all the provisions of the Land Ordinance and of regulations made thereunder shall apply and extend to such right of occupancy.*"

<sup>224</sup> Statement of Defence, para. 121. In case of conflict, the Land Act prevails (*cf.* Reply, para. 35; Land Act, s. 181, **CLA-10**).

<sup>225</sup> Land Act, s. 32, **CLA-10**.

<sup>226</sup> Land Act, s. 33, **CLA-10**.

granted a right of occupancy shall be issued a “certificate of occupancy” by the Commissioner for Lands.<sup>227</sup>

151. Regarding the ownership of land by non-citizens,<sup>228</sup> section 20 of the Land Act provides as follows:

- (1) For avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act.
- (2) Land to be designated for investment purposes under subsection (1) of this section shall be identified, gazetted and allocated to the Tanzania Investment Centre which shall create derivative rights to investors.
- (3) For the purposes of compensation made pursuant to this Act or any other written law, all lands acquired by non-citizens prior to the enactment of this Act, shall be deemed to have no value, except for unexhausted improvements for which compensation may be paid under this Act or any other law.
- (4) For the purposes of this Act, any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be noncitizens or foreign company's [*sic*].
- (5) At the expiry, termination or extinction of the right of occupancy or derivative right granted to a non-citizen or a foreign company, reversion of interests or rights in and over the land shall vest in the Tanzania Investment Center or any other authority as the Minister may prescribe in the Gazette.<sup>229</sup>

(b) *Conditions of Rights of Occupancy*

152. The Land (Conditions of Rights of Occupancy) Regulations, 2001 (the “**Conditions of Rights of Occupancy Regulations**”) provide in relevant part as follows:

7. Every right of occupancy of land for agricultural purposes shall be subject to the terms and conditions to the following effect, namely:-
  - (a) that the occupier will during the first year of the term of the right of occupancy fully cultivate one eighth of the total area of the arable land subject to the right of occupancy to the satisfaction of the Commissioner and during each of the next four years of such term will fully cultivate a further one-eighth of the total area of such arable land in the like manner as aforesaid;
  - (b) that the occupier will at all times during the term of the right of occupancy have and maintain fully cultivated to the satisfaction of the Commissioner all areas which he is required to cultivate under condition (a) set out in this regulation amounting, in the fifth year of such term and thereafter, to five-eighths of such arable lands.

[...]

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<sup>227</sup> Land Act, s. 29(1), **CLA-10**.

<sup>228</sup> Land Act, s. 20(4), **CLA-10**, provides: “*For the purposes of this Act, any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be noncitizens or foreign company's (sic).*”

<sup>229</sup> Land Act, s. 20, **CLA-10**.

9. Every right of occupancy of land for mixed agricultural and pastoral purposes shall be subject to the terms and conditions to the following effect, namely-
- (a) that the occupier will during the first year of the term of the right of occupancy fully cultivate one-fiftieth, and fully stock with his own cattle one-tenth of the total area of the land subject to the right of occupancy to the satisfaction of the Commissioner, and during each of the next four years of such term will fully cultivate a further one-fiftieth, and wilfully stock with his own cattle a further one-tenth of the total area of such land in like manner as aforesaid;
  - (b) that the occupier will at all times during the term of the right of occupancy:
    - (i) have and maintain fully cultivate to the satisfaction of the Commissioner all areas which he is required to cultivate under condition (a) set out in this regulation amounting in the fifth year of such term and thereafter to one-tenth of the total area of the land to which the right of occupancy relates; and
    - (ii) have and maintain fully stocked with his own cattle to the satisfaction of the Commissioner all areas which he is required so to stock under condition (a) set out in this regulation amounting in the fifth year of such term and thereafter to one-half of the total area of the land to which the right of occupancy relates.<sup>230</sup>

(c) *Revocation of Rights of Occupancy*

153. The Land Act provides that rights of occupancy may be revoked by the President in case of breach of any conditions under which a right of occupancy is granted.<sup>231</sup> Section 45(2) of the Land Act provides that the President shall not revoke a right of occupancy save for “good cause”, which includes the following scenarios:

- (i) there has been an attempted disposition of a right of occupancy to a non-citizen contrary to this Act and any other law governing dispositions of a right of occupancy to a non-citizen;
- (ii) the land the subject of the right of occupancy has been abandoned for not less than two years;
- (iii) where the right of occupancy is of land of an area of not less than five hundred hectares, not less than eighty per centum of that area of land has been unused for the purpose for which the right of occupancy was granted for not less than five years;
- (iv) there has been a disposition or an attempt at a disposition which does not comply with the provisions of this Act;
- (v) there has been a breach of a condition contained or implied in a certificate of occupancy;
- (vi) there has been a breach of any regulation made under this Act.<sup>232</sup>

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<sup>230</sup> Conditions of Rights of Occupancy Regulations, reg. 7, 9, **RLA-1**.

<sup>231</sup> Land Act, s. 45(1), **CLA-10**, which provides as follows: “Upon any breach arising from any condition subject to which any right of occupancy has been granted, the right of occupancy shall become liable to be revoked by the President.”

<sup>232</sup> Land Act, s. 45(2), **CLA-10**.

154. Apart from these scenarios, Section 45(3) of the Land Act also establishes that the President may in any event “revoke a right of occupancy if in his opinion it is in the public interest to do so.”<sup>233</sup>

155. Revocation by the President is premised on a recommendation from the Commissioner for Lands.<sup>234</sup> Pursuant to section 45(4) of the Land Act:

Before proceeding to take any action in respect of a breach of a condition of the right of occupancy, the Commissioner shall consider-

- (a) the nature and gravity of the breach and whether it could be waived;
- (b) the circumstances leading to the breach by the occupier;
- (c) whether the condition that has been breached could be amended so as to obviate the breach, and shall in all cases where he is minded to proceed to take action on a breach, first issue a warning letter to the occupier advising him that he is in breach of the conditions of the right of occupancy.<sup>235</sup>

156. Section 45(5) of the Land Act further provides:

The Commissioner may, instead of proceeding to the enforcement of the revocation -

- (a) impose a fine on the occupier in accordance with section 46;
- (b) serve a notice on the occupier in accordance with section 47 requiring the breach to be remedied.<sup>236</sup>

157. Pursuant to section 48(1) of the Land Act:

Where the Commissioner is satisfied that -

- (a) a notice served under section 47 has not been complied with; or
- (b) the breach of condition is so serious and of far-reaching consequences that-
  - (i) it would not be practicable for the occupier to remedy that breach within a reasonable time; or
  - (ii) the occupier has demonstrated a clear unwillingness to comply with the conditions of the grant of the right of occupancy made to him;
- (c) there has been an attempted disposition of a right of occupancy to a non-citizen contrary to this Act and any other law governing the disposition of a right of occupancy to a non-citizen;
- (d) the land the subject of the right of occupancy has been abandoned for not less than two years;
- (e) where the right of occupancy is of land of an area of not less than five hundred hectares, not less than eighty per centum of that area of land has been unused for the purpose for which the right of occupancy was granted for not less than five years;
- (f) there has been a disposition or an attempt at a disposition which does not comply with the provisions of this Act;

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<sup>233</sup> Land Act, s. 45(3), **CLA-10**.

<sup>234</sup> Land Act, s. 48(3) and s. 49(1), **CLA-10**.

<sup>235</sup> Land Act, s. 45(4), **CLA-10**.

<sup>236</sup> Land Act, s. 45(5), **CLA-10**.

- (g) any rent, taxes or other dues remain unpaid six months after a written notice in the prescribed form was served on the occupier and subsection (8) of section 33 does not apply to the occupier,

he shall-

- (i) serve a notice of revocation in the prescribed form on the occupier;
- (ii) cause a copy of that notice to be served on all persons having an interest in the land; and
- (iii) notify the Registrar of the service of the notice which shall be recorded in the Land Register.

158. A notice of revocation comes into effect ninety days after its service to the occupier.<sup>237</sup> Pursuant to section 48(3) of the Land Act, “[a]s soon as the notice of revocation has come into effect the Commissioner shall recommend to the President to revoke the right of occupancy.”<sup>238</sup>

159. Once a revocation is approved by the President, the Commissioner for Lands shall cause its publication in the Gazette and in one or more newspapers circulating in the area where the land subjected to revocation is located.<sup>239</sup>

160. The legal effects stemming from the President’s approval of revocation are set out in section 49(2) of the Land Act. These effects include that “the right of occupancy to which it refers shall determine immediately and without further action” and that “all rights and interests in the land the subject of the right of occupancy shall revert to the President and the same shall be registered in the Land Register.”<sup>240</sup>

161. Section 49(3) of the Land Act establishes that compensation should be paid to the occupier whose right of occupancy is revoked. Such compensation “shall equal the value of unexhausted improvements made in accordance with the terms and condition of the right of occupancy on the land at the time of the revocation,” minus certain amounts explicitly provided for in such provision.<sup>241</sup>

*(d) Compensation for Revocation of Rights of Occupancy*

162. Section 180 of the Land Act establishes the law applicable to the adjudication of land disputes in Tanzania.<sup>242</sup>

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<sup>237</sup> Land Act, s. 48(2), **CLA-10**.

<sup>238</sup> Land Act, s. 48(3), **CLA-10**.

<sup>239</sup> Land Act, s. 49(1), **CLA-10**.

<sup>240</sup> Land Act, s. 49(2), **CLA-10**.

<sup>241</sup> Land Act, s. 49(3), **CLA-10**.

<sup>242</sup> Statement of Defence, para. 122; Land Act, s. 180, **CLA-10**. Section 180(1) of the Land Act provides as follows: “Subject to the provisions of the Constitution and this Act, the law to be applied by the courts in implementing, interpreting and applying this Act and determining disputes about land arising under this Act or any other written law shall be - (a) the customary laws of Tanzania; and (b) the substance of the

163. The Land (Compensation Claims) Regulations, 2001 (the “**Claims Regulations**”) “shall apply to all applications or claims for compensation against the Government or local government authority or any public body or institution under the [Land] Act who may claim compensation.”<sup>243</sup>
164. The Claims Regulations foresee among those who may claim compensation “the holder of a granted right of occupancy [...] in respect of a right of occupancy which has been revoked under Section 49 of the [Land] Act.”<sup>244</sup>
165. Pursuant to regulation 5(1) of the Claims Regulations, the Land (Assessment of Value for Compensation) Regulations, 2001 (the “**Assessment Regulations**”) “shall apply to any application or claim for compensation by any person occupying land.”<sup>245</sup>
166. Pursuant to regulation 5(2) of the Claims Regulations, “[w]ithout prejudice to the generality of the above, the compensation that may be claimed by any person occupying land shall be – (a) the value of unexhausted improvements on the land he is occupying; (b) grazing land.”<sup>246</sup>
167. According to the Assessment Regulations, “[t]he basis for assessment of the value of any land and unexhausted improvement for purposes of compensation under the [Land] Act shall be the market value of such land.”<sup>247</sup> The Assessment Regulations provide that every assessment of value for the purposes of the Act “shall be prepared by qualified valuer.”<sup>248</sup> Regulation 6 of the Assessment Regulations provides as follows:

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*common law and the doctrines of equity as applied from time to time in any other countries of the Commonwealth which appear to the court to be relevant to the circumstances of Tanzania.”*

<sup>243</sup> Claims Regulations, reg. 3, **CLA-13**.

<sup>244</sup> Statement of Claim, para. 62; Claims Regulations, reg. 4(a), **CLA-13**.

<sup>245</sup> Claims Regulations, reg. 5(1), **CLA-13**. Cf. Statement of Claim, para. 65. The Respondent argues that the Assessment Regulations were meant to apply where the land has value, while in the present case pursuant to section 20(3) of the Land Act, the land is deemed to have no value (Statement of Defence, para. 333).

<sup>246</sup> Regulation 5(2) of the Claims Regulations, reg. 5(2), **CLA-13**.

<sup>247</sup> Assessment Regulations, 2001, reg. 3, **CLA-12**. Regulation 4 of the Assessment Regulations specifies that “[t]he market value of any land and unexhausted improvement shall be arrived at by use of comparative method evidenced by actual recent sales of similar properties or by use of income approach or replacement cost method where the property is of special nature and not saleable.”

<sup>248</sup> Assessment Regulations, reg. 5, **CLA-12**.

Every assessment of the value of land and unexhausted improvement for the purposes of payment of compensation by Government or Local Government Authority shall be verified by the Chief Valuer of the Government or his representative.<sup>249</sup>

168. Pursuant to the Assessment Regulations, “[c]ompensation for loss of any interest in land shall include value of unexhausted improvement, disturbance allowance, transport allowance, accommodation allowance and loss of profits.”<sup>250</sup>

## 2. The Claimants’ Position

169. According to the Claimants, the Commissioner for Lands must send a letter notifying the right holder of the existence of a breach as a pre-condition to taking any action in relation with a breach of a condition of a right of occupancy.<sup>251</sup> As noted above, by letters dated 8 June 2011<sup>252</sup> and 16 June 2011,<sup>253</sup> Sunlodges Tanzania requested the withdrawal of the Notices of Revocation, *inter alia*, due to the absence of a prior warning letter.<sup>254</sup>

170. In this regard, the Claimants disagree with the Respondent’s interpretation that a warning letter need not be issued if the alleged breach is one which cannot be remedied.<sup>255</sup> The Claimants consider that such interpretation ignores the scheme of the Land Act and the clear language of section 45(4)(c).<sup>256</sup>

171. The Claimants contend that the Respondent did not allege in the Notices of Revocation any “public interest” but rather claimed to act on the basis of a “good cause.”<sup>257</sup> According to the Claimants, this would imply that the Respondent did not expropriate the Estate for a public purpose.<sup>258</sup>

172. The Claimants understand the Respondent’s position in this arbitration to be that the revocation of their Rights of Occupancy over the Estate was premised on (i) section 45(2)(ii) of the Land Act [abandonment of the land subject of the right of occupancy for not less than two years]; (ii) section 45(2)(iii) of the Land Act [in regard to land of 500 hectare or more if 80% or more of the land is unused for five years or more for the purpose for which the right of occupancy was granted]; and

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<sup>249</sup> Assessment Regulations, reg. 6, **CLA-12**.

<sup>250</sup> Assessment Regulations, reg. 7, **CLA-12**.

<sup>251</sup> Statement of Claim, para. 51.

<sup>252</sup> Statement of Claim, para. 96; Letter from Sunlodges Tanzania to the Commissioner of Lands, 8 June 2011, **C-166**.

<sup>253</sup> Letter from J S Beleko Advocate to Mr Inyasi Msafiri Maiba (the Authorized Officer of Mtwara District Council), exhibits excluded, 16 June 2011, **C-167**.

<sup>254</sup> Statement of Claim, paras 96-97.

<sup>255</sup> Reply, paras 61-63; Statement of Defence, para. 253.

<sup>256</sup> Reply, para. 63; Oral Hearing Tr., Day 1, 82:24-83:10.

<sup>257</sup> Statement of Claim, para. 48.

<sup>258</sup> Statement of Claim, para. 48.

(iii) section 45(3)(v) of the Land Act [breach of a condition contained or implied in a Certificate of Title (but also states Certificate of Occupancy), namely to use land for agricultural purposes].<sup>259</sup> The Claimants do not deny that these circumstances constitute “good causes” within the meaning of the Land Act,<sup>260</sup> but claim that such circumstances have not been established in the present case.<sup>261</sup> They also note that, in any event, they were not invoked by Tanzania in the Notices of Revocation.<sup>262</sup>

173. Similarly, the Claimants criticize the Respondent’s reliance in this arbitration on the conditions allegedly contained in the Certificates of Incentives and the Business Plan.<sup>263</sup> According to the Claimants, the breach of those conditions cannot constitute a “good cause” under section 45(2) of the Land Act and, accordingly, cannot be valid grounds for issuing a Notice of Revocation under section 48 of the Land Act.<sup>264</sup> Therefore, the Claimants submit that the extent to which they achieved the objectives set out in the Certificate of Incentives and the Business Plan has no bearing to the validity of the Notices of Revocation.<sup>265</sup>

174. The Claimants also assert that the Notices of Revocation had “obvious errors.”<sup>266</sup> In particular, the Claimants note that the Certificates of Title contradict the Notices of Revocation<sup>267</sup> in that the former do not stipulate any “conditions” with regard to the development of the land.<sup>268</sup> Further, they note that the Notices of Revocation did not imply that the conditions of use of the land in the certificates of Rights of Occupancy had been breached.<sup>269</sup>

175. The Claimants also argue that the Notices of Revocation failed to set out the conditions of the certificates of occupancy that were allegedly breached with the degree of specificity required by form 11 of the Land Act (Forms) Regulation and due process.<sup>270</sup> In particular, the Claimants

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<sup>259</sup> Reply, para. 56.

<sup>260</sup> Although the Claimants agree that these are “good causes” within the meaning of the Land Act, the Claimants disagree with the Respondent’s interpretation of section 45(2)(iii) of the Land Act. The Claimants deny that this provision would require the Claimants to develop the land up to 80% as submitted by the Respondent (Reply, para. 238.1. Statement of Defence, para. 238; fn 143). In the Claimants’ view, section 45(2)(iii) of the Land Act sets the threshold of a “good cause” for revocation at 80% or more of the land being unused and, therefore, only requires development of more than 20% of the land (Reply, para. 238; Oral Hearing Tr., Day 1, 71:7-11).

<sup>261</sup> Reply, para. 56; Paglieri I, paras 31, 34-39, 48, 61, 64, 71, 72.

<sup>262</sup> Reply, para. 56.

<sup>263</sup> Reply, para. 57; Statement of Defence, paras 56, 59, 61-62, 158, 185, 195.

<sup>264</sup> Reply, para. 57.

<sup>265</sup> Reply, paras 57-58.

<sup>266</sup> Statement of Claim, para. 89; Reply, paras 1, 110.

<sup>267</sup> Statement of Claim, para. 89; Reply, paras 107-109.

<sup>268</sup> Statement of Claim, paras 89, 94; Reply, paras 1, 99.1, 110.

<sup>269</sup> Reply, para. 110.

<sup>270</sup> Reply, paras 66-67, 109; Land Act (Forms) Regulations, p. 17, **CLA-128**.



point out that the Notices of Revocation did not rely on any of the “good causes” asserted by the Respondent in its Statement of Defence as a justification for the revocation.<sup>271</sup>

176. In any event, the Claimants submit that they had not abandoned the Estate nor failed to develop it for agricultural purposes.<sup>272</sup> In particular, the Claimants dispute that a prior inspection of the Estate ever took place, or that any such inspection could have possibly determined that the Estate was abandoned or underdeveloped.<sup>273</sup> In this regard, the Claimants criticize the Respondent for having never mentioned the existence of the Inspection Report of May 2011 that was allegedly produced following the May 2011 inspection until it was filed with the Rejoinder.<sup>274</sup> Further, in the Claimants’ view, Tanzania tacitly accepted their complaint regarding the lack of a prior inspection by appointing a Special Committee to inspect the Estate on 25 July 2011.<sup>275</sup> Similarly, the Claimants note that there was no reference to the Inspection Report of May 2011 in the report allegedly produced by the Special Committee as a result of its inspection in July 2011, nor in the Judicial Review Proceedings.<sup>276</sup>
177. In addition, the Claimants contend that the lack of advance notification by the Government of the alleged May 2011 inspection would also be a clear indication that the inspection never took place, especially as the inspections on 25 July 2011 and 2 August 2012 were preceded by notifications.<sup>277</sup> In this sense, the Claimants submit that the author of the Inspection Report of May 2011 would not have been able to enter the Estate without the knowledge and permission of the Estate management.<sup>278</sup>
178. Moreover, the Claimants also argue that the description of the Estate in the Inspection Report of May 2011 is very inaccurate and consider that “the only plausible conclusion is that it was written by someone who had not visited the Estate.”<sup>279</sup>

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<sup>271</sup> Reply, paras 67, 97.3.

<sup>272</sup> Statement of Claim, paras 89, 94; Reply, paras 99.2, 99.3, 104.

<sup>273</sup> Statement of Claim, para. 100; Reply, para. 123; Surrejoinder, paras 26-44.

<sup>274</sup> Surrejoinder, para. 28. The Claimants criticize Mr Luanda’s allegation that they failed to dispute the Inspection Report of May 2011 in their letter of 16 June 2011, arguing that the Claimants could not have been expected to engage with a report with which they were not provided nor informed about (*cf.* Surrejoinder, para. 48; Luanda II, paras 19-20.). *Cf.* Rebutter, para. 61.

<sup>275</sup> Surrejoinder, para. 29.

<sup>276</sup> Surrejoinder, paras 31-33.

<sup>277</sup> Surrejoinder, para. 34.

<sup>278</sup> Surrejoinder, paras 35-36; Paglieri I, para. 34; Paglieri III, para. 15.

<sup>279</sup> Surrejoinder, paras 38-41. The Inspection Report of May 2011 refers to all the Certificates of Title covering the Estate while no other governmental documentation did so until the Revocation Decision of 6 September 2011, and the Certificates of Title are mentioned in the same sequence as in the Revocation Decision. According to the Claimants, this would be a further indication that such report was created afterwards (Surrejoinder, paras 42-43).

179. The Claimants further contend, relying on the Counter-Affidavit of Ms Monica Peter Oturu (Principal State Attorney of Tanzania) filed in the Judicial Review Proceedings, that the Respondent did not rely on the First Notice of Revocation to support the Revocation Decision.<sup>280</sup>
180. Finally, the Claimants note that the Revocation Decision referred to the Certificates of Title Nos. 15501, 2769, 3550 and 3985 (all of the Claimants' titles over the Estate) while the Notices of Revocation had only been issued in relation to the Certificates of Title No. 15501, 2769 and 3985; but not in relation to the Certificate of Title Nos. 3550.<sup>281</sup> This means, according to the Claimants, that the part of the Estate covered by Certificate of Title No. 3550 was revoked without having been subject of a notice of revocation.<sup>282</sup>

### 3. The Respondent's Position

181. The Respondent contends that the revocation of the Claimants' rights over the Estate was made in accordance with section 17(8) of the Tanzania Investment Act<sup>283</sup> and Sections 45(1), 45(3), and 48(1), (2) and (3) of the Land Act.<sup>284</sup>
182. First, the Respondent notes that the "[c]onditions of right of occupancy are stipulated in Certificates of Occupancy whereby upon registration the owner of the estate is entitled to Certificate of Title."<sup>285</sup> According to the Respondent, the Government decided to terminate the Claimants' Rights of Occupancy over the Estate following the Claimants' breach of the conditions of the Rights of Occupancy,<sup>286</sup> which is confirmed by the Notices of Revocation.<sup>287</sup>
183. The Respondent notes that the Rights of Occupancy required the use of the land for agricultural purposes, and asserts that the Claimants were required to apply to the Commissioner for Lands to

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<sup>280</sup> Statement of Claim, paras 90-91; Counter Affidavit of Monica Peter Oturu in Misc. Land Cause No. 6 of 2011 (*exhibits omitted, save for D6*), 4 November 2011, **C-184**. In particular, the Claimants contend that copies of the Notices of Revocation relied on by the Respondent to revoke the Claimants' Rights of Occupancy were annexed to such Counter Affidavit as exhibit D6, and point out that the First Notice of Revocation was not included therein.

<sup>281</sup> Statement of Claim, para. 105.

<sup>282</sup> Statement of Claim, para. 105; Reply, paras 1, 109, 136.

<sup>283</sup> Statement of Defence, para. 56; Tanzania Investment Act, s. 17(8), **CLA-9**: "*Where a holder of a certificate does not commence operations within the first two years of issuance of a certificate without satisfactory reasons, the centre may, subject to the rights of innocent third parties declare anything done or any benefit obtained under the certificate to be void and notify the holder of the certificate accordingly.*"

<sup>284</sup> Statement of Defence, paras 52, 57-58. *See supra* paras 153-154.

<sup>285</sup> Statement of Defence, para. 205; Rejoinder, paras 12, 37-38; Land Registration Act, s. 35, **RLA-31**. The Respondent also claims that the terms and conditions stipulated in the Certificates of Incentives supplemented those in the Certificates of Occupancy (Oral Hearing Tr., Day 1, 174:15-175:12).

<sup>286</sup> Statement of Defence, para. 52.

<sup>287</sup> Statement of Defence, paras 194, 198-202; Rejoinder, paras 12, 35; Luanda II, para. 7.

seek a change of use if they were to develop a livestock business in the Estate.<sup>288</sup> Further, according to the Respondent, the Certificates of Incentives did not supersede or override the terms and conditions stipulated in the Certificates of Occupancy and did not exempt the Claimants from seeking the necessary approvals.<sup>289</sup> Further, the Respondent affirms that in order for an approved change of use to take effect, it must be endorsed on the certificate of occupancy, signed by the Commissioner with his official seal and all outstanding rent must have been paid.<sup>290</sup>

184. In the alternative, the Respondent argues that the Claimants did not develop the land to the extent required by the law.<sup>291</sup> In particular, the Respondent submits that the Claimants failed to abide by section 45(2)(iii) of the Land Act and Regulation 9 of the Rights of Occupancy Regulations, pursuant to which the owner of a plot of land larger than 500 hectares is required to develop 80% of the estate for a period of not less than five years.<sup>292</sup> In the Respondent's view, the Claimants' claim that Sunlodges Tanzania was only required by law to develop 20% of the Estate is misplaced.<sup>293</sup>
185. The Respondent also considers that it complied with all the required steps to effect the revocation.<sup>294</sup>
186. First, the Respondent argues that the law does not require that an inspection be held prior to the issuance of a notice of revocation.<sup>295</sup> Notwithstanding this, the Respondent submits that the fact that the Special Committee carried out an inspection of the Estate on 25 July 2011 does not prove that the prior inspection in May 2011 did not take place.<sup>296</sup> The Respondent denies that the authorized officer that allegedly inspected the Estate would have been required to give prior notice

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<sup>288</sup> Rejoinder, para. 43; Conditions of Rights of Occupancy Regulations, reg. 6, **RLA-1**; Rejoinder, paras 75-76; Land Act, s. 35(1), **CLA-10**.

<sup>289</sup> Rejoinder, paras 43, 75.

<sup>290</sup> Rejoinder, para. 17.

<sup>291</sup> Statement of Defence, para. 198; Conditions of Rights of Occupancy Regulations, regs. 3, 4, 7, **RLA-1**; Ng'itu I, para. 10; Land Act, s. 45(2), 45(3), and 48(1)(e), **CLA-10**; Conditions of Rights of Occupancy Regulations, reg. 7(a), 7(b), 9(a), and 9(b), **RLA-1**; Rejoinder, para. 36; Land Act, s. 44(3), **CLA-10**; Luanda II, para. 10.

<sup>292</sup> Rejoinder, paras 12, 40; Land Act, s. 45(2)(iii), **CLA-10**; Conditions of Rights of Occupancy Regulations, reg. 9, **RLA-1**; Luanda II, para. 11.

<sup>293</sup> Rejoinder, paras 12, 40; Luanda II, para. 11.

<sup>294</sup> Statement of Defence, para. 62; Rejoinder, para. 22.

<sup>295</sup> Statement of Defence, para. 215; Rebutter, para. 59.

<sup>296</sup> Statement of Defence, paras 8, 10, 215; Ng'itu I, para. 9; **Luanda I**, para. 10; Rejoinder, paras 13, 45; Inspection Report on Kabisera Farm owned by Sunlodges Tanzania Limited with C.T. No. 15501, 2769, 3550 and 3985 of 2nd May 2011, English Translation, **R-15B**; Luanda II, para. 19; Rebutter, paras 52, 59. *See also supra* para. 108.

to the Claimants of her visit,<sup>297</sup> and contends that the said officer was allowed to enter the Estate without being restricted by the gateman or other workers.<sup>298</sup>

187. According to the Respondent, the Claimants' criticism of the Inspection Report of May 2011 is based solely on the personal perceptions of Mr Paglieri, and lacks any factual or legal support.<sup>299</sup> The Respondent asserts that the report is authentic and denies that any relevance could be attached to the fact that it mentions the Certificates of Title in the same order as they are mentioned in the Revocation Decision.<sup>300</sup> The Respondent also stresses that the Claimants and their lawyers did not dispute the contents of the Inspection Report of May 2011 in their letter to the Authorized Land Officer of 16 June 2011.<sup>301</sup>
188. Second, the Respondent disputes the Claimants' assertion that the absence of a warning letter could render the entire revocation process unlawful.<sup>302</sup> In the Respondent's view, it is not mandatory for the Commissioner for Lands to issue a warning letter under all circumstances.<sup>303</sup> Thus, the Commissioner for Lands is not required by law to issue a warning letter if he or she is satisfied that the breach of conditions of the right of occupancy is grave and of far-reaching consequences.<sup>304</sup>
189. On this issue, the Respondent argues that the Claimants' breach of the conditions of development of the Estate was so serious that it could not be amended within a reasonable time.<sup>305</sup> According to the Respondent, there were no signs that the Claimants could have developed the Estate in accordance with the requirements of the Land Act and the Tanzania Investment Act within that timeframe.<sup>306</sup> The Respondent argues that, in these circumstances, and pursuant to section

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<sup>297</sup> Rebutter, para. 60.

<sup>298</sup> Rebutter, para. 63.

<sup>299</sup> Rebutter, paras 7, 47, 65-66, 72.

<sup>300</sup> Rebutter, paras 68, 74-75.

<sup>301</sup> Rebutter, para. 73; Luanda II, para. 20; Letter from J S Beleko Advocate to Mr Inyasi Msafiri Maiba (the Authorized Officer of Mtwara District Council) [exhibits excluded], 16 June 2011, **C-1677**.

<sup>302</sup> Rejoinder, para. 27.

<sup>303</sup> Rejoinder, para. 28.

<sup>304</sup> Rejoinder, para. 28; Land Act, s. 48(1)(b)(i), **CLA-10**; Luanda II, para. 12; Oral Hearing Tr., Day 1, 200:3-11. The Claimants note in this regard that, if a warning letter was required (which the Respondent contends), the prescribed form would have been Form No. 6 of the Land Act (Forms) Regulations 2001 as required by section 45(4)(c) of the Land Act and not under section 48(1)(g)(i) of the Land Act, as submitted by the Claimants (Rejoinder, para. 30; Luanda II, para. 13).

<sup>305</sup> Statement of Defence, para. 211.

<sup>306</sup> Statement of Defence, para. 195.

45(4)(c) of the Land Act, the Commissioner for Lands was not required to issue a warning letter.<sup>307</sup>

190. Third, the Respondent denies that the Notices of Revocation had any errors as alleged by the Claimants,<sup>308</sup> and notes that the Notices clearly stated that Sunlodges Tanzania had abandoned the land and had failed to develop it according to the conditions of the Rights of Occupancy.<sup>309</sup>
191. In response to the Claimants' contention that the Revocation Decision encompassed a certificate of title (No. 3550) that had not been covered by the Notices of Revocation, the Respondent submits that the Claimants were served with Notices of Revocation in respect of all land titles revoked, including certificate of title No. 3550.<sup>310</sup> The Respondent considers that this is confirmed by the letter from the Claimants' lawyers of 16 June 2011 to the Authorized Land Officer of the Mtwara District Council, challenging the Notices of Revocation and also referring to Certificate of Title No. 3550.<sup>311</sup>
192. Further, the Respondent denies that the Counter-Affidavit of the Principal State Attorney filed in the Judicial Review Proceedings would evidence, as submitted by the Claimants, that the Respondent did not rely on the First Notice of Revocation.<sup>312</sup>
193. The Respondent also denies that the Revocation Decision was predetermined to benefit a third party.<sup>313</sup> In particular, the Respondent considers that the letter dated 18 February 2011 from the Acting District Executive Director to the Commissioner for Lands has no bearing in this matter,<sup>314</sup> since the Acting District Executive Director "has no legal authority in revocation of rights of occupancy."<sup>315</sup> The Respondent claims that, as a result, the letter had no impact on the revocation of the Claimants' Rights of Occupancy.<sup>316</sup>

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<sup>307</sup> Statement of Defence, para. 211; Land Act, s. 45(4)(c), **CLA-10**; Ng'itu I, para. 8; Luanda I, para. 17; Rejoinder, para. 10.

<sup>308</sup> Statement of Defence, para. 205.

<sup>309</sup> Statement of Defence, paras 201-203, 209; Ng'itu I, para. 8; Luanda I, para. 19; Rejoinder, para. 35; Luanda II, paras 7, 9.

<sup>310</sup> Statement of Defence, paras 218-219; Rejoinder, paras 11, 32; Luanda II, para. 15.

<sup>311</sup> Rejoinder, paras 11, 32; Luanda II, para. 16; Letter from J S Beleko Advocate to Mr Inyasi Msafiri Maiba (the Authorised Officer of Mtwara District Council) [exhibits excluded], 16 June 2011, **C-167**.

<sup>312</sup> Statement of Defence, paras 206-207.

<sup>313</sup> Statement of Defence, paras 221, 248, 277-278, 308; Ng'itu I, para. 11; Luanda I, para. 15.

<sup>314</sup> Statement of Defence, para. 192; Ng'itu I, para. 11; Ng'itu II, para. 13.

<sup>315</sup> Statement of Defence, para. 192.

<sup>316</sup> Statement of Defence, para. 192.

194. Finally, the Respondent notes that, after the revocation took place, the Commissioner for Lands, in the exercise of his powers under the Land Act,<sup>317</sup> designated the Estate for investment (industrial and mining) purposes under the Tanzanian Investment Act.<sup>318</sup> The land was allocated then to the TIC and any qualified investor could apply to invest through derivative rights.<sup>319</sup>

## **B. EXPROPRIATION UNDER TANZANIAN LAW**

### **1. Undisputed Legal Background**

195. Section 24 of the Constitution of Tanzania (1977) provides:

- (1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.
- (2) Subject to the provisions of subarticle (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.<sup>320</sup>

196. Section 22 of the Tanzania Investment Act reads:

- (1) Subject to subsection (2) and (3) of this section-
  - (a) no business enterprise shall be nationalised or expropriated by the Government, and
  - (b) no person who owns, whether wholly or in part, the capital of any business enterprise shall be compelled by law to cede his interest in the capital to any other person.
- (2) There shall not be any acquisition, whether wholly or in part of a business enterprise to which this Act applies by the State unless the acquisition is under the due process of law which makes provision for –
  - (a) payment of fair adequate and prompt compensation, and
  - (b) a right of access to the Court or a right to arbitration for the determination of the investors interest or right and the amount of compensation to which he is entitled.
- (3) Any compensation payable under this section shall be paid promptly and authorisation for its repatriation in convertible currency, where applicable, shall be issued.<sup>321</sup>

197. The Land Acquisition Act, 1967 (the “**Land Acquisition Act**”) provides that “[t]he President may, subject to the provisions of this Act, acquire any land for any estate or term where such land is required for any public purpose.”<sup>322</sup> In that event, the Land Acquisition Act establishes the

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<sup>317</sup> Ng’itu I, para. 12; Luanda I, para. 14; Land Act, s. 20(2), **CLA-10**.

<sup>318</sup> Statement of Defence, para. 191; Government Gazette No. 41 of 2012 for designation of land for investment purpose, dated 20 January 2012, **R-8**; Ng’itu I, para. 12; Luanda I, para. 14.

<sup>319</sup> Statement of Defence, paras 11, 191, 221, 248; Ng’itu I, para. 12; Luanda I, para. 14.

<sup>320</sup> Constitution of the United Republic of Tanzania, s. 24, **CLA-7**.

<sup>321</sup> Tanzania Investment Act, s. 22, **CLA-9**.

<sup>322</sup> Land Acquisition Act, s. 3, **CLA-2**.

Government's obligation to pay "such compensation as may be agreed upon or determined in accordance with the provisions of this Act."<sup>323</sup>

## **2. The Claimants' Position**

198. The Claimants submit that Tanzania has breached the expropriation provisions in the Constitution of Tanzania and in the Tanzania Investment Act.<sup>324</sup> In the Claimants' view, the direct and indirect expropriations that occurred as a matter of the Italy-Tanzania BIT and customary international law were also deprivations within the meaning of section 24(2) of the Constitution and acquisitions within the meaning of section 22 of the Tanzania Investment Act.<sup>325</sup>
199. Furthermore, the Claimants contend that those deprivations and acquisitions were unlawful under both the Constitution and the Tanzania Investment Act insofar as compensation was not paid; and also consider those deprivations to be in breach of section 22(2)(b) of the Tanzania Investment Law because Tanzania failed to provide access to the court to determine the amount of compensation.<sup>326</sup>
200. The Claimants finally note that Tanzania did not invoke the Land Acquisition Act when revoking their Rights of Occupancy. In the Claimants' view, this would evidence that Tanzania did not expropriate the Estate for a public purpose.<sup>327</sup>

## **3. The Respondent's Position**

201. According to the Respondent, Tanzanian law does not provide a definition of the term "expropriation" or of measures of equivalent effect to direct expropriation.<sup>328</sup> Thus, the Respondent contends, there are no criteria to determine what sort of action could amount to an indirect expropriation under Tanzanian law.<sup>329</sup>
202. Furthermore, according to the Respondent there was nothing of value in the Estate when the Claimants' rights were revoked, and the Claimants' requested amount for compensation is "baseless."<sup>330</sup>

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<sup>323</sup> Land Acquisition Act, s. 11, s.14, and s. 15, **CLA-2**.

<sup>324</sup> Statement of Claim, paras 215, 220.

<sup>325</sup> Statement of Claim, para. 220; Reply, para. 280.

<sup>326</sup> Statement of Claim, para. 220; Reply, para. 280.

<sup>327</sup> Statement of Claim, para. 66.

<sup>328</sup> Statement of Defence, para. 117.

<sup>329</sup> Statement of Defence, para. 117.

<sup>330</sup> Statement of Defence, para. 62.

203. The Respondent finally notes that, pursuant to section 20(3) of the Land Act, land acquired by non-citizens of Tanzania prior to the enactment of the Land Act “shall be deemed to have no value, save for unexhausted improvements for which compensation may be paid.”<sup>331</sup>

## C. JUDICIAL REVIEW UNDER TANZANIAN LAW

### 1. Undisputed Legal Background

204. Judicial review in Tanzania “is a specialized remedy in public law by which the High Court [...] exercises a supervisory jurisdiction over inferior courts, tribunals and other public bodies.”<sup>332</sup>

205. The purpose of judicial review proceedings is to ensure that the decision being reviewed is within the limits of the powers that were granted to make it, and does not concern the correctness of the decision.<sup>333</sup>

206. The Judicial Review Judgement lays down the two stages of judicial review:<sup>334</sup>

- (a) During the first stage or threshold stage the “applicant has to seek and obtain a leave or permission to apply for judicial review.”<sup>335</sup> At this stage “[t]he court simply needs to be satisfied that the applicant has established an arguable prima facie case of reasonable suspicion worthy of scrutiny of the court at the second stage.”<sup>336</sup> The purpose of having a threshold stage is to stop “frivolous and hopeless applications.”<sup>337</sup>

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<sup>331</sup> Statement of Defence, para. 120; Land Act, s. 20(3), **CLA-10**.

<sup>332</sup> Statement of Claim, para. 111; Daudi Mwita Nyamaka, “Judicial Review of Administrative Action/Decision as the Primary Vehicle for Constitutionalism: Law and Procedures in Tanzania”, 28 March 2012, bepress, p. 1, **CLA-31**.

<sup>333</sup> Statement of Claim, para. 111; Wade & Forsyth, *Administrative Law* (11th edn., OUP, 2014), p. 26, **CLA-33**.

<sup>334</sup> Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, p. 4, 23 July 2012, **C-191**; Statement of Claim, para. 112; Statement of Defence, para. 222.

<sup>335</sup> Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, p. 4, 23 July 2012, **C-191**; Statement of Defence, para. 222.

<sup>336</sup> Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, p. 4, 23 July 2012, **C-191**; *Bivac International SA (Bureau Veritas)* [2006] 1 EA 26 (HCK).

<sup>337</sup> Statement of Claim, para. 112; Statement of Defence, para. 222.



(b) If permission to proceed to the second stage is granted, the applicant shall file “a substantive application seeking for judicial review”<sup>338</sup> and the court “go[es] into the depth of the matter.”<sup>339</sup>

207. An order of *certiorari* (a quashing order) is one of the remedies that may be obtained “where there has been an excess of jurisdiction or an *ultra vires* decision; a breach of natural justice; or an error of law.”<sup>340</sup> The High Court of Tanzania has discretion to decide whether or not to grant this remedy.<sup>341</sup>

## 2. The Claimants’ Position

208. According to the Claimants, the Judicial Review Judgement contains the following errors of fact: (i) Sunlodges Tanzania admitted that it had not developed the land in full; and (ii) the abandonment of the land had not been not seriously disputed.<sup>342</sup> In particular, the Claimants note that Mziray J relied in error on this second error of fact as “a reasonable and probable cause for the notice of revocation.”<sup>343</sup>

209. Furthermore, the Claimants criticize Mziray J’s ruling that the dispute, being a “purely”<sup>344</sup> land dispute, could not be resolved by allowing an application for judicial review. The Claimants consider that their judicial review application was not meant to decide on a land dispute but to determine whether the Commissioner for Lands and the President had exceeded their powers

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<sup>338</sup> Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, p. 4, **C-191**.

<sup>339</sup> Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, pp. 4-5, 23 July 2012, **C-191**.

<sup>340</sup> Daudi Mwita Nyamaka, “Judicial Review of Administrative Action/Decision as the Primary Vehicle for Constitutionalism: Law and Procedures in Tanzania”, 28 March 2012, bepress, p. 28, **CLA-31**; Statement of Claim, para. 111.

<sup>341</sup> Statement of Claim, para. 111; Daudi Mwita Nyamaka, “Judicial Review of Administrative Action/Decision as the Primary Vehicle for Constitutionalism: Law and Procedures in Tanzania”, 28 March 2012, bepress, pp. 28-29, **CLA-31**.

<sup>342</sup> Statement of Claim, paras 130-132.

<sup>343</sup> Statement of Claim, para. 133; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, p. 10, 23 July 2012, **C-191**.

<sup>344</sup> Judgment of the High Court of Tanzania of *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, dated 23 July 2012, p. 10, **C-191**: “[...] the nature of the dispute is purely a land dispute which can appropriately and conveniently be resolved by way of instituting a plaint and such dispute cannot therefore be resolved by way of allowing an application for prerogative orders.”

under the Land Act when revoking their Rights of Occupancy over the Estate.<sup>345</sup> This, according to the Claimants, falls “squarely”<sup>346</sup> within the scope of judicial review.

210. The Claimants also criticize the dismissal of their application for judicial review in light of the seriousness of the factual background of their application and the low threshold for granting permission to seek judicial review in Tanzania.<sup>347</sup>
211. In response to the Respondent’s argument that the Claimants should have appealed the Judicial Review Judgement, the Claimants retort that Tanzanian law does not allow appeals on orders denying permission to apply for judicial review.<sup>348</sup> According to the Claimants, the Respondent’s contention that such appeal was possible ignores the distinction between interlocutory and final orders, as well as section 5(2)(d) of the Appellate Jurisdiction Act.<sup>349</sup> The Claimants also reject the Respondent’s reliance on Rule 45 of the Tanzania Court of Appeal Rules 2009,<sup>350</sup> since this provision sets out the procedure for making an appeal but does not determine the circumstances in which an appeal may be made.<sup>351</sup>
212. The Claimants also consider that the decision of the Tanzania Court of Appeal in *Attorney General v. Wilfred Mganyi and Ors* invoked by the Respondent actually supports their position that no appeal was possible against the Judicial Review Judgement.<sup>352</sup> In that case, the Court of Appeal held that:
- This Court in the **Karibu Textile Mills Limited** case discussed exhaustively and ruled that an application for leave to apply for the orders of *certiorari*, *mandamus* and prohibition is an interlocutory proceeding and that an appeal against such a decision would offend paragraph (d) of section 5(2) of the [Appellate Jurisdiction] Act. [...] <sup>353</sup>
213. Hence, the Claimants submit, that Sunlodges Tanzania exhausted all possible remedies in Tanzanian courts in relation to seeking a review of the purported expropriation of the Estate.<sup>354</sup>

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<sup>345</sup> Statement of Claim, para. 135.

<sup>346</sup> Statement of Claim, para. 135; Wade & Forsyth, *Administrative Law* (11th edn., OUP, 2014), pp. 25, 33-37, 512, **CLA-33**.

<sup>347</sup> Statement of Claim, paras 136-137.

<sup>348</sup> Reply, paras 146, 152.

<sup>349</sup> Reply, para. 147; Appellate Jurisdiction Act, **CLA-136**.

<sup>350</sup> Tanzania Court of Appeal Rules, 2009, **RLA-4**.

<sup>351</sup> Reply, para. 150; Tanzania Court of Appeal Rules, **RLA-4**.

<sup>352</sup> Reply, para. 151.

<sup>353</sup> Reply, para. 151; *A-G v. Wilfred Mganyi and Ors*, Decision of the Tanzania Court of Appeal (Unreported), 20 November 2007, p. 21, para. 32, **RLA-5** (with paragraph numbers added by Claimants).

<sup>354</sup> Reply, para. 152.

214. In any event, the Claimants note, an investor is not required to exhaust local remedies as a pre-condition to bringing proceedings under a BIT.<sup>355</sup>

### 3. The Respondent's Position

215. In the Respondent's view, the Claimants should have appealed the Judicial Review Judgment before the Court of Appeal of Tanzania if they felt aggrieved by it.<sup>356</sup> The Respondent considers that Sunlodges Tanzania filed no such appeal because it was satisfied with the decision that was reached.<sup>357</sup>

216. The Respondent argues that the Claimants have misinterpreted the law in claiming that Sunlodges Tanzania had no right to appeal the Judicial Review Judgement.<sup>358</sup> According to the Respondent, under Tanzanian law, "the refusal to grant a leave to apply for a prerogative order is appealable with the leave."<sup>359</sup> Further, the Respondent notes that the right of appeal was explained by the judge when delivering the Judicial Review Judgement.<sup>360</sup> Thus, the Respondent alleges that Sunlodges Tanzania was made aware of the appropriate avenue of resolving any grievance.<sup>361</sup>

217. According to the Respondent, even assuming *arguendo*, that the Judicial Review Judgement was not appealable, the aggrieved party would still have the right to move the appellate court to exercise its revision jurisdiction to resolve his alleged grievances.<sup>362</sup>

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<sup>355</sup> Reply, para 152; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 412, **CLA-121**; *PL Holdings, S.à.r.l. v. Poland*, SCC Case No V2014/163, Partial Award, 28 June 2017, paras 439-441, **CLA-140**; *Saar Papier Vertriebs GmbH v. The Republic of Poland*, UNCITRAL, Final Award, 16 October 1995, paras 72, 76-77, **CLA-141**.

<sup>356</sup> Statement of Defence, para. 230; Appellate Jurisdiction Act [CAP 141 R.E 2002], s. 5(1)(c), **RLA-3**; Tanzania Court of Appeal Rules, 2009, Rule 45(a), **RLA-4**; Court of Appeal of Tanzania, *Attorney General v. Wilfred Onyango Mganyi @Dadii and 11 others*, Criminal Appeal No 276 of 2006 (Unreported), 30 November 2007, **RLA-5**; Rejoinder, para. 20.

<sup>357</sup> Statement of Defence, para. 230.

<sup>358</sup> Rejoinder, para. 86.

<sup>359</sup> Rejoinder, paras 86-87; Court of Appeal of Tanzania, *Attorney General v. Wilfred Onyango Mganyi @ Dadii and 11 others*, Criminal Appeal No 276 of 2006 (Unreported), 30 November 2007, pp. 18-19, **RLA-5** ("Although in Tanzania, per the Senate of University of Dar es Salaam case supra, it was stated that a decision at the leave stage is appealable with leave under section 5(1) (c) of the Appellate Jurisdiction Act, 1979, the same thing could not be said of this criminal appeal because there is no equivalent of Section 1(c) of section 5, which deals with civil appeals, in section 6 which relates to criminal appeals to the Court of Appeal. So, the question of leave to appeal does not arise in a criminal appeal."); High Court of Tanzania, *TUICO- OTTU Union and Augustine Celestine V. NBC (1997) LTD and Ors.*, Misc. Civil Cause No.11/1999, 25 June 1999, **RLA-42**.

<sup>360</sup> Rejoinder, para. 87; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, page 11, 23 July 2012, **C-191**.

<sup>361</sup> Rejoinder, para. 87.

<sup>362</sup> Rejoinder, paras 20, 87-88; Court of Appeal of Tanzania, *Moses J Mwakibete v. the Editor- Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd* [1995] T.L.R 134, 22 March 1995, p. 135, **RLA-43** ("The court of Appeal can be moved to use its revisional Jurisdiction under s 2(3) of the Appellate

218. Finally, the Respondent contends that this arbitration is not the appropriate avenue to deal with the Claimants' dissatisfaction on matters covered by Tanzanian law that ought to be decided through the appropriate procedures of domestic law.<sup>363</sup> Thus, the Respondent considers it unnecessary to address the errors and shortcomings alleged by the Claimants in relation to the Judicial Review Judgment.<sup>364</sup>

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*Jurisdiction Act 1979 only where there is no right of Appeal, or where the right of appeal is there but has been blocked by judicial process.”); Court of Appeal of Tanzania, *Transport Equipment Ltd v. D.P. Valambhia* [1995] T.L.R. 161, 24 May 1995, p.167, **RLA-44**; Court of Appeal of Tanzania, *Halais Pro – Chemie v. Wella A.G.* [1996] T.L.R 269, 27 October 1995, p. 272, **RLA-45**.*

<sup>363</sup> Rejoinder, para. 89.

<sup>364</sup> Rejoinder, para. 89.

## V. THE PARTIES' REQUESTS FOR RELIEF

### A. THE CLAIMANTS' REQUEST FOR RELIEF

219. In their Statement of Claim, the Claimants request the following relief:

401. For the reasons stated, the Tribunal is respectfully requested to render an award granting the following relief:

#### A. Declaration in Regard to Breaches of Tanzanian Law

401.1 In relation to **the Claimants**, declaring that Tanzania has breached the following provisions of Tanzanian Law:

401.1.1 s24(2) of the Constitution 1977;

401.1.2 ss3(1)(g), 45(2), 45(3), 45(4)(c), 48(1), 48(1)(g)(i), 48(3), 49(3) of the Land Act; and

401.1.3 s22(2) of the Investment Act 1997.

#### B. Declaration in Regard to MFN

401.2 In relation to **the Claimants**, a declaration that pursuant to Article 3(1) of the Italian BIT, they may claim the benefit of and rely on the:

401.2.1 expropriation standard in Article 6 of the Switzerland-Tanzania BIT to the extent that the expropriation standard in Article 5 of the Italian BIT is less favourable;

401.2.2 FET and FPS standards in Article 2(2) of the UK BIT to the extent that the FET and FPS standards in Article 2(2) of the Italian BIT are less favourable;

401.2.3 FET, FPS and non-impairment standards in Article 4 of the Switzerland-Tanzania BIT to the extent that the FET, FPS and non-impairment standards in Article 2(2) of the Italian BIT are less favourable;

401.2.4 National treatment standard in Article 4 of the Switzerland-Tanzania BIT to the extent that the national treatment standards in Article 3 of the Italian BIT are less favourable.

#### C. Declaration in Regard to Breaches of the Italian BIT

401.3 In relation to **the Claimants**, a declaration that Tanzania has breached the following Articles of the Italian BIT:

401.3.1 Article 5(1) by limiting the Claimants' right of ownership, possession, control or enjoyment of their investments without lawful authority;

401.3.2 Article 5(2) by unlawfully expropriating the Claimants' investments;

401.3.3 Article 2(2) by failing to accord FET to the Claimants' investments, and alternatively, Article 3(1) (MFN) by denying the Claimants the FET standard that Tanzania has contracted in Article 2(2) of the UK BIT to accord to British investors, and further and alternatively, Article 3(1) (MFN) by denying the Claimants the FET standard that Tanzania has contracted in Article 4(1) of the Switzerland-Tanzania BIT to accord to Swiss investors;

401.3.4 Article 2(2) by failing to accord to the Claimants' investments FPS to a standard that was not less favourable than that accorded to residents in Tanzania's territory, and alternatively, Article 3(1) (MFN) by denying the Claimants the FPS standard that Tanzania has contracted in Article 2(2) of the UK BIT to accord to British investors, and further and alternatively, Article 3(1) (MFN) by denying the Claimants the FPS standard that Tanzania has contracted in Article 4(1) of the Switzerland-Tanzania BIT to accord to Swiss investors;

401.3.5 Article 2(2) by impairing by unreasonable measures the management, maintenance, use, transformation, enjoyment and disposal of the Claimants' investments, and alternatively, Article 3(1) (MFN) by denying the Claimants the nonimpairment standard that Tanzania has contracted in Article 4(1) of the Switzerland-Tanzania BIT to accord to Swiss investors;

401.3.6 Article 3(1) by (in terms of compensation) subjecting the Claimants' investments to a treatment less favourable than that which it accorded to investments of its own nationals or companies, and alternatively, Article 3(1) (MFN) by denying the Claimants the national treatment standard that Tanzania has contracted in Article 4(2) of the Switzerland-Tanzania BIT to accord to Swiss investors;

401.3.7 Article 3(2) by (in terms of compensation) subjecting the Claimants as regards the management, maintenance, use, transformation, enjoyment or disposal of their investments to treatment less favourable than that which it accorded to its own nationals or companies and alternatively, Article 3(1) (MFN) by denying the Claimants the national treatment standard that Tanzania has contracted in Article 4(3) of the Switzerland-Tanzania BIT to accord to Swiss investors;

#### **D. Declaration in Regard to Breaches of Customary International Law**

401.4 In relation to **the Claimants**, a declaration that Tanzania has breached customary international law:

401.4.1 by expropriating the Claimants' investments without the observance of the principles that expropriation under customary international law must be for a public purpose, observe due process and be accompanied by payment of prompt, adequate, and effective compensation;

401.4.2 by failing to accord the Claimants and their investments the customary international law minimum standard of treatment;

401.4.3 by failing to accord the Claimants and their investments protection and security;

#### **E. Declaration in Regard to Damage Caused by Tanzania**

401.5 In relation to **the Claimants**, a declaration that the breaches pleaded above have caused the Claimants to suffer loss.

#### **F. Order as to Damages, Costs and Interest**

401.6 Ordering Tanzania to pay the Claimants:

401.6.1 Full compensation and damages in accordance with the applicable law for the breaches pleaded above, in an amount to be established in the proceeding, but not less than **USD 34,707,778.08** plus pre- and post-award compound interest on any damages until the date of payment in accordance with the applicable law; and

401.6.2 All of the Claimants' legal and other costs and expenses in respect of the arbitration, plus compound interest thereon until the date of payment.

401.7 Ordering Tanzania to bear in full (i) the costs of the Tribunal and (ii) any costs incurred by the Appointing Authority and the PCA, including by ordering Tanzania to pay to the Claimants any share paid in advance by them in respect of such costs, plus compound interest thereon until the date of payment.

**G. Further or Additional Relief**

401.8 Further or additional relief as may be appropriate under the applicable law.

**XV. MR PAGLIERI**

402. All of the measures pleaded herein in regard to the Claimants were also applied to Mr Paglieri and his investments by Tanzania. For the reasons stated above in regard to each of the causes of action, Tanzania's measures also breached the obligations that Tanzania owed to Mr Paglieri under the Italian BIT and Tanzanian and customary international law. To the extent they are able, the Claimants, in addition to their own claims, claim for the losses caused to Mr Paglieri by those breaches. Those losses are pleaded in the Remedies Section above.<sup>365</sup>

220. In their Reply, the Claimants request the following relief:

**XIV. REQUEST FOR RELIEF**

444. For the reasons stated, the Tribunal is respectfully requested to render an award granting the following relief:

**A. Declaration in Regard to Jurisdiction over the Claimants' Claims**

444.1 In relation to **the Claimants**, a declaration that the Tribunal has jurisdiction over the Claimants' claims and that those claims are admissible;

**B. Declaration in Regard to Tanzania's Defences**

444.2 In relation to **the Claimants**, a declaration that all of Tanzania's defences are denied and dismissed;

**C. Declaration in Regard to: Breaches of Tanzanian Law; MFN; Breaches of the Italian BIT; Breaches of Customary International Law; and Damage Caused by Tanzania. And Order as to Damages, Costs and Interest**

444.3 In relation to **the Claimants**, the relief as set out at [401] of the Statement of Claim, including but not limited to: (i) ordering Tanzania to pay the Claimants USD 34,707,778.08 in damages, plus interest, declaratory relief and costs; and (ii) ordering Tanzania to bear in full (a) the costs of the Tribunal and (b) any costs incurred by the Appointing Authority and the PCA, including by ordering Tanzania to pay to the Claimants any share paid in advance by them in respect of such costs, plus interest thereon;

**D. Declaration in Regard to Tanzania's counterclaims**

444.4 In relation to **Tanzania's counterclaims**, a declaration that:

444.4.1 The Tribunal lacks jurisdiction over Tanzania's counterclaims;

444.4.2 Alternatively, Tanzania's counterclaims are inadmissible;

444.4.3 Alternatively, Tanzania's counterclaims are denied and dismissed on the merits;

444.4.4 Alternatively, to the extent that any of Tanzania's counterclaims are upheld, any amounts found owing by the Claimants to Tanzania be set off against the amounts found owing by Tanzania to the Claimants;

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<sup>365</sup> Statement of Claim, paras 401-402.

**E. Further or Additional Relief**

444.5 Further or additional relief as may be appropriate under the applicable law.<sup>366</sup>

**B. THE RESPONDENT'S REQUEST FOR RELIEF**

221. In its Statement of Defence and Counter Claim, the Respondent requests the following relief:

**XIX. DECLARATORY RELIEF**

343. The Respondent request the Tribunal for the declarations that it has not breached any provision of Tanzanian law, the Italian BIT and customary international law. Thus, the Tribunal is respectively requested to render an award on the following reliefs:

- (a) **Declaration** that there is no any Breaches of Tanzanian Law
- (b) **Declaration** in that there is no violation to MFN
- (c) **Declaration** that that there is no any Breach of the Italian BIT
- (d) **Declaration** that there is no any Breach of Customary International Law
- (e) **Declaration** that there is no any Damage Caused to the Claimants.
- (f) **Declaration** that the Claimants are not entitled to any Relief sought.

344. The Respondent requests the Tribunal to order that the Claimants have failed to discharge the burden of proof that the measure taken by Tanzania in revoking the Claimants right of occupancy of the land in dispute was/is in violation of various provisions of Tanzanian Laws, the Italian BIT, Customary International Law and various BITs of which Tanzania is a party to.

345. On the basis of the foregoing explanation Respondent respectfully requests that the Tribunal for the follows:

- (a) **Declaration** that the Claimant are in breach of the Conditions of the Rights of Occupancy, provisions of Tanzanian Laws, the Italian BIT and Customary International Law.
- (b) **Order** that the Claimants pay damages for loss suffered as a result of the breaches of Tanzanian land laws, and general principles of law in an amount to be determined during the course of these proceedings.
- (c) **Order** the Claimants to pay interest (both pre- and post-Award) on the sums ordered to be paid above, at a rate to be determined during the course of these proceedings.
- (d) **Order** the Claimants under Article 42 of the UNCITRAL Arbitration Rules revised in 2010), to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and the costs that the Government has and will incur in pursuing the breaches in this Arbitration, including, without limitation, all legal and other professional fees associated with any and all proceedings undertaken in connection with this arbitration.
- (e) **Order** such other relief as it deems just and appropriate.<sup>367</sup> [footnotes omitted]

222. In its Rejoinder, the Respondent requests the following relief:

**XIII. RELIEF SOUGHT**

180. As pleaded in declaratory relief section in the Respondent's Statement of Defence and Counter Claim (Corrected) dated 30 October 2018. The Respondent seeks from the Tribunal the following reliefs;

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<sup>366</sup> Reply, para. 444; Surrejoinder, para. 71.

<sup>367</sup> Statement of Defence, paras 343-345.



- i. **Declaration** that there is no any Breaches of Tanzanian Law
- ii. **Declaration** in that there is no violation to MFN
- iii. **Declaration** that that there is no any Breach of the Italian BIT
- iv. **Declaration** that there is no any Breach of Customary International Law
- v. **Declaration** that there is no any Damage Caused to the Claimants.
- vi. **Declaration** that the Claimants are not entitled to any of the Reliefs sought.

181. The **Respondent** further request the tribunal to render an award on the following relief;

- vii. To rule out that it has jurisdiction to hear the Respondent's counterclaim.
- viii. **Declaration** that the Claimants are in breach of the Conditions of the Rights of Occupancy, provisions of Tanzanian Laws, the Italian BIT and Customary International Law.
- ix. **Order** that arbitral award be entered in favor of the Respondent in respect of counter claim.
- x. The Claimants be ordered to pay damages for the loss suffered in respect of the Counter Claim and interest thereon.
- xi. **Order** the Claimants to pay interest (both pre- and post-Award) all compensatory damages ordered to be paid by the Tribunal at a rate to be determined during the course of these proceedings.
- xii. **Order** the Claimants under Article 42 of the UNCITRAL Arbitration Rules revised in 2010), to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and the costs that the Government has and will incur in pursuing the breaches and this Arbitration, including, without limitation, all legal and other professional fees associated with any and all proceedings undertaken in connection with this arbitration.
- xiii. **Order** any other and additional relief that may be just and proper.<sup>368</sup>

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<sup>368</sup> Rejoinder, paras 180-181; Rebutter, para. 106.

## VI. JURISDICTION AND ADMISSIBILITY

223. The Respondent requests that the Tribunal decide on the Respondent's jurisdictional objections as a preliminary question in accordance with Article 23(3) of the UNCITRAL Rules.<sup>369</sup> However, it has not requested bifurcation of the proceedings and accordingly the Respondent's jurisdictional objections are decided in this Award.

### A. SETTLEMENT NEGOTIATIONS

#### 1. The Respondent's Position

224. The Respondent asserts that the Claimants had already filed their Notice of Arbitration when they referred the matter to the Government for negotiation.<sup>370</sup> On this basis, the Respondent advances two separate objections to the Tribunal's jurisdiction: (i) there is no dispute sufficiently expressed in legal terms for purposes of arbitration;<sup>371</sup> and (ii) there has been a premature reference to arbitration.<sup>372</sup> These two objections are summarized below.

225. First, the Respondent contends that, in the eyes of the law, there is no dispute between the Parties that is capable of being determined by the Tribunal because Tanzania was not notified of the Claimants' claims prior to the commencement of the arbitration.<sup>373</sup> The Claimants submitted their Notice of Dispute on 1 March 2017<sup>374</sup> and their Notice of Arbitration on 5 September 2017, while it was only on 16 October 2017 that the Respondent requested withdrawal of the Notice of Arbitration "as a condition to it entering into settlement negotiations."<sup>375</sup>

226. In support of its contention, the Respondent refers to section 23(1), (2) and (3) of the Tanzania Investment Act, setting out a settlement mechanism for disputes between foreigners and the Government.<sup>376</sup> The Respondent also refers to several common law judicial decisions as containing the applicable requirement of the existence of a "dispute,"<sup>377</sup> and asserts that, in failing to raise a

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<sup>369</sup> Rejoinder, paras 23, 178.

<sup>370</sup> Statement of Defence, para. 69.

<sup>371</sup> Statement of Defence, paras 65-74.

<sup>372</sup> Statement of Defence, paras 78-115.

<sup>373</sup> Statement of Defence, paras 70-74, 114.

<sup>374</sup> Steptoe's letter to the High Commissioner for Tanzania to the United Kingdom and to the Attorney General of Tanzania, dated 1 March 2017, **C-2**.

<sup>375</sup> Statement of Defence, para. 67.

<sup>376</sup> Statement of Defence, para. 68.

<sup>377</sup> Statement of Defence, paras 71-73; *Fastrack Contractors Ltd v Morrison Construction Ltd & Imreglio UK Ltd* [2000] 1 BLR 168, as reported also in Adj. L.R. 01/04, para. 27, **RLA-25**; *Edmund Nuttall Limited v. R.G. Carter Limited* [2002] EWHC 400 (TCC), para. 34, **RLA-30**; *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2005] Adj. L.R. 03/07, **RLA-26**.

claim to challenge the revocation of their Rights of Occupancy over the Estate or to request compensation before the commencement of the arbitration, this requirement was not met.<sup>378</sup>

227. Second, the Respondent contends that the Claimants' commencement of the arbitration was not in accordance with Article 8 of the Treaty.<sup>379</sup> In the Respondent's view, Article 8 includes a mandatory pre-arbitration requirement<sup>380</sup> pursuant to which investor-State Treaty disputes shall "be settled through consultations and negotiations, as far as possible."<sup>381</sup> According to the Respondent, the mandatory nature of this provision is evidenced by the use of the word "shall"<sup>382</sup> and the wording and multi-tier structure of the provision.<sup>383</sup> The Respondent notes that pre-arbitral requirements of this sort seek to increase efficiency,<sup>384</sup> give the parties the opportunity to settle the dispute amicably<sup>385</sup> and accord the host State the right to be informed of the existence of a dispute before it is referred to arbitration.<sup>386</sup> Finally, the Respondent considers this requirement to be jurisdictional in nature,<sup>387</sup> and argues that any breach of this requirement would result in the Tribunal lacking jurisdiction over the dispute.<sup>388</sup>
228. The Respondent acknowledges that the Claimants submitted a Notice of Dispute on 1 March 2017,<sup>389</sup> but notes that the Notice was not sent to the Tanzanian authorities responsible for supervising the investment underlying the dispute,<sup>390</sup> i.e. the Ministry for Lands and the TIC.<sup>391</sup> Also in the Respondent's view, the Notice of Dispute did not actually seek to initiate negotiations,

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<sup>378</sup> Statement of Defence, para. 74.

<sup>379</sup> Statement of Defence, para. 93.

<sup>380</sup> Statement of Defence, para. 82; Rejoinder, para. 160.

<sup>381</sup> Statement of Defence, para. 79; Rejoinder, paras 133-135.

<sup>382</sup> Statement of Defence, paras 88-90; Black's Law Dictionary, 8<sup>th</sup> Edition (2004) (extracts), p. 1407, **RLA-16**; *Wintershall Aktiengesellschaft v. Argentine Republic* ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 119, **RLA-18**; Rejoinder, paras 142-145.

<sup>383</sup> Statement of Defence, paras 91, 94.

<sup>384</sup> Statement of Defence, para. 105.

<sup>385</sup> Statement of Defence, para. 110; *Murphy Exploration and Production Company – International v. Republic of Ecuador*, UNCITRAL/PCA, Award on Jurisdiction, 15 December 2010, para. 151, **RLA-19**.

<sup>386</sup> Statement of Defence, paras 106, 111-112; *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315, **RLA-24**.

<sup>387</sup> Statement of Defence, para. 84; Rejoinder, paras 162-164; *Sulamérica Cia Nacional De Seguros S.A and Others v. Enesa Engenharia S.A. and Others* [2012] EWCA Civ. 638, paras 33-37, **RLA-52**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paras 332-340, **RLA-53**.

<sup>388</sup> Statement of Defence, paras 84, 87; Rejoinder, paras 137-140.

<sup>389</sup> Statement of Defence, paras 66, 97.

<sup>390</sup> Rejoinder, para. 150.

<sup>391</sup> Rejoinder, para. 155.

but merely informed the Government of the Claimants' decision to refer the dispute to arbitration.<sup>392</sup>

229. The Respondent also notes that the High Commission of Tanzania in the United Kingdom replied to the Notice of Dispute on 13 March 2017, informing the Claimants that they should expect an appropriate response from the Tanzanian authorities,<sup>393</sup> and advised them to consult the High Commission should they need anything else in relation to the letter.<sup>394</sup> The Respondent considers that, in those circumstances, it was inappropriate for the Claimants to file the Notice of Arbitration without having followed up on the matter with the High Commission, the Attorney General or any other Tanzanian authority.<sup>395</sup>
230. In the Respondent's view, the wording of the Notice of Dispute suggests that there was no "good faith approach to negotiation,"<sup>396</sup> which is tantamount to a breach of Article 8 of the Treaty rendering the arbitration agreement voidable.<sup>397</sup>
231. Furthermore, the Respondent contends that the Party claiming that negotiations have failed needs to prove not only that negotiations were initiated but also that they actually took place.<sup>398</sup> The Claimants, it contends, have failed to do so in the instant case.<sup>399</sup>

## **2. The Claimants' Position**

232. The Claimants dispute the Respondent's argument regarding the absence of a dispute both as a matter of fact and as a matter of law.<sup>400</sup>
233. The Claimants deny that they failed to notify their claims to the Respondent prior to filing their Notice of Arbitration.<sup>401</sup> They assert that they invited Tanzania to enter into settlement negotiations in their Notice of Dispute dated 1 March 2017<sup>402</sup> and received a reply on 5 April 2017 via Tanzania's High Commissioner in London, acknowledging receipt of the Claimants'

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<sup>392</sup> Statement of Defence, para. 97; Rejoinder, paras 153, 156-157; Steptoe's letter to the High Commissioner for Tanzania to the United Kingdom and to the Attorney-General of Tanzania, dated 1 March 2017, **C-2**.

<sup>393</sup> Rejoinder, para. 150. *See* Letter from the High Commissioner for Tanzania to the United Kingdom to Steptoe & Johnson, dated 13 March 2017, **C-3**.

<sup>394</sup> Rejoinder, para. 151.

<sup>395</sup> Rejoinder, paras 151, 154, 159.

<sup>396</sup> Statement of Defence, para. 100; Rejoinder, para. 157.

<sup>397</sup> Statement of Defence, para. 101.

<sup>398</sup> Statement of Defence, para. 96.

<sup>399</sup> Statement of Defence, para. 113.

<sup>400</sup> Reply, paras 204-205.

<sup>401</sup> Reply, para. 204.

<sup>402</sup> Statement of Claim, para. 161; Reply, paras 171, 173; Steptoe's letter to the High Commissioner for Tanzania to the United Kingdom and to the Attorney-General of Tanzania, dated 1 March 2017, **C-2**.

letter and expressing belief that an appropriate response would be delivered soon.<sup>403</sup> According to the Claimants, no further response was received from Tanzania during the six-month period following receipt of the Notice of Dispute.<sup>404</sup>

234. Moreover, the Claimants dispute the Respondent's position as to when a "dispute" exists as a matter of legal principle.<sup>405</sup> First, the Claimants argue that the legal authorities invoked by the Respondent actually conclude that a dispute may arise when a party refuses to answer a claim or remains silent for a sufficient period of time to give rise to the inference that it does not admit the claim.<sup>406</sup> Second, the Claimants point to decisions of several investment treaty tribunals holding that a "dispute" arises when a treaty breach is alleged.<sup>407</sup> Third, the Claimants submit that the meaning of the word "dispute" should be ascertained by reference to the terms of the Treaty, and consider that it follows from Article 8 that "a 'dispute' arises by no later than the expiry of the cooling-off period in respect of any claims which are not settled during that period."<sup>408</sup>
235. Applying the above considerations to the instant case, the Claimants submit that a dispute arose on 1 March 2017, the date of receipt of the Notice of Dispute; and, in any event, a dispute had arisen by no later than the expiry of the cooling-off period foreseen in Article 8 of the Treaty, and before the Notice of Arbitration was submitted on 5 September 2017.<sup>409</sup>
236. Second, the Claimants also reject the Respondent's argument that the Claimants prematurely referred the dispute to arbitration by failing to seek an amicable settlement.<sup>410</sup> The Claimants refer in this regard to the Tribunal's letter dated 13 February 2018, whereby the Tribunal

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<sup>403</sup> Reply, para. 174; Letter from the High Commissioner for Tanzania to the United Kingdom to Steptoe & Johnson, dated 13 March 2017, **C-3**.

<sup>404</sup> Reply, para. 174.

<sup>405</sup> Reply, paras 205-209.

<sup>406</sup> Reply, paras 205-207; *Fastrack Contractors Ltd v Morrison Construction Ltd & Ireglio UK Ltd*, [2000] 1 BLR 168, as reported also in Adj. L.R. 01/04 (para. 28: "[...] a dispute only arises when a claim has been notified and rejected [...] a rejection can occur when an opposing party refuses to answer the claim [...]"); **RLA-25**; *AMEC Civil Engineering Ltd v. The Secretary of State for Transport* [2005] Adj. L.R. 03/07, **RLA-26** (para. 29: "[...] a dispute does not arise unless and until it emerges that the claim is not admitted [...] [t]he respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference [...]"); *Edmund Nuttall Limited v. R.G. Carter Limited* [2002] EWHC 400 (TCC), **RLA-30** (para. 36: "[...] It may be that it can be said that there is a 'dispute' in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation [...]")

<sup>407</sup> Reply, para. 208; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras 183, 185, **CLA-62**; *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 336, **RLA-24**; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras 102-103, **CLA-170**.

<sup>408</sup> Reply, para. 208.

<sup>409</sup> Reply, paras 171, 209.

<sup>410</sup> Reply, paras 181-185.

dismissed the Respondent's request for a suspension of the arbitration.<sup>411</sup> In the letter, the Tribunal stated:

[...] It appears from the evidence that the Claimants did invite the Respondent to engage in negotiations during the six-month cooling-off period, but the Respondent failed to do so [...] The Tribunal's decision [to deny the Respondent's request for suspension] is without prejudice to the Respondent's right to raise any preliminary objections it may wish to raise [...] including on the basis that the Claimants have failed to engage in negotiations during the cooling-off period, if supported with additional evidence.<sup>412</sup>

237. In the Claimants' submission, the Respondent's argument concerning a purported premature reference to arbitration seeks to overturn the Tribunal's above finding without providing any new evidence, and is therefore inadmissible.<sup>413</sup>
238. The Claimants also reject the Respondent's contention that Article 8 of the Treaty requires that actual negotiations take place before a dispute can be referred to arbitration;<sup>414</sup> indeed, Article 8 is qualified by the words "as far as possible."<sup>415</sup> In the Claimants' view, a requirement of actual negotiations would also be contrary to the object and purpose of the Treaty, as it would allow a respondent State to unilaterally prevent an investor from acceding to the dispute settlement mechanism foreseen in the Treaty by refusing to engage with a claim raised against it.<sup>416</sup> In the same vein, the Claimants submit that the decisions invoked by the Respondent on this point actually support the conclusion that the purpose of a cooling-off period is to offer the respondent an opportunity to address the dispute before its submission to arbitration,<sup>417</sup> and that a failure by the host State to make use of that opportunity cannot operate as a bar to jurisdiction.<sup>418</sup> Finally,

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<sup>411</sup> Reply, paras 178-179; Tanzania's email to the Tribunal, 29 January 2018, and the attachments thereto, **C-265**; Steptoe's letter to the Tribunal, 6 February 2018, and the attachments thereto, **C-266**; Tribunal's letter to the Parties, 13 February 2018, **C-267**.

<sup>412</sup> See Tribunal's letter to the Parties, 13 February 2018, p. 4, **C-267**.

<sup>413</sup> Reply, paras 6, 183.

<sup>414</sup> Reply, para. 186.

<sup>415</sup> Reply, para. 188.

<sup>416</sup> Reply, para. 189.

<sup>417</sup> Reply, paras 191-199; *Ambiente Ufficio S.P.A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **CLA-169** (para. 583: [a duty to consult] "is not violated if it is established that (a) the sufficient minimum amount of consultations was actually conducted, or at least offered, [...]"); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, **CLA-170** (para. 105: "it would suffice for Claimant to inform its counterpart of the alleged Treaty breach"; para. 135: "[t]he obligation to consult and negotiate falls on both parties [...]"); *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, **RLA-24** (para. 315: "[t]he purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration").

<sup>418</sup> Reply, para. 199; *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 348, **CLA-85**.

the Claimants submit that several tribunals have held that cooling-off periods are not jurisdictional requirements, nor mandatory.<sup>419</sup>

239. In any event, the Claimants argue that the Respondent's argument is wrong on the facts, since even the Respondent has acknowledged that the Claimants initiated negotiations through their Notice of Dispute.<sup>420</sup> The Claimants also submit that they complied with the cooling-off period required by Article 8 of the Treaty and were entitled to commence arbitration after its expiry.<sup>421</sup>
240. Finally, in the Claimants' view, the Respondent's conduct evidences that *bona fide* negotiations were not possible in this case due to the Respondent's failure to (i) take up the Claimants' invitation to negotiate in their Notice of Dispute; (ii) respond to the Claimants' letter of 20 October 2017 expressing their willingness to negotiate during the pendency of the arbitration; and (iii) make any effort to negotiate following the Tribunal's decision on 13 February 2018.<sup>422</sup>

### 3. The Tribunal's Determination

241. As summarized above, the Respondent raises two separate preliminary objections in relation to the settlement negotiations: (i) there is no dispute between the Parties for purposes of the arbitration; and (ii) the Claimants have referred the matter to arbitration prematurely. The two objections are based on the same facts and are therefore interrelated, and the Tribunal will deal with them together.
242. The Tribunal agrees with the Respondent that there must exist a dispute between the Parties before a matter can be referred to arbitration. Indeed, Article 8(2) of the BIT specifically provides that a dispute may be submitted to arbitration if it cannot be settled through consultations and negotiations "within six months of the date of the written application for settlement."<sup>423</sup> This implies that a "dispute" must be considered to exist between the parties if the claim raised by the investor cannot be settled within six months from the date it has been raised.
243. In the present case, it is clear from the evidence before the Tribunal that a dispute had arisen between the Parties that could not be settled through negotiations. As noted in the Tribunal's ruling of 13 February 2018,<sup>424</sup> on 1 March 2017 the Claimants wrote to the Respondent, notifying the Respondent of the Claimants' claims pursuant to the Treaty and inviting the Respondent to

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<sup>419</sup> Reply, para. 203; referring to, *inter alia*, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343, **CLA-85**.

<sup>420</sup> Reply, paras 184-185.

<sup>421</sup> Reply, para. 210.

<sup>422</sup> Reply, para. 202.

<sup>423</sup> Treaty, Article 8(2), **CLA-14**.

<sup>424</sup> Tribunal's letter to the Parties, 13 February 2018, **C-267**.

engage in negotiations.<sup>425</sup> The letter was accompanied by a draft Notice of Arbitration. The Respondent replied on 13 March 2017, stating that “an appropriate response will be delivered to you soon.”<sup>426</sup> There was no further correspondence between the Parties after these initial exchanges until 5 September 2017, when the six-month cooling-off period under Article 8(2) of the Treaty had expired, and when the Claimants served their Notice of Arbitration.

244. On 16 October 2017 the Respondent wrote to the Claimants, inviting the Claimants to Tanzania for negotiations and requesting that the Claimants withdraw the Notice of Arbitration.<sup>427</sup> The Claimants replied on 20 October 2017, confirming their willingness to enter into negotiations in parallel with the arbitration proceedings.<sup>428</sup> It appears that the Respondent never replied to this letter.
245. Based on the evidence before it, the Tribunal finds that a dispute had arisen between the Parties at the latest at the end of the six-month cooling-off period. While the Claimants in their letter of 1 March 2017 specifically invited the Respondent to engage in negotiations during the six-month cooling-off period, the Respondent failed to do so. The Respondent cannot rely on its failure to engage in negotiations during the cooling-off period to argue that the mandatory pre-arbitration dispute settlement procedure has not been complied with. For the same reason, it cannot argue that the Claimants submitted the dispute to arbitration prematurely.
246. Nor can the Respondent legitimately argue that the Notice of Dispute was not addressed to the competent Tanzanian authorities since the Respondent in this case is the United Republic of Tanzania, that is, the State as a subject of international law, not any particular State organ. While the attribution of competencies between the various State organs may be a relevant consideration under Tanzanian law, it is not relevant in the context of an international claim arising under the Treaty. Accordingly, if the Notice of Dispute was served on a wrong State organ (and the Tribunal takes no view on this), it is up to the State organ in question to transfer the document to the relevant organ.
247. In view of the above, the Respondent’s preliminary objections relating to the existence of a dispute and the alleged premature submission of the dispute to arbitration are dismissed. In the

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<sup>425</sup> Steptoe’s letter to the High Commissioner for Tanzania to the United Kingdom and to the Attorney-General of Tanzania, and the accompanying Draft Notice of Arbitration, 1 March 2017, para 2.4, **C-264**.

<sup>426</sup> Letter from the High Commissioner for Tanzania to the United Kingdom to Steptoe & Johnson, 13 March 2017, **C-3**.

<sup>427</sup> Letter from the Tanzanian Attorney General’s Office to Franco Paglieri/Sunlodges Ltd BVI, c/o Steptoe & Johnson, 16 October 2017, **C-206**.

<sup>428</sup> Letter from Steptoe & Johnson to Tanzania, 20 October 2017, **C-5**.



circumstances the Tribunal need not take a view on whether the Respondent's preliminary objections relate to the Tribunal's jurisdiction or to the admissibility of the Claimants' claims.

## **B. JURISDICTION *RATIONE PERSONAE***

### **1. The Respondent's Position**

248. The Respondent argues that Mr Paglieri and the Claimants do not qualify as Italian investors for the purposes of the Treaty,<sup>429</sup> and consequently the Tribunal lacks jurisdiction *ratione personae* over the dispute.<sup>430</sup> The Respondent submits that Mr Paglieri is actually a Kenyan national<sup>431</sup> attempting to engage in treaty shopping.<sup>432</sup>
249. First, as to Mr Paglieri's nationality, the Respondent notes that the Treaty requires the nationality of a natural person to be determined by reference to the domestic law of the State in question (here, Italian law).<sup>433</sup> Under Italian law, "whoever spontaneously acquires a foreign citizenship and establishes his residence abroad" loses his or her Italian citizenship.<sup>434</sup> Any such person may reacquire his or her citizenship, *inter alia*, "one year after the date at which he established his residence in the territory of the Republic [of Italy], save in case of explicit renunciation within the same time-limit."<sup>435</sup>
250. The Respondent points to evidence on record which indicates, in its view, that Mr Paglieri did not hold Italian nationality at any relevant time as required by the Treaty.<sup>436</sup> The Respondent contends that the Claimants have not produced any evidence showing that Mr Paglieri was paying any tax or telephone bills, or had any liabilities in Italy as a citizen of Italy.<sup>437</sup>
251. The Respondent also notes (and the Claimants acknowledge) that Mr Paglieri denounced his Italian nationality in 1980.<sup>438</sup> Therefore, he was a Kenyan national when he invested in Tanzania.<sup>439</sup> According to the Respondent, this is evidenced by the Certificates of Incentives

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<sup>429</sup> Statement of Defence, para. 75; Rejoinder, para. 23.

<sup>430</sup> Statement of Defence, para. 77; Rejoinder, para. 131; Rebutter, para. 6.

<sup>431</sup> Statement of Defence, para. 75; Rebutter, para. 37.

<sup>432</sup> Rebutter, para. 46.

<sup>433</sup> Rejoinder, para. 119.

<sup>434</sup> Rejoinder, para. 119; Italian Law No. 555 of 1912, art. 8, para. 1 (p. 268), **RLA-58B**.

<sup>435</sup> Rejoinder, para. 119; Italian Law No. 91 of 1992, art. 13(1)(d) (p. 6), **RLA-57**.

<sup>436</sup> Rejoinder, para. 121; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **RLA-46**; Rebutter, para. 17.

<sup>437</sup> Rebutter, para. 17.

<sup>438</sup> Rejoinder, para. 116.

<sup>439</sup> Rejoinder, para. 116; Rebutter, paras 16, 27.

issued by the TIC, both of which list Mr Paglieri as a Kenyan national.<sup>440</sup> The Respondent notes that Mr Paglieri presented himself as a Kenyan national when applying for a Second Certificate of Incentives on 13 September 2006.<sup>441</sup> In the Respondent's view, the Claimants' contradicting allegation that Mr Paglieri reacquired Italian nationality on 5 May 2004 should be ignored, since any doubts raised by such contradictory evidence should be resolved in its favour.<sup>442</sup>

252. The Respondent further submits that dual citizenship was only allowed in Kenya as of 2011 and, as a result, Mr Paglieri could not have been a dual Italian-Kenyan national in 2004 or 2006.<sup>443</sup> In the Respondent's view, Mr Paglieri's failure to disclose to the Italian authorities that he was also a Kenyan national at the time of reacquiring his Italian nationality in 2004<sup>444</sup> should lead the Tribunal to find that the Italian authorities made an error of fact and should therefore disregard the official documents presented by Mr Paglieri to assert his Italian nationality in these proceedings.<sup>445</sup>

253. Finally, the Respondent rejects the Claimants' allegation that the Treaty only requires Mr Paglieri to hold Italian nationality at the date of the alleged breach of the Treaty and on the date of commencement of this arbitration.<sup>446</sup> According to the Respondent, the Claimants are relying on the 'broad' definition of citizen contained at Article 25 of the ICSID Convention that is not applicable in this arbitration and that, if applied, would result in an illegitimate revision of the terms of the Treaty.<sup>447</sup>

254. The Respondent also rejects the notion that the Claimants themselves qualify as Italian investors under the Treaty.<sup>448</sup>

255. According to the Respondent, most investment agreements require that the nationality of a legal entity be determined by reference to three factors: the State of organization or incorporation; the State where the legal entity has its seat; and the State of ownership or control.<sup>449</sup> Relying on *Tokio*

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<sup>440</sup> Statement of Defence, para. 75; Sunlodges Tanzania's First Certificate of Incentives, 29 May 2003, **C-95**; Sunlodges Tanzania's Second Certificate of Incentives, 13 September 2006, **C-96**.

<sup>441</sup> Rejoinder, para. 116; Sunlodges Tanzania's Second Certificate of Incentives, 13 September 2006, **C-96**; Rebutter, para. 16.

<sup>442</sup> Rejoinder, para. 117; Rebutter, para. 18.

<sup>443</sup> Rejoinder, para. 117; Kenyan Citizenship and Immigration Act, Act No. 12 of 2011, **RLA-51**; Rebutter, paras 15, 18.

<sup>444</sup> Rebutter, paras 19-20.

<sup>445</sup> Rebutter, para. 19.

<sup>446</sup> Rejoinder, para. 122.

<sup>447</sup> Rejoinder, para. 122; ICSID Convention, art. 25, **RLA-47**; Rebutter, para. 21.

<sup>448</sup> Rejoinder, paras 23, 113; Rebutter, paras 29-34.

<sup>449</sup> Rejoinder, para. 123; United Nation Conference on Trade and Development, *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II*(New York and Geneva, 2011), pp.

*Tokelés v Ukraine*, the Respondent submits that these three criteria must be considered collectively.<sup>450</sup> However, the Respondent notes that tribunals have usually adopted the test of incorporation or seat of a company and abstained from engaging in investigations concerning control over a company when determining the nationality of a legal person.<sup>451</sup>

256. Applying these criteria,<sup>452</sup> the Respondent considers that Sunlodges BVI cannot qualify as an Italian investor under the Treaty because first, it is a company registered in the British Virgin Islands, a territory with whom Tanzania has not signed any BIT;<sup>453</sup> and second, the Claimants have failed to prove the exact number of shares owned by Mr Paglieri or whether he holds a managerial position in that company.<sup>454</sup>
257. As to Sunlodges Tanzania, the Respondent notes that it is incorporated and has its seat in Tanzania,<sup>455</sup> thus confirming that Sunlodges Tanzania is a Tanzanian company.<sup>456</sup> The Respondent also disputes that Mr Paglieri holds control over Sunlodges Tanzania.<sup>457</sup> First, according to the Respondent, Mr Paglieri was not included in the list of directors of the Estate that was submitted to the Business Registration and Licensing Authority;<sup>458</sup> and second, he is a minority shareholder in that company.<sup>459</sup>

## 2. The Claimants' Position

258. The Claimants assert that Mr Paglieri is an Italian investor as required by the Treaty because he is, and was at all material times, an Italian national who invested in Tanzania.<sup>460</sup> In turn, the Claimants qualify as investors under Article 1(2) of the Treaty because they are “foreign subsidiaries, affiliates and branches controlled in any way” by a natural person of Italy investing in Tanzania.<sup>461</sup>

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81-84, **R-16**; Rebutter, paras 40-41; Christopher Benedict *et al*, “The Determination of Nationality of Investor Under Investment Protection Treaties” (2011), p. 15, **RLA-59**.

<sup>450</sup> Rejoinder, paras 125-126; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **RLA-48**; Rebutter, para. 29.

<sup>451</sup> Rebutter, para. 41; Catherine Yannaca Small, *Definition of Investor and Investment in International Agreement*, Chapter 1, OECD, 2008, p.8, **RLA-60**; Rebutter, paras 43-44.

<sup>452</sup> Rejoinder, para. 130.

<sup>453</sup> Statement of Defence, para. 77; Rejoinder, para. 130.

<sup>454</sup> Statement of Defence, para. 77; Rejoinder, para. 130.

<sup>455</sup> Rejoinder, para. 123; Rebutter, para. 23.

<sup>456</sup> Rejoinder, para. 123.

<sup>457</sup> Rejoinder, para. 128.

<sup>458</sup> Rejoinder, para. 128; Sunlodges Tanzania's Form No. 14, Particulars of Directors or Managers, 18 March 2003, **C-36**.

<sup>459</sup> Rejoinder, paras 127-128; Rebutter, para. 26.

<sup>460</sup> Statement of Claim, para. 164.

<sup>461</sup> Statement of Claim, para. 165.

259. According to the Claimants, Mr Paglieri lost his Italian nationality after becoming a Kenyan national on 15 November 1979,<sup>462</sup> and then reacquired Italian nationality on 5 May 2004.<sup>463</sup> The Claimants consider that Mr Paglieri's reacquisition of Italian nationality in 2004 is a matter to be determined solely pursuant to Italian law.<sup>464</sup>
260. The Claimants also assert that the Tribunal is empowered to determine whether Mr Paglieri reacquired Italian nationality in order to ascertain its jurisdiction in this arbitration.<sup>465</sup> The Claimants rely in this regard on the *Soufraki* decision, which found that certificates of nationality are *prima facie* evidence of nationality.<sup>466</sup> The Claimants also note that the *Soufraki ad hoc* committee held that, once a claimant had submitted *prima facie* evidence of his nationality, the burden of proof shifts to the respondent.<sup>467</sup> Finally, the Claimants refer to the decision in *Ioan Micula and others v Romania*, where the tribunal held that it would only disregard the national authorities' decision on the nationality of the claimants

if there was convincing and decisive evidence that [the claimant's] acquisition of Swedish nationality was fraudulent or at least resulted from a material error. It is for the Respondent to make such a showing. For this purpose, casting doubt is not sufficient.<sup>468</sup>

261. The Claimants consider that the point of disagreement between the Parties in this case is whether Mr Paglieri met the criteria established in Article 13(1)(d) of Italian Law No. 91 of 5 February 1992 in order to reacquire the Italian nationality.<sup>469</sup> In the Claimants' view, a note from the Consular Office of the Italian Embassy in Kuala Lumpur unmistakably established that Mr Paglieri reacquired his Italian nationality on 5 May 2004.<sup>470</sup>

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<sup>462</sup> The Claimants note that such sequence of events includes a minor factual correction after Mr Paglieri reviewed an official statement from the Mayor of Alessandria (*cf.* Surrejoinder, paras 2-3; Paglieri III; Document entitled "City of Alessandria[,] Civil Registrar Service", 5 May 2004, **C-272A** and **C-272B**; Letter 9 January 1980 from the Italian Embassy in Nairobi, Kenya to Mr Franco Paglieri, **C-273**). Initially, Mr Paglieri had affirmed that he renounced his Italian nationality in 1980 and afterwards became a Kenyan national (*cf.* Surrejoinder, para. 2). In any event, the Claimants submits that such sequence of events is not relevant for Mr Paglieri's reacquisition of his Italian nationality in 2004 (*cf.* Surrejoinder, para. 3).

<sup>463</sup> Reply, para. 224; Paglieri II para. 3; Declaration of the Consular Officer of the Italian Embassy in Kuala Lumpur, Malaysia, 14 December 2018, **C-256A** and **C-256B**.

<sup>464</sup> Surrejoinder, para. 5.

<sup>465</sup> Surrejoinder, para. 5.

<sup>466</sup> Surrejoinder, para. 21.

<sup>467</sup> Surrejoinder, para. 22; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/07, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, para. 109, **CLA-177**.

<sup>468</sup> Surrejoinder, para. 23; *Ioan Micula and Others v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 95, **CLA-178**.

<sup>469</sup> Surrejoinder, para. 11; Italian Law No. 91 of 5 February 1992, art. 13(1)(d), **RLA-57**.

<sup>470</sup> Surrejoinder, para. 11; Declaration of the Consular Officer of the Italian Embassy in Kuala Lumpur, Malaysia, 14 December 2018, **C-256A** and **C-256B**.

262. The Claimants point to other evidence on record which supports, in their view, the conclusion that Mr Paglieri automatically reacquired the Italian nationality on 5 May 2004, after having been residing in Italy for one year while visiting his ailing mother:<sup>471</sup>
- (a) The Italian Embassy in Dar es Salaam issued a multi entry visa to Mr Paglieri allowing him to enter Italy from 15 March 2002 to 15 September 2002.<sup>472</sup> Mr Paglieri entered Milan (Italy) on 20 March 2002, as recorded in a Foreigners' Permit to Stay issued by the police on 3 June 2002 that was valid from 14 May 2002 to 14 May 2004.<sup>473</sup>
  - (b) Mr Paglieri has testified to the effect that, on 5 May 2003, he was registered in the *Anagrafe della Popolazione Residente* (Civil Registry of Residing People) of the city of Alessandria, where he was residing.<sup>474</sup> That was the date on which the one-year residence period in Italy started for the purpose of automatically reacquiring his Italian nationality as a matter of Italian law.<sup>475</sup>
  - (c) Mr Paglieri's automatic reacquisition of his Italian nationality on 5 May 2004 is recorded in a statement of the Mayor of Alessandria transcribed on that date by the Civil Registrar Officer of the Municipality of Alessandria.<sup>476</sup> In the Claimants' view, this statement generates a presumption that Mr Paglieri reacquired his Italian nationality, and posit that the threshold to rebut that presumption is high.<sup>477</sup>
263. The Claimants further assert that Mr Paglieri has remained an Italian national thereafter.<sup>478</sup> The Claimants note that Article 8(1) of Italian Law No. 555 of 13 June 1912 (pursuant to which Italian nationals may lose their nationality on becoming a foreign national and establishing their

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<sup>471</sup> Surrejoinder, para. 11; Oral Hearing Tr., Day 1, 22:7-18.

<sup>472</sup> Surrejoinder, para. 12; Franco Paglieri's Kenyan passport, numbered B061255, valid for the period 1999 to 2004, p. 5 which contains a visa for "Stati Schengen", **C-269**; Paglieri III, para. 5.

<sup>473</sup> Surrejoinder, para. 13; Foreigners' Permit to Stay issued to Franco Paglieri by the Police of the Italian Ministry of the Interior on 3 June 2002, **C-271**; Paglieri III, para. 6.

<sup>474</sup> Surrejoinder, para. 14.

<sup>475</sup> Surrejoinder, para. 14; Paglieri III, para. 7.

<sup>476</sup> Rejoinder, para. 120; Surrejoinder, para. 15; Document entitled "City of Alessandria[,] Civil Registrar Service", 5 May 2004, **C-272A** and **C-272B**.

<sup>477</sup> Surrejoinder, para. 25. The Claimants submit that the Respondent would need to establish fraud or material error, while no such allegation has been put forward in this case.

<sup>478</sup> Surrejoinder, para. 16. Nevertheless, the Claimants note that he moved back to Africa and on 30 August 2004 he registered on the *Anagrafe Italiani Residenti All'Estero* (Register of Italians Resident Abroad) (*cf.* Surrejoinder, para. 16; Documents entitled, "City of Alessandria[,] Directorate of Population and Demographics Services", 5 June 2015, **C-274**; Paglieri III, para. 10).

residence abroad) was repealed by Article 26(1) of Italian Law No. 91 of 5 February 1992 (in effect on 15 August 1992).<sup>479</sup> Since 1992, dual nationality is recognized under Italian law.<sup>480</sup>

264. The Claimants acknowledge that the Certificates of Incentives state that Mr Paglieri was Kenyan, as he indeed was,<sup>481</sup> but they consider this to be irrelevant because investors are not required to indicate their nationality when applying for a certificate of incentives.<sup>482</sup> The Claimants argue that, in any event, the Treaty does not exclude dual nationals from its scope.<sup>483</sup> In the Claimant's view, Mr Paglieri need only establish his Italian nationality on the date of the alleged breach of the Treaty and on the date of initiation of the present arbitration to qualify as an investor.<sup>484</sup>
265. As to the status of Sunlodges BVI and Sunlodges Tanzania as investors under the Treaty, the Claimants argue that Mr Paglieri's control over the Claimants is both legal (through his shareholding) and factual (through his managerial position in those companies),<sup>485</sup> but caveat that the Treaty only requires legal or factual control (but not both).<sup>486</sup>
266. The Claimants finally reject the Respondent's allegation that they have failed to establish Mr Paglieri's shareholding and managerial position in Sunlodges BVI,<sup>487</sup> and suggest that the incorporation of Sunlodges BVI in the British Virgin Islands does not affect its qualification as an Italian investor under the Treaty.<sup>488</sup>
267. During the Oral Hearing, the Claimants argued that the Respondent had made the following three arguments out of time in its Rebuttal:<sup>489</sup> (i) investments into Tanzania were only made by Sunlodges Tanzania;<sup>490</sup> (ii) Article 1(2) of the Treaty requires the investor to be Italian at the time

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<sup>479</sup> Surrejoinder, para. 18; Italian Law No. 555 of 1912, Article 8, p. 268, **RLA-58B**; Italian Law No. 91 of 5 February 1992, Article 26(1), **RLA-57**.

<sup>480</sup> Surrejoinder, para. 18; Italian Law No. 91 of 5 February 1992, Article 11, **RLA-57**.

<sup>481</sup> Reply, para. 22.

<sup>482</sup> Oral Hearing Tr., Day 1, 43:24-44:14.

<sup>483</sup> Reply, para. 225.

<sup>484</sup> Reply, para. 225; *Garcia Armas and Another v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014 (Spanish), paras 214-218, **CLA-142A** with the relevant parts translated into English, **CLA-142B**; *Vladislav Kim and Others v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 191, **CLA-148**.

<sup>485</sup> Statement of Claim, para. 165.

<sup>486</sup> Reply, para. 230.

<sup>487</sup> Reply, paras 227-229; Paglieri I, paras 10-15; First Witness Statement of Rexella D Hodge, 13 December 2018, **CWS-4** ("**Hodge I**"); First Witness Statement of Sally Perry, 12 December 2018, **CWS-3** ("**Perry I**").

<sup>488</sup> Reply, para. 231.

<sup>489</sup> Oral Hearing Tr., Day 1, 9:17-10:1.

<sup>490</sup> Oral Hearing Tr., Day 1, 51:18-52:6.

of the investment;<sup>491</sup> and (iii) the Certificates of Incentives were granted on the basis that Mr Paglieri was a Kenyan national.<sup>492</sup>

### 3. The Tribunal's Determination

268. The Respondent challenges the Tribunal's jurisdiction *ratione personae* on two separate grounds: first, Mr Paglieri does not qualify as a national of Italy under the Treaty; and second, the Claimants have not proven that they are controlled by Mr Paglieri.
269. The relevant provisions of the Treaty regarding the Claimants' nationality are Articles 1(2) to (4). They provide:
2. The term "investor" shall mean any natural person or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates or branches controlled in anyway by the above natural and legal persons.
  3. The term "natural person," in reference to either Contracting Party, shall mean any natural person holding the nationality of that State in accordance with its laws.
  4. The term "legal person," in reference to either Contracting Party, shall mean any entity having its head office in the territory of one of the Contracting Parties and recognised by it, such as public institutions, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise.<sup>493</sup>
270. The Claimants' case is that they are controlled by Mr Paglieri, a national of Italy, and accordingly they qualify as protected investors under Article 1(2) of the Treaty. According to the Claimants, Sunlodges BVI and Sunlodges Tanzania are "foreign subsidiaries, affiliates or branches" within the meaning of Article 1(2) of the Treaty, controlled by Mr Paglieri.
271. As to the nationality of Mr Paglieri, it is undisputed that he denounced his Italian nationality when acquiring Kenyan nationality in 1979. It is also undisputed that he maintained his Kenyan nationality after 5 May 2004, when, according to the Claimant, he re-acquired Italian nationality. However, the Parties disagree on whether there is sufficient evidence that Mr Paglieri re-acquired Italian nationality in 2004. The Respondent further argues that Kenya only allowed dual nationality in 2011, and the Claimants therefore in any event cannot rely on Mr Paglieri's alleged Italian nationality.
272. The Tribunal notes that it is undisputed between the Parties that the question of whether or not Mr Paglieri qualifies as a national of Italy is governed by Italian law. The Tribunal notes and accepts the Claimants' evidence that, under Italian law, re-acquisition of nationality requires

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<sup>491</sup> Oral Hearing Tr., Day 1, 52:7-58:1.

<sup>492</sup> Oral Hearing Tr., Day 1, 58:2-15.

<sup>493</sup> Treaty, art. 1(2) to 1(4), **CLA-14**.

being a resident of Italy for one year.<sup>494</sup> In support of their allegation that Mr Paglieri regained his Italian nationality on 4 May 2004, the Claimants have produced as evidence, *inter alia*, a certificate issued by the Civil Registrar Service of the Municipality of Alessandria on 5 May 2004, accompanied by a statement of the Mayor of Alessandria, confirming that Mr Paglieri regained his Italian nationality on 5 May 2004, having relocated to Alessandria and registered there on 5 May 2003.<sup>495</sup> The Claimants have also presented as further evidence a declaration issued by the Consular Officer of the Italian Embassy in Kuala Lumpur, which is the nearest Italian Embassy to where Mr Paglieri currently resides.<sup>496</sup> The declaration confirms that Mr Paglieri regained his Italian nationality on 5 May 2004. The documentary evidence is supported by Mr Paglieri's witness statements, in which he explained in detail the circumstances of his reacquisition of Italian nationality.<sup>497</sup>

273. In view of this evidence, the Tribunal is satisfied that Mr Paglieri reacquired Italian nationality on 5 May 2004. For purposes of the Tribunal's jurisdiction it does not matter whether he also maintained his Kenyan nationality after this date. Italian law specifically allows dual nationality,<sup>498</sup> and whether or not Kenyan law allows dual nationality is irrelevant as the Claimants do not rely on Mr Paglieri's Kenyan nationality before this Tribunal.
274. The Claimants further contend that they are allowed to bring their claims under the Treaty even if neither Claimant is a legal person "having its head office in the territory of one of the Contracting Parties [that is, Italy] and recognised by it," within the meaning of Article 1(3) of the Treaty. The Claimants' case is that they are entitled to bring their claims under Article 1(1) of the Treaty because they qualify as "foreign subsidiaries, affiliates and branches controlled in anyway by [a natural person of a Contracting Party]," which in this case is Italy.
275. The Tribunal notes that Sunlodges BVI is incorporated in the British Virgin Islands, that is, a third State, and Sunlodges Tanzania is organized under the laws of Tanzania, which is one of the Contracting Parties to the Treaty. In this connection, the Tribunal recalls that one of the questions it raised during the hearing was whether the term "foreign" in Article 1(2) of the Treaty should be interpreted, in accordance with the applicable rules of treaty interpretation, to cover subsidiaries, affiliates and branches of a Contracting Party that are incorporated or organized

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<sup>494</sup> Italian version of Italian Law No. 91 of 5 February 1992 (pp. 5-8), in the *Gazzetta Ufficiale* Anno 133 – Numero 38, 15 February 1992, art. 13(1)(d), **CLA-176**. An English version of such law is available in **RLA-57**.

<sup>495</sup> Document entitled "City of Alessandria, Letter to Franco Paglieri and Others", 5 May 2004, **C-272A** (Italian) and **C-272B** (English translation).

<sup>496</sup> Declaration of the Consular Officer of the Italian Embassy in Kuala Lumpur, Malaysia, 14 December 2018 (with English translation), **C-256**.

<sup>497</sup> Paglieri II, para. 3; Paglieri III, paras 3-10.

<sup>498</sup> Italian Law No. 91 of 5 February 1992, art. 11, **RLA-57**.



under the laws of both third countries and of the other Contracting Party.<sup>499</sup> The Tribunal is satisfied, having heard the Parties' oral argument on the issue, that this is indeed the ordinary meaning of the term "foreign" in its context and in light of the object and purpose of the Treaty;<sup>500</sup> it must be interpreted to refer to any subsidiary, affiliate or branch, controlled by a natural or legal person of a Contracting Party, that has invested in the territory of the other Contracting Party and that is "foreign" to such natural person or legal person in the sense that it is a subsidiary, affiliate or branch that is not incorporated or organized under the laws of the Contracting Party of which the natural or legal person in question is a national. Consequently, in the circumstances of this case, Sunlodges BVI, a legal person incorporated under the laws of the British Virgin Islands, must be considered to be a "foreign" entity within the meaning of Article 1(2) of the Treaty in the sense that it is not a company organized under the laws of Italy, the home State of Mr Paglieri.<sup>501</sup> Similarly, Sunlodges Tanzania, a legal person incorporated under the laws of Tanzania, must be considered to be a "foreign" entity within the meaning of Article 1(2) of the Treaty in the sense that it is not a company organized under laws of Italy, the home State of Mr Paglieri.

276. The remaining issue is whether the Claimants are controlled by Mr Paglieri under Article 1(2) of the Treaty. The Claimants contend that Mr Paglieri's control over the Claimants consists of both legal control by way of shareholding and factual control by way of management in that he directed the operations of the company. However, this is disputed by the Respondent.
277. As to Sunlodges BVI, the Claimants argue that Mr Paglieri has always been the beneficial owner of all of the company's issued share capital, which he has held through professional nominee companies, and that Mr Paglieri has directed, managed and controlled Sunlodges BVI from its incorporation.
278. The Tribunal notes that, while the nominee companies changed over the years, the Claimants have produced as evidence declarations of trust from each of them, confirming that they held the shares in the company registered in their name as nominee of and trustee for Mr Paglieri.<sup>502</sup> Mr Paglieri's own evidence further provides a detailed account of his continuous control over

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<sup>499</sup> See Oral Hearing Tr., Day 1, 29:4-30:2.

<sup>500</sup> Vienna Convention on the Law of Treaties (the "VCLT"), art. 31, **CLA-4**.

<sup>501</sup> While Article 1(1) of the Treaty refers only to "foreign subsidiaries, affiliates and branches" controlled by natural and legal persons of a Contracting Party, it must be interpreted to also cover legal entities that are directly owned and controlled by natural persons of a Contracting Party, and not only those that are indirectly controlled (through a legal person) by natural persons of a Contracting Party; indeed art. 1(1) refers to foreign subsidiaries, affiliates and branches controlled "in anyway" in art. 1(1) of the Treaty, **CLA-14**.

<sup>502</sup> Declaration of Trust made by Fort Street Nominees Limited in favor of Fort Street Nominees Limited, for 1 Sunlodges BVI share, 29 November 1996, **C-14**; Declaration of Trust made by Fort Street Nominees Limited in favor of Saavedra Registrars Limited, for 1 Sunlodges BVI share, 31 October 2003, **C-20**; and Declaration of Trust made by Jorden's Nominees (BVI) Limited, 25 December 2017, **C-26**.

Sunlodges BVI throughout the period relevant to the claims.<sup>503</sup> The Claimants have also produced as further evidence a witness statement from Ms Rexella D. Hodge, Managing Director of Vistra Nominees (BVI) Ltd, a provider of nominee shareholder services, which has, since 25 December 2017, been the holder of the one issued share in Sunlodges BVI.<sup>504</sup> Ms Hodge confirms in her witness statement that Mr Paglieri has been the sole beneficial owner and controller of Sunlodges BVI since its incorporation in November 1996.<sup>505</sup> The Tribunal notes that the Respondent did not call Ms Hodge for cross-examination and has not challenged her evidence.

279. The Tribunal is satisfied, based on the evidence before it, that Sunlodges BVI is controlled by Mr Paglieri, a national of Italy.
280. As to Sunlodges Tanzania, the Claimants contend that, while Mr Paglieri was a minority shareholder of Sunlodges Tanzania, he had factual control of the company through directing and controlling its management. The Claimants' case is supported by the witness evidence of Ms Perry,<sup>506</sup> as well as, *inter alia*, the daily reports which were copied to Mr Paglieri on a daily basis for purposes of oversight.<sup>507</sup> The Respondent disputes this evidence and notes that Mr Paglieri has not acted as a director of the company, however, the Respondent has not produced any evidence to rebut the Claimants' case.
281. The Tribunal is satisfied that the Claimants have proven, through both witness and documentary evidence, that Mr Paglieri also effectively controlled the activities of Sunlodges Tanzania during the relevant period.
282. The Respondent further argues that since Sunlodges Tanzania is controlled by Sunlodges BVI, and Mr Paglieri is a minority shareholder of Sunlodges Tanzania, it must be considered a national of British Virgin Islands and not that of Italy. The Tribunal is unable to agree with the Respondent's reasoning. Under Article 1(2) of the Treaty, the term "investor" covers any foreign legal persons controlled "in anyway" by, *inter alia*, a natural person of a Contracting Party. The term "in anyway" must be considered to cover both direct and indirect control, that is, control exercised over a legal person through another legal person. The Tribunal has determined above that Mr Paglieri controls Sunlodges BVI, and since 75 per cent of the shares of Sunlodges Tanzania are held by Sunlodges BVI, Sunlodges Tanzania must be considered to be indirectly

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<sup>503</sup> Paglieri I, paras 10-15.

<sup>504</sup> Hodge I, para. 1.

<sup>505</sup> Hodge I, paras 2-3.

<sup>506</sup> Perry I, paras. 5-7.

<sup>507</sup> See, for instance, Daily Reports – Bi-Annual Extract (2003-2011), **C-130**.

controlled by Mr Paglieri through Sunlodges BVI. Sunlodges Tanzania thus qualifies as a legal person “controlled” by a natural person of a Contracting Party.

283. Finally, the Tribunal notes that Mr Paglieri was a national of Italy on 6 September 2011, the date of the alleged breach of the Treaty, as well as on 5 September 2017, the date of commencement of this arbitration. Consequently, the Claimants qualified as investors of Italy within the meaning of Article 1(2) of the Treaty on the relevant dates.
284. In view of the above, the Tribunal finds that both Sunlodges BVI and Sunlodges Tanzania qualify as “investors” within the meaning of Article 1(2) of the Treaty and are entitled to submit claims to arbitration pursuant to Article 8(2) of the Treaty. Accordingly, the Tribunal determines that it has jurisdiction *ratione personae* over the claims of both Sunlodges BVI and Sunlodges Tanzania.

### **C. JURISDICTION *RATIONE MATERIAE***

285. The Tribunal notes that the Respondent does not contest that the Claimants have made an investment in Tanzania, and that the Tribunal has jurisdiction *ratione materiae* in this case.<sup>508</sup>
286. Having considered the evidence before it, the Tribunal is satisfied that the Claimants have indeed made an investment in Tanzania under Article 1(1) of the Treaty. Sunlodges BVI’s shareholding in Sunlodges Tanzania constitutes an investment under Article 1(1)(b) of the Treaty, and similarly Sunlodges Tanzania’s Rights of Occupancy over the Estate constitute an investment under Article 1(1)(a) of the Treaty. The Tribunal notes that these assets were “invested” (as required by Article 1(1) of the Treaty) in the sense that they were contributed to the Claimants’ agricultural business activities and were used for income-generating purposes.
287. In view of the above, the Tribunal considers that it has jurisdiction *ratione materiae* over the claims.

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<sup>508</sup> While the Respondent in its Rejoinder addresses what it refers to as the Tribunal’s “subject-matter jurisdiction,” it discusses under this heading the absence of settlement negotiations and the alleged premature submission of the dispute to arbitration, but not the existence of investment.

## VII. THE CLAIMANTS' COMPLIANCE WITH APPLICABLE TANZANIAN LAW

288. The Tribunal notes that the Respondent does not expressly raise the Claimants' alleged failure to comply with Tanzanian law as an objection to jurisdiction or admissibility. In the circumstances, the Tribunal prefers to deal with the issue under a separate heading, as a matter of compliance with the applicable Tanzanian law.

### A. THE RESPONDENT'S POSITION

289. The Respondent notes that, pursuant to Article 1 of the Treaty, the Claimants had an obligation to invest in accordance with Tanzanian laws and regulations.<sup>509</sup> In the Respondent's submission, any conduct of the Claimants in breach of Tanzanian law would constitute a grave violation of the Treaty, and any non-compliance with Tanzanian law may limit their right to invoke the substantive protections and the dispute settlement clause of the Treaty.<sup>510</sup>

290. According to the Respondent, the Certificates of Incentives did not exempt the Claimants from seeking the necessary approvals to run their business, including business licenses or permits from governmental authorities.<sup>511</sup> The Respondent contends that the Certificates of Incentives did not supersede or override the terms and conditions stipulated in the certificates of occupancy,<sup>512</sup> which required that the Estate be used for agricultural purposes. Thus the Claimants were required to seek a change of use from the granting authority to develop a livestock business in the Estate.<sup>513</sup> The Respondent claims that the Claimants had the duty to first request in writing a change of use of the land in the Estate from agricultural use to mixed agricultural and pastoralism, and later request that the TIC secure approval of that change from the Commissioner for Lands.<sup>514</sup>

291. The Respondent further asserts that there is no record that the Claimants had a permit or license to undertake a livestock keeping business.<sup>515</sup> The Respondent submits that, in these circumstances, it is not estopped from denying that the Claimants use the Estate as a ranch cattle and maize farm, as such use was not in accordance with the applicable laws.<sup>516</sup> The Respondent

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<sup>509</sup> Statement of Defence, para. 234; Rejoinder, paras 21, 91.

<sup>510</sup> Statement of Defence, para. 234; Rejoinder, paras 21, 91; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 319, **RLA-7**.

<sup>511</sup> Rejoinder, paras 16, 75.

<sup>512</sup> Rejoinder, para. 17.

<sup>513</sup> Rejoinder, para. 16.

<sup>514</sup> Rejoinder, paras 76, 77; Tanzanian Investment Act, s. 16(2), **CLA-9** (“(2) Notwithstanding the generality of sub-section (1), where licences or approvals are required by an investor, the Centre shall liaise in writing with the relevant authorities to secure the necessary licences and approvals as required by the investor.”)

<sup>515</sup> Rejoinder, paras 16-17.

<sup>516</sup> Rejoinder, paras 18, 78.

finally submits that the doctrine of estoppel is related to the determination of facts, and not to questions of law.<sup>517</sup>

## **B. THE CLAIMANTS' POSITION**

292. The Claimants submit that their investments were made in accordance with Tanzanian law.<sup>518</sup> According to the Claimants, the Respondent is precluded from denying the legality of their investments,<sup>519</sup> as the acquisition of the Estate by Sunlodges Tanzania was approved by the Respondent.<sup>520</sup>
293. First, the Claimants posit that the legality requirement in the Treaty must be assessed vis-à-vis the time the investment was made, while any subsequent illegality (which the Claimants deny exists) would be irrelevant.<sup>521</sup>
294. The Claimants refer to the finding of the *Rumeli* tribunal that investments may only be excluded from treaty protection “if they have been made in breach of fundamental legal principles of the host country,”<sup>522</sup> which they claim did not occur in the instant case.<sup>523</sup>
295. In any event, the Claimants submit, the Respondent is estopped from questioning the legality of the Claimants’ investments.<sup>524</sup> They refer in this regard to the three requirements of the principle of estoppel considered by the International Court of Justice (the “**ICJ**”), which have also been applied by several investment tribunals.<sup>525</sup> According to the Claimants, these are:

- [(1)] an express or implied statement of fact that is clear and unambiguous;
- [(2)] the statement must be voluntary, unconditional and authorised; and
- [(3)] there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.<sup>526</sup>

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<sup>517</sup> Rejoinder, paras 18, 78.

<sup>518</sup> Reply, para. 212.

<sup>519</sup> Reply, paras 130, 135, 216.

<sup>520</sup> Reply, para. 212; Letter from Coopers & Lybrand to Franco Paglieri, 29 May 1998 (with transcript), **C-147**; Paglieri I, para. 23.

<sup>521</sup> Reply, para. 213.

<sup>522</sup> Reply, para. 214; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 319, **RLA-7**; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 104, **CLA-146**; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, paras 197, 199, **CLA-147**.

<sup>523</sup> Reply, para. 214.

<sup>524</sup> Reply, paras 216-220; Reply, paras 124-135.

<sup>525</sup> Reply, para. 129; referring to, *inter alia*, *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 475, **CLA-79**.

<sup>526</sup> Reply, para. 127; *North Sea Continental Shelf*, Judgment, 1969 I.C.J. 3 (20 February), para. 30, p. 26, **CLA-154**; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United

296. If these three elements are met, the doctrine of estoppel has the effect of precluding the party that made a certain representation from adopting a different position on the issue.<sup>527</sup> In the Claimants' view, estoppel applies to both statements of fact and of law.<sup>528</sup>
297. In the Claimants' submission, the three elements are met in this case.<sup>529</sup> First, the Respondent, through the Certificates of Incentives, gave them permission "[t]o diversify the Sisal Estate into cattle ranch and maize farm,"<sup>530</sup> thus allowing the use of the Estate for such purposes in accordance with Tanzanian law.<sup>531</sup> Second, the Respondent's statements were voluntary, unconditional and authorized.<sup>532</sup> Third, the Claimants invested in the Estate relying on those representations and in good faith. According to the Claimants, such reliance caused them a detriment in that, if those statements were not true, the Claimants could lose their entire investment by way of a revocation, while at the same time creating an advantage for the Respondent, who received land rent.<sup>533</sup>

### C. THE TRIBUNAL'S DETERMINATION

298. The relevant provision of the Treaty regarding the legality requirement is Article 1(1), which provides:

The term 'investment' shall mean any kind of asset invested by a natural or legal person of a Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework. [...]<sup>534</sup>

299. As summarized above, the Respondent's position is that the Claimants' investment does not meet the legality requirement in Article 1(1) of the Treaty as the Claimants failed to comply with the applicable Tanzanian law when diversifying the use of the Estate, in particular by failing to seek the necessary licenses and permits from competent Tanzanian authorities. According to the

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States) 1984 I.C.J. 246 (12 October), para. 145, p. 309, **CLA-155**; *Case Concerning the Land, Island and Maritime Frontier Dispute*, Application by Nicaragua to Permission to Intervene, Judgment (El Salvador v. Honduras) 1990 I.C.J. 92 (13 September), para. 63, p. 118, **CLA-156**.

<sup>527</sup> Reply, para. 128.

<sup>528</sup> Oral Hearing Tr., Day 1,61:5-10.

<sup>529</sup> Reply, para. 131.

<sup>530</sup> Reply, para. 124; Sunlodges Tanzania's First Certificate of Incentives, 29 May 2003, numbered para. 2, **C-95**; Reply, paras 132, 218. In any event, the Claimants note that the activities pursued pursuant to the Certificate of Incentives did not change the use of the Estate (which continued to be used for agricultural purposes) and, therefore, no permission for change of land use was required as a consequence of the Certificates of Incentives (Reply, para. 23).

<sup>531</sup> Reply, paras 132, 218; Oral Hearing Tr., Day 1, 39:10-15.

<sup>532</sup> Reply, paras 133, 219.

<sup>533</sup> Reply, para. 134.

<sup>534</sup> Treaty, art. 1(1), **CLA-14**.

Respondent, “[a]ny non-compliance by investor with host state laws may limit the right of investor to invoke the substantive right and dispute settlement clause of the applicable BIT.”<sup>535</sup>

300. The Respondent submits that the Certificates of Incentives required that the Estate be used for agricultural purposes, and that the Claimants were required to seek a change of use from the granting authority to develop a livestock business in the Estate. According to the Respondent, the Claimants were required to first request in writing a change of use of the land in the Estate from agricultural use to mixed agricultural and pastoralism to the TIC, and then later request that the TIC secure approval of that change from the Commissioner for Lands.
301. The Respondent’s argument is based on the assumption that livestock business (or the mixed use of the Estate for cattle raising and growing maize) does not qualify as an “agricultural purpose.” In this connection, the Tribunal notes that, while the Certificates of Incentives were granted to “[d]iversify sisal estate into cattle ranch and maize farm,” both documents indicated that the relevant “sector” of activity remained “agriculture” (while the “subsector” was identified as “Cattle ranch & Maize Farm”).<sup>536</sup> Accordingly, based on the assessment of the TIC, which granted the Incentives, only the “subsector” but not the “sector” of the Claimants’ investment activity changed as a result of the diversification, and that the Claimants continued to use the Estate for agricultural purposes after the diversification. The Tribunal is therefore unable to agree with the Respondent’s argument that the diversification amounted to a change of the purpose for which the Estate was to be used; both sisal growing and cattle raising, whether with or without maize growing, qualify as an “agricultural purpose” under the terms of the Certificates of Incentives themselves.
302. The Respondent has not established, and there is no evidence before the Tribunal, that any new permits or licenses were required if a subsector, rather than the sector, of the Claimants’ investment activity changed. The Tribunal also notes that there is no evidence that the TIC advised the Claimants to seek any further permits or licenses, even though according to the Tanzanian Investment Act, the TIC is a “one-stop Centre” and accordingly, “where licenses or approvals are required by an investor,” the TIC “shall liaise in writing with the relevant authorities to secure the necessary licenses and approvals as required by the investor.”<sup>537</sup> This suggests that, in TIC’s view, no further permits or licenses were required.

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<sup>535</sup> Statement of Defence, para. 234.

<sup>536</sup> Sunlodges Tanzania’s First Certificate of Incentives, 29 May 2003, numbered paras 2-3 **C-95**; and Sunlodges Tanzania’s Second Certificate of Incentives, 13 September 2006, numbered paras 2-3 **C-96**.

<sup>537</sup> Tanzanian Investment Act, s. 16(2), **CLA-9**.

303. Accordingly, as the Respondent's defense fails on the facts, the Tribunal need not consider whether the legality requirement in Article 1 of the Treaty must be assessed vis-à-vis the time the investment was made, or whether it can also be raised in relation to any alleged subsequent illegality. Nor does the Tribunal need to address the issue of whether the Respondent is in any event estopped from challenging the legality of the Respondent's investment since they did not raise the argument contemporaneously.



## VIII. THE CLAIMANTS' EXPROPRIATION CLAIM

### A. THE APPLICABLE LEGAL STANDARD

#### 1. The Claimants' Position

304. The Claimants principal claim is for expropriation of their investments. The claim is based on Article 5(2) of the Treaty, which provides:

2. Investments of nationals or companies of either Contracting Party shall not be, “de jure” or “de facto”, nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party, except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, full and effective compensation. Such compensation shall amount to the genuine market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be calculated in a convertible currency at the prevailing exchange rate applicable on the date on which the decision to nationalise or expropriate is announced or made public, shall include interests calculated on the basis of London Interbanking Offered Rate (LIBOR) Standards from the date of expropriation to the date of payment, shall be made without delay and in any case within six month be effectively realizable and be freely transferable. Whenever there are difficulties in ascertaining the genuine market value, it shall be determined according to the internationally acknowledged evaluation standards. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent Authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.<sup>538</sup>

305. The Claimants argue that the revocation of their rights over the Estate (i) had no legal basis; (ii) was not in accordance with the revocation procedure dictated by the Land Act; (iii) was not a *bona fide* regulatory action but a pretext to give the Estate to another investor; and (iv) was discriminatory and disproportionate in the circumstances.<sup>539</sup>

306. The Claimants also contend that public purpose is a requirement for determining the legality of an expropriation under Article 5(2) of the Treaty, but not for determining whether an expropriation has occurred.<sup>540</sup> The Claimants invoke several decisions in support of this

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<sup>538</sup> Treaty, art. 5(2), **CLA-14**.

<sup>539</sup> Reply, para. 245.

<sup>540</sup> Reply, para. 246.

contention,<sup>541</sup> including *Siemens v. Argentina*;<sup>542</sup> *Santa Elena v. Costa Rica*;<sup>543</sup> *Metalclad v. Mexico*;<sup>544</sup> and *Vivendi II v. Argentina*.<sup>545</sup>

307. The Claimants also refer to Article 5(1) of the Treaty, which provides:

The investments to which this Agreement relates shall not be subject to any measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily, unless specifically provided by current, national or local, legislation and regulations and orders handed down by Courts or Tribunals having jurisdiction.<sup>546</sup>

308. According to the Claimants, Article 5(1) of the Treaty prohibits the adoption of measures “if without specific authorisation in law” those measures might limit an investor’s rights of ownership, possession, control or enjoyment of his or its investments, either permanently or temporarily.<sup>547</sup> They argue that such measures need not rise to the level of an expropriation, which is covered under Article 5(2).<sup>548</sup>

309. The Claimants argue that the revocation of their Rights of Occupancy over the Estate “had a permanent limit on their right of ownership, possession, control or enjoyment over that investment” insofar as none of those rights could be exercised (or at least were limited) after the revocation.<sup>549</sup> They also argue, in relation to Sunlodges BVI, that the revocation also involved a permanent limit on its right of ownership, possession, control or enjoyment over (i) its 75% share in Sunlodges Tanzania’s share capital;<sup>550</sup> and (ii) the Sunlodges BVI Loan.<sup>551</sup>

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<sup>541</sup> Reply, paras 247-257.

<sup>542</sup> Reply, para. 247; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 270, **CLA-82**.

<sup>543</sup> Reply, para. 252; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, paras 71-72, **CLA-56**.

<sup>544</sup> Reply, para. 254; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 (NAFTA), Award, 30 August 2000, para. 111, **CLA-58**.

<sup>545</sup> Reply, paras 255-256; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic (Vivendi II)*, ICSID Case No ARB/97/3, Award, 20 August 2007, paras 7.5.20-21, 7.5.24, 7.5.30, 7.5.34, **CLA-83**.

<sup>546</sup> Treaty, art. 5(1), **CLA-14**.

<sup>547</sup> Statement of Claim, para. 227;

<sup>548</sup> Statement of Claim, paras 227-228; Newcombe and Paradell, *Law and Practice of Investment Treaties, Standards of Treatment* (2008, Wolters Kluwer), p. 339, **CLA-29**; *GPF S.à.r.l v. Poland*, [2018] EWHC 409 (Comm), Judgment of the High Court of England & Wales, para. 95, **CLA-120**.

<sup>549</sup> Statement of Claim, para. 229.

<sup>550</sup> Statement of Claim, para. 230.1.

<sup>551</sup> Statement of Claim, para. 230.2.

310. The Claimants submit that the limitation of their rights amounted to a breach of Article 5(1) of Treaty as there was neither due process nor compensation and, was not specifically provided by law within the meaning of Article 5(1).<sup>552</sup>

## **2. The Respondent's Position**

311. The Respondent contends that the Claimants' expropriation claim is not governed by Article 5(2) of the Treaty but is a matter of Tanzanian law.<sup>553</sup> According to the Respondent, it did not revoke the Claimants' Rights of Occupancy for a public purpose; the revocation was made pursuant to section 48 of the Land Act for failure to comply with the conditions of the Rights of Occupancy.<sup>554</sup> This does not qualify as an expropriation, but as a legitimate measure under Tanzanian law.

312. The Respondent does not expressly address the Claimants' argument relating to Article 5(1) of the Treaty in its submissions.<sup>555</sup>

## **B. THE NATURE OF THE ALLEGED EXPROPRIATION**

### **1. The Claimants' Position**

313. According to the Claimants, there is a direct expropriation "where the investor's investment is taken through formal transfer of title or outright seizure."<sup>556</sup> They contend that, as a result of the Revocation Decision, Tanzania directly expropriated the Claimants' title to the Estate and its increase in value.<sup>557</sup> In the Claimants' submission, the expropriation of their investment was not for a public purpose, did not follow due process and compensation was not paid, and each of these circumstances, by itself, renders the expropriation unlawful under the Treaty and under customary international law.<sup>558</sup>

314. The Claimants submit that an indirect expropriation occurs when there is a substantial deprivation of an investor's rights over a property caused by the State.<sup>559</sup> They submit that, through the Revocation Decision, the Respondent indirectly expropriated, in regard to Sunlodges BVI: (i) the livestock, farm machinery, vehicles and other assets used in the course of the Estate's business (although the Claimants do not seek compensation for those assets in this arbitration);

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<sup>552</sup> Statement of Claim, para. 231.

<sup>553</sup> Statement of Defence, para. 320.

<sup>554</sup> Statement of Defence, paras 236-237; Rejoinder, para. 93.

<sup>555</sup> Reply, para. 283; Oral Hearing Tr., Day 1, 122:18-20; *cf.* Rejoinder, para. 3

<sup>556</sup> Statement of Claim, para. 185; Reply, para. 258.

<sup>557</sup> Statement of Claim, paras 186-187; Reply, paras 241, 258.

<sup>558</sup> Statement of Claim, paras 193-212.

<sup>559</sup> Statement of Claim, paras 188-190; Reply, para. 259; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, paras 667, 708, **CLA-117**.

(ii) Sunlodges BVI's 75% ownership in Sunlodges Tanzania's share capital and its increase in value; and (iii) the Sunlodges BVI Loan (which is outstanding).<sup>560</sup>

315. The Claimants argue that the Respondent's conduct vis-à-vis Sunlodges BVI amounts to an indirect expropriation because without ownership over the Estate, the share capital of Sunlodges Tanzania became worthless to Sunlodges BVI and the Sunlodges BVI Loan could not be repaid (given that the business could not operate).<sup>561</sup>

## **2. The Respondent's Position**

316. The Respondent denies that the Claimants' investments were expropriated, whether directly or indirectly.<sup>562</sup> In the Respondent's view, the Claimants' Rights of Occupancy were revoked as a consequence of the Claimants' breach of their terms and conditions, and such revocation was carried out in accordance with the requirements of the applicable Tanzanian law.<sup>563</sup>

317. The Parties' respective positions regarding the requirements of (i) a public purpose, (ii) due process, and (iii) compensation are summarized below.

## **C. THE LEGALITY OF THE ALLEGED EXPROPRIATION**

### **1. Public Purpose**

#### *(a) The Claimants' Position*

318. The Claimants note that the concept of "public purpose" is not defined in the Treaty itself<sup>564</sup> and suggest that this is a question for the Tribunal to determine.<sup>565</sup> However, they submit that (i) an ostensible public purpose is not enough to render the expropriation lawful; rather there must be a

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<sup>560</sup> Statement of Claim, para. 191. The Claimants also argue, in regard to Sunlodges Tanzania, that the Revocation Decision amounted to an indirect expropriation of the assets used in the course of the Estate's business, insofar as lacking ownership over the Estate those assets were of no economic use. However, the Claimants do not seek damages for those assets in this arbitration.

<sup>561</sup> Statement of Claim, para. 191; Reply, paras 242, 259.

<sup>562</sup> Rejoinder, paras 22, 93; Statement of Defence, para. 245.

<sup>563</sup> Statement of Defence, para. 245.

<sup>564</sup> Statement of Claim, para. 195.

<sup>565</sup> Statement of Claim, para. 196; Bin Cheng, *General Principles of Law as Applied by International Tribunals* (1953, republished 2006), p. 38, **CLA-28**, citing from *Norwegian Shipowners' Claims* (Norway v USA), Award, 13 October 1922, para. 309, at p. 332, **CLA-36**.

public purpose in fact;<sup>566</sup> and (ii) expropriating an investment from one investor in order to give it to another investor does not amount to a public purpose.<sup>567</sup>

319. The Claimants stress that, when revoking their Rights of Occupancy over the Estate, Tanzania did not declare that the revocation was for a public purpose.<sup>568</sup> In the Revocation Decision, the President did not invoke article 45(3) of the Land Act, which recognises public interest as a ground to revoke rights of occupancy;<sup>569</sup> or the Land Acquisition Act, which would be, according to the Claimants, the legal instrument that would apply to expropriations for a public purpose in Tanzania.<sup>570</sup>
320. Thus, the Claimants claim, there was not an ostensible public purpose in this case.<sup>571</sup> According to the Claimants, the sole purpose behind the revocation of their rights over the Estate was to give the Estate to another investor (i.e. Dangote Industries) for private gain.<sup>572</sup>
321. The Claimants finally argue that Tanzania's conduct must be examined by reference only to the justifications put forward in the Notices of Revocation, while post-event justifications cannot be taken into consideration.<sup>573</sup> In this regard, the Claimants reject the Respondent's reliance on section 17(8) of the Tanzania Investment Act to justify the revocation of their Rights of Occupancy,<sup>574</sup> as the TIC never made any declaration pursuant to that provision in relation with the Certificates of Incentives.<sup>575</sup>

(b) *The Respondent's Position*

322. The Respondent acknowledges that the Claimants' rights over the Estate were not acquired for a public purpose.<sup>576</sup> Rather, their rights were revoked as a consequence of their failure to develop

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<sup>566</sup> Statement of Claim, para. 198; Commentary on Article 3, OECD 1967 "Draft Convention on the Protection of Foreign Property", p. 19, **CLA-27**.

<sup>567</sup> Statement of Claim, para. 199; *Walter F. Smith Case* (U.S. v. Cuba) 2 R.I.A.A. 913 (May 1929), pp. 915-918, **CLA-40**; Statement of Claim, para. 200; *LETCO v. Liberia*, 2 ICSID Reports 343, Award, 31 March 1986, pp. 363 and 366, **CLA-48**.

<sup>568</sup> Statement of Claim, para. 202; Reply, para. 264.

<sup>569</sup> Statement of Claim, para. 204; Reply, para. 264.

<sup>570</sup> Statement of Claim, para. 205; Reply, para. 264.

<sup>571</sup> Statement of Claim, paras 202, 204.

<sup>572</sup> Statement of Claim, para. 206; Reply, paras 140, 263.

<sup>573</sup> Reply, paras 3, 88, 105-106.

<sup>574</sup> Reply, para. 2; Statement of Defence, para. 56; Tanzanian Investment Act, s. 17(8) **CLA-9**: "*Where a holder of a certificate [of incentives] does not commence operations within the first two years of issuance of a certificate without satisfactory reasons, the [Tanzania Investment Centre] may, [...] declare anything done or any benefit obtained under the certificate to be void and notify the holder of the certificate accordingly*".

<sup>575</sup> Reply, para. 30.

<sup>576</sup> Statement of Defence, para. 171.

and use the land in accordance with their Rights of Occupancy.<sup>577</sup> As a result, the Respondent considers the Claimants' allegations with regard to the public purpose requirement to have no merit and requests that the Tribunal reject them.<sup>578</sup>

323. In any event, the Respondent denies that the revocation was intended to benefit another investor.<sup>579</sup> The Respondent points out that, after revocation, the land was allocated to the TIC by the Commissioner for Lands.<sup>580</sup> The TIC then entered into a leasehold agreement with Dangote Industries in relation to part of that land, while the remaining portion of the land was allocated to other investors and Tanzanian nationals.<sup>581</sup>

## 2. Due Process

### (a) *The Claimants' Position*

324. The Claimants assert that Article 5(2) of the Treaty expressly requires that due process be followed after the expropriation has occurred,<sup>582</sup> while public international law extends the scope of this requirement to the time before an expropriation occurs.<sup>583</sup>

325. In the Claimants' submission, Tanzania did not accord due process to the Claimants before, during, and after the expropriation of the Estate.

326. First, no warning letter was issued by the Commissioner for Lands in breach of the procedure set out in the Land Act for the revocation of rights of occupancy.<sup>584</sup> In the Claimants' view, the Respondent's contention that a warning letter is not required if the Commissioner for Lands is satisfied that the breach is grave and of far reaching consequences is mistaken and ignores key provisions of the Land Act and its structure.<sup>585</sup>

327. Second, the Claimants submit that no prior inspection of the Estate ever took place, and therefore there was never a prior assessment as to whether the conditions regarding the development of the Estate had been breached.<sup>586</sup> Even if a prior inspection had taken place, and even if Tanzania had

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<sup>577</sup> Statement of Defence, para. 171; Rejoinder, paras 93-94.

<sup>578</sup> Statement of Defence, para. 248.

<sup>579</sup> Statement of Defence, para. 248.

<sup>580</sup> Statement of Defence, para. 248.

<sup>581</sup> Statement of Defence, para. 248.

<sup>582</sup> Statement of Claim, para. 208.

<sup>583</sup> Statement of Claim, para. 208; *Amco Asia Corporation and Others v Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 3 December 1992, 9 ICSID Reports 9, at p. 46, para. 7.47, **CLA-53**.

<sup>584</sup> Statement of Claim, para. 211.1; Reply, paras 4, 113, 118, 269.

<sup>585</sup> Reply, para. 269; Statement of Defence, para. 253 and fn 148.

<sup>586</sup> Surrejoinder, paras 26-44; Reply, paras 4, 114; Paglieri I, para. 765; Paglieri II, para. 15; Statement of Claim, para. 211.2; Reply, paras 123, 270.

relied on the Inspection Report of May 2011 in revoking the rights over the Estate (which the Claimants deny), the Claimants consider that the said report lacked the necessary level of detail to allow the Respondent to make that determination.<sup>587</sup> Furthermore, the Claimants contend that the fact that they were not provided with a copy nor informed about the existence of that report would constitute another failure by Tanzania to accord due process.<sup>588</sup>

328. Third, there was no legal basis for the revocation as there had been no abandonment of the land nor any breach of the Estate's development conditions.<sup>589</sup>
329. Fourth, the Notices of Revocation did not refer to all of the Certificates of Title affected by the Revocation Decision.<sup>590</sup> In this regard, the Claimants affirm that the Respondent's contention that the Claimants were served with the Notices of Revocation and were aware of them does not address this issue.<sup>591</sup> In their view, the case remains that the Notices of Revocation did not individually or collectively refer to the Certificate of Title 3550, which was also affected by the Revocation Decision.<sup>592</sup>
330. Fifth, the Claimants were never provided with a copy of the Special Committee Inspection Report until its purported submission by the Respondent together with its Rejoinder.<sup>593</sup> As noted above, the Claimants criticize the Special Committee Inspection Report and argue that it is inaccurate and incomplete, and cannot be considered authentic.<sup>594</sup>

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<sup>587</sup> Surrejoinder, para. 46.

<sup>588</sup> Surrejoinder, para. 48.

<sup>589</sup> Statement of Claim, para. 211.3; Reply, para. 271.

<sup>590</sup> Statement of Claim, para. 211.4; Reply, para. 272.

<sup>591</sup> Reply, para. 272; Statement of Defence, paras 218-219.

<sup>592</sup> Reply, para. 272.

<sup>593</sup> Reply, para. 123; Email from Matthew Coleman (Steptoe) to Tanzania's Solicitor-General, 8 June 2018, together with the Claimants' Request for Documents, **C-180**. Email from Matthew Coleman (Steptoe) to Tanzania's Solicitor-General, 18 June 2018, **C-252**; Letter from Tanzania's Solicitor-General to Steptoe, 19 June 2018 **C-253**; and Email from Thomas Innes (Steptoe) to Tanzania's Solicitor-General, 13 September 2018, **C-254**. In the Reply, at para. 123, the Claimants requested the Tribunal, pursuant to Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration 2010, to infer that such report would be adverse to the Respondent's interests and, in particular, that it would confirm that there was no inspection prior to the issuance of the Notices of Revocation; and that the Claimants had not breached any laws in relation to the Estate. Surrejoinder, paras 50-51; Statement of Claim, para. 211.5; Reply, para. 273.

<sup>594</sup> Surrejoinder, paras 49, 53-54, 57-70. *Inter alia*, the Claimants deny the following allegations contained in the Special Committee Inspection Report: (i) that the cattle operation was not commercial (arguing that it was the largest within the Mtwara region); (ii) that they were responsible for the existence of dangerous animals within the Estate; (iii) that their investments did not benefit the local community; (iv) that they did not allow the reparation of water pipes crossing the Estate; and (v) that they demolished a school.

331. Sixth, despite having approved the (Amended) GimcoAfrica Valuation Report, Tanzania never paid compensation.<sup>595</sup>
332. Seventh, the Claimants submit that their right to “prompt review, by a judicial or other independent Authority of the Party, of his or its case” was denied in the Judicial Review Proceedings.<sup>596</sup> In their view, Tanzanian law did not permit appeal of the Judicial Review Judgement;<sup>597</sup> and their purported failure to appeal would not mean that they “are estopped to bring claim in respect of denial of justice.”<sup>598</sup>
333. Eighth, the Claimants argue that Tanzania failed to comply with the Interim Injunctions.<sup>599</sup> According to the Claimants, the Respondent’s allegation that there is no evidence of the alleged invasions of the Estate because “there is no charge sheet and court judgement” would merely confirm that Tanzania failed to accord full protection and security to the Claimants.<sup>600</sup>
334. More broadly, in the Claimants’ submission, in order to ensure due process, the Respondent’s conduct must be measured against the content of the Notices of Revocation, those being the contemporaneous statements by Tanzania to justify the revocation of the Claimants’ Rights of Occupancy.<sup>601</sup> These were also the justifications against which the Claimants were required to “show cause” as to why their rights should not be revoked.<sup>602</sup>
335. In this regard, the Claimants note that the Notices of Revocation did not allege that the conditions of use of land as stated in the certificates of Rights of Occupancy had been breached.<sup>603</sup> Insofar as the Notices of Revocation erroneously referred to the breach of inexistent conditions of use contained in the Certificates of Title, the Claimants assert that they could not determine which conditions were alleged to have been breached.<sup>604</sup>

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<sup>595</sup> Statement of Claim, para. 211.6; Reply, para. 274.

<sup>596</sup> Statement of Claim, para. 211.7; Reply, para. 275.

<sup>597</sup> Reply, para. 275.

<sup>598</sup> Reply, para. 275; Statement of Defence, paras 260-261. In this regard, the Claimants submit that the Respondent has failed to plead the elements of estoppel. Furthermore, the Claimants assert that their claim is not a denial of justice but failure to accord due process, which does not require the exhaustion of local remedies. In any event, the Claimants consider that they exhausted local remedies given that appeal of the Judicial Review Judgement was not possible (Reply, para. 275.)

<sup>599</sup> Statement of Claim, para. 211.8; Reply, para. 276.

<sup>600</sup> Reply, para. 276; Statement of Defence, para. 263.

<sup>601</sup> Reply, paras 3, 105

<sup>602</sup> Reply, paras 3, 105.

<sup>603</sup> Reply, para. 110.

<sup>604</sup> Reply, para. 110.



336. Furthermore, the Claimants contend that the Notices of Revocation failed to specify the laws and regulations that were allegedly in breach or the facts giving rise to such breaches.<sup>605</sup> In particular, the Claimants stress that the Notices of Revocation made no reference to the Conditions of Rights of Occupancy Regulations on which the Respondent relies in its Statement of Defence.<sup>606</sup> According to the Claimants, in such circumstances they were unable to effectively “show cause” as to why their certificates of occupancy should not be revoked.<sup>607</sup>
337. In sum, the Claimants argue that the Respondent cannot rely on post-event justifications, as this would infringe due process (to which the Claimants were entitled under Tanzanian law and the Treaty)<sup>608</sup> and the transparency required by the Treaty.<sup>609</sup>

*(b) The Respondent’s Position*

338. The Respondent argues that the Commissioner for Lands is not required to issue a warning letter if he or she is satisfied that the breach of the conditions of the right of occupancy is grave and of far-reaching consequences.<sup>610</sup>
339. The Respondent further rejects the Claimants’ contention that there was no assessment of the Estate’s development prior to the Notices of Revocation.<sup>611</sup> The Estate was inspected on 2 May 2011, and the Inspection Report of May 2011 was produced as a result.<sup>612</sup>
340. The Respondent reiterates that the revocation took place due to the Claimants’ breach of the conditions of their Rights of Occupancy, and was carried out in accordance with section 45(2)(ii), (iii) and (v) of the Land Act.<sup>613</sup>
341. In relation to the alleged withholding of the Special Committee Inspection Report, the Respondent submits that Sunlodges Tanzania did not request its production during the Judicial Review Proceedings.<sup>614</sup> Further, by letter dated 19 June 2018, the Respondent explained to the Claimants that communications were underway with the relevant governmental authorities to obtain the requested documents, including the Special Committee Inspection Report, and that those

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<sup>605</sup> Reply, para. 111.

<sup>606</sup> Reply, para. 88; Statement of Defence, para. 198 and fn 112; Reply, paras 109, 116, 239.

<sup>607</sup> Reply, para. 111.

<sup>608</sup> Reply, paras 105-106; Constitution of Tanzania, s. 24(2), **CLA-7**; Tanzanian Investment Act, s. 22, **CLA-9**; Treaty, art. 5(2), **CLA-14**; Statement of Claim, paras 208-211, 216-218. Reply, para. 112.

<sup>609</sup> Reply, para. 106; Statement of Claim, para. 243; Reply, para. 239.

<sup>610</sup> Statement of Defence, para. 253; Tanzanian Land Act, s. 48(1)(b)(i), **CLA-10**.

<sup>611</sup> Statement of Defence, paras 254-255.

<sup>612</sup> Rebutter, paras 51-52.

<sup>613</sup> Statement of Defence, paras 256-257.

<sup>614</sup> Rebutter, para. 79.

documents would then be reviewed.<sup>615</sup> The Respondent later produced the Special Committee Inspection Report at the Claimants' request.<sup>616</sup>

342. The Respondent denies any shortcomings in the Special Committee Inspection Report and considers that the Claimants' criticisms are supported by no evidence other than Mr Paglieri's statements.<sup>617</sup> In any event, the Special Committee's inspection was an administrative step not required by the applicable law.<sup>618</sup>
343. Regarding the Claimants' allegation that they were denied prompt review by a judicial or independent authority, the Respondent retorts that Sunlodges Tanzania was given a full opportunity to be heard during the Judicial Review Proceedings and notes that, when delivering his ruling, the judge explained the right of appeal assisting Sunlodges Tanzania.<sup>619</sup> The Second Claimant decided not to appeal such decision and is now estopped from bringing a denial of justice claim.<sup>620</sup>
344. Finally, the Respondent considers that there is no evidence that the Government authored or instigated any breach of the Interim Injunctions,<sup>621</sup> and notes that the Leasehold Agreement with Dangote Industries over part of the Estate was executed seven days after the delivery of the Judicial Review Decision, when the said injunctions were no longer in effect.<sup>622</sup>

### 3. Compensation

#### (a) *The Claimants' Position*

345. According to the Claimants, the fact that no compensation has been paid is not in dispute between the Parties.<sup>623</sup> The Claimants submit that the absence of payment of prompt, full and effective compensation renders the expropriation unlawful.<sup>624</sup>

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<sup>615</sup> Rebutter, para. 77; Letter from Tanzania's Solicitor-General to Steptoe, 19 June 2018, **C-253**.

<sup>616</sup> Rebutter, paras 8, 77, 80.

<sup>617</sup> Rebutter, paras 8, 86-96, 101-102.

<sup>618</sup> Statement of Defence, paras 258-259; Rebutter, paras 53, 84.

<sup>619</sup> Statement of Defence, paras 260-261; Rejoinder, para. 87; Judgment of the High Court of Tanzania in *Sunlodges Tanzania Ltd v. Minister of Lands Housing and Human Settlement Development & Ors*, Miscellaneous Land Cause No. 6 of 2011, 23 July 2012, p. 11, **C-191**.

<sup>620</sup> Statement of Defence, para. 261; *Jan de Nul v Egypt*, Award, 6 November 2008, paras 255-261, **RLA-9**; *Toto v Lebanon*, Decision on Jurisdiction, 11 September 2009, para. 164, **RLA-10**.

<sup>621</sup> Statement of Defence, para. 263; Rejoinder, para. 85.

<sup>622</sup> Statement of Defence, para. 263.

<sup>623</sup> Statement of Claim, para. 207; Reply, para. 265.

<sup>624</sup> Statement of Claim, para. 193.

(b) *The Respondent's Position*

346. The Respondent insists that the standard contained in Article 5(2) of the Treaty, including the requirement that compensation be paid, does not apply to the Claimants' claims<sup>625</sup> because their Rights of Occupancy were not acquired for public purpose but rather were revoked for breach of the conditions to which they were subject.<sup>626</sup>
347. According to the Respondent, compensation payable as a consequence of revocation of rights of occupancy differs from compensation payable after compulsory acquisition of land.<sup>627</sup> In case of revocation, compensation is, pursuant to section 49(3) of the Land Act, limited to the value of unexhausted improvements<sup>628</sup> for the purpose for which the land had been granted.<sup>629</sup>
348. The Respondent further submits that the land comprising the Estate is deemed to have no value as per section 20(3) of the Land Act,<sup>630</sup> and considers that, in any event, the Claimants have not substantiated having made any investment in the Estate that would warrant payment of compensation by the Respondent.<sup>631</sup>

**D. THE CLAIMANTS' RELIANCE ON THE MFN CLAUSE IN ARTICLE 3(1) OF THE TREATY**

349. The Claimants argue that the most-favored-nation ("MFN") clause in Article 3(1) of the Treaty allows them to invoke the expropriation standard in Article 6 of the Agreement between the Swiss Confederation and the United Republic of Tanzania on the Promotion and Reciprocal Protection of Investments (the "**Switzerland-Tanzania BIT**"), to the extent that the expropriation standard in Article 5 of the Treaty is less favourable.<sup>632</sup> Article 3(1) of the Treaty provides:

Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to a treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

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<sup>625</sup> Statement of Defence, para. 320.

<sup>626</sup> Statement of Defence, para. 320.

<sup>627</sup> Statement of Defence, para. 315.

<sup>628</sup> Statement of Defence, para. 315; Tanzanian Land Act, s. 49(3), **CLA-10**. Unexhausted improvements "*means any thing or any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, or the sustainability of its environmental quality and includes trees, standing crops and growing produce whether of and agricultural or horticultural nature;*" (Tanzanian Land Act, s. 2, **CLA-10**).

<sup>629</sup> Statement of Defence, para. 315.

<sup>630</sup> Statement of Defence, para. 322.

<sup>631</sup> Statement of Defence, para. 317.

<sup>632</sup> Statement of Claim, para. 214.

350. On this basis, the Claimants argue that the Respondent's decision to revoke their Rights of Occupancy over the Estate was contrary to Article 6 of the Switzerland-Tanzania BIT, and, as a result, amounted to a breach of Article 3(1) of the Treaty.<sup>633</sup> Article 6 ("Expropriation and Compensation") of the Switzerland-Tanzania BIT provides:

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalisation or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the following conditions are met:

(a) the measures are taken in the public interest, on a non-discriminatory basis and under due process of law; and

(b) provisions have been made for prompt, effective and adequate compensation.

(2) The compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier, and shall include interest at a normal commercial rate, from the date of dispossession until the date of payment. It shall be settled in a freely convertible currency, be paid without delay and be freely transferable.

(3) The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his case and of the valuation of his investment in accordance with the principles set out in this Article.

(4) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure, that compensation according to paragraphs (1) and (2) of this Article will be made available to such investors.<sup>634</sup>

351. The Respondent considers that the revocation of the Claimants' Rights of Occupancy over the Estate does not amount to an expropriation within the meaning of Article 6 of the Switzerland-Tanzania BIT.<sup>635</sup>

## **E. THE TRIBUNAL'S DETERMINATION**

352. The Parties disagree on a number of issues arising under the Claimants' expropriation claim, including the applicable law and the factual basis of the claims.

353. Applicable law for purposes of this arbitration is specified in Article 8(4) of the Treaty, which provides that, "[w]hen delivering its decisions, the Arbitration Tribunal shall apply the provisions contained in this Agreement, as well as the principles of international law recognised by the two Contracting Parties."<sup>636</sup> Article 8 thus reflects the general principle that the legal basis of the investor's substantive claims, or its claims on the merits, is the applicable investment treaty and,

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<sup>633</sup> Statement of Claim, para. 214; Reply, para. 279.

<sup>634</sup> Switzerland-Tanzania BIT, art. 6, **CLA-15**.

<sup>635</sup> Statement of Defence, para. 265; Rejoinder, para. 93.

<sup>636</sup> Treaty, Article 8(4), **CLA-14**.

as applicable, other sources of international law. In the absence of a specific provision to that effect in the treaty, an investment treaty tribunal has no jurisdiction over claims based exclusively on the domestic law of a contracting State.

354. This does not imply that an investment treaty tribunal cannot interpret or apply the domestic law of the host State; on the contrary, an investment treaty tribunal may be required to determine, as a preliminary matter, whether the host State has complied with its own law, in order to determine whether the host State's alleged failure to comply with its own law also amounts to a breach of the applicable investment treaty. However, while a breach by the host State of its own domestic law may constitute evidence of a breach of the applicable investment treaty, it does not automatically, without more, amount to a breach of a treaty; this is a determination to be made exclusively under international law. Moreover, as the Parties to this arbitration agree, it is trite international law that the host State cannot invoke the provisions of its internal law to evade its obligations under an international treaty.<sup>637</sup>
355. The preliminary Tanzanian law issue that arises in the present case is whether the Respondent was entitled to revoke the Claimants' Rights of Occupancy pursuant to the Land Act, for failure to comply with the conditions of the Rights of Occupancy. The Respondent refers, specifically, to sections 48 and 45 of the Land Act.<sup>638</sup> Section 48 sets out the conditions on which the Commissioner may serve a notice of revocation on the occupier of the land, whereas section 45 regulates the revocation of the right of occupancy by the President; the conditions for these measures are similar but not identical.
356. As summarized above, the Claimants dispute the Respondent's reliance on the Land Act, denying that they had failed to develop the land in accordance with the Rights of Occupancy and arguing that the real reason for the revocation was to benefit another investor. By contrast, the Respondent argues that the title to the Estate was not expropriated; it was rather revoked as a result of a fundamental breach of conditions of the right of occupancy pursuant to Section 48 of the Land Act. According to the Respondent, the decision did not require public purpose under Tanzanian law as it was made for good cause under Section 45(1) of the Land Act, and not for "public interest" under Section 45(3) of the Land Act. The Respondent also argues that the Claimants' title was revoked in compliance with the requirements of due process under the Land Act.
357. The Tribunal addresses the issue of whether the revocation of the Claimants' title was justified under Tanzanian law as a preliminary matter.

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<sup>637</sup> VCLT, art. 27, **CLA-4**.

<sup>638</sup> Tanzanian Land Act, s. 45 and s. 48, **CLA-10**.

358. In the First Notice of Revocation, dated 9 May 2011, the Respondent relied on Section 48 of the Land Act and cited as a basis of the revocation the breach of conditions contained in the Certificate of Title Nos. 15501 and Certificates of Occupancy Nos. 7877 and 21272 (the former relating to Certificate of Title No. 2769 and the latter to Certificate of Title No. 15501), specifically, “(i) [a]bandonment of the land and failure to develop the farm as per conditions stipulated in the certificate of title.”<sup>639</sup> Thus the Notice relied on Section 48(1)(d) of the Land Act, which provides, in relevant part:

“(1) Where the Commissioner is satisfied that –

[...]

(d) the land the subject of the right of occupancy has been abandoned for not less than two years;

...  
he shall –

(i) serve a notice of revocation in the prescribed form on the occupier:

[...].”<sup>640</sup>

359. The Second, Third, Fourth and Fifth Notices of Revocation, all dated 7 June 2011 and identical in all relevant respects, also relied on Section 48 of the Land Act and cited as a basis of revocation “the breach of conditions contained in the Certificate of Title, namely [...] (i) [a]bandonment of the land and failure to develop the farm as per conditions stipulated in the certificate of title.”<sup>641</sup> The Tribunal notes that the five Notices of Revocation only referred to the Rights of Occupancy under Certificates of Title Nos. 3985 and 15501; there was no reference in the notices to the other Certificates of Title or Certificates of Occupancy.

360. In its submissions the Respondent argues that the Claimants abandoned the land and failed to develop it to a cattle ranch and a maize farm, and also failed to comply with the terms and conditions of the Certificates of Occupancy.<sup>642</sup> According to the Respondent, the Rights of Occupancy “stipulated clearly that the land allocated was for agricultural purposes,” and the Claimants failed to use it for the intended purpose, thus breaching the terms and conditions of the Rights of Occupancy.<sup>643</sup> The Respondent also refers to the presence of wild animals on the Estate as evidence of abandonment.<sup>644</sup>

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<sup>639</sup> First Notice of Revocation, 9 May 2011, **C-161**.

<sup>640</sup> Tanzanian Land Act, s. 48(1)(d), **CLA-10**.

<sup>641</sup> Second Notice of Revocation, 7 June 2011, **C-162**; Third Notice of Revocation, 7 June 2011, **C-163**; Fourth Notice of Revocation, 7 June 2011, **C-164**; Fifth Notice of Revocation, 7 June 2011, **C-165**.

<sup>642</sup> Statement of Defence, paras 36, 200, 202.

<sup>643</sup> Rejoinder, para. 35.

<sup>644</sup> Rejoinder, para. 67.

361. The Tribunal notes that the three Certificates of Title<sup>645</sup> are identical in relevant part and do not contain any terms or conditions or other indications of the purpose for which the Estate was to be used. However, the Certificates of Occupancy attached to the Certificates of Title state that the occupiers are “entitled to a right of occupancy in and over the agricultural land” described in the relevant schedule, and that “the land shall be used solely for agricultural purposes and purposes ancillary thereto.”<sup>646</sup> Thus the sole term or condition the Claimants had to comply with was that they had to use the land in question for agricultural purposes.
362. The Tribunal has determined above that the diversification of the Estate from a sisal estate into a cattle ranch and maize farm cannot be considered a change of purpose of use of the land, even less an abandonment. This is evidenced by the Certificates of Incentives, which indicate that the relevant sector of activity remained “agriculture,” even if the sub-sector of the activity changed,<sup>647</sup> and accordingly the Claimants must be considered to have used the Estate for agricultural purposes even after the diversification. The Tribunal therefore cannot accept that the Claimants had breached the conditions of the Certificates of Title or those of the Certificates of Occupancy, which as noted above merely required that the land be used for “agricultural purposes.” The Tribunal notes, furthermore, that Article 51 of the Land Act defines the circumstances in which a right of occupancy “shall be taken to have been abandoned.” The Respondent has not invoked any of these circumstances in any of the notices of revocation, or in the decision of revocation, nor in the course of this arbitration. Indeed, none of the circumstances listed in Article 51 would appear to apply in the circumstances of this case.<sup>648</sup> Moreover, in order to be able to invoke Article 51 of the Land Act, the Commissioner would have to publish a prior notice in the Gazette and in a newspaper circulating in the area where the land is located, followed by a declaration of abandonment.<sup>649</sup> There is no evidence that this procedure was applied in this case. The Claimants therefore cannot be considered to have “abandoned” the land under Tanzanian law.
363. In its submissions in the course of the arbitration the Respondent also contends that the Claimants were required under the applicable Tanzanian law to develop the land up to 80% in accordance with the purpose for which the right of occupancy was granted, within five years from the date

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<sup>645</sup> The Claimants have never been provided with or been able to obtain a copy of Certificate of Title 15501; however they have a Certificate of Occupancy; Statement of Claim, para. 21. Also the Certificates of Occupancy Nos. 311, 2662 and 2664, which relate to Certificate of Title No. 3985, are not evidence.

<sup>646</sup> Second Witness Statement of Mr Oscar Ng’itu, 22 February 2019 (revised version 27 February 2019), Certificate of Title No. 2769 and Certificate of Occupancy 7877, 1935, p. 5, **C-87**.

<sup>647</sup> Sunlodges Tanzania’s First Certificate of Incentives, 29 May 2003, numbered paras 2-3, **C-95**; and Sunlodges Tanzania’s Second Certificate of Incentives, 13 September 2006, numbered paras 2-3, **C-96**.

<sup>648</sup> Tanzanian Land Act, s. 51, **CLA-10**.

<sup>649</sup> Tanzanian Land Act, s. 51(2) and 51(3), **CLA-10**.

they acquired the land.<sup>650</sup> The Respondent argues that the Claimants failed to comply with this requirement. The Respondent's argument is based on Section 45(2)(iii) of the Land Act, which provides:

(2) The President shall no[t] revoke a right of occupancy save for good cause. In this subsection "good cause" shall include the following:

[...]

(iii) where the right of occupancy is of land of an area of not less than five hundred hectares, not less than eighty per centum of that area of land has been unused for the purpose for which the right of occupancy was granted for not less than five years.<sup>651</sup>

364. The Claimants disagree with the Respondent's reading of Section 45(2)(iii) (and the corresponding provision in Section 4848(1)(e)); according to the Claimants, as long as more than 20 per cent of the land is used for the designated purpose, the owner is in compliance with Section 45(2)(iii).<sup>652</sup>

365. The Tribunal agrees with the Claimants' reading of the provision. While the drafting is less than felicitous, due to the many negatives, but when read with care, Section 45(2)(iii) clearly states that, in the case of large estates of 500 hectares or more, if at least 20 per cent of the land has been used (i.e. if less than 80 per cent was unused) for the purpose for which the right of occupancy was granted (or, in case less than 20 per cent of the land was used, the period of failure to use does not exceed five years), there is no basis to revoke the right of occupancy. The Tribunal notes that the Respondent does not allege that the Claimants had failed to develop at least 20 per cent of the land. There was therefore no basis under Section 45(2)(iii) of the Land Act to revoke the Claimants' title. In any event, the Tribunal notes that the Respondent in fact did not invoke Section 45(2)(iii) as a basis of revocation in the Notices of Revocation, and there is no evidence before the Tribunal showing that less than 20 per cent of the Estate was used for agricultural purposes at the time the Notices of Revocation were issued.

366. Accordingly, in the absence of any evidence before the Tribunal justifying the conclusion that the Claimants had abandoned the land, or that they had failed to use it for agricultural purposes in accordance with the Rights of Occupancy, the Tribunal concludes that the revocation of the Claimants' Rights of Occupancy was not justified in the circumstances under Tanzanian law.

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<sup>650</sup> Statement of Defence, para. 238; Rejoinder, paras 12, 39-40.

<sup>651</sup> Land Act, s. 45(2)(iii), **CLA-10**.

<sup>652</sup> Reply, paras 50, 56, 98; Oral Hearing Tr., Day 1, 70:20-71:6.



367. The Claimants contend that the real reason for the revocation of their rights was not the Claimants' alleged failure to comply with the terms and conditions of the Rights of Occupancy, but the Respondent's wish to transfer the Estate to another foreign investor, Dangote Industries, which had expressed an interest in building a cement works on the land. In support of their contention, the Claimants rely on a letter dated 18 February 2011 from the Acting District Managing Director of the Mtwara District Council to the Commissioner of Lands. In the letter, the Managing Director stated that he was "spearheading the process of retrieving land for the purpose of being used for the construction of a cement factory by Dangote Industries Limited in Mtwara Province," and that the "targeted land" was that owned by Sunlodges Tanzania.<sup>653</sup> The Managing Director requested that the Commissioner "advise the President to retrieve it (part acquisition)."<sup>654</sup>
368. The Respondent denies that the Claimants' title was revoked to benefit Dangote Industries. According to the Respondent, this was not the case because the land was first "placed to the President and later on the land was designated for Investment purposes whereby it was assigned to [TIC]."<sup>655</sup> The TIC subsequently transferred part of the land (1701.323 hectares of the total area of 5277.8 Hectares) to Dangote Industries, which built a cement factory on it, while the remaining parts were allocated to other investors.<sup>656</sup>
369. Having considered the evidence before it, the Tribunal concludes that, while the evidence suggests that the Claimants' Rights of Occupancy could indeed have been revoked in order to enable the subsequent transfer of at least part of the land to Dangote Industries, it need not address the issue as it has already determined that the revocation of the Claimants' Rights of Occupancy was not justified under Tanzanian law. The underlying motive of the decision remains irrelevant in the circumstances.
370. Having concluded that the revocation of the Claimants' title was not justified under Tanzanian law, the Tribunal must determine whether the Respondent's failure to comply with its own law amounts to a breach of the Treaty, and more specifically, whether it amounts to an expropriation of the Claimants' investments in Tanzania.

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<sup>653</sup> Letter from the Acting Executive Director of Mtwara District Council to the Commissioner of Lands at the Ministry of Land, Housing and Human Settlement (English translation), 18 February 2011, paras 2-3, **C-160A**.

<sup>654</sup> Letter from the Acting Executive Director of Mtwara District Council to the Commissioner of Lands at the Ministry of Land, Housing and Human Settlement (English translation), 18 February 2011, para. 7, **C-160A**.

<sup>655</sup> Statement of Defence, para. 191.

<sup>656</sup> Statement of Defence, para. 248.

371. The relevant provision for the purposes of this determination is Article 5(2) of the Treaty, which provides:

2. Investments of nationals or companies of either Contracting Party shall not be, “de jure” or “de facto”, nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party, except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, full and effective compensation. Such compensation shall amount to the genuine market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be calculated in a convertible currency at the prevailing exchange rate applicable on the date on which the decision to nationalise or expropriate is announced or made public, shall include interests calculated on the basis of London Interbanking Offered Rate (LIBOR) Standards from the date of expropriation to the date of payment, shall be made without delay and in any case within six month be effectively realizable and be freely transferable. Whenever there are difficulties in ascertaining the genuine market value, it shall be determined according to the internationally acknowledged evaluation standards. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent Authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.<sup>657</sup>

372. The Tribunal notes that there appears to be no dispute between the Parties that the purported revocation of the Claimants’ Rights of Occupancy, which took place on 6 September 2011,<sup>658</sup> had the effect of depriving the Claimants of the entirety of their investments in Tanzania. It therefore amounted, *de facto*, to a measure having [an] effect equivalent to expropriation and accordingly, under Article 5(2) of the Treaty, to an expropriation. (This is the case because the definition of expropriation under Article 5(2) of the Treaty covers not only a *de jure* and a *de facto* expropriation, but also any “measures having effect equivalent to nationalisation or expropriation;” each of these scenarios is defined under the provision as an “expropriation.”) While the Tribunal need not determine in the circumstances whether the revocation of the Claimants’ Rights of Occupancy amounted to a *de jure* expropriation, or a *de facto* expropriation, or a measure having an effect equivalent to expropriation (as all of these are considered “expropriations” under the Treaty), it considers that the most appropriate characterization in the circumstances of this case is a *de facto* expropriation. While Tanzania did not purport to expropriate the Claimants’ investments *de jure*, this is what it did *de facto*. In the circumstances, the Tribunal need not determine whether the expropriation of the Claimants’ investments amounted to a direct or an indirect expropriation, as such a distinction is not relevant under Article 5(2) of the Treaty.

373. The Claimants also contend that the Respondent’s expropriation of their investments was unlawful under Article 5(2) of the Treaty and customary international law since the Respondent’s

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<sup>657</sup> Treaty, Article 5(2), **CLA-14**.

<sup>658</sup> Government *Gazette* Notice No. 755 in Swahili, together with an English translation, 23 September 2011, **C-171B** and **C-171A**.

measures did not comply with the requirements of public purpose, due process and payment of prompt, full and effective compensation. While the requirement of due process is not specifically mentioned in Article 5(2) of the Treaty, the Claimants argue that this requirement applies as a matter of customary international law.

374. The Tribunal notes that the determination of the legality of the expropriation of the Claimants' investments is mainly relevant for two issues: (i) whether the Claimants are entitled to claim restitution of the expropriated property; and (ii) whether the Claimants' loss is valued by reference to the date of taking or the date of the award; in the case of an unlawful expropriation, the Claimants would be able to claim that the valuation be conducted by reference to the latter date, if this were to result in a higher valuation.<sup>659</sup> In the present case, the Claimants do not claim restitution, and they also do not claim for a higher valuation of the expropriated investments as at the date of the award, nor is there any reliable evidence before the Tribunal that the value of the Claimants' investments would have been higher on the date of this award than it was at the time of the expropriation on 6 September 2011. It is therefore strictly speaking not necessary for the Tribunal to determine whether the expropriation of the Claimants' investments was unlawful under the Treaty.
375. The Tribunal notes however that it is undisputed between the Parties that the purported revocation of the Claimants' Rights of Occupancy under the Land Act was not for a public purpose, but rather a consequence of the Claimants' alleged failure to comply with the terms and conditions of the Rights of Occupancy. The Tribunal having determined above that there was no such alleged failure, and that the revocation of the Claimants' title amounted to a *de facto* expropriation, public purpose would be required for the measure to qualify as lawful under the Treaty. Similarly, while the Parties disagree on the basis and quantum of the compensation due as a result of the Claimants' loss, it is undisputed that the Respondent has not provided any compensation (although the Respondent's position remains that the Claimants are in any event only entitled to compensation for unexhausted improvements, and that they have not substantiated any investments that would warrant compensation).<sup>660</sup> The expropriation must therefore be considered unlawful under Article 5(2) of the Treaty.

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<sup>659</sup> *Bernardus Henricus Funnekotter and Others v. The Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras 111-112, **CLA-93**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 352, **CLA-82**.

<sup>660</sup> Statement of Defence, para. 315. It is in any event debatable whether failure to pay compensation, or sufficient compensation, alone would amount to a breach, or only a potential breach, of Article 5 of the Treaty; if the expropriation would otherwise be lawful, payment of compensation pursuant to an arbitral tribunal's award would remedy any potential breach.

376. In view of its determinations above, the Tribunal need not address the issue of whether the expropriation of the Claimants' investments complied with the requirements of due process. Nor does the Tribunal need to address the Claimants' argument in relation to Article 5(1) of the Treaty, including the question of whether Article 5(1) establishes a standalone investment protection standard separate from expropriation – an issue that has not been fully addressed by either Party.
377. As to the Claimants' MFN claim, the Tribunal notes that the Claimants do not explain in what way, or to what extent the Switzerland-Tanzania BIT would be more favourable than the Treaty. In the circumstances, and in view of its findings above, the Tribunal does not consider it necessary, as a matter of arbitral economy, to consider the issue.

## IX. THE CLAIMANTS' OTHER CLAIMS

378. In addition to the expropriation claim, the Claimants raise a series other claims for alleged breaches of the Treaty and customary international law, including a claim for breach of fair and equitable treatment, full protection and security, non-impairment, national treatment and minimum standard of treatment. The Claimants also invoke, in many instances, the MFN clause in Article 3(1) of the Treaty, seeking to import more favourable standards from other investment treaties concluded by Tanzania.
379. In view of its determination above that the Claimants' investments in Tanzania have been expropriated, the issue arises whether it is necessary for the Tribunal to determine the Claimants' remaining claims. First, while the applicable legal standards are not identical, expropriation is, in substance, the most intrusive form of sovereign interference with an investor's investment in the sense that it results in a total loss of the value of the expropriated investment, whereas a breach of the other investment protection standards may only adversely affect the value of the investment but will not necessarily result in a total loss. Thus, an expropriation claim in substance encompasses a claim for breaches of the other investment protection standards. Second, in the present case, the Claimants have not quantified their claims for the other alleged breaches of the Treaty separately from their claim for expropriation. Consequently, since compensation for expropriation covers the full value of the expropriated investment (see below Section X), any further findings of breach of the Treaty that the Tribunal might make in relation to the Claimants' other claims would not affect in any way the quantum of the Claimants' claims. In the circumstances, and in the interest of judicial (or arbitral) economy, the Tribunal finds it unnecessary to make a determination on each of the Claimants' remaining claims. Such findings would delay the issuance of the award and increase the costs of the arbitration but would have no impact on the amount of compensation awarded.<sup>661</sup>

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<sup>661</sup> Other investment treaty tribunals have adopted a similar approach; *see, e.g., UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 493.

## **X. THE STANDARD OF COMPENSATION**

380. The Claimants' main submission under this heading is that the expropriation which they claim to have suffered was unlawful and, therefore, the applicable standard of compensation is that established under customary international law.<sup>662</sup> However, the Claimants also contend that the issue of applicable law is not outcome determinative as the principles governing compensation are essentially the same under Tanzanian law, the Treaty and customary international law.<sup>663</sup>

381. The Respondent argues that the nature of compensation payable for revocation under Tanzanian law is different from compensation paid for compulsory acquisition of land.<sup>664</sup> According to the Respondent, compensation in case of revocation is limited to unexhausted improvements made in connection with the purposes and use for which the land was granted, while the Claimants have not substantiated any investment on the Estate which would warrant the payment of any compensation.<sup>665</sup> Finally, the Respondent argues that compensation pursuant to the standard provided for in Article 5(2) of the Treaty is not applicable to the Claimants' claim.<sup>666</sup>

### **A. STANDARD OF COMPENSATION UNDER TANZANIAN LAW**

#### **1. The Claimants' Position**

382. First, the Claimants argue that the expropriation which they claim to have suffered also amounts to (i) a deprivation of property for the purpose of section 24(2) of the Constitution of Tanzania; and (ii) an acquisition for the purpose of section 22 of the Tanzanian Investment Law, both of which require compensation.<sup>667</sup>

383. Second, the Claimants claim that, pursuant to section 3(1)(g) of the Land Act and the Assessment Regulations, the holder of rights of occupancy revoked pursuant to section 49 of the Land Act is entitled to "full, fair and prompt compensation" for the land and unexhausted improvements to be assessed on the basis of their fair market value, plus the allowances provided by section 3(1)(g) of the Land Act.<sup>668</sup>

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<sup>662</sup> Statement of Claim, para. 301.

<sup>663</sup> Statement of Claim, para. 352.

<sup>664</sup> Rejoinder, para. 105.

<sup>665</sup> Rejoinder, para. 106.

<sup>666</sup> Rejoinder, para. 107.

<sup>667</sup> Statement of Claim, paras 215-220.

<sup>668</sup> Statement of Claim, para. 312; Reply, para. 8.

384. The Claimants submit that the constitutional principle providing for payment of “fair and adequate compensation” is effected through several provisions of the Land Act.<sup>669</sup> They contend that an occupier whose rights of occupancy are revoked under section 49 of the Land Act is entitled to “full, fair and prompt compensation” covering the value of the land and unexhausted improvements, to be assessed on the basis of their market value, plus other allowances provided for in section 3(1)(g) of the Land Act and developed by the Assessment Regulations.<sup>670</sup>
385. The Claimants reject the Respondent’s interpretation of section 49(3) of the Land Act to the effect that this provision would restrict compensation to certain unexhausted improvements and be less favourable than the “market value of the real property” standard in section 3(1)(g) of the Land Act.<sup>671</sup> The Claimants discuss the construction of section 49(3) of the Land Act and argue that this provision should not be interpreted in isolation.<sup>672</sup> According to the Claimants, sections 3(1)(g) and 180(3) of the Land Act not only provide context but also mandatory rules of interpretation which must be applied when interpreting section 49(3) of the Land Act.<sup>673</sup>
386. The Claimants construe sections 3(1)(g) and section 49(3) as providing together that section 49(3) of the Land Act merely limits the scope of compensable unexhausted improvements to those made in accordance with the terms and conditions of the right of occupancy, but does not prohibit compensation for the value of the land and other allowances.<sup>674</sup> Even if an “irreconcilable inconsistency” were found to exist between these two provisions, the Claimants claim that it should be resolved in favour of section 3(1)(g) of the Land Act as the leading provision.<sup>675</sup>
387. According to the Claimants, their interpretation of section 49(3) of the Land Act is confirmed by (i) the legislative history and the provisions of the Claims Regulations and the Assessment Regulations;<sup>676</sup> (ii) certain principles derived from legal policy (i.e. there is no detriment to property rights except under clear authority of law, and national law should conform to public

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<sup>669</sup> Statement of Claim, para. 306.

<sup>670</sup> Reply, para. 326.

<sup>671</sup> Reply, paras 326-350.

<sup>672</sup> Reply, paras 331-333.

<sup>673</sup> Reply, paras 334-336.

<sup>674</sup> Reply, paras 337, 348.

<sup>675</sup> Reply, para. 338.

<sup>676</sup> Reply, paras 340-343. In this sense, the Claimants note that regulation 4(a) of the Claims Regulations provides that the holder of a right of occupancy revoked under section 49 of the Land Act may claim compensation and that, pursuant to regulation 5(1) of the Claims Regulations, the Assessment Regulations shall apply to such compensation claims. In turn, regulation 3 of the Assessment Regulations provides that “[t]he basis for assessment of the value of any land and unexhausted improvement for purposes of compensation under the [Land] Act shall be the market value of such land.” (Statement of Claim, paras 309-310; Reply, paras 341-342).

international law);<sup>677</sup> and (iii) the presumption against absurdity, which is here relevant insofar as the Respondent's proposed interpretation would allow it to circumvent the more favourable compensation provisions under the Land Acquisition Act by simply choosing to proceed under the Land Act.<sup>678</sup>

388. Even if the Respondent's interpretation of section 49(3) of the Land Act were accepted, the Claimants claim that the Claims Regulations and the Assessment Regulations have created additional rights and also require compensation to be paid for the value of the land and various allowances.<sup>679</sup> The Claimants acknowledge that "[s]ubsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act,"<sup>680</sup> but consider that any inconsistency should be measured by reference to the Act as a whole.<sup>681</sup> Thus, subsidiary legislation creating additional rights cannot be regarded as inconsistent with the Land Act insofar as such rights are consistent with section 3(1)(g) of the Land Act.<sup>682</sup>
389. Further, the Claimants submit that, to the extent that section 49(3) of the Land Act may restrict the compensation available in case of lawful revocation (which the Claimants deny), such restriction would not apply in circumstances where the revocation was not lawful, which the Claimants consider is the case here.<sup>683</sup>
390. The Claimants also consider the Respondent's reliance on section 20(3) of the Land Act to be improper because that provision is, in their view, in irreconcilable conflict with section 3(1)(g) of the Land Act, and thus the latter must prevail.<sup>684</sup>
391. In turn, the Claimants consider section 20(3) of the Land Act to be discriminatory on the basis of nationality, and thus in breach of sections 13<sup>685</sup> and 24(2)<sup>686</sup> of the Constitution of Tanzania.<sup>687</sup> The Claimants posit that, under section 30(5) of the Constitution,<sup>688</sup> the Tribunal must either

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<sup>677</sup> Reply, para. 344.

<sup>678</sup> Reply, paras 345-347.

<sup>679</sup> Reply, paras 330, 349.

<sup>680</sup> Reply, para. 349; Interpretation of Laws Act, s. 36(1), **RLA-27**.

<sup>681</sup> Reply, para. 349.

<sup>682</sup> Reply, para. 349.

<sup>683</sup> Reply, paras 8, 330, 350.

<sup>684</sup> Reply, paras 8, 353-354.

<sup>685</sup> Constitution of Tanzania, s. 13, **CLA-7**: "(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law[...]"

<sup>686</sup> Constitution of Tanzania, s. 24(2), **CLA-7**: "(2) *Subject to the provisions of subarticle (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.*"

<sup>687</sup> Reply, para. 8, 355-360; Constitution of Tanzania, s. 13 and s. 24(2), **CLA-7**.

<sup>688</sup> Constitution of Tanzania, s. 30(5), **CLA-7**: "*Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights,*



declare section 20(3) of the Land Act void or afford Tanzania the opportunity to remedy the defect within a period and in a manner which it deems fit.<sup>689</sup> In the Claimants' view, the only way to remedy the defect is for them to be paid compensation without regard to section 20(3) of the Land Act.

392. Third, and last, the Claimants also claim compensation under the Tanzania Investment Act.<sup>690</sup> Section 22(2)(a) of the Tanzanian Investment Act requires "payment of fair, adequate and prompt compensation" in the event of an acquisition.<sup>691</sup> This is consistent with the overarching constitutional requirement that compensation should be "fair and adequate."<sup>692</sup>

393. According to the Claimants, the Tanzania Investment Law establishes a *lex specialis* regime providing to investors more favourable conditions than those available under general law.<sup>693</sup> Therefore, they argue that, to the extent that section 20(3) and 49(3) of the Land Act may limit compensation under the Land Act, such restrictions should not limit the Claimants' entitlement to compensation under the Tanzania Investment Act.<sup>694</sup>

## 2. The Respondent's Position

394. The Respondent acknowledges that the former holder of a revoked right of occupancy is entitled to compensation.<sup>695</sup> Nevertheless, the Respondent argues that the nature of compensation payable pursuant to revocation is different than compensation payable for compulsory acquisition of land.<sup>696</sup>

395. Pursuant to section 49(3) of the Land Act, in cases of revocation, compensation is limited to the value of unexhausted improvements made in accordance with the terms and conditions of the right of occupancy.<sup>697</sup> Hence, the Respondent submits that, in case of revocation, the Government

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*freedoms and duties set out in Articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier."*

<sup>689</sup> Reply, para. 360; Constitution of Tanzania, s. 30(5), **CLA-7**.

<sup>690</sup> Reply, para. 363.

<sup>691</sup> Statement of Claim, para. 313; Tanzania Investment Act, s. 22, **CLA-9**.

<sup>692</sup> Statement of Claim, paras 312-313; Constitution of Tanzania, s. 24(2), **CLA-7**.

<sup>693</sup> Reply, para. 363.

<sup>694</sup> Reply, paras 8, 363.

<sup>695</sup> Statement of Defence, para. 156.

<sup>696</sup> Statement of Defence, para. 315; Rejoinder, para. 105.

<sup>697</sup> Statement of Defence, paras 156, 169, 315. The Respondent notes that unexhausted improvements "*means any thing or any quality permanently attached to the land directly resulting from the expenditure of capital*

cannot compensate for the value of the land.<sup>698</sup> In this sense, the Respondent denies that section 3(1)(g) of the Land Act would enable compensation beyond section 49(3) of the Land Act.<sup>699</sup>

396. According to the Respondent, the Claimants have not substantiated having made any investment on the Estate which would warrant payment of compensation.<sup>700</sup>
397. Furthermore, the Respondent underscores that the Claimants are non-citizens and, as such, and pursuant to section 20(3) of the Land Act, any land acquired by them before the enactment of the Land Act (i.e. 1 May 2001) is deemed to have no value except for unexhausted improvements.<sup>701</sup> This would apply to the Claimants' acquisition of the Estate, which took place in 1998.<sup>702</sup>
398. The Respondent rejects the Claimants' allegation that section 20(3) of the Land Act would be unconstitutional,<sup>703</sup> and argues that the provision is in line with Article 30(2) of the Constitution of Tanzania.<sup>704</sup>
399. Finally, the Respondent submits that the Claimants have resorted to the wrong forum in questioning the legality and constitutionality of the Land Act, as the Tribunal lacks jurisdiction to decide on constitutional matters of Tanzania.<sup>705</sup> The Respondent argues that all proceedings regarding the enforcement of constitutional basic rights and duties are to be instituted before the High Court of Tanzania.<sup>706</sup>

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*or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, or the sustainability of its environmental quality and includes trees, standing crops and growing produce whether of and agricultural or horticultural nature*" (Land Act, s.2, **CLA-10**). Rejoinder, paras 14, 105-106.

<sup>698</sup> Statement of Defence, para. 315.

<sup>699</sup> Rejoinder, paras 14, 51, 101.

<sup>700</sup> Statement of Defence, para. 315; Rejoinder, para. 106.

<sup>701</sup> Statement of Defence, para. 166; Rejoinder, para. 14.

<sup>702</sup> Statement of Defence, para. 317.

<sup>703</sup> Rejoinder, para. 103; Second Witness Statement of Ms Evelyn Baruti Mugasha, 22 February 2019 (revised version sent on 27 February 2019), para. 14, **RWS-6** ("**Mugasha II**").

<sup>704</sup> Constitution of Tanzania, s. 30(2), **CLA-7**: "(2) *It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of [...].*"

<sup>705</sup> Rejoinder, para. 104; Mugasha II, para. 15.

<sup>706</sup> Rejoinder, para. 104; Basic Rights and Duties Enforcement Act, Cap.3, **RLA-55**; Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, rule 4, **RLA-56**.

**B. STANDARD OF COMPENSATION UNDER THE TREATY**

**1. The Claimants' Position**

400. In the event the Tribunal finds that the Respondent's decision to revoke their rights of occupancy over the Estate constituted a lawful expropriation, the Claimants request that the Tribunal apply the standard of compensation for lawful expropriation set out at Article 5(2) of the Treaty (i.e. "prompt, full and effective compensation [amounting to] the genuine market value of the investment"),<sup>707</sup> which in the Claimants' view is equivalent to that of customary international law.<sup>708</sup> By virtue of this provision, the Claimants claim, they are entitled to claim compensation amounting to the fair market value of the expropriated investments as at 5 September 2011, plus interest thereon.<sup>709</sup>
401. First, the Claimants argue that the term "genuine market value" in the Treaty has the same meaning as "fair market value" as used in the World Bank Guidelines.<sup>710</sup> The "fair market value" standard would also apply, in the alternative, by operation of the MFN Clause of the Treaty, which the Claimants claim allows them to benefit from Article 5 of the Agreement between the Government of the United Republic of Tanzania and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments, signed on 22 April 1996 (the "**Denmark-Tanzania BIT**").<sup>711</sup>
402. Furthermore, the Claimants argue that the principle of highest and best use is to be applied when assessing fair market value,<sup>712</sup> and that the valuation of the Estate should be assessed in a hypothetical context that disregards the effect of measures in breach of the Treaty.<sup>713</sup> According to the Claimants, this "but for" approach also applies to lawful expropriations.<sup>714</sup> As a result, they argue that any valuation must ignore (i) the fact that the Estate was expropriated on 6 September

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<sup>707</sup> Statement of Claim, paras 301, 314.

<sup>708</sup> Statement of Claim, para. 301.

<sup>709</sup> Statement of Claim, para. 301.

<sup>710</sup> Statement of Claim, paras 319-320; Commentary on Article 3, OECD 1967 "Draft Convention on the Protection of Foreign Property", p. 21, [8(a)] of the commentary on Article 3, **CLA-23**; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras 490-502, **CLA-121**. Statement of Claim, para. 321.

<sup>711</sup> Statement of Claim, para. 324; Denmark-Tanzania BIT, Article 5(1) and 5(2), **CLA-21**: "[...] compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment." Reply, para. 369.

<sup>712</sup> Statement of Claim, para. 322; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, paras 70, 94, **CLA-56**.

<sup>713</sup> Statement of Claim, para. 326.

<sup>714</sup> Statement of Claim, para. 330.

2011 and the preceding threat of expropriation from 7 January 2011 onwards; and (ii) any subsequent changes in the Estate.<sup>715</sup>

403. Second, the Claimants consider that, pursuant to Article 5 of the Treaty, the valuation date should be 5 September 2011 (the day immediately before the expropriation).<sup>716</sup>

404. Third, regarding the currency of compensation, relying on Article 5(2) of the Treaty (and noting that the currency in which the capital was originally invested was the US dollar),<sup>717</sup> the Claimants request that compensation be paid in US dollars and calculated by reference to the prevailing exchange rate applicable on 5 September 2011.<sup>718</sup> To the extent that the conversion rate is not provided for under the Treaty, the Claimants invoke the MFN clause in Article 3(1) of the Treaty to rely on Article 5(3) of the Denmark-Tanzania BIT, which requires that fair market value “be calculated in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the valuation date.”<sup>719</sup>

405. Finally, the Claimants argue that the provisions in the Land Act invoked by the Respondent do not restrict the Claimants’ entitlement to compensation under the Treaty.<sup>720</sup> The Claimants contend that the Respondent cannot rely on the Land Act to avoid the standard of compensation required under international law, since it is an established rule that a State cannot invoke its domestic law as a justification for its failure to perform a Treaty.<sup>721</sup>

## 2. The Respondent’s Position

406. The Respondent submits that the legal principle of compensation provided for in Article 5(2) of the Treaty applies in cases of compulsory acquisition of land for public purposes.<sup>722</sup> However, it is not applicable in cases of revocation where the holder of rights of occupancy breached their conditions.<sup>723</sup>

407. The Respondent asserts that the Claimants’ Estate was not acquired by Tanzania for public purposes; rather their Rights of Occupancy were revoked on the basis of their breaches of

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<sup>715</sup> Statement of Claim, para. 332.

<sup>716</sup> Statement of Claim, para. 325.

<sup>717</sup> Statement of Claim, para. 335; Paglieri I, para. 23.

<sup>718</sup> Statement of Claim, para. 335.

<sup>719</sup> Statement of Claim, para. 335 and fn 406; Denmark-Tanzania BIT, Article 5(3), **CLA-21**. Article 5(3) of the Denmark-Tanzania BIT provides, in relevant part: “*Such fair market value shall be calculated in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the valuation date [...]*”

<sup>720</sup> Reply, paras 8, 365-367.

<sup>721</sup> Reply, paras 8, 365-367; VCLT, art. 27, **CLA-4**.

<sup>722</sup> Statement of Defence, para. 171.

<sup>723</sup> Statement of Defence, para. 171; Rejoinder, para. 107.

development and land use conditions.<sup>724</sup> In such circumstances, the Respondent considers that Article 5(2) of the Treaty does not apply and “the [L]and Act restricts compensation to unexhausted improvements.”<sup>725</sup>

408. Likewise, the Respondent denies that the Claimants could invoke the Treaty’s MFN clause to benefit from the standard of compensation found in the Denmark-Tanzania BIT.<sup>726</sup> The Claimants cannot invoke the BIT “to request for compensation hiding in their own breaches of conditions of right of occupancy.”<sup>727</sup>

## C. STANDARD OF COMPENSATION FOR UNLAWFUL EXPROPRIATION

### 1. The Claimants’ Position

409. The Claimants note that the Treaty does not establish a *lex specialis* standard of compensation for unlawful expropriation or other Treaty breaches,<sup>728</sup> and, as a result, they claim that the Tribunal must apply the standard under customary international law as a default.<sup>729</sup> This standard of compensation is that set out in the *Chorzow Factory* judgment: “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>730</sup> The Claimants maintain that this principle has been repeatedly affirmed by numerous tribunals,<sup>731</sup> and note that the standard of full reparation is also reflected in Articles 31 and 34 of the ILC Articles on State Responsibility.<sup>732</sup>
410. Following this standard, the Claimants submit that they must be put in the position in which they would have been if the investment had been made but the State’s unlawful conduct had not

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<sup>724</sup> Statement of Defence, para. 171; Rejoinder, para. 107.

<sup>725</sup> Statement of Defence, para. 171.

<sup>726</sup> Statement of Defence, para. 322; Rejoinder, para. 108.

<sup>727</sup> Statement of Defence, para. 322; Rejoinder, para. 108.

<sup>728</sup> Statement of Claim, paras 337-338; referring to, *inter alia*, *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras 481, 483, **CLA-79**.

<sup>729</sup> Statement of Claim, para. 337; Reply, para. 370.

<sup>730</sup> Statement of Claim, para. 339; *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, PCIJ 1928 Ser A, No.17, p. 47, **CLA-39**; Reply, paras 370-375.

<sup>731</sup> Statement of Claim, para. 340; Reply, para. 373.

<sup>732</sup> Statement of Claim, para. 341; ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (with Commentary), 2001, **CLA-18**; Reply, para. 374.

occurred.<sup>733</sup> They also consider the “but for” approach discussed above<sup>734</sup> to be equally applicable under the customary international law standard of compensation.<sup>735</sup>

411. As to the valuation date, the Claimants argue that, under customary international law, they are entitled not only to the value of their investments as of the date when the expropriation took place, but also to any greater value achieved thereafter.<sup>736</sup> However, the Claimants have elected to pursue their claims on the basis of the valuation date of the (Amended) GimcoAfrica Valuation Report. They have nonetheless reserved their right to propose an alternative valuation date if the Respondent challenges that of the GimcoAfrica Report.<sup>737</sup>
412. As to the currency of compensation, the Claimants state that damages must be paid in US dollars, as (i) it is the usual practice of international tribunals to provide payment in a convertible currency such as US dollars; and (ii) the Treaty requires compensation for lawful expropriation in US dollars (that being the currency in which the capital was originally invested) and that compensation for unlawful conduct not be less favourable than compensation for lawful expropriation.<sup>738</sup>
413. As to the date of currency conversion, the Claimants refer to the decision of the *Vivendi II* tribunal holding that a party should not be prejudiced by the effects of currency devaluation between the date of the wrongful act and the determination of the amount of damages.<sup>739</sup> They nevertheless request that, if a current valuation date is selected, currency conversion should be as of that date.<sup>740</sup>
414. Finally, the Claimants argue that the provisions in the Land Act invoked by the Respondent do not restrict the Claimants’ entitlement to compensation under customary international law.<sup>741</sup>

## **2. The Respondent’s Position**

415. The Respondent argues that the burden to prove the existence of a rule of customary international law rests on the party who alleges it.<sup>742</sup> In particular, the Respondent asserts that it must be proven that the alleged custom is established in such a manner that it has become binding for the other

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<sup>733</sup> Statement of Claim, para. 343.

<sup>734</sup> *See supra* para. 402.

<sup>735</sup> Statement of Claim, para. 347.

<sup>736</sup> Statement of Claim, para. 345.

<sup>737</sup> Statement of Claim, para. 346.

<sup>738</sup> Statement of Claim para. 350.

<sup>739</sup> Statement of Claim, para. 351; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 8.4.5, **CLA-83**.

<sup>740</sup> Statement of Claim, para. 351.

<sup>741</sup> Reply, para. 8.

<sup>742</sup> Statement of Defence, para. 324.

party.<sup>743</sup> In the Respondent's view, there is no evidence of State practice or *opinio juris* to support the Claimants' assertions regarding the standard of compensation under customary international law.<sup>744</sup>

#### D. THE TRIBUNAL'S DETERMINATION

416. The Tribunal has determined above that the revocation of the Claimants' title to the Estate amounts to an expropriation of the Claimants' investments in Tanzania under the Treaty. The standard of compensation for expropriation is set out in Article 5(2) of the Treaty, which provides, in relevant part:

Investments of nationals or companies of either Contracting Party shall not be, "de jure" or "de facto," nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, full and effective compensation. Such compensation shall amount to the genuine market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall be calculated in a convertible currency at the prevailing exchange rate applicable on the date on which the decision to nationalise or expropriate is announced or made public, shall include interests calculated on the basis of London Interbanking Offered Rate (LIBOR) Standards from the date of expropriation to the date of payment, shall be made without delay and in any case within six month be effectively realizable and be freely transferable. Whenever there are difficulties in ascertaining the genuine market value, it shall be determined according to the internationally acknowledged evaluation standards.[...] <sup>745</sup> (Emphasis added.)

417. The applicable standard of compensation under the Treaty is thus "full" compensation which shall amount to "the genuine market value" of the investment that has been expropriated, the valuation date being the day "immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier."<sup>746</sup> The Tribunal considers that this standard provides sufficient guidance for the valuation of the Claimants' investments, and there is no need to consider the applicable standard under customary international law. The Tribunal merely notes that, in accordance with its ordinary meaning the term "genuine market value" must be considered to refer to market-based valuation, that is, "the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's

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<sup>743</sup> Statement of Defence, para. 324; *Case concerning rights of Nationals of the United States of America in Morocco (France v United States)*, Judgement, 27 August 1952 [1952] I.C.J. Rep. 176 at p. 200, **RLA-13**.

<sup>744</sup> Statement of Defence, para. 324.

<sup>745</sup> Treaty, Article 5(2), **CLA-14**.

<sup>746</sup> Treaty, Article 5(2), **CLA-14**.

length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.”<sup>747</sup>

418. In the circumstances there is neither legal basis nor need to consider the relevant standards of compensation under Tanzanian law. The Tribunal’s jurisdiction is founded on a treaty and not on Tanzanian law, and in any event, if Tanzanian law also provided for full compensation, it would not affect the outcome of the Tribunal’s determination under the Treaty. On the other hand, the Respondent cannot rely on any lesser standard of compensation that might be applicable in the circumstances under Tanzanian law. As noted above, under international law, the State may not rely on the provisions of its own law to evade its obligations under a treaty.<sup>748</sup> For the same reason, the Respondent cannot be heard to argue that, because the Claimants are non-citizens and acquired the Estate before the entry into force of the Land Act, the Estate is deemed to have no value under section 20(3) of the Land Act, except for unexhausted improvements.<sup>749</sup>

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<sup>747</sup> Marboe, *Calculation of Compensation and Damages in International Investment Law*, (2nd edn, OUP 2017), para. 4.38, **CLA-30**.

<sup>748</sup> See VCLT, art. 27, **CLA-4**.

<sup>749</sup> Statement of Defence, para. 166; Rejoinder, para. 14.



## XI. VALUATION

419. The Claimants accept that they cannot recover damages twice for the same loss and, should the Tribunal uphold all their claims, damages should only be awarded for (i) either the Estate or Sunlodges BVI's shares in Sunlodges Tanzania (the "**Company Shares**"); (ii) the Loan; and (iii) a disturbance allowance (the "**Disturbance Allowance**"), plus interest.<sup>750</sup>
420. The Claimants value their losses at USD 34,707,778.08, plus interest and costs.<sup>751</sup> The Claimants request that 75% of compensation be allocated to Sunlodges BVI and 25% to Sunlodges Tanzania.<sup>752</sup>
421. The Respondent considers that the Claimants would only be entitled to compensation for unexhausted improvements and argues that they have failed to establish that any investment was made that would warrant payment of compensation.<sup>753</sup>

### A. VALUATION OF THE ESTATE

#### 1. The Claimants' Position

422. The Claimants rely on the (Amended) GimcoAfrica Valuation Report as basis for the valuation of the Estate.<sup>754</sup>
423. The Claimants note that GimcoAfrica was requested to provide its opinion concerning the market value of the Estate's assets for the purposes of compensation under Tanzanian law.<sup>755</sup> The Claimants acknowledge that the report refers to "compulsory land acquisition," but note that this term is used in a broad sense and that the report was clearly prepared for the purpose of compensation under section 3 of the Land Act, which applies to both compulsory acquisitions and revocations.<sup>756</sup> In any event, the Claimants submit that, irrespective of the valuation basis, the (Amended) GimcoAfrica Valuation Report applies the correct standard of compensation under Tanzanian law.<sup>757</sup>

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<sup>750</sup> Statement of Claim, para. 368.

<sup>751</sup> Statement of Claim, paras 353, 369.

<sup>752</sup> Statement of Claim, para. 370.

<sup>753</sup> Statement of Defence, paras 315, 327.

<sup>754</sup> Statement of Claim, paras 354-360. Nevertheless, while the (Amended) GimcoAfrica Report (page 13, **C-194**) adopted an exchange rate as of October 2011 (resulting in a total of USD 30,118,180), in their Statement of Claim the Claimants put forward their claim using an exchange rate as at 5 September 2011. As a result, they reached a figure of USD 30,972,072,47 (Statement of Claim, para. 359 and fn 434).

<sup>755</sup> Statement of Claim, para. 354.

<sup>756</sup> Reply, paras 377-379.

<sup>757</sup> Reply, para. 380.

424. Furthermore, insofar as the Claimants consider that the core valuation principles under Tanzanian law are consistent with those under international law, they submit that the Amended GimcoAfrica Valuation Report is relevant to determine the Claimants' losses for the Respondent's alleged unlawful conduct.<sup>758</sup>
425. In particular, the Claimants affirm that GimcoAfrica adopted in its report the definition of market value from the 2010 International Valuation Standards, which is consistent with Tanzanian law, the Treaty and customary international law.<sup>759</sup>
426. Furthermore, the Claimants consider that the (Amended) GimcoAfrica Valuation Report adopted an "inherently conservative" approach by valuing (i) the land and buildings using a comparable sales method; (ii) the roads and fire breaks using a replacement cost method; and (iii) other infrastructure using a depreciated replacement cost ("DRC") method.<sup>760</sup> The Claimants also note that the report did not value other allowances provided for under Tanzanian law (discussed in Section XI.2.3 below).<sup>761</sup>
427. The Claimants note that GimcoAfrica inspected the Estate on 9 October 2011, and suggest that that date is a reasonable proxy for the Estate's value as at the time of the expropriation (6 September 2011).<sup>762</sup>
428. The Claimants further reject the Respondent's characterization of the (Amended) GimcoAfrica Valuation Report.<sup>763</sup> First, the Claimants dispute the Respondent's allegation that the buildings on the Estate were overvalued.<sup>764</sup> According to the Claimants, the photographs in the Government Valuation Reports are misleading because (i) they ignored the buildings used for agricultural purposes and instead valued others (Mbuo Camp and Market Zone) that had been used for sisal production and had fallen into disuse;<sup>765</sup> (ii) the inspection during which the pictures in the reports were taken took place eleven months after the Revocation Decision, and the Estate had been

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<sup>758</sup> Statement of Claim, para. 354; Reply, para. 380.

<sup>759</sup> Statement of Claim, para. 357; the (Amended) GimcoAfrica Valuation Report, October 2011, pp. 3-4, **C-194** ("the estimated amount for which a property/asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after property marketing wherein the parties had each acted knowledgeably, prudently and without compulsion").

<sup>760</sup> Statement of Claim, para. 358; the (Amended) GimcoAfrica Valuation Report, October 2011, pp. 6-8, 16, **C-194**.

<sup>761</sup> Statement of Claim, para. 355.

<sup>762</sup> Statement of Claim, para. 356.

<sup>763</sup> Reply, para. 9.

<sup>764</sup> Reply, para. 381.

<sup>765</sup> Reply, para. 382.

invaded and vandalised in the interim;<sup>766</sup> and (iii) they were prepared by Government valuers, who could not have acted in an independent manner.<sup>767</sup>

429. The Claimants also reject the Respondent's allegation that they have failed to prove the existence of any unexhausted improvements made in accordance with the terms and conditions of their Rights of Occupancy over the Estate.<sup>768</sup> In their view, the Rights of Occupancy required that the Estate be used for "agricultural purposes" and the Estate was used for cattle ranching and crops cultivation, so the unexhausted improvements were used for that purpose.<sup>769</sup>
430. Similarly, the Claimants dispute the Respondent's allegation that they did not have legal capacity to engage GimcoAfrica to value the Estate.<sup>770</sup> In their view, the Respondent has failed to identify any provision which would forbid a former owner of right of occupancy from engaging a valuer.<sup>771</sup> Furthermore, they submit that any such prohibition would be contrary to due process and, in any event, finds no basis in international law.<sup>772</sup> In any case, they consider that the Respondent's criticism refers to a minor point of form which does not affect the substantive conclusions reached by GimcoAfrica.<sup>773</sup>
431. In the Claimants' view, the stamp by Tanzania's Chief Valuer in the (Amended) GimcoAfrica Valuation Report constituted a verification of the valuation report.<sup>774</sup> The Claimants are critical of the fact that the Respondent has failed to pay any compensation even after verifying the Report.<sup>775</sup>

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<sup>766</sup> Reply, paras 383-390; referring to, *inter alia*, Paglieri I, para. 87; Paglieri II, paras 18-22; "Photographs of the fence having been pulled down and cows having been injured by locals", undated, **C-106**; Affidavit of Rashid Mashuhuri (an employee of Sunlodges Tanzania) in Misc. Civil Cause No. 6 of 2011 (exhibits omitted), 13 November 2011, paras 5-10, **C-185**; GimcoAfrica letter to Sunlodges Tanzania, 22 November 2011, p. 2, **C-258**; Email from Ali Maawiya to Franco Paglieri, 23 January 2013, **C-260**; Email from Ali Maawiya to Franco Paglieri, 25 January 2013, **C-261**; Police Report of Malicious Property Damage, 9 February 2013, **C-263**.

<sup>767</sup> Oral Hearing Tr., Day 1, 163:14-20.

<sup>768</sup> Reply, paras 391-392.

<sup>769</sup> Reply, paras 392-396. The Claimants submit that the Estate's infrastructure (electric fence, access and circulation roads, water supply pipe network, electricity supply); the "operational buildings" (the Administration Block, the Workshop Building, the Ex-Corona Building, the Ex-Brush House, the Power House, the Main Store, the Car Shed, and the Ablution Bock and Mosque); and the "residential houses" served important functions in relation to the operation of the Estate's agricultural business (*cf.* Reply, paras 393-396; Paglieri II, paras 23-28).

<sup>770</sup> Reply, para. 398.

<sup>771</sup> Reply, para. 400.

<sup>772</sup> Reply, para. 400.

<sup>773</sup> Reply, para. 399.

<sup>774</sup> Statement of Claim, paras 141-142; Paglieri I, paras 102-103; Statement of Claim, para. 360.

<sup>775</sup> Statement of Claim, para. 142; Paglieri I, para. 103.

432. Finally, the Claimants contend that the Government Valuation Reports are not reliable because they apply the wrong standard of compensation, do not value the correct buildings and infrastructure, and are based on the wrong valuation date.<sup>776</sup>

## 2. The Respondent's Position

433. The Respondent rejects the (Amended) GimcoAfrica Valuation Report as a basis for valuation<sup>777</sup> because it assessed compensation arising out of compulsory land acquisition of the Estate, while the dispute between the Parties concerns a revocation of rights of occupancy.<sup>778</sup> As discussed above (see Section X.1.2), the Respondent argues that compensation of land rights following compulsory acquisition differs from compensation resulting from revocation of rights of occupancy.<sup>779</sup>

434. The Respondent also disputes the relevance of the Claimants' reliance on references to section 3 of the Land Act within the (Amended) GimcoAfrica Valuation Report.<sup>780</sup> The Respondent submits that such provision only provides for fundamental principles of land policy.<sup>781</sup>

435. Moreover, in the Respondent's view, the Claimants have not substantiated having made any investment on the revoked land which would warrant the payment of compensation.<sup>782</sup> The Respondent contends that under the principles of unexhausted improvements, when the revoked land is a bare land no compensation can be paid as "[l]and is and will always be that of government while the improvements on land are of occupier."<sup>783</sup>

436. The Respondent also notes that, according to the witness statement provided by Ms Mugasha (Chief Government Valuer in the Ministry for Lands), the pictures within the (Amended) GimcoAfrica Valuation Report are not representative of the prevailing situation of the buildings in the Estate and this results in an overestimation of the Estate's value.<sup>784</sup> In response to the

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<sup>776</sup> Reply, paras 9, 403-404, 407.

<sup>777</sup> Statement of Defence, paras 19, 329; Land Act, s. 20(3) and s. 49(3), **CLA-10**.

<sup>778</sup> Statement of Defence, paras 15-16; First Witness Statement of Ms Evelyine Baruti Mugasha, 26 October 2018, para. 16, **RWS-3** ("**Mugasha I**"); Mugasha II, para. 8.

<sup>779</sup> Statement of Defence, paras 16, 19, 162-169, 315, 317, 326-327; Mugasha I, para. 21. In any event, the Respondent notes that section 12 of the Land Acquisition Act establishes the following restriction on compensation: "[w]here the development of any land acquired under this Act is inadequate, whether such land is in an urban area or in a rural area, any compensation awarded shall be limited to the value of the unexhausted improvements of the land." Statement of Defence, para. 162. Land Acquisition Act, s. 12 (2), **CLA-2**. Rejoinder, paras 47-50; Mugasha II, paras 8, 11, 13.

<sup>780</sup> Rejoinder, paras 49-50; Mugasha II, paras 9-11.

<sup>781</sup> Rejoinder, para. 51.

<sup>782</sup> Statement of Defence, paras 315, 327.

<sup>783</sup> Rejoinder, para. 61.

<sup>784</sup> Statement of Defence, para. 21; Mugasha I, para. 24; Oral Hearing Tr., Day 1, 226:23-227:4.

Claimants' allegation that the Government Valuation Reports referred to buildings that had been formerly used for sisal cultivation and had been unused for a long time, the Respondent submits that GimcoAfrica as a valuer had to value all the unexhausted improvements in order to determine the market value of the property in its state at that time.<sup>785</sup>

437. According to the Respondent, the Claimants had no authority to prevent the valuer from assessing some buildings,<sup>786</sup> and in excluding some buildings GimcoAfrica acted in breach of the Guidelines of Valuers, which brings the credibility of the Reports into question.<sup>787</sup>
438. Further, the Respondent rejects the Claimants' contention that the Government Valuation Reports would not be representative of the value of the purportedly expropriated investments as at 5 September 2011 due to the damage allegedly caused in the Estate, *inter alia*, by invaders.<sup>788</sup> The Respondent recalls that the Claimants obtained an Interim Injunction<sup>789</sup> preventing the Government from taking any measure in relation to the Estate during that interim period.<sup>790</sup> The Government Valuation Reports were produced immediately after the Judicial Review Judgement, and the Estate was in possession of the Claimants until the date of the ruling.<sup>791</sup>
439. The Respondent also criticizes the fact that GimcoAfrica identified the Claimants as the owners of the Estate, while their Rights of Occupancy over the Estate had already been revoked at the time when such valuation report was developed.<sup>792</sup> According to the Respondent, the Claimants did not have the legal capacity to engage a private valuer to conduct a valuation of the Estate at that point in time.<sup>793</sup>
440. In sum, the Respondent submits that the (Amended) GimcoAfrica Valuation Report cannot be relied upon by the Tribunal because the report was not officially approved, the terms of reference issued to GimcoAfrica are not incorporated, and the basis of valuation used is wrong.<sup>794</sup> According to Ms Mugasha, the Government Valuation Reports provide a better basis for the Tribunal to determine valuation.<sup>795</sup>

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<sup>785</sup> Rejoinder, para. 54; Mugasha II, para. 17.

<sup>786</sup> Rejoinder, para. 54; Mugasha II, para. 17.

<sup>787</sup> Rejoinder, para. 54; Mugasha II, para. 17.

<sup>788</sup> Rejoinder, paras 55-56.

<sup>789</sup> Rejoinder, para. 57; Mugasha II, para. 19.

<sup>790</sup> Rejoinder, para. 57; Mugasha II, para. 19.

<sup>791</sup> Rejoinder, para. 58; Mugasha II, para. 20.

<sup>792</sup> Statement of Defence, para. 18; Mugasha I, para. 20.

<sup>793</sup> Statement of Defence, para. 18; Land Act, s. 49(2), **CLA-10**.

<sup>794</sup> Rejoinder, para. 62.

<sup>795</sup> Mugasha II, para. 21.

**B. VALUATION OF ADDITIONAL HEADS OF LOSS**

**1. Company Shares**

*(a) The Claimants' Position*

441. The Claimants consider that the value of the shares of Sunlodges Tanzania (the Company Shares) was directly related to the value of the Estate, since all of Sunlodges Tanzania's other assets had negligible value.<sup>796</sup> Without the Estate, Sunlodges Tanzania's business could not operate, and, as a result, the Company Shares became worthless to Sunlodges BVI.<sup>797</sup> Therefore, the Claimants contend that the diminution in value of the Company Shares equals its lost interest in the expropriated assets, which they claim amounts to USD 30,972,072.47.<sup>798</sup>

*(b) The Respondent's Position*

442. The Respondent submits that the Company Shares are not compensable given that the Revocation Decision arises out of the Claimants' failure to comply with the conditions of their rights of occupancy.<sup>799</sup>

**2. Sunlodges BVI Loan**

*(a) The Claimants' Position*

443. The Claimants allege that, without ownership over the Estate, Sunlodges Tanzania's business cannot operate, and, as a result, Sunlodges Tanzania is incapable of repaying the Sunlodges BVI Loan.<sup>800</sup> Thus, the Claimants claim compensation for outstanding value of the Sunlodges BVI Loan as at the date of the purported expropriation, which they claim amounts to USD 1,908,356.45.<sup>801</sup>

*(b) The Respondent's Position*

444. The Respondent submits that the Sunlodges BVI Loan is not compensable also on the grounds that the Revocation Decision arises out of the Claimants' non-compliance with the conditions of their Rights of Occupancy.<sup>802</sup>

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<sup>796</sup> Statement of Claim, para. 361.

<sup>797</sup> Statement of Claim, para. 361.

<sup>798</sup> Statement of Claim, para. 361.

<sup>799</sup> Statement of Defence, para. 336.

<sup>800</sup> Statement of Claim, para. 362.

<sup>801</sup> Statement of Claim, para. 362.

<sup>802</sup> Statement of Defence, para. 336.

### 3. Disturbance Allowance

#### (a) *The Claimants' Position*

445. The Claimants point to section 3(1)(g) of the Land Act as requiring that compensation include various allowances.<sup>803</sup> The Claimants request compensation for disturbance allowance which, they claim, is governed by Regulation 10 of the Assessment Regulations:

The disturbance allowance shall be calculated by multiplying value of the land by average percentage rate of interest offered by commercial banks on fixed deposits for twelve months at the time of loss of interest in land.<sup>804</sup>

446. The Claimants calculate this Disturbance Allowance on the basis of (i) the value of the Estate land as set out in the (Amended) GimcoAfrica Valuation Report (i.e. USD 24,929,729.33); and (ii) the “average percentage rate of interest offered by commercial banks on fixed deposits for twelve months” in September 2011 (which, on the basis of the interest rates collated by the Bank of Tanzania on a monthly basis and reported in its monetary Policy Statements, is 7.33%).<sup>805</sup>

447. As a result, the Claimants claim to be entitled to a disturbance allowance amounting to USD 1,827,349.16.<sup>806</sup>

#### (b) *The Respondent's Position*

448. The Respondent argues that the Claimants are not entitled to the payment of a Disturbance Allowance on the basis that the Revocation Decision arises out of the Claimants' non-compliance with the conditions of their Rights of Occupancy.<sup>807</sup>

### C. THE TRIBUNAL'S DETERMINATION

449. The Treaty does not define the applicable method of valuation, which is not unusual since the appropriate method of valuation tends to depend on the circumstances, as well as the type of asset that is to be valued. Article 5(2) of the Treaty merely provides that “[w]hen there are difficulties in ascertaining the genuine market value, it shall be determined according to the internationally acknowledged evaluation standards.”<sup>808</sup> Consequently, while the applicable standard of compensation always remains “genuine market value,” the method of valuation may

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<sup>803</sup> Statement of Claim, para. 363.

<sup>804</sup> Statement of Claim, para. 363; Assessment Regulations, reg. 10, **CLA-12**.

<sup>805</sup> Statement of Claim, paras 364-365; Bank of Tanzania, Monetary Policy Statement, June 2012, Table A11, **C-221**.

<sup>806</sup> Statement of Claim, para. 366. In this calculation, the Claimants used a currency exchange rate as at 5 September 2011.

<sup>807</sup> Statement of Defence, para. 336.

<sup>808</sup> Treaty, Article 5(2), **CLA-14**.

vary according to the circumstances and the type of asset in question; this is reflected in the use of plural in the Treaty (“evaluation standards”).

450. As to the valuation date, Article 5(2) of the Treaty provides that, in case of expropriation, the relevant date is the date “immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier.” The Tribunal notes that the date of valuation used in the GimcoAfrica Report is 9 October 2011, which is the date on which GimcoAfrica inspected the Estate. The Tribunal accepts that this is a reasonable proxy for the Estate’s value as at the time of the expropriation, 6 September 2011.<sup>809</sup> If anything, it may lead to an understatement rather than overstatement of the value of the property, given that the valuation date post-dates the date of expropriation, and given the widespread looting that appears to have started on the Estate after its expropriation.
451. Furthermore, as there are two Claimants in the present case, their respective losses must be valued separately, as acknowledged by the Claimants.

#### **1. The loss of Sunlodges Tanzania**

452. The Claimants argue that the core valuation principles are essentially the same under Tanzanian law, the Treaty and customary international law.<sup>810</sup> The Claimants further submit that, in any event, GimcoAfrica adopted in its report the definition of market value from the 2010 International Valuation Standards, which is consistent not only with Tanzanian law, but also with the Treaty and customary international law.<sup>811</sup> Indeed, the (Amended) GimcoAfrica Report specifically relies on the definition of “market value” in the 2010 International Valuation Standards and has applied valuation standards that seek to quantify market value.<sup>812</sup> In the circumstances, the Tribunal agrees and finds that GimcoAfrica has relied on appropriate methods of valuation.
453. To establish the Estate’s market value, GimcoAfrica has valued (i) the land and buildings using a comparable sales method; (ii) the roads/fire breaks using a replacement cost method and DRC; and (iii) the other infrastructure using the DRC method. The Claimants make no claim for the moveable assets, although GimcoAfrica has valued them in a separate report.

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<sup>809</sup> Statement of Claim, para. 356.

<sup>810</sup> Statement of Claim, para. 354; Reply, para. 380.

<sup>811</sup> Statement of Claim, para. 357; the (Amended) GimcoAfrica Valuation Report, October 2011, pp. 3-4, **C-194** (“the estimated amount for which a property/asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after property marketing wherein the parties had each acted knowledgeably, prudently and without compulsion”).

<sup>812</sup> (Amended) GimcoAfrica Valuation Report, October 2011, pp. 3-4, **C-194**.



454. The GimcoAfrica valuation is summarized in the table below. The USD figures have been amended by the Claimants to reflect the valuation date of 5 September 2011, the date before the expropriation and the exchange rate applicable on that date.<sup>813</sup>

Table – Summary of the GimcoAfrica Valuation

<b>Asset</b>	<b>Valuation Method</b>	<b>Valuation (TZS)</b>	<b>Valuation (USD)</b>
<b>Land</b>			
Farm Land	Comparable Sales	40,000 m	24,929,729.33
<b>Infrastructure</b>			
Electrified Fencing (40km)	DRC (20% depreciation)	4,000 m	2,492,972.93
Roads/Fire Breaks (20km)	Replacement Cost	400 m	249,297.29
Water Supply Pipe Network (15km)	DRC (33% depreciation)	200 m	124,648.65
Electricity Supply	DRC (20% depreciation)	4,000 m	2,492,972.93
<b>Buildings</b>			
Operational Buildings	Comparable Sales	620 m	386,410.80
Residential Buildings	Comparable Sales	475 m	296,040.54
<b>Totals:</b>		<b>TZS 49,695 m</b>	<b>USD 30,972,072.47</b>

455. The three key elements of the valuation are the land, the infrastructure and the buildings. Of the total amount claimed (USD 30,972,072.47 or TZS 49,695 m), USD 24,929,729.33 relates to the farm land, USD 5,359,891.80 (TZS 8,600 m) relates to infrastructure and USD 682,451.34 (TZS 1,095 m) relates to buildings.

456. The valuation of the farm land, which forms the main component of the valuation, covering TZS 40,000 m of the total valuation of TZS 49,695 m, is based on the comparable sales method. However, GimcoAfrica has not provided any information about the other, comparable properties and sales transactions it considered in reaching its valuations. This is unsatisfactory, and the Tribunal is unable to accept GimcoAfrica’s valuation at face value, and must take into account other relevant considerations in determining the value of the farm land. The fact that the Government’s Chief Valuer stamped the GimcoAfrica Report as “accepted” also cannot be

<sup>813</sup> See *supra* para. 372.

considered conclusive; it is unclear in which circumstances, and on what basis, the purported approval was provided, and in any event, the Respondent disputes that any approval was provided.

457. First, the Tribunal notes that Sunlodges Tanzania purchased the property back in October 1997 for a price of USD 175,000, of which USD 150,000 was for the land and USD 25,000 for the Estate's machinery.<sup>814</sup> While the Tribunal accepts that the transaction was entered into with a receiver of the previous owner and was effectively a "fire sale" and thus cannot be taken to reflect the genuine market value of the property, it does raise questions about the reliability of GimcoAfrica's valuation, in particular in the absence of any further information about the basis on which GimcoAfrica reached its estimate.
458. The Tribunal further notes that in its business plan submitted in support of its application for investment incentives, Sunlodges Tanzania indicated that the application covered "LR No. 3995,"<sup>815</sup> which is by far the largest (some 3,043 of the total of 5,277 hectares) of the four plots of land on which the Estate is located. According to the business plan, Sunlodges Tanzania intended to "rehabilitate" the plot as it "had fallen into neglect."<sup>816</sup> However, on 15 December 2003, in its subsequent correspondence to the TIC, Sunlodges Tanzania indicated that "very little progress indeed has so far been achieved" for a number of reasons, and that "somewhere in the region of US\$50-70,000 of the envisaged investment has been lost in day-to-day expenditure, without any real long-term benefit, with the possible exception of the rehabilitation of a few wells."<sup>817</sup> In its bi-annual progress report to the TIC of 24 May 2006, Sunlodges Tanzania, while noting some positive developments (including planting of 100 hectares of Rhodes Grass and decrease in stolen cattle and fence), stated that "the only way to make the estate profitable in a relatively short time is to substantially increase the number of quality livestock units by importing them from outside the country."<sup>818</sup>
459. The Tribunal further notes that, according to its audited financial statements, Sunlodges Tanzania's accumulated losses during the period of 31 December 2007 to 31 December 2010 increased from TZS 2,076,642,000 to TZS 2,749,413,000, and the amount by which its liabilities

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<sup>814</sup> Contract between Karimjee Agriculture Limited (in Receivership) and Sunlodges Tanzania, 1 October 1997, clause 3, **C-91**; Transfer of the Right of Occupancy to the Mikindani Estate, 11 May 1998, **C-93**.

<sup>815</sup> This appears to be a typo; reference must have been to Certificate of Title (Land Registry Title No.) 3985. See Land Registry Search Results in regard to the Mikindani Estate, 11 August 1998, p. 3, **C-94**.

<sup>816</sup> Project Profile submitted to TIC together with the Application form for Registration of Certificate of Incentive, 20 March 2003, p 3, **R-13**.

<sup>817</sup> Letter from Sunlodges Ltd to the Executive Director (TIC), 15 December 2003, p 1, **R-14**.

<sup>818</sup> Bi-annual Progress report from Sunlodges Limited to TIC, 24 May 2006, p 2, **R-18**.

exceeded its assets increased from TZS 799,112,000 to TZS 1,471,884,000.<sup>819</sup> The company was loss-making each year during this period. It therefore was not in a position to make substantial investments from profit made during this period.

460. On the other hand, it is clear from the evidence that the Claimants made significant investments on the Estate, apparently funded by Sunlodges BVI, including building an electric fence surrounding a large portion of the Estate, an airstrip and a 33-kilometre road around the perimeter of the property. The land underlying the Estate also contained significant and valuable limestone deposits, as evidenced by Dangote Industries' subsequent investments and construction of a cement factory on the Estate. The Estate is also strategically located opposite to large offshore oil and gas blocks that are currently in the process of being developed or exploited by leading international oil and gas companies. This has increased the interest in the land in the Mtwara and Lindi coasts, including in the area on which the Estate is located.
461. Taking into account these considerations, while the evidence on record does not allow the Tribunal to arrive at a precise value, the Tribunal estimates that, as at 5 September 2011, the genuine market value of the land fell within the range of TZS 10,000 m to 20,000 m. In the absence of any further and more detailed quantitative evidence,<sup>820</sup> and doing its conscientious best in the light of the evidence before it, the Tribunal finds that, as at 5 September 2011, the genuine market value of the land was at the mid-point of this range, that is, TZS 15,000 m, or USD 9,348,649.<sup>821</sup> In reaching this conclusion, the Tribunal takes into account that some of the significant offshore oil and gas discoveries in the region occurred prior to the expropriation and the valuation date.<sup>822</sup>
462. As to the infrastructure and farm buildings (operational and residential buildings), the (Amended) GimcoAfrica Report provides much more detail, and in the absence of an effective rebuttal by the Respondent, the Tribunal accepts the Claimants' valuation of these elements of Sunlodges Tanzania's investments. While the Respondent has sought to quantify the value of the

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<sup>819</sup> Sunlodges Tanzania's Financial Statements (2007), p. 5, **C-81**; Sunlodges Tanzania's Financial Statements (2008), p. 5, **C-82**; Sunlodges Tanzania's Financial Statements (2009), p. 5, **C-83**; Sunlodges Tanzania's Financial Statements (2010), p. 5, **C-84**.

<sup>820</sup> The Tribunal contemplated seeking further evidence from the Parties' experts, but this did not materialize for reasons summarized above; *cf.* paras 40-51.

<sup>821</sup> Calculated on the basis of the exchange rate applicable on 5 September 2011, i.e. the day immediately before the expropriation, which is the valuation and conversion date under art. 5(2) of the Treaty.

<sup>822</sup> Most of the discoveries appear to have occurred after the valuation date; *cf.* The Economist, "Eastern El Dorado", 7 April 2012, **C-110**; The Economist, "Tanzania's gas boom, The Mtwara Rockefellers, A gas bonanza brings hopes of wealth", 20 April 2013, **C-113**; The Financial Times, "Tanzania natural gas investment threatened by arrest of officials", 4 November 2014, **C-115**; Statoil publication, "Tanzania gas project, From discovery to gas sales", 2015, **C-118**; Quartz Africa, "After a clash with Dangote, investors won't be so sure Magufuli's Tanzania is a place to do business", 14 December 2016, **C-122**; Shell's web page, downloaded on 6 June 2018, **C-125**; and Equinor's web page, downloaded on 6 June 2018, **C-126**.

unexhausted improvements, based on the assumption that Sunlodges Tanzania's title was lawfully revoked, it has not made any attempt to value the land. Moreover, although it has sought to value the buildings and the infrastructure, it appears that many of the buildings on the Estate were in fact not valued, and in any event the valuation took place almost two years after the expropriation, on 2 August 2012, when most of the buildings and much of the infrastructure had already been vandalized.

463. The Tribunal is also unable to follow the Respondent's argument that the Claimants did not have the legal capacity in October 2011 to engage a private valuer to conduct a valuation of the Estate since at that point in time they no longer held title.<sup>823</sup> It is the very purpose of a valuation report produced in support of an expropriation claim in a litigation context to value a property as to which the claimant no longer holds title precisely because it has been (allegedly) lost as a result of the expropriation. Due process requires that the party claiming compensation must be able to produce evidence in support of its claim, including in support of its valuation and quantification.

## **2. The loss of Sunlodges BVI**

464. Sunlodges BVI's claim is for the loss of the value of its shareholding in Sunlodges Tanzania. The Claimants' case is that the value of the company shares is "directly related to the value of the Estate."<sup>824</sup> The Tribunal agrees that the value of the Estate is a reasonable proxy for Sunlodges BVI's loss.

465. In addition to the value of its shareholding, Sunlodges BVI also seeks compensation in the amount corresponding to the value of its outstanding loan to Sunlodges Tanzania, i.e. TZS 3,061,977,000, or USD 1,908,356.45, as at the date of the expropriation of the Estate.

466. The Tribunal considers that Sunlodges BVI's outstanding loan is in the nature of a capital loan and thus an investment, and that Sunlodges BVI is entitled to compensation for the value of the loan which it has lost without any realistic possibility of recovery.

## **3. Claim for Disturbance Allowance**

467. The Claimants also claim for the Disturbance Allowance under Section 3(1)(g) of the Land Act and Regulation 10 of the Assessment Regulations, in the amount of TZS 2,932 m (USD 1,827,349.16). Regulation 10 provides:

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<sup>823</sup> Statement of Defence, para. 18; Land Act, s. 49(2), **CLA-10**.

<sup>824</sup> Statement of Claim, para. 361.

The disturbance allowance shall be calculated by multiplying value of the land by average percentage rate of interest offered by commercial banks on fixed deposits for twelve months at the time of loss of interest in land.<sup>825</sup>

468. The Tribunal notes that the claim for Disturbance Allowance is not based on the Treaty but Tanzanian law, and the Claimants do not argue that if they were compensated for the value of the Estate, and for the value of Sunlodges BVI's outstanding loan to Sunlodges Tanzania, this would not amount to a full compensation for their loss. Indeed, it appears that, given the way in which the Disturbance Allowance is calculated, it would compensate for the same loss as pre-award interest, for which the Claimants make a separate claim (see Section XII below).
469. Consequently, the claim having no basis in the Treaty, and in the absence of any explanation of, or justification for, the precise loss that the Disturbance Allowance is intended to compensate the Claimants for and that is not already compensated for by their claims under the other heads of loss, the claim must be rejected.

#### **4. Apportionment of the Compensation Awarded**

470. The Claimants request that the amount claimed be apportioned between them as follows: 75% to Sunlodges BVI and the remaining 25% to Sunlodges Tanzania, "or in such other manner of allocation that they may prefer."<sup>826</sup>
471. The Tribunal considers that the Respondent shall pay compensation to Sunlodges BVI in the amount of the outstanding loan, i.e. TZS 3,061,977,000, or USD 1,908,356.45, and in the amount corresponding to its shareholding in Sunlodges Tanzania, i.e. 75% of the amount awarded to compensate the Claimants for the loss of the Estate, i.e. TZS 11,250 m or USD 7,011,486. The remaining 25%, i.e. the amount of TZS 3,750 m or USD 2,337,162, is awarded to Sunlodges Tanzania.

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<sup>825</sup> Assessment Regulations, reg. 10, **CLA-12**.

<sup>826</sup> Statement of Claim, para. 370.

## **XII. INTEREST**

### **A. INTEREST ON LAWFUL EXPROPRIATION AND UNDER TANZANIAN LAW**

#### **1. The Claimants' Position**

472. In the event that the Tribunal finds the alleged expropriation to be lawful, the Claimants refer to Article 5(2) of the Treaty as containing the applicable interest rule. According to this provision, compensation “shall include interests calculated on the basis of London Interbanking Offered Rate (LIBOR) Standards from the date of expropriation to the date of payment.”<sup>827</sup>
473. According to the Claimants, if interest were awarded on this basis, the appropriate interest rate would be six-month USD LIBOR compounded on a six-month basis.<sup>828</sup> They note, however, that the average rate from 2011 to 19 June 2018 is 0.905%, and consider this rate to be “unfavourably low”<sup>829</sup> because (i) LIBOR does not reflect the savings or borrowing rate that would be available to the Claimants;<sup>830</sup> and (ii) the credibility of LIBOR has been significantly undermined and consider that its future beyond 2021 is in doubt.<sup>831</sup>
474. As a result, the Claimants invoke the MFN clause (Article 3(1) of the Treaty) to rely on the more favourable interest rate set out in Article 5(3) of the Denmark-Tanzania BIT,<sup>832</sup> which provides that compensation shall “include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.”<sup>833</sup> According to the Claimants, interest under customary international law is assessed on essentially the same basis.<sup>834</sup>
475. Finally, the Claimants submit that the Respondent’s references to section 49(3) of the Land Act are inapposite in this context and, being domestic law, cannot be relied upon by the Respondent to avoid application of the Treaty provisions concerning interest.<sup>835</sup>
476. As to Tanzanian law, the Claimants submit that section 3(1)(g) of the Land Act provides for interest at the market rate.<sup>836</sup>

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<sup>827</sup> Statement of Claim, para. 380; Treaty, Article 5(2), **CLA-14**.

<sup>828</sup> Statement of Claim, para. 380.

<sup>829</sup> Statement of Claim, para. 380; LIBOR Rates, 2011 to 19 June 2018, **C-229**.

<sup>830</sup> Statement of Claim, para. 380.

<sup>831</sup> Statement of Claim, para. 380; Financial Times, “Regulator calls on banks to replace Libor by 2022”, 27 July 2017, **C-231**.

<sup>832</sup> Statement of Claim, para. 381.

<sup>833</sup> Statement of Claim, para. 381; Denmark-Tanzania BIT, Article 5(3), **CLA-21**.

<sup>834</sup> Statement of Claim, para. 381.

<sup>835</sup> Reply, para. 411.

<sup>836</sup> Statement of Claim, para. 372; Land Act, s. 3(1)(g), **CLA-10**.

477. The Claimants also refer to Regulation 13 of the Assessment Regulations, which provides that, “[w]here amount of compensation remains unpaid for six months after acquisition or revocation, interest at the average percentage rate of interest offered by commercial banks on fixed deposits shall be recoverable until such compensation is paid.”<sup>837</sup>
478. The Claimants affirm that the Respondent did not pay compensation to the Claimants within six months of the revocation of their rights over the Estate (i.e. 6 March 2012) or at all.<sup>838</sup> As a result, the Claimants claim, interest on compensation is due from 6 March 2012 until effective payment.<sup>839</sup>
479. Regarding the applicable interest rate, the Claimants note that Regulation 13(3) of the Assessment Regulations does not specify the fixed deposit period to be used for this purpose.<sup>840</sup> However, they note that regulation 10 of the Assessment Regulations uses the twelve month fixed deposit rate for calculating the disturbance allowance.<sup>841</sup> In the Claimants’ view, selecting the twelve month fixed deposit rate would be a realistic interpretation of regulation 13(3) and consistent with overarching requirements under the Land Act.<sup>842</sup>
480. The Claimants also argue that interest should be calculated on a compounded basis.<sup>843</sup> They submit that interest offered by commercial banks on fixed deposits is necessarily compounded.<sup>844</sup> The Claimants refer to *Continental Casualty v. Argentina*, where the tribunal held that “compound interest reflects economic reality in modern times [...]”<sup>845</sup>
481. Furthermore, to the extent that the Respondent’s conduct would breach the Constitution and/or the Tanzania Investment Act but not the Land Act (which would be the case in relation to the Company Shares) the Claimants argue that the question of interest is governed by the requirement under such instruments that compensation be “fair and adequate.”<sup>846</sup> However, the Claimants assert that the Constitution and the Tanzania Investment Act do not contain any provisions expressly dealing with interest.<sup>847</sup> In the Claimants’ view, there is no good reason to distinguish

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<sup>837</sup> Statement of Claim, paras 373-374; Assessment Regulations, reg. 13(3), **CLA-12**.

<sup>838</sup> Statement of Claim, para. 373.

<sup>839</sup> Statement of Claim, para. 373.

<sup>840</sup> Statement of Claim, para. 374.

<sup>841</sup> Statement of Claim, para. 374.

<sup>842</sup> Statement of Claim, para. 374.

<sup>843</sup> Statement of Claim, para. 375.

<sup>844</sup> Statement of Claim, para. 375.

<sup>845</sup> Statement of Claim, para. 375; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 309, **CLA-89**.

<sup>846</sup> Statement of Claim, para. 376.

<sup>847</sup> Statement of Claim, para. 376.

between expropriations under the Constitution and the Tanzania Investment Act and under the Land Act.<sup>848</sup> As a result, they submit, the interest rate provided for under the Assessment Regulations should also be adopted for expropriations under the Constitution and the Tanzania Investment Act.<sup>849</sup> In the alternative, they argue that the interest rate should not be less than the default Tanzanian judgement interest rate of 7%.<sup>850</sup>

482. In sum, the Claimants request to be awarded interest under Tanzanian law from 6 March 2012 until the date of payment at the average percentage rate of interest offered by commercial banks on fixed deposits for twelve months, compounded on annual basis.<sup>851</sup> Pursuant to the Claimants' calculation on the basis of an interest rate of 11,17%,<sup>852</sup> as at 18 June 2018, interest in relation to compensation owed in relation to the Estate or the Company Shares and the Loan amounts to USD 22,168,768.02 and interest owed in relation to the Disturbance Allowance amounts to USD 1,232,042.31.<sup>853</sup>

## 2. The Respondent's Position

483. The Respondent reiterates its position that interest is only payable in cases where the land is acquired for a public interest, while in the case at hand the Estate was revoked due to the Claimants' breach of the terms of their Rights of Occupancy.<sup>854</sup>

484. As to Tanzanian law, the Respondent submits that section 49(3) of the Land Act and the Assessment Regulations explicitly provide that the Claimants are not entitled to any interest.<sup>855</sup>

485. The Respondent argues that, pursuant to section 49(3) of the Land Act, the Claimants are not entitled to interest or any payment other than for unexhausted improvements made in the revoked land in accordance with the purposes of their Rights of Occupancy.<sup>856</sup>

486. Moreover, the Respondent submits that the Assessment Regulations invoked by the Claimants were meant to apply to cases where the land has value.<sup>857</sup> In contrast, as per section 20(3) of the

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<sup>848</sup> Statement of Claim, para. 376.

<sup>849</sup> Statement of Claim, para. 376.

<sup>850</sup> Statement of Claim, fns 450 and 485; Tanzanian Civil Procedure Code, s29 (on p. 34) and Order XX, s. 21 (on p. 98), 1966, **CLA-20**.

<sup>851</sup> Statement of Claim, para. 377.

<sup>852</sup> Statement of Claim, para. 377; Interest Calculation, Table 1, undated, **C-220**.

<sup>853</sup> Statement of Claim, para. 378; Interest Calculations, Tables 1 and 5, undated, **C-220**.

<sup>854</sup> Statement of Defence, para. 339.

<sup>855</sup> Statement of Defence, para. 339.

<sup>856</sup> Statement of Defence, para. 332; Rejoinder, paras 15, 109.

<sup>857</sup> Statement of Defence, para. 333; Rejoinder, para. 110.



Land Act, the land comprising the Estate is deemed to have no value.<sup>858</sup> Thus, the Respondent contends that it is not subject to interest.<sup>859</sup>

487. In relation to the other heads of loss claimed by the Claimants (i.e. the Company Shares, the Sunlodges BVI Loan, and the Disturbance Allowance), the Respondent denies that they would be compensable under Tanzanian law and likewise denies that any derived interest could be compensated.<sup>860</sup>

## **B. INTEREST ON CLAIMS FOR UNLAWFUL EXPROPRIATION**

### **1. The Claimants' Position**

488. The Claimants note that the Treaty does not establish a *lex specialis* for the payment of interest in case of unlawful expropriation or other non-expropriatory breaches of the Treaty and customary international law.<sup>861</sup> Thus, according to the Claimants, this question is governed by customary international law.<sup>862</sup>

489. In the Claimants' submission, customary international law requires the payment of interest on damages.<sup>863</sup> The Claimants argue that it is an accepted legal principle that the State in breach must pay interest on damages awarded to the injured party in order to restore the latter to the position in which it would have been if the breach had not occurred.<sup>864</sup>

490. The Claimants invoke Article 38 of the ILC Articles on State Responsibility, which was characterized by the tribunal in *Siemens v. Argentina* as "an expression of customary international law,"<sup>865</sup> to argue that interest is payable to ensure full reparation.<sup>866</sup> In this regard, interest performs two functions: (i) it compensates the claimant for the temporary withholding of money due to it; and (ii) it precludes the respondent's unjust enrichment arising from the fact that it had use of the money.<sup>867</sup>

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<sup>858</sup> Statement of Defence, para. 333; Rejoinder, para. 110.

<sup>859</sup> Statement of Defence, para. 333; Rejoinder, para. 110.

<sup>860</sup> Statement of Defence, para. 336; Rejoinder, paras 15, 111.

<sup>861</sup> Statement of Claim, para. 382.

<sup>862</sup> Statement of Claim, para. 382.

<sup>863</sup> Statement of Claim, para. 383.

<sup>864</sup> Statement of Claim, para. 383.

<sup>865</sup> Statement of Claim, para. 384; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paras 395-396, **CLA-82**.

<sup>866</sup> Statement of Claim, para. 383; ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (with Commentary), 2001, art. 38, **CLA-18**.

<sup>867</sup> Statement of Claim, para. 388; Marboe, *Calculation of Compensation and Damages in International Investment Law* (2<sup>nd</sup> edn, OUP 2017), paras 6.09-6.39, **CLA-30**; Statement of Claim paras 385-387;

491. The Claimants further state that compound interest is frequently awarded by tribunals in investment treaty cases and consider that it reflects the commercial reality that a company that has been denied money has also been denied the use of that money.<sup>868</sup>
492. In relation to the interest period, the Claimants argue that, if the valuation date is taken to be the day immediately before the breach, interest accrues from the date of the breach (i.e. 6 September 2011) to the date of payment.<sup>869</sup> If the valuation date were fixed at the current date, interest would not be payable between the date of the breach and the date of the award but only from the date of the award until the date of payment.<sup>870</sup>
493. As to the applicable interest rate, the Claimants' primary claim is for interest on the basis of the Tanzanian 2-year government bonds, compounded semi-annually.<sup>871</sup> In the Claimants' submission, this is the most appropriate interest rate to ensure full reparation as it reflects the return rate which they could have earned if they had received compensation on the day of the alleged breach and also ensures that the Respondent does not benefit from having had use of the money.<sup>872</sup> The Claimants affirm that the average rate from the date of the breach until 18 June 2018 is 13.87%<sup>873</sup> and calculate the interest due on this basis in relation to the Estate or the Company Shares and the Sunlodges BVI Loan as amounting to USD 34,886,449.25.<sup>874</sup>
494. In the alternative, the Claimants propose that the Tribunal apply the average percentage interest rate offered by Tanzanian commercial banks on fixed deposits for twelve months compounded annually.<sup>875</sup> According to the Claimants, this rate, from 6 September 2011 to 18 June 2018 was,

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*Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 308, **CLA-89**; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, paras 101, 104, **CLA-56**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.3, **CLA-83**.

<sup>868</sup> Statement of Claim, paras 389-392; referring to, *inter alia*, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 104, **CLA-56**; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, paras 309-312, **CLA-89**.

<sup>869</sup> Statement of Claim, para. 394.

<sup>870</sup> Statement of Claim, para. 394.

<sup>871</sup> Statement of Claim, para. 395.

<sup>872</sup> Statement of Claim, para. 395.

<sup>873</sup> Statement of Claim, para. 395. The Claimants refer for the calculation of this average to Interest Calculations, Table 2, undated, **C-220**.

<sup>874</sup> Statement of Claim, para. 395; Interest Calculations, Table 2, undated, **C-220**. The Claimants note that the claim for the payment of a Disturbance Allowance is based on Tanzanian law only and interest thereon is governed by Tanzanian law (*cf.* Statement of Claim, fn 477).

<sup>875</sup> Statement of Claim, para. 396.

on average, 10.72%.<sup>876</sup> Interest due on this basis in relation to the Estate or the Company shares and the Sunlodges BVI Loan amounts to USD 23,121,483.26.<sup>877</sup>

495. As a third alternative, the Claimants request interest at 6% per annum, compounded annually.<sup>878</sup> The Claimants consider that this rate is commonly awarded by investment treaty tribunals and international courts, and is also consistent with the interest set out in the Land Acquisition Act (6%),<sup>879</sup> and with the Tanzanian judgement rate (7%).<sup>880</sup> On this basis, interest due as at 18 June 2018 in relation to the Estate or the Company Shares and the Sunlodges BVI Loan amounts to USD 15,946,211.04.<sup>881</sup>

496. Finally, the Claimants note that the Respondent's position in this regard is based on sections 20(3) and 49(3) of the Land Act. According to the Claimants, regardless of their disagreement as to the interpretation of those provisions, the Respondent cannot invoke its domestic law to avoid the requirements of customary international law.<sup>882</sup>

## 2. The Respondent's Position

497. The Respondent argues that pursuant to section 49(3) of the Land Act the Claimants are not entitled to any interest.<sup>883</sup> Similarly, the Respondent notes that, according to section 20(3) of the Land Act, the Estate is deemed to have no value and, therefore, it is not subject to interest.<sup>884</sup>

## C. THE TRIBUNAL'S DETERMINATION

498. As summarized above, the Claimants have made their claim for interest alternatively under Tanzanian law and international law, including the Treaty. In view of its findings above regarding the law governing a claim for expropriation and the standard of compensation, the Tribunal considers that the starting point in determining the applicable interest rate must be the Treaty.

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<sup>876</sup> Statement of Claim, para. 396. The Claimants refer for the calculation of this average to Interest Calculations, Table 3, undated, **C-220**.

<sup>877</sup> Statement of Claim, para. 396; Interest Calculations, Table 3, undated, **C-220**. The Claimants note that the claim for the payment of a Disturbance Allowance is based on Tanzanian law only and interest thereon is governed by Tanzanian law (*cf.* Statement of Claim, fn 481).

<sup>878</sup> Statement of Claim, para. 397.

<sup>879</sup> Statement of Claim, para. 397; Land Acquisition Act, s. 15(1), **CLA-2**.

<sup>880</sup> Statement of Claim, para. 397; Tanzanian Civil Procedure Code, s. 29, and Order XX, s. 21, 1966, **CLA-20**.

<sup>881</sup> Statement of Claim, para. 397. The Claimants refer for interest calculation to Interest Calculations, Table 4, undated, **C-220**.

<sup>882</sup> Reply, para. 412.

<sup>883</sup> Statement of Defence, para. 341.

<sup>884</sup> Statement of Defence, para. 341.

499. According to Article 5(2) of the Treaty, compensation for expropriation “shall include interests calculated on the basis of London Interbanking Offered Rate (LIBOR) Standards from the date of expropriation to the date of payment, shall be made without delay and in any case within six month[s].”<sup>885</sup> The Tribunal notes that, in the Claimants’ submission, this clause only applies to interest claims for lawful expropriation, whereas interest claims for unlawful expropriation are governed by customary international law. While the Tribunal agrees that the plain language of the interest clause indeed suggests that it applies to compensation to be provided based on “the decision [of a Contracting Party] to nationalise or expropriate is announced or made public,” this does not necessarily imply that a different interest rate would automatically be inapplicable in the event of an unlawful expropriation.
500. The Claimants argue that, since the LIBOR rate was so low during the relevant period, awarding interest on a LIBOR basis would not fully compensate the Claimants for their loss and would result in unjust enrichment to Tanzania. They therefore invoke the MFN clause in Article 3 of the BIT to rely on an allegedly more favourable provision in Article 5 of the Denmark-Tanzania BIT which provides that compensation in the event of expropriation shall include “interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.”<sup>886</sup> According to the Claimants, under customary international law interest is assessed on the same basis.
501. The Tribunal notes that the Respondent does not respond to the Claimants’ interest claims under the Treaty and international law, other than to state that interest is not available under the applicable Tanzanian law.
502. Having carefully considered the matter, including the relevant jurisprudence of other investment treaty tribunals, the Tribunal considers that the appropriate interest rate in the present case is 7% per annum (which corresponds to the default Tanzanian judgement interest rate),<sup>887</sup> compounded annually from 5 September 2011 until full payment of the award. This rate strikes an appropriate balance between the two policy purposes of an interest claim – compensating the claimant for the temporary withholding of money due to it, and precluding the respondent’s unjust enrichment from the use of the claimant’s funds.

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<sup>885</sup> Treaty, Article 5(2), **CLA-14**.

<sup>886</sup> Denmark-Tanzania BIT, art. 5(3), **CLA-21**.

<sup>887</sup> Tanzanian Civil Procedure Code, Order XX, S. 21, **CLA-20**: “*The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent [...]*”.

### XIII. THE RESPONDENT'S COUNTERCLAIM

#### A. THE RESPONDENT'S POSITION

503. Without prejudice to its objections to the Tribunal's jurisdiction, the Respondent has brought a counterclaim arising from the Claimants' alleged outstanding corporate tax liability, which it claims amounts to TZS 76,725,000.<sup>888</sup> According to the Respondent, this liability is a penalty due to the late submission of income tax returns from the years 2012 to 2015, as submitted by the Tanzania Revenue Authority (the "TRA").<sup>889</sup>
504. The Respondent also puts forward a claim for the loss allegedly caused by the Claimants' breach of the terms and conditions of the Certificates of Incentives "[in an] amount [...] to be quantified [by the] submission of [a] quantum claim."<sup>890</sup> The Respondent alleges to have suffered substantial loss and damage as a result of the Claimants' various breaches of the Tanzania Investment Act, land laws and various tax laws.<sup>891</sup>
505. Relying on Article 19(4) of the UNCITRAL Rules and the Model Arbitration Clause (as set out after Article 2 of the UNCITRAL Rules), the Respondent argues that it may make a counterclaim and a claim for the purposes of set-off provided that the Tribunal has jurisdiction over it.<sup>892</sup> Similarly, the Respondent invokes the decisions in *Saluka* and *Paushok*, which found that the term "all disputes" in the UNCITRAL Rules was wide enough to encompass counterclaims.<sup>893</sup>
506. According to the Respondent, its counterclaims are closely related to the primary claim.<sup>894</sup> The Respondent submits that the counterclaim concerning the Claimants' tax liability is related to the primary claim because the alleged tax liability is due as a result of the investment relationship between the Parties.<sup>895</sup> Similarly, the Respondent argues that the counterclaim regarding the losses suffered as result of the Claimants' alleged breach of the Certificates of Incentives is also

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<sup>888</sup> Statement of Defence, para. 349.

<sup>889</sup> Statement of Defence, para. 349; Letter from Tanzania Revenue Authority to Solicitor General with supporting documents, 25 September 2018, **R-7**.

<sup>890</sup> Statement of Defence, para. 350.

<sup>891</sup> Statement of Defence, para. 361.

<sup>892</sup> Statement of Defence, paras 351, 354.

<sup>893</sup> Statement of Defence, para. 355; *Saluka Investments B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, **RLA-32**; *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, **RLA-33**. Statement of Defence, paras 356-358; Rejoinder, para. 169.

<sup>894</sup> Rejoinder, paras 170-173.

<sup>895</sup> Rejoinder, paras 171, 175.

closely connected to the substantive dispute, as certificates of incentives are only granted to investors and the counterclaim arises from the investment relationship between the Parties.<sup>896</sup>

507. Therefore, the Respondent submits that the Claimants' allegations regarding the purported lack of a close connection should be rejected by the Tribunal.<sup>897</sup> More generally, the Respondent argues that its counterclaims are not defeated by the Claimants' failure to analyse them and to connect them to the primary claim.<sup>898</sup>

508. Finally, the Respondent argues that, pursuant to Article 8(4) of the Treaty, the present arbitration is governed by Tanzanian Law.<sup>899</sup> According to the Respondent, pursuant to Article 33(1) of the UNCITRAL Rules, the Tribunal shall apply both Tanzanian law and international law as the law designated by the Parties as applicable to the substance of the dispute.<sup>900</sup> In this regard, the Respondent asserts that, under Tanzanian law, a counterclaim creates an independent suit within the original suit.<sup>901</sup>

## **B. THE CLAIMANTS' POSITION**

509. According to the Claimants, the Respondent has failed to establish that the Tribunal has jurisdiction over its counterclaims.<sup>902</sup>

510. As a preliminary matter, the Claimants argue that the UNCITRAL Model Arbitration Clause on which the Respondent relies is not applicable because it was not adopted in the Treaty;<sup>903</sup> the only relevant provisions are Article 8(1) and (2) of the Treaty and Article 19(3) of the UNCITRAL Rules.<sup>904</sup>

511. The Claimants accept that Article 8 of the Treaty is in principle wide enough to include disputes giving rise to counterclaims, but only under certain conditions:<sup>905</sup> in addition to being disputes

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<sup>896</sup> Rejoinder, para. 172.

<sup>897</sup> Rejoinder, para. 173

<sup>898</sup> Rejoinder, para. 173.

<sup>899</sup> Statement of Defence, para. 352; Treaty, art. 8(4), **CLA-14**. Article 8(4) of the Treaty provides that: “[w]hen delivering its decisions, the Arbitration Tribunal shall apply the provisions contained in this Agreement, as well as the principles of international law recognised by the two Contracting Parties. Recognition and implementation of the arbitration decision in the territory of the contracting Parties shall be governed by their respective national legislations, in compliance with the relevant international conventions they are parties to.”

<sup>900</sup> Statement of Defence, para. 353.

<sup>901</sup> Statement of Defence, para. 360; Civil Procedure Code, Cap 33, 2002, Order VIII, rule 9(2), **RLA-36**.

<sup>902</sup> Reply, paras 10, 418.

<sup>903</sup> Reply, para. 420.

<sup>904</sup> Reply, paras 420-422.

<sup>905</sup> Reply, para. 423.

“on investments,” “a legitimate counterclaim must have a close connexion with the primary claim to which it is a response.”<sup>906</sup> The Claimants also note that that the tribunal in *Saluka* declined jurisdiction over the Czech Republic’s counterclaims because they pertained to State’s domestic law.<sup>907</sup> This approach was followed in *Paushok v. Mongolia*<sup>908</sup> and in *Oxus Gold v. Uzbekistan*.<sup>909</sup>

512. The Claimants consider that when a respondent fails to set forth a sufficiently specific counterclaim and to substantiate it with particulars of law (including causes of action) and fact, it has failed to discharge its burden to prove that the counterclaim has a close connection with the primary claim.<sup>910</sup>
513. In this regard, the Claimants submit that the Respondent has failed to particularise both of its counterclaims and has failed to establish that they have a close connection to the primary claim,<sup>911</sup> and, as a result, the Tribunal lacks jurisdiction over them.<sup>912</sup>
514. In particular, the Claimants submit that the counterclaim concerning a tax penalty lacks a close connection with the primary claim insofar as it is not a dispute “on investment” as required by Article 8 of the Treaty, and it involves purported obligations arising from Tanzanian domestic law that apply to persons subject to Tanzania’s domestic jurisdiction.<sup>913</sup> The Claimants rely in this regard on the decision in *Paushok*, where the tribunal held that alleged non-compliance with domestic tax legislation fell within the exclusive jurisdiction of the respondent’s domestic courts and could not be regarded as an indivisible part of the claimants’ claim.<sup>914</sup>
515. As to the counterclaim regarding losses purportedly caused by the Claimants’ breach of the terms and conditions of the Certificates of Incentives, the Claimants argue that there is no close connection with their claims and it is not a dispute “on investment” as required by Article 8 of the

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<sup>906</sup> Reply, para. 423; *Saluka Investments B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, paras 61, 76, **RLA-32**.

<sup>907</sup> Reply, para. 424; *Saluka Investments B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, para. 79, **RLA-32**.

<sup>908</sup> Reply, para. 425; *Sergei Paushok and Others v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 693, **RLA-33**.

<sup>909</sup> Reply, para. 426; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 954, **CLA-115**.

<sup>910</sup> Reply, para. 428.

<sup>911</sup> Reply, paras 429, 432.

<sup>912</sup> Reply, paras 429, 432, 434.

<sup>913</sup> Reply, para. 430.

<sup>914</sup> Reply, para. 431; *Sergei Paushok and Others v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 694, **RLA-33**.

Treaty,<sup>915</sup> and, as was the case with the first limb of its counterclaim, it involves purported obligations applicable as a matter of Tanzanian domestic law.<sup>916</sup>

516. In any event, the Claimants submit, the Respondent's counterclaims are inadmissible.<sup>917</sup> Under the UNCITRAL Rules, a counterclaim must include a statement of facts supporting the claim the points at issue, and the relief sought.<sup>918</sup> Likewise, the Claimants recall that section 5.2 of Procedural Order No. 1 requires the Parties to submit all the evidence and authorities on which they intend to rely in support of their factual and legal arguments with their written submissions.<sup>919</sup> In the Claimants' view, the counterclaims fail to rise to this standard because they fail to state a sufficiently specific and clear claim, substantiate it with particulars of law (including causes of action) and establish the underlying facts.<sup>920</sup> Moreover, the Respondent has not quantified the second counterclaim.<sup>921</sup>
517. In these circumstances, the Claimants consider that they are denied the opportunity to respond to those counterclaims, which they believe is contrary to Article 19(3) of the UNCITRAL Rules, which requires counterclaims to be pleaded in the statement of defence.<sup>922</sup>
518. In the alternative, the Claimants submit that the counterclaims must be rejected on the merits.<sup>923</sup> In relation to the Respondent's counterclaim that it has suffered loss as a result of the Claimants' purported breach of the terms and conditions of the Certificates of Incentives, the Claimants contend that nothing in the Tanzania Investment Act or any other legislation makes the content of the Business Plan binding on the investor.<sup>924</sup> Thus, they argue that a failure to fulfil the Business Plan is not a cause of action against the investor.<sup>925</sup> The Claimants also deny having on-sold the tax free goods imported pursuant to the Certificates of Incentives.<sup>926</sup>

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<sup>915</sup> Reply, para. 433.

<sup>916</sup> Reply, para. 433.

<sup>917</sup> Reply, paras 10, 418, 435.

<sup>918</sup> Reply, para. 436; UNCITRAL Rules, Article 19(4) and 18(2), **CLA-6**.

<sup>919</sup> Reply, para. 436.

<sup>920</sup> Reply, paras 10, 440.

<sup>921</sup> Reply, paras 10, 440.

<sup>922</sup> Reply, paras 438, 441.

<sup>923</sup> Reply, paras 10, 418, 443.

<sup>924</sup> Reply, para. 442.

<sup>925</sup> Reply, para. 442.

<sup>926</sup> Reply, para. 442.



**C. THE TRIBUNAL'S DETERMINATION**

519. As summarized above, the Respondent has brought two counterclaims: (i) a claim based on an outstanding corporate tax liability, in the amount of TZS 76,725,000; and (ii) a claim for loss caused by the Claimants' alleged breach of the terms and conditions of the Certificates of Incentives. The Respondent has not quantified the latter counterclaim.
520. The Respondent refers in support of its counterclaims, in particular, to Article 8(1) of the Treaty and Article 19(3) of the UNCITRAL Rules. According to the Respondent, its counterclaims relate to a "dispute [...] on investments" within the meaning of Article 8(1) of the Treaty. Article 19(3) of the UNCITRAL Rules in turn provides that "the respondent may make a counter-claim arising out of the same contract."
521. The Tribunal notes that both of the Respondent's counterclaims arise out of Tanzanian law. The Tribunal has no jurisdiction over such claims. While Article 8 of the Treaty is indeed broad enough to cover counterclaims, just as an investor may only bring claims arising under the Treaty, the respondent State may only bring counterclaims arising under the Treaty. Similarly, while Article 19(3) of the UNCITRAL Rules is drafted with a view to contract claims rather than treaty claims, it reflects the same principle: a counterclaim must arise out of the same legal foundation as the main claim. Since neither of the Respondent's counterclaims arises under the Treaty, they stand to be dismissed for lack of jurisdiction.

#### **XIV. COSTS**

##### **A. THE CLAIMANTS' POSITION**

522. Pursuant to Articles 38 to 40 of the UNCITRAL Rules, the Claimants request the Tribunal to order the Respondent to (i) pay the Claimants' legal and other costs and expenses in respect of this arbitration, plus compound interest at the same interest rate and interval as on the damages; and (ii) bear in full the costs of the Tribunal and any costs incurred by the appointing authority and the PCA, including by ordering the Respondent to pay any share paid in advance by the Claimants in relation to such costs, plus compound interest thereon.<sup>927</sup>
523. In sum, the Claimants quantify their costs as follows: arbitration costs amount to USD 279,877.40; disbursements amount to USD 93,664.29 and legal fees amount to USD 338,521, plus a success fee of 7% of the total damages and interest awarded by the Tribunal or of the total amount paid by Tanzania if a settlement is reached.<sup>928</sup>
524. The Claimants note that the Treaty does not contain particular provisions concerning costs and thus refer to Article 38 of the UNCITRAL Rules, pursuant to which, the Tribunal shall fix the costs of arbitration in its award.<sup>929</sup>
525. In accordance with Article 40(1) of the UNCITRAL Rules, there is a presumption that "the costs of arbitration shall in principle be borne by the unsuccessful party," namely that costs follow the event.<sup>930</sup> The Tribunal has discretion to depart from such presumption only "if it determines that apportionment is reasonable, taking into account the circumstances of the case."<sup>931</sup>
526. In accordance with Article 40(2) of the UNCITRAL Rules, the Tribunal has discretion when deciding on the apportionment of legal costs (i.e. costs foreseen in Article 38(e) of the UNCITRAL Rules) but is constrained in that only the successful party may be awarded its legal costs.<sup>932</sup>

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<sup>927</sup> Statement of Claim, para. 400.

<sup>928</sup> Claimants' Submission on Costs, paras 1, 23, 47. As to their legal costs, the Claimants submit that if counsel had billed at their normal hourly rate, legal costs would have amounted to USD 2,610,538.64 (Claimants' Submission on Costs, para. 33 and Table 1 in Appendix A).

<sup>929</sup> Claimants' Submission on Costs, paras 2-4.

<sup>930</sup> Claimants' Submission on Costs, para. 7.

<sup>931</sup> Claimants' Submission on Costs, para. 7.

<sup>932</sup> Claimants' Submission on Costs, paras 9-12.

527. The Claimants submit that in apportioning arbitration costs tribunals routinely follow the principle that costs follow the event, also with regard to legal costs.<sup>933</sup> They consider that this approach is justified in order to ensure that a claimant receives full reparation and is also the approach required under Swedish arbitration law.<sup>934</sup>
528. The Claimants note that the Parties agree that investment treaty tribunals usually apply the principle that costs follow the event and that the parties' conduct may be taken into account.<sup>935</sup> However, the Parties disagree as to the application of such principles to this case. According to the Claimants, the Respondent's conduct has led to a notable increase in the amount of time spent by counsel in this arbitration, which further justifies an award of costs in their favour.<sup>936</sup>
529. Furthermore, the Claimants deny the Respondent's allegation that their conduct has increased inefficiency or costs.<sup>937</sup> In particular, the Claimants argue that the reason why an additional round of pleadings was required was due to the filling of evidence and argument out of time by the Respondent in its Rejoinder.<sup>938</sup> Similarly, they deny that their application to vacate the Quantum Hearing and their request for interim measures were "frivolous" or "vexatious," and further affirm that they cannot be considered unsuccessful insofar as the Quantum Hearing was vacated and the

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<sup>933</sup> Claimants' Submission on Costs, paras 8, 12; *British Caribbean Bank Ltd. v. Government of Belize*, UNCITRAL 1976, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 325, **CLA-188**.

<sup>934</sup> Claimants' Submission on Costs, para. 8; S Brocker and K Löf, "Chapter 8 The Proceedings" in U Franke, A Magnusson et al (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law International 2013), paras 220-221, 236, **CLA-191**; U Franke, "National Report for Sweden (2018 through 2019)" in L Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 105, April 2019) (Kluwer Law International), p. 12, **CLA-192** ("The main rule in Swedish proceedings is that the losing party pays all costs reasonably necessary for the conduct of the winning party's case."). Cf. Claimants' Submission on Costs, paras 12-16; *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533, **CLA-79**; *Gemplus S.A., SLP S.A and Gemplus Industrial S.A. de C.V. v. The United Mexican States & Talsud S.A. v. The United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, paras 17-21 of Part XVII, **CLA-184**; *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 860, **CLA-139**; *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 563, **CLA-185**.

<sup>935</sup> Claimants' Reply Submission on Costs, paras 1-2.

<sup>936</sup> Claimants' Submission on Costs, para. 25. In particular, the Claimants criticize the Respondent's conduct in relation to four matters: (i) the submission of two counter-claims failing to particularize any cause of action, as well as the underlying facts and other legal requirements; (ii) the objection on the basis that reference of this dispute to arbitration is premature, which the Claimants deem as "manifestly flawed" and an attempt to re-open the Tribunal's prior decision on the issue; (iii) the inclusion of evidence and arguments out of time in the Rejoinder, which resulted in an additional round of pleadings; and (iv) the submission of evidence which, according to the Claimants is not authentic.

<sup>937</sup> Claimants' Reply Submission on Costs, paras 1, 7-24.

<sup>938</sup> Claimants' Reply Submission on Costs, para. 8.

Tribunal reminded the Parties of their ongoing duty not to aggravate the dispute and to arbitrate in good faith.<sup>939</sup> In the Claimants' view, "[t]hat direction was, in itself, a form of relief."<sup>940</sup>

530. Likewise, the Claimants deny having put forward "meritless factual allegations;"<sup>941</sup> having misrepresented the Respondent's position in relation to the GimcoAfrica Valuation Report;<sup>942</sup> having increased costs by submitting "voluminous exhibits that covered subject matter of limited relevance to [their] claim,"<sup>943</sup> and having "purposely intend[ed] to mislead the tribunal [...] [and] acted in bad faith."<sup>944</sup>
531. Hence, the Claimants submit that, if they broadly succeed overall, costs should follow the event and the Respondent should be ordered to bear all the arbitration costs and pay all of the Claimants' legal costs, plus interest thereon at the same rate as applied on damages, from the date of the award until the date of payment.<sup>945</sup> The Claimants point out that their legal fees include a success fee element and contend that such element is recoverable, as has been recognized in *Khan Resources*,<sup>946</sup> *Siag v. Egypt*,<sup>947</sup> and *Axos v. Kosovo*.<sup>948</sup> They further argue that their legal costs are reasonable, taking into account the importance of these claims for the Claimants, Mr Paglieri and Ms Perry.<sup>949</sup>
532. As to the costs claimed by the Respondent, although the Claimants acknowledge that the overall amount claimed is not unreasonable in the context of an international arbitration, they consider that the Respondent has failed to provide sufficient information to establish whether the specific fees and expenses claimed have been reasonably incurred and are reasonable in amount.<sup>950</sup>

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<sup>939</sup> Claimants' Reply Submission on Costs, paras 9-11.

<sup>940</sup> Claimants' Reply Submission on Costs, para. 11. The Claimants note that in Procedural Order No. 3, the Tribunal reserved its decision on costs in relation to the Claimants' application to vacate the Quantum Hearing and their request for interim measures, and request the Tribunal to order the Respondent to bear the Claimants' costs in making such applications (Claimants' Submission on Costs, para. 46).

<sup>941</sup> Claimants' Reply Submission on Costs, para. 12.

<sup>942</sup> Claimants' Reply Submission on Costs, paras 13-16.

<sup>943</sup> Claimants' Reply Submission on Costs, paras 17-23.

<sup>944</sup> Claimants' Reply Submission on Costs, para. 24.

<sup>945</sup> Claimants' Submission on Costs, paras 1, 23, 47.

<sup>946</sup> Claimants' Submission on Costs, para. 19; *Khan Resources Inc. and Others v. The Government of Mongolia and MonAtom LLC*, UNCITRAL 2010, PCA Case no. 2011-09, Award on the Merits, 2 March 2015, paras. 427(i), 445-447, **CLA-189**.

<sup>947</sup> Claimants' Submission on Costs, para. 20; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, paras 604, 625, 630, **CLA-94**.

<sup>948</sup> Claimants' Submission on Costs, para. 21; *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award, 3 May 2018, paras 269-271, 274-275, **CLA-190**.

<sup>949</sup> Claimants' Submission on Costs, paras 40-41.

<sup>950</sup> Claimants' Reply Submission on Costs, paras 1, 26-42. For instance, in relation to legal costs, the Claimants note that the Respondent has not indicated which billable rate has been used to calculate fees, nor has it stated the number of hours incurred.

**B. THE RESPONDENT’S POSITION**

533. The Respondent requests that the Claimants be ordered to pay all the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, and the costs in which the Government has incurred in pursuing this arbitration, including, without limitation, all legal and other professional fees associated with any and all proceedings undertaken in connection with this arbitration.<sup>951</sup>

534. The Respondent has provided the following summary of its costs and expenses:<sup>952</sup>

<b>DESCRIPTION OF THE COSTS</b>	<b>TSHS</b>	<b>USD\$ (at the Exchange Rate of (TZS1: 2,350/USD))</b>
Tribunal’s Fees	646,250,000	275,000.00
<b>COST OF LEGAL REPRESENTATION</b>		
State Attorneys	1,108,000,000.00	471,489.36
Administrative staffs	582,500,000.00	247,872.34
Other Civil Servants Costs	458,000,000.00	194,893.62
Witnesses Costs	90,000,000.00	8,297.87
Travelling costs	199,757,498.08	85,003.19
<b>SUB TOTAL</b>	<b>2,438,257,498.08</b>	<b>1,282,556.38</b>
<b>Cost of preparation of the application and application on interim measures</b>	<b>379,700,000.00</b>	<b>161,574.47</b>
<b>DISBURSEMENT COSTS</b>		
Hyper linking of Documents	2,500,000.00	1,063.83
Printing and photocopy costs	73,657,040.00	31,343.42
Conference room costs	328,000,000.00	139,574.47
Courier costs/Postage costs	5,000,000.00	2,127.66
Material and supplies	65,202,671.00	27,745.82
<b>SUB TOTAL</b>	<b>474,359,711.00</b>	<b>201,855.20</b>
<b>GRAND TOTAL COSTS</b>	<b>3,938,567,209.08</b>	<b>1,645,986.05</b>

535. According to the Respondent, the Tribunal has broad discretion under Article 38 of the UNCITRAL Rules to allocate costs.<sup>953</sup> The Respondent requests that costs be awarded on the basis of the principle that costs follow the event.<sup>954</sup>

<sup>951</sup> Statement of Defence, para. 345(d); Respondent’s Submission on Costs, para. 59.

<sup>952</sup> Respondent’s Submission on Costs, Annexure 1. The Respondent considers that its costs are entirely reasonable and submits that it has been “exceptionally conservative” in quantifying its costs (*cf.* Respondent’s Submission on Costs, paras 60-62).

<sup>953</sup> Respondent’s Submission on Costs, para. 12.

<sup>954</sup> Respondent’s Submission on Costs, para. 16.

536. The Respondent considers that it is common practice in international arbitration that the unsuccessful party bears the costs of the arbitration.<sup>955</sup> The Respondent is also of the view that having the principle of costs follow the event as a general rule is desirable from a policy perspective in order to prevent the successful party from having to pay to vindicate its legal rights.<sup>956</sup>
537. The Respondent submits that the Tribunal should also take into account the Parties' conduct and the nature of the case they have advanced when deciding on the allocation of costs.<sup>957</sup> In this regard, the Respondent denies any inappropriate procedural conduct on its part and argues that the Claimants' conduct has led to delay, inefficiency and increased costs.<sup>958</sup> In particular, the Respondent refers to the Claimants' request to have an additional round of written pleadings,<sup>959</sup> and their "frivolous" and "vexatious" application in relation to the Quantum Hearing.<sup>960</sup>
538. The Respondent considers that the Claimants were unsuccessful with regard to their application to vacate the Quantum Hearing and their request for interim measures, and asserts that they should bear the Respondent's expenses incurred in dealing with such applications.<sup>961</sup>
539. The Respondent requests that the Claimants be ordered to bear in full the fees and expenses of the Tribunal and other costs and expenses incurred by the PCA.<sup>962</sup> The Respondent also requests that the Claimants be ordered to reimburse the Respondent its legal costs and expenses within 60 days from the dispatch of the award, "increased by compounded interest at the rate of three month LIBOR (or such other rate as determined by the Tribunal) until full payment is received."<sup>963</sup>

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<sup>955</sup> Respondent's Submission on Costs, paras 18-23; *Canfor Corporation v. United States of America; Tembec et al v. United States of America; and Terminal Forest Products Ltd v. United States of America*, UNCITRAL, Joint Order on the costs of arbitration and for the termination of certain arbitral proceedings, 19 July 2007, paras 139, 149, **RLA-62**; *Khan resources Inc., et al v. Government of Mongolia and MonAtom LLC*, UNCITRAL, Award on the Merits, 2 March 2015, para. 432, **RLA-63**; *British Caribbean Bank v. Government of Belize*, Award, 19 December 2014, para. 325, **RLA-64**.

<sup>956</sup> Respondent's Submission on Costs, para. 18.

<sup>957</sup> Respondent's Submission on Costs, para. 25; *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 1253, **RLA-61**; Respondent's Submission on Costs, paras 38-47.

<sup>958</sup> Respondent's Submission on Costs, paras 27, 37; Respondent's Reply Submission on Costs, para. 25.

<sup>959</sup> Respondent's Submission on Costs, paras 28-30; Respondent's Reply Submission on Costs, para. 25.

<sup>960</sup> Respondent's Submission on Costs, paras 31-34, 52-57; Respondent's Reply Submission on Costs, para. 25.

<sup>961</sup> Respondent's Submission on Costs, paras 13, 36. The Respondent asserts that it incurred TZS 379,700,000 in addressing such application.

<sup>962</sup> Respondent's Submission on Costs, para. 85.e. The Respondent notes that its share of the Tribunal's fees payment amounts to USD 275,000 (TZS 646,250,000, *cf.* Respondent's Submission on Costs, para. 63 and Annexure 1); Respondent's Reply Submission on Costs, para. 30.e.

<sup>963</sup> Respondent's Submission on Costs, para. 85.f; Respondent's Reply Submission on Costs, para. 30.f.

540. In the alternative, the Respondent seeks an order that the Parties shall equally share the costs and expenses incurred in relation to these proceedings, including the fees and expenses of the Members of the Tribunal, and any other associated costs.<sup>964</sup>
541. As to the amount of costs claimed by the Claimants, the Respondent criticizes that their legal costs include amounts as from 2014 and considers that any legal costs incurred before the commencement of this arbitration should be excluded.<sup>965</sup>
542. The Respondent further argues that the success fee is not recoverable as a cost in this case because there is no clear legal basis on which it should be awarded and the amount claimed is vague.<sup>966</sup> In the Respondent's view, the cases invoked by the Claimants regarding success fees are distinguishable from the present case.<sup>967</sup> The Respondent further considers that awarding the success fee is unjustifiable and contends that success fees are prohibited under Swedish Law (where the seat of the arbitration is located) as well as under Tanzanian law.<sup>968</sup>
543. Finally, the Respondent disputes the inclusion of disbursements and travelling costs dating back to 2012, well before the commencement of this arbitration.<sup>969</sup>

### **C. THE TRIBUNAL'S DETERMINATION**

544. The relevant provisions for determining the allocation of costs are Articles 38 and 40 of the UNCITRAL Rules. Article 38 of the UNCITRAL Rules provides:

The arbitral tribunal shall fix the costs of arbitration in the final award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

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<sup>964</sup> Respondent's Submission on Costs, para. 85.h; Respondent's Reply Submission on Costs, para. 30.h.

<sup>965</sup> Respondent's Reply Submission on Costs, paras 7-10. The Respondent asserts that Claimants' legal costs incurred before the commencement of this arbitration would amount to USD 505,564.89 (*cf.* Respondent's Reply Submission on Costs, para. 8).

<sup>966</sup> Respondent's Reply Submission on Costs, paras 13-15, 18.

<sup>967</sup> Respondent's Reply Submission on Costs, paras 16-17.

<sup>968</sup> Respondent's Reply Submission on Costs, paras 19-20.

<sup>969</sup> Respondent's Reply Submission on Costs, paras 21-23.

- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

545. According to Article 39(1) of the UNCITRAL Rules, “[t]he fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.”

546. Article 40 of the UNCITRAL Rules further provides, in relevant part:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

[...]

547. Pursuant to Article 38 of the UNCITRAL Rules, the Tribunal shall fix the costs of arbitration in the final award. The Claimants have made advances in the amount of USD 275,000 and the Respondent in the amount of USD 200,000, which amount in total to USD 475,000.

548. As to Article 38(a), (b), (c) and (f) and Article 39 of the UNCITRAL Rules, according to paragraphs 12.2 and 12.4 of the Terms of Appointment agreed between the Parties and the members of the Tribunal, each member of the Tribunal shall be remunerated at the rate of USD 450 per hour for all work carried out in connection with the arbitration, and shall be reimbursed for all disbursements and charges reasonably incurred in connection with the arbitration, including but not limited to travel expenses, telephone, fax, delivery, printing, and other expenses. Based on the agreed rate, the fees of the members of the Tribunal amount to USD 45,675.00 for Sir David A R Williams, USD 119,250.00 for Dr Ucheora Onwuamaegbu and USD 131,400.00 for Dr Veijo Heiskanen. The travel and other expenses of the Tribunal amount to USD 21,682.53. The PCA’s fees and expenses for registry services, which were paid in accordance with the PCA’s Schedule of Fees, amount to USD 76,597.78. Other costs incurred (including costs of court reporting, catering, courier services, hearing venue services, office supplies and printing, telecommunications, and banking services) amount to USD 59,871.13. The non-refundable administrative fee for the analysis of the Claimants’ request for the designation



of an appointing authority by the Secretary-General of the PCA amounts to USD 2,363.60<sup>970</sup>, and the fee charged by the appointing authority, Prof. Fabien Gélinas, to act in such capacity amounts to USD 2,500. These last two fees were paid directly by the Claimants.

549. Accordingly, the total costs of the arbitration (excluding the legal and other costs incurred by the Parties under Articles 38(d) and (e) and 40(1)) amount to USD 459,340.04, of which USD 454,476.44 were paid from the deposit. This leaves an unused balance in deposit of USD 20,523.56. The PCA will provide the Parties with a statement of account after the issuance of this Award.
550. Article 40(1) of the UNCITRAL Rules provides that “the costs of arbitration shall in principle be borne by the unsuccessful party.” However, the arbitral tribunal may apportion each of such costs between the parties “if it determines that apportionment is reasonable, taking into account the circumstances of the case.” As summarized above, the Parties agree with this principle.
551. Having considered the relevant provisions of the UNCITRAL Rules and the Parties’ positions, the Tribunal considers it appropriate to apportion the arbitration costs, i.e. the costs and fees of the Tribunal, the costs and fees of the PCA, and other costs incurred in relation to the arbitration, in accordance with the costs follow the event principle, on which both Parties agree. In this connection, the Tribunal notes that the Claimants have prevailed on their main claim in this arbitration. In these circumstances, the Tribunal considers it appropriate that the Respondent be ordered to bear the arbitration costs. As set out in paragraph 549, the costs of the arbitration amount to USD 459,340.04 (of which USD 454,476.44 were paid from the deposit) and, as set out in paragraph 547, the Parties have deposited with the PCA USD 475,000, leaving an unexpended balance of USD 20,523.26. The PCA will reimburse the balance of the deposit in the proportion in which each side contributed to it (i.e. the PCA will reimburse USD 11,882.06 to the Claimants and USD 8,641.50 to the Respondent). Since the Claimants have advanced USD 275,000, the Respondent is ordered to reimburse USD 263,117.94 to the Claimants for the costs met from the Claimants’ share of the deposit. The Respondent is also ordered to reimburse the fees paid directly by the Claimants to the PCA for the designation of an appointing authority and to the appointing authority, totalling USD 4,863.60. In sum, the Respondent will reimburse USD 267,981.54 to the Claimants. This amount is payable within 60 days of the notification of this Award.
552. The Tribunal considers that the same considerations regarding the apportionment of the costs of arbitration are applicable to the legal and other costs incurred by the Parties under Articles 38(d)

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<sup>970</sup> Equal to EUR 2,000 as per the applicable exchange rate on 18 October 2017, which is the date on which this fee was paid by the Claimants (i.e. 1 EUR/1.1818 USD).

and (e), and that it is therefore appropriate to apportion these costs pursuant to the costs follow the event principle, on which both Parties agree. The Tribunal notes that the Claimants' cost claim includes a success fee element, which is quantified at 7% of the total compensation and interest awarded by the Tribunal. The Tribunal agrees that this cost element is recoverable in the circumstances of this case as it is an obligation that has already been incurred by the Claimants and reasonable in amount. In this connection, the Tribunal notes that, had the Claimants' counsel billed at their normal hourly rate, the Claimants' legal costs would have amounted to USD 2,610,538.64. In view of the amount awarded, the success fee payable under this award does not fully cover this amount (even taking into account fees that have been paid). Accordingly, the Tribunal considers it appropriate that the Respondent be ordered to reimburse the Claimants their legal and other costs, in the amount of USD 432,185, plus a success fee of 7% of the total compensation, within 60 days of the notification of this Award, together with simple interest thereon at the rate of 7 % from the 61st day after the date of notification of this award until the date of full and final payment.

## **XV. THE TRIBUNAL'S DECISION**

553. For the reasons set out above, the Tribunal finds, declares and awards as follows:

- (a) The Respondent's preliminary objections are dismissed;
- (b) The Claimants' claim that the Respondent has unlawfully expropriated the Claimants' investments is upheld;
- (c) Sunlodges BVI is awarded compensation for the Respondent's breach of its obligations under the Italy-Tanzania Bilateral Investment Treaty in the amount of USD 8,919,842.45, with interest at 7% per annum, compounded annually from 5 September 2011 until full payment of the award. This amount is payable within 60 days of the notification of this award;
- (d) Sunlodges Tanzania is awarded compensation for the Respondent's breach of its obligations under the Italy-Tanzania Bilateral Investment Treaty in the amount of USD 2,337,162, with interest at 7% per annum, compounded annually from 5 September 2011 until full payment of the award. This amount is payable within 60 days of the notification of this award;
- (e) The Respondent's counterclaims are dismissed;
- (f) The Respondent is ordered to bear the costs of arbitration;
- (g) The Respondent is ordered to reimburse (i) USD 263,117.94 to the Claimants for the costs met from the Claimants' share of the deposit; and (ii) USD 4,863.60 for the fees paid directly by the Claimants to the PCA for the designation of an appointing authority and to the appointing authority. These amounts are payable within 60 days of the notification of this award;
- (h) The Respondent is ordered to pay to the Claimants USD 432,185, plus a success fee of 7% of the total compensation, in compensation of their legal costs within 60 days of notification of this award, together with simple interest thereon at the rate of 7% from the 61st day after the date of the notification of this award until the date of full and final payment; and
- (i) All other requests for relief are dismissed.

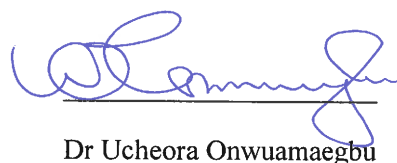
Seat of the arbitration: Stockholm, Sweden

Date: 20 December 2019 (corrected on 15 January 2020)

The Arbitral Tribunal



Sir David A R Williams QC



Dr Ucheora Onwuamaegbu



Dr Veijo Heiskanen

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**Statutory Notice to the Parties under the Swedish Arbitration Acts 1999 and 2019**

Pursuant to Section 41 of the Swedish Arbitration Act 1999 as revised on 1 March 2019, any action by a Party against this Award regarding the payment of remuneration of any arbitrator shall be brought before the Stockholm District Court within two (2) months from the date when a Party received the Award.