INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WESTWATER RESOURCES, INC.

Claimant

v.

THE REPUBLIC OF TÜRKIYE

Respondent

ICSID Case No. ARB/18/46

AWARD

Members of the Tribunal
Honourable Ian Binnie, C.C., K.C.
Professor Robert G. Volterra, Co-Arbitrator
Professor Brigitte Stern, Co-Arbitrator

Secretary to the Tribunal
Anneliese Fleckenstein

Date of dispatch to the Parties: 3 March 2023

REPRESENTATION OF THE PARTIES

Representing Westwater Resources, Inc.:

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Representing the Republic of Türkiye:

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Directorate-General of Law and Legislation
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and
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Mr. Serkan Yikarbaba
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Türk Ocağı Cad. No:2
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Republic of Türkiye
and
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United States of America
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INDEX OF ABBREVIATIONS

ABBREVIATION	MEANING
Adur	Adur Madencilik Limited
Anatolia	Anatolia Energy Limited
Article 121	Article 121 of the Mining Regulation
CIM	Canadian Institute of Mining
CIM Definition Standards	Canadian Institute of Mining Standards on Resources and Reserves Definitions and Guidelines
CIMVAL Standards	Canadian Institute of Mining Standards and Guidelines for Valuation of Mineral Properties
Claimant's Memorial	Claimant's Memorial on the Merits (27 January 2020)
Claimant's Reply	Claimant's Reply on the Merits (17 March 2021)
Claimant's Response on Bifurcation	Claimant's Response to the Respondent's Request for Bifurcation (30 March 2020)
CP	Competent Person, as defined under the JORC Code
CSA Global	Crow Schaffalitzky Associates
DCF	Discounted Cash Flow
EIA	Environmental Impact Assessment
IAEA	International Atomic Energy Agency
ICSID or the **Centre**	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Disputes Between States and Nationals of Other States
ICJ	International Court of Justice
ILC Articles	International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts
ISL	In situ leaching
ISR	In situ recovery
JORC Code	Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves
MENR or **Ministry of Energy**	Ministry of Energy and Natural Resources
MEU	Ministry of Environment and Urbanization

ABBREVIATION	MEANING
MIGEM	General Directorate of Mining Affairs
MTA	General Directorate of Mineral Research and Exploration
NPP	Nuclear Power Plant
OLC	Office of the Legal Counsellor of the Ministry of Energy
PCIJ	Permanent Court of International Justice
PEA	Preliminary Economic Analysis
PFS	Prefeasibility Study
PO	Procedural Order
Request for Arbitration	Westwater's Request for Arbitration (13 December 2018)
Request for Bifurcation	Turkey's Request for Bifurcation (11 March 2020)
Respondent's Counter-Memorial	Respondent's Counter-Memorial and Objections to Jurisdiction (14 September 2020)
Respondent's Rejoinder	Respondent's Rejoinder on the Merits (15 July 2021)
TAEK	Turkish Atomic Energy Authority
***Tethyan* Award**	*Tethyan Copper Co. Pty. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019)
Treaty	Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments
VCLT	Vienna Convention on the Law of Treaties
WACC	Weighted Average Cost of Capital
Westwater or the **Company**	Westwater Resources, Inc.

DRAMATIS PERSONAE

Individuals

[redacted]

[redacted]

Entities

Adur Madencilik Ltd. ("**Adur**") is a Turkish mining company that held the licenses to mine the largest uranium deposits in Turkey, known as the Temrezli and Sefaatli sites, until these licenses were cancelled by MIGEM. Before November 2015, Adur's ultimate parent company was Anatolia Energy Limited. Anatolia was acquired by Westwater Resources, Inc. by a share swap in November 2015.

Anatolia Energy Limited ("**Anatolia**") is an Australian mining company that owns Adur Madencilik Ltd. Anatolia was purchased by Westwater in 2015.

The General Directorate of Mining Affairs ("**MIGEM**") is the Turkish agency responsible for regulating the mining industry. MIGEM cancelled Adur's licenses due to a claimed conflict in the Turkish *Mining Law*.

The Ministry of Energy and Natural Resources ("**MENR**" or **Ministry of Energy**) is the Turkish authority responsible for regulating the energy sector. MIGEM is part of the Ministry of Energy and Natural Resources.

The General Directorate of Mineral Research and Exploration ("**MTA**") is the Turkish Government authority that conducts exploration activities. MTA discovered the Temrezli deposit in the 1980s.

The Turkish Atomic Energy Agency ("**TAEK**") is the Turkish Government agency responsible for regulating nuclear power and materials.

Westwater Resources, Inc. ("**Westwater**" or the "**Company**") is an American mining company that specializes in in-situ recovery. Westwater purchased Anatolia Energy Limited in November 2015.

PART 1 - INTRODUCTION

1. Westwater Resources, Inc., ("**Westwater**" or the "**Claimant**") brings this claim pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") and the Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments ("**Treaty**") which entered into force on 18 May 1990.

2. The respondent is the Republic of Türkiye ("**Turkey**" or the "**Respondent**").

3. The Claimant and the Respondent are collectively referred to as the "**Parties**".

4. [redacted]

5. [redacted]

6. [redacted]

7. [redacted]

[1] Claimant's Reply, 17 March 2021, para. 18 ("**Reply"**).

[redacted]

8. [redacted]

9. [redacted]

10. [redacted]

11. [redacted]

12. [redacted]

[2] Claimant's Memorial on Jurisdiction and Merits, 27 January 2020, para. 3 ("**Memorial**").
[3] Respondent's Counter-Memorial and Objections to Jurisdiction, 14 September 2020, para. 334 ("**Counter-Memorial**").

[redacted]

13. [redacted]

14. [redacted]

[redacted]

[4] Memorial, para. 35.
[5] **Exhibit R-0059**, Adur's Request to Consolidate Group IV(ç) Licences, 9 January 2018, para. 2.3.
[6] Expert Report of [redacted], p. 17, para. 2.6.11.

15. [redacted]

16. [redacted]

17. [redacted]

18. For the reasons that follow Westwater is entitled to:

(i) compensation for "investment costs" in the sum of USD 1,283,000;

(ii) no compensation in respect of future profits;

(iii) costs, but in light of divided success only 50% of its costs claim;

[7] **Exhibit R-0059**, at 2.3.

(iv) pre- and post-judgment interest compounded annually at the then current Secured Overnight Financing Rate (SOFR) plus 2% from the Valuation Date until the date of final payment.

PART 2 - PROCEDURAL HISTORY

19. On 13 December 2018, ICSID received a Request for Arbitration of the same date from Westwater Resources, Inc. against the Republic of Turkey, along with Exhibits C-1 to C-15 (the "**Request for Arbitration**").

20. On 21 December 2018, the Secretary General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

21. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention in the following manner: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.

22. On 21 January 2019, following appointment by the Claimant, Professor Robert Volterra, a national of Canada, accepted his appointment as arbitrator. On 4 March 2019, following appointment by the Respondent, Professor Brigitte Stern, a national of France, accepted her appointment as arbitrator. On 1 May 2019, upon appointment by his co-arbitrators, Judge Ian Binnie C.C., K.C., a national of Canada, accepted his appointment as presiding arbitrator.

23. In accordance with Article 37(2)(a) of the ICSID Convention, the Tribunal was constituted on 1 May 2019 consisting of the abovementioned members. Ms. Jara Mínguez Almeida was designated to serve as Secretary of the Tribunal.

24. The Tribunal held its first session by telephone conference on 17 July 2019, in accordance with ICSID Arbitration Rule 13(1).

25. On 5 September 2019, the Tribunal held a preliminary procedural consultation with the Parties by telephone conference.

26. Following the first session and the procedural consultation with the Parties, on 9 September 2019, the Tribunal issued Procedural Order ("**P.O.**") No.1 recording the agreement of the Parties on procedural matters. P.O. No. 1 established that, *inter alia*, the applicable Arbitration Rules would be those in effect from 10 April 2006, the procedural language would be English, and the place of the proceeding would be Washington D.C. P.O. No. 1 also set out the agreed procedural calendar to this arbitration, included as Annex B to that order.

27. On 27 January 2020, the Claimant filed its Memorial on the Merits (the "**Claimant's Memorial**") with Exhibits C-0001 to C-0079 and Legal Authorities CL-0001 to CL-0064. The pleading was accompanied by three Witness Statements and two Expert Reports, as follows: (i) [redacted]

28. On 11 March 2020, following an extension agreed by the Parties, the Respondent filed a Request to address the objections to jurisdiction as a preliminary question ("**Request for Bifurcation**"), with Exhibits R-0001 and R-0002 and Legal Authorities RL-0001 to RL-0013, in accordance with Annex B of P.O. No. 1.

29. Pursuant to Annex B of P.O. No. 1, on 30 March 2020, the Claimant filed its Response to the Respondent's Request for Bifurcation ("**Claimant's Response on Bifurcation**") with Exhibits C-0001-TUR, C-0080 and C-0081, and Legal Authorities CL-0065 to CL-0092.

30. On 31 March 2020, Ms. Veronica Lavista was designated to serve as Secretary to the Tribunal.

31. On 6 April 2020, the Tribunal invited the Parties' comments on which of the two versions of the Treaty submitted as exhibits C-1 and C-0001 on the record should be considered as authoritative for the purposes of this arbitration.

32. On 16 April 2020, the Parties agreed that the Tribunal should consider Exhibit C-0001 to be the authoritative English language version of the BIT.

33. On 28 April 2020, the Tribunal issued P.O. No. 2 concerning the Respondent's request to address the objections to jurisdiction as a preliminary question. By unanimity, the Tribunal decided to reject the Request for Bifurcation based on the Respondent's "Investment" objection; and by a majority, the Tribunal rejected Respondent's "negotiation period" objection. Professor Brigitte Stern dissented from the majority's decision on the Respondent's second ground of objection – failure to respect the Negotiation Period.

34. On 3 June 2020, following agreement by the Parties as of 14 May 2020, the procedural calendar was revised and attached as the second revised procedural timetable in Annex B to P.O. No. 1.

35. On 14 September 2020, the Respondent filed a Counter-Memorial and Objections to Jurisdiction ("**Counter Memorial**"), with Exhibits R-0003 to R-0088 and Legal Authorities RL-0014 to RL-0092. The pleading was accompanied by three Witness Statements and two Expert Reports, as follows: [redacted]

36. On 9 November 2020, following exchanges between the Parties, each Party submitted their request for the Tribunal to decide on production of documents.

37. On 1 December 2020, the Tribunal issued P.O. No. 3 concerning the Parties' requests for production of documents of 9 November 2020. The Tribunal's decisions on the Claimant's document requests were included in Annex A of P.O. No. 3, while the Tribunal's decisions on the Respondent's document requests were included in Annex B of P.O. No. 3.

38. On 8 December 2020, Ms. Anneliese Fleckenstein was designated to serve as Secretary of the Tribunal.

39. On 17 March 2021, the Claimant filed its Reply on the Merits ("**Reply**"), with Exhibits C-0082 to C-0233 and Legal Authorities CL-0093 to CL-0147. The pleading was accompanied by three Witness Statements and three Expert Reports, as follows: [redacted]

40. On 30 June 2021, the Tribunal informed the Parties that because of the COVID-19 pandemic, an in-person hearing would not be possible during the reserved hearing dates of 13-17 September 2021, and invited the Parties to make arrangements for a virtual hearing on the scheduled dates.

41. On 15 July 2021, according to the parties' agreed short extension of the deadline, the Respondent filed its Rejoinder on the Merits ("**Rejoinder**"), with Exhibits R-0089 to R-0205 and Legal Authorities RL-0093 to RL-0146. The pleading was accompanied by three Witness Statements and three Expert Reports, as follows: [redacted]

[redacted].

42. On 12 July 2021, the Secretary of the Tribunal transmitted Draft P.O. No. 4 regarding the logistics of the hearing for the Parties' comments. On 29 July 2021, the Parties submitted their comments to the Draft P.O. No. 4.

43. On 18 August 2021, the President of the Tribunal and the Parties held a Pre-Hearing Conference to discuss items in Draft P.O. No. 4.

44. On 23 August 2021, the Tribunal issued P.O. No. 4 concerning the organization of the Hearing.

45. A hearing on the merits was held via Zoom from 13 September to 17 September 2021 (the "Hearing"). The following persons were present at the Hearing:

Tribunal:

Hon. Ian Binnie	President
Prof. Brigitte Stern	Arbitrator
Prof. Robert Volterra	Arbitrator

ICSID Secretariat:

Ms. Anneliese Fleckenstein	Secretary of the Tribunal

On behalf of the Claimant:

Mr. John Townsend	Hughes Hubbard & Reed LLP
Mr. James Boykin	Hughes Hubbard & Reed LLP
Mr. Terence Healy	Hughes Hubbard & Reed LLP
Mr. Malik Havalic	Hughes Hubbard & Reed LLP
Ms. Eleanor Erney	Hughes Hubbard & Reed LLP
Mr. Alexander Bedrosyan	Hughes Hubbard & Reed LLP
Mr. James Canfield	Hughes Hubbard & Reed LLP
Mr. John Lawrence	Westwater Resources, Inc.
Mr. Jeff Vigil	Westwater Resources, Inc.

On behalf of the Respondent:

Mr. Thomas K. Sprange	King & Spalding LLP
Mr. Sajid Ahmed	King & Spalding LLP
Mr. Viren Mascarenhas	King & Spalding LLP
Mr. Charles B. Rosenberg	King & Spalding LLP
Ms. Lisa Wong	King & Spalding LLP
Mr. Joshua S. Wan	King & Spalding LLP
Ms. Vivasvat Dadwal	King & Spalding LLP
Ms. Emma Iannini	King & Spalding LLP
Mr. Süleyman Önel	Ministry of Energy and Natural Resources
Mr. Serkan Yıkarbaba	Ministry of Energy and Natural Resources
Mr. Damla Cihan Alat	Ministry of Energy and Natural Resources
Ms. Ezgi Ceren Çubuk	Ministry of Energy and Natural Resources
Mr. Ahmet Sefa Dinleyici	Ministry of Energy and Natural Resources
Ms. Övgü Sena Yılmazer	Ministry of Energy and Natural Resources
Mr. Mehmet Teoman Çetin	Ministry of Energy and Natural Resources
Ms. Melike Geylan	Ministry of Energy and Natural Resources

Mr. Serhat Eskiyörük	Ministry of Energy and Natural Resources
Mr. Abdullah Oyanik	Ministry of Energy and Natural Resources
Mr. Cevat Genç	General Directorate of Mining and Petroleum Affairs
Mr. Vedat Yanik	General Directorate of Mining and Petroleum Affairs
Mr. Muzaffer Büyükgenç	General Directorate of Mining and Petroleum Affairs
Mr. Hakki Susmaz	Presidency of the Republic of Turkey
Ms. Eda Manav Özdemir	Presidency of the Republic of Turkey
Mr. Üzeyir Karabıyık	Presidency of the Republic of Turkey
Ms. Açelya Şahin	Presidency of the Republic of Turkey

Court Reporter:

Marjorie Peters	Worldwide Reporting, LLP

Interpreters:

Ms.Hande Guner	Enterkon, Inc.
Ms. Ahu Latifoglu Dogan	Enterkon, Inc.
Ms. Verda Kivrak	Enterkon, Inc.

During the Hearing, the following persons were examined:

On behalf of the Claimant:

Witnesses:

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

Experts:

[redacted]	[redacted]

[redacted]

On behalf of the Respondent:

Witnesses:

[redacted]

Experts:

[redacted]

46. On 27 September 2021, the Tribunal sent the Parties a list of questions to be answered in their post-hearing briefs.

47. Pursuant to P.O. No. 4, on 1 October 2021, the Parties submitted their agreed corrections to the hearing transcripts.

48. On 25 October 2021, the Parties jointly informed the Tribunal of their agreement to extend the deadline for the post-hearing brief submissions to 5 November 2021. In response to the Tribunal's questions of 27 September 2021, the Parties also informed the Tribunal of their intention to submit new legal authorities in support.

49. The Parties filed simultaneous post-hearing briefs on 5 November 2021.

50. On 14 January 2022, the Centre informed the Parties of a supervening scheduling conflict for one of the Tribunal members which would make proceeding with the oral hearing, tentatively scheduled for 31 January 2022, impossible. The Centre further indicated that the Tribunal was working through the written submissions, and it would inform the Parties should it wish to pose oral questions to counsel.

51. The Parties filed their submissions on costs on 10 October 2022.

52. The proceeding was closed on 18 November 2022.

53. On 8 February 2023, the Claimant requested that the Tribunal suspend its deliberations until March 1, 2023. On 9 February 2023, the Respondent was invited to comment on such request and on 16 February 2023, the Respondent stated that it had no objection to such request. In view of the Parties' positions, on 17 February 2023, the Tribunal stayed its deliberations until 1 March 2023.

PART 3 - STATEMENT OF FACTS

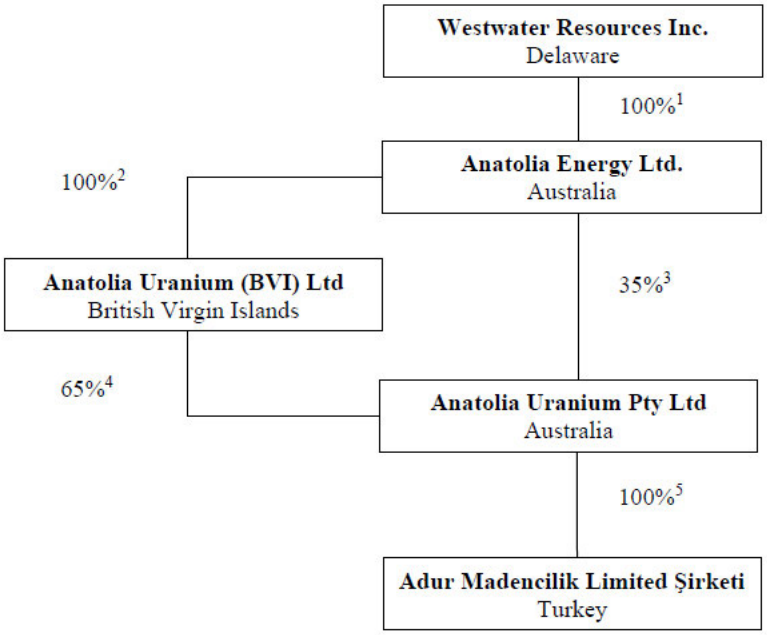
54. [redacted]

[8] Annex A to Westwater's Post-Hearing Submission, 5 November 2021.

[redacted]

55. [redacted]

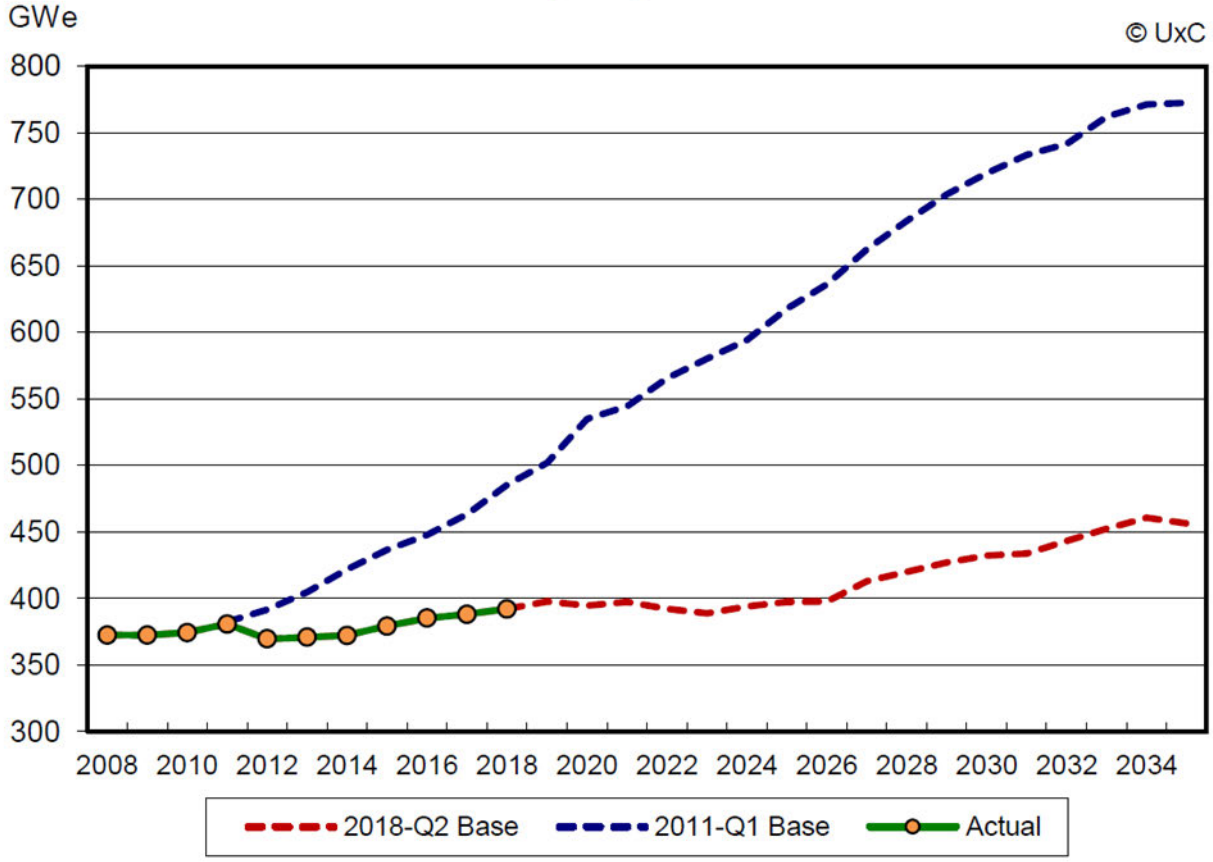
56. [redacted]



[9] Memorial, para. 26.
[10] Memorial, para. 26.

[redacted]

Figure 8. UxC Base Case Nuclear Capacity Forecasts Before & After Fukushima



Source: UxC Nuclear Power Outlook, Q2 2018

[redacted]

[11] [redacted]

[12] Counter-Memorial, para. 9.

58. [redacted]

A. Regulatory Licenses

59. [redacted]

60. [redacted]

61. [redacted]

62. [redacted]

[13] Memorial, para. 27.
[14] [redacted]
[15] **Exhibit BD-0014**, *Mining Law*, Article 3.
[16] **Exhibit BD-0014**, *Mining Law*, Articles 7, 24(11).
[17] **Exhibit BD-0014**, *Mining Law*, Articles 7, 24(11).
[18] **Exhibit BD-0014**, *Mining Law*, Article 17.
[19] **Exhibit BD-0014**, *Mining Law*, Article 24(11).

[redacted]

63. [redacted]

B. In-Situ Mining

64. [redacted]

65. [redacted]

C. Evaluating the Size of the Uranium Deposits

66. [redacted]

[20] [redacted]

[21] For a complete description of the ISR process and how it compares to traditional mining techniques, see [redacted]

[22] [redacted]

[23] [redacted]

[25] For a description of the Turkish licensing regime and a list of the relevant licenses, see [redacted]

[26] [redacted]

67. [redacted]

68. [redacted]

D. The 2015 Pre-Feasibility Study

69. [redacted]

70. [redacted]

[27] Counter-Memorial, paras. 10-11.
[28] Counter-Memorial, para. 11.
[29] **Exhibit C-0021**, Anatolia Energy Pre-Feasibility Study, 5 March 2015, 26-1.
[30] **Exhibit C-0021**, Anatolia Energy Pre-Feasibility Study, 24-2.

[redacted]

71. [redacted]

72. [redacted]

73. [redacted]

[redacted]

[38] Counter-Memorial, para. 14.
[39] Counter-Memorial, para. 18.

74. [redacted]

75. [redacted]

76. [redacted]

[40] **Exhibit C-0044**, [redacted]

[41] [redacted]

Confidence Classification	CSA Global (lbs. eU_3O_8)	Daviess/Moran URI (lbs. eU_3O_8)
Measured	6,099,877	0
Indicated	5,187,972	9,122,000
Inferred	2,004,782	3,344,000
TOTAL	**13,292,631**	**12,466,000**

[42] [redacted]

E. Working Towards Regulatory Approval

77. [redacted]

(6) [redacted];

[43] Memorial, para. 29.

78.

79.

80.

81.

82.

[44]
[45] Counter-Memorial, para. 22.
[46]
[47] Memorial, para. 33.
[48] Memorial, para. 33.

[redacted]

83. [redacted]

84. [redacted]

85. [redacted]

[49] [redacted]

[50] Memorial, para. 35.

[51] [redacted]

[52] [redacted]

[53] [redacted]

[54] [redacted]

[55] [redacted]

[56] **Exhibit R-0059**, Adur's Request to Consolidate Group IV(ç) Licenses, 9 January 2018, at s. 2.3.

[redacted]

F. The Cancellation of the Licenses

86. [redacted]

87. [redacted]

88. [redacted]

[57] [redacted]

[redacted]

[redacted]

89. [redacted]

90. [redacted]

[redacted]

91. [redacted]

[redacted]

[62] [redacted]

[63] Counter-Memorial, para. 26.

[64] [redacted]

92. [redacted]

93. [redacted]

94. [redacted]

96.

97.

[72]
[73] Counter-Memorial, para. 191.
[74]

[redacted]

98. [redacted]

([redacted]

99. [redacted]

(d) [redacted]

100. [redacted]

[redacted]

79 [redacted]

[redacted]

101. [redacted]

102. [redacted]

[redacted]

103. [redacted]

104. [redacted]

[redacted]

[81] [redacted]

[86] **Exhibit C-0006**, Letters from MIGEM to Adur, 19-20 June 2018.
[87] Counter-Memorial, para. 205; **Exhibits R-0064** to **R-0069**.

[redacted]

105. [redacted]

106. [redacted]

G. Attempts to Resolve Compensation Through Consultation and Negotiation

107. [redacted]

108. [redacted]

[88] **Exhibit R-0064**.
[89] Counter-Memorial, para. 235.
[90] [redacted]

[redacted]

109. [redacted]

110. [redacted]

111. [redacted]

112. [redacted]

[redacted]

101 [redacted]

102 [redacted]

[redacted]

113. [redacted]

114. [redacted]

115. [redacted]

116. [redacted]

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103 [redacted]

117.

118.

112

[redacted]

119. [redacted]

120. [redacted]

[redacted]

[redacted]

[redacted]

119 [redacted]

[redacted]

121. [redacted]

[redacted]

120 [redacted]

[redacted]

122. [redacted]

[redacted]

123. [redacted]

[redacted]

PART 4 - JURISDICTION OVER WESTWATER'S CLAIMS

124. The Respondent submits that ICSID and therefore the Tribunal does not have jurisdiction to adjudicate Westwater's claims because:

(i) Westwater does not have an "*investment*" within the meaning of either the BIT or the ICSID Convention;

(ii) Westwater did not comply with the mandatory negotiation period in Article VI(3) of the BIT and non-compliance:

a) deprived the Tribunal of jurisdiction;

b) prejudiced the Respondent; and

c) cannot be cured by the BIT's MFN clause.

125. It is common ground that Westwater bears the burden of establishing the facts necessary to establish the jurisdiction of the Tribunal.[129]

[128] [redacted]

[129] See, *e.g.*, **Exhibit RL-0061**, *Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011, para. 97 ("Where an investment is owned and/or controlled by the investor/claimant through a series of corporations, typically the claimant will adduce evidence as to how it owns or controls such investment."); **Exhibit RL-0076**, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, para. 112 (examining whether the investor fulfilled its burden of proof regarding the investment).

A. The Requirement of an "Investment" Within the Meaning of the BIT and the ICSID Convention

126. It is also common ground that a qualifying investment must (i) be covered by the Contracting Parties' consent under the BIT;[130] and (ii) meet the requirements under the ICSID Convention. Thus, the Tribunal's jurisdiction *ratione materia*e rests on the "intersection of ... two definitions,"[131] or a "double keyhole."[132]

127. Westwater contends (and the Respondent denies)[133] that Westwater has an "investment" within the meaning of Article I(1)(c) of the BIT[134] on the basis that it has: (i) an "indirect shareholding in Adur;" and (ii) a "corresponding interest in Adur's assets," namely, the "exploration and operating licenses pertaining to Temrezli, Sefaatli, and Sorgun-Cegdemli uranium mines."[135] Such assets satisfy the definition of "investment" in Article I(1)(c)(ii) ("shares of stock ... in a company" and "interests in the assets thereof"). The exploration and operating licenses themselves also satisfy the definition of "investment" in Article I(1)(v) ("any licenses and permits pursuant to law").

128. The Respondent states[136] that Westwater has failed to provide any proper documentary

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[130] Article I(1)(c) of the BIT defines an "investment" as:

> [E]very kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts; and includes;
>
> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
>
> (ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual property, including rights with respect copyrights and related patents, trade marks and trade names, industrial designs, trade secrets and know-how, and goodwill.
>
> (v) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
>
> [(vi)] reinvestment of returns and of principal and interest payments arising under load agreements.

[131] **Exhibit RL-0092**, *Phoenix Action, LTD v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 74 ("[T]he jurisdiction *ratione materiae* of the Tribunal rests on the intersection of the two definitions.").

[132] See, *e.g.*, **Exhibit RL-0017**, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 107; **Exhibit RL-0011**, *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on *Jurisdiction*, 27 September 2012, paras. 211, 213.

[133] Counter-Memorial, paras. 252-256.

[134] **Exhibit C-0001**, U.S.-Turkey BIT.

[135] Memorial, para. 75.

[136] [redacted]

evidence of the chain of ownership of its alleged investment in Adur[137] and, in its view, Westwater's assertion or various regulatory filings and a chart attached to Mr. Er's First Witness Statement do not provide sufficient proof. Westwater has failed to satisfy its burden of demonstrating that it has an "investment" under Article I(1)(c) of the BIT and its claim should be dismissed on that ground alone.

B. The Tribunal's Ruling on Whether Westwater Made an "Investment" Within the Scope of Article I(1)(c) of the BIT

129. The Tribunal is satisfied that when Westwater acquired Anatolia and indirectly the Adur mining project in Turkey and subsequently made development expenditures, it made an investment in Turkey within the scope of the BIT.

130. While Westwater's documentary productions are thin in respect of the ownership of Anatolia, and though the Tribunal would have preferred to have more extensive evidence on the subject, the Tribunal has concluded on the evidence that it is more probable than not that Westwater owns Anatolia and Anatolia owns Adur. Mr. Cevat Er testified about the chain of titles leading to Westwater. The Tribunal has no reason to disbelieve the evidence. The official documentation including U.S. regulatory filings is consistent with Westwater ownership. The Respondent has treated Westwater as a lawful foreign investor since 2015. There is no contrary evidence before the Tribunal. The Respondent has not pointed to any document in the record which might throw doubt on the chain of Westwater's ownership and control of the investment.

[redacted]

[137] Counter-Memorial, para. 254. **Exhibit C-0004**, Organisation Chart of Westwater's Investment in Adur. Namely (i) Westwater's acquisition of Anatolia Energy (Australia); (ii) Anatolia Energy's 100% ownership of Anatolia Uranium (BVI) Ltd. (British Virgin Islands); (iii) Anatolia Uranium (BVI) Ltd.'s 65% ownership of Anatolia Uranium Pty Ltd. (Australia); (iv) Anatolia Energy's 35% ownership of Anatolia Uranium Pty Ltd.; and (v) Anatolia Uranium Pty Ltd.'s 100% ownership of Adur.

In the Tribunal's view, Westwater made an investment through Anatolia and through Anatolia has indirectly invested in Adur's licenses and its uranium project as well as, in addition, made subsequent investments in Adur's exploration and regulatory activities.

131. The Respondent's denunciation of the alleged poor quality of Westwater as a "desperate uranium company"[138] as well as the Respondent's attack on the frailties of the uranium projects both at the time of the acquisition and the time of cancellation[139] may call into question the value of Westwater's investment but not the existence of an investment. Once it is established that a qualifying investment was made, the valuation issue focuses on the date of the alleged breach (the "Valuation Date"), not the value at the time of the original acquisition.

132. The Tribunal does not agree with the Respondent that Westwater's claim should be reduced by the value of Adur's investment in the mining project prior to Westwater's acquisition of Anatolia. The theory that a foreign investor which buys into an ongoing project in the host country is to be protected by the BIT only for post-acquisition expenditures would not only deny full market value of the asset but would discourage foreign investment in ongoing development projects and undermine achievement of the objectives of the BIT. An investor steps into the shoes of the vendor and acquires what the vendor owned although aspects of the transaction have to be examined to determine whether the investment thus purchased is protected by the BIT and the ICSID Convention.

133. Accordingly, Westwater made an investment within the scope of Article 1(i)(c) of the BIT.

C. Did Westwater Make an "Investment" Under Article 25 of the ICSID Convention

134. Article 25(1) of the ICSID Convention establishes jurisdictional requirements:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

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[138] Counter-Memorial, para. 12.
[139] Counter-Memorial, paras. 20-23.

135. Thus, Article 25 requires a Claimant to establish on a balance of probabilities the existence of a dispute (1) between a Contracting State and a national of another Contracting State ("jurisdiction *ratione personae*"); (2) a legal dispute arising directly out of an investment ("jurisdiction *ratione materiae*"); and (3) one that the parties to the dispute have consented in writing to submit to the Centre ("jurisdiction *ratione voluntatis*").

*(i) **Jurisdiction ratione personae***

136. It is incumbent on Westwater to establish that this dispute is between a Contracting State and a national of another Contracting State to the Convention.[140] The Republic of Turkey has been a Contracting State to the Convention since 2 April 1989.[141] The United States has been a Contracting State to the Convention since 14 October 1966.[142]

137. Article VI(2) of the BIT clarifies that the "investment dispute" must be "between a Party and a national or company of the other Party."[143] Westwater is a publicly traded company incorporated under the laws of the State of Delaware, U.S.A. on 12 September 1977.[144] Nationals of the United States of America collectively own at least 52 percent of Westwater's outstanding shares, which qualifies as a "substantial interest" under United States law.[145] Westwater is therefore a "company of a Party."[146] The dispute between Respondent and Westwater is thus between a Party and a company of the other Party.

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[140] Article 25(2)(b) defines "National of another Contracting State" as "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration...."

[141] See **Exhibit C-0031**, Database of ICSID Member States, ICSID (last accessed 27 January 2020), https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx#.

[142] See **Exhibit C-0031**, Database of ICSID Member States, ICSID (last accessed 27 January 2020), https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx#.

[143] Article I(1)(b) defines a "company of a Party" as "a company duly incorporated ... under the applicable laws and regulations of a Party or a political subdivision thereof in which (i) natural persons who are nationals of such Party…have a substantial interest as determined by such Party. The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions."

[144] The Company was originally incorporated under the name Uranium Resources, Inc. in 1977. On 13 August 1987 it reincorporated, again in Delaware, under the name Westwater Resources, Inc. See **Exhibit C-0069**, Delaware Secretary of State Website Entries, File Numbers 843318 and 2134922; see also **Exhibit C-0002**, Certificate of Good Standing for Westwater.

[145] See **Exhibit C-0024**, 15 U.S.C. s. 78m(d) (requiring persons to disclose acquisition of more than five per cent of the beneficial ownership of a class of securities issued by a publicly traded legal entity).

[146] See *supra* n. 143.

The Tribunal's Ruling With Respect to Jurisdiction *Ratione Personae*

138. The Tribunal has already discussed, and rejected, the Respondent's challenge to Westwater's ownership of Anatolia and (through Anatolia) of Adur. That being the case, the dispute arises out of the alleged unfair and inequitable treatment of (and expropriation of) Westwater's investment in violation of the BIT. It therefore "involv[es] ... an alleged breach of any right conferred or created by this Treaty with respect to an investment," as required by Article VI(1)(c).

139. Moreover, as Westwater points out, Adur is a Turkish company and the Temrezli, Sefaatli, and Sorgun-Cigdemli mines are located in Turkey, therefore the investment is "in the territory" of Respondent. Article I(1)(d) expressly covers Westwater's indirect ownership of these investments through foreign subsidiaries.[147]

(ii) ***Jurisdiction ratione materiae***

140. The Respondent argues,[148] as mentioned, that a long line of ICSID cases, subject to minor variations, has established four cumulative criteria to determine whether an investment qualifies under Article 25(1) of the Convention namely: (i) a contribution of money or assets, (ii) a certain duration; (iii) an element of risk; and (iv) a contribution to the host State's economic development (factors commonly referred to as the "*Salini* test").[149]

141. The Respondent contends[150] that Westwater has failed to prove that it satisfies at least two prongs of the *Salini* test, namely (i) a contribution of money and assets, and (ii) a contribution to the Respondent's economic development.

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[147] See **Exhibit C-0004**, Organization Chart of Westwater's Interest in Adur.
[148] Counter-Memorial, para. 259.
[149] See, *e.g.*, **Exhibit RL-0012**, *Salini*, para. 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction ... In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition."); **Exhibit RL-0045**, *Jan de Nul*, para. 91 (stating elements of the *Salini* test); **Exhibit RL-0070**, *Saipem*, para. 99 (applying the "*Salini* test"); **Exhibit CL-0048**, *Kardassopoulos*, para. 116 (applying the "set of conjunctive criteria" found within the *Salini* test).
[150] Counter-Memorial, para. 267.

142. The Respondent says that under the first prong of the *Salini* test, the investor must establish a "substantial commitment"[151] in the form of money and assets or "in terms of know-how, equipment, personnel and services."[152] However, (i) "much of Adur's investments occurred before Westwater engaged in the share-swap transaction with Anatolia Energy;"[153] (ii) Westwater did not expend any financial capital in the share swap; (iii) cannot claim credit for the pre-swap exploration activity; and (iv) there was negligible post-swap activity because Westwater essentially put the project to sleep in early 2016.

143. The Respondent says Westwater also fails the final prong of the *Salini* test, because it did not contribute to the Republic's economic development. It was nowhere close to obtaining the basic permits and authorisations required to begin mining operations and its alleged investments are best characterised as pre-investment expenditures.[154] The mine, according to the Respondent, was neither developed nor "closer to production" after Westwater's acquisition. Indeed, according to the Respondent,[155] Adur lacked the most basic conditions to launch its project:

(1) Westwater acknowledged that it needed to update the PFS that Tetra-Tech had completed in 2015, but never ultimately did so;

(2) Westwater concedes that its independent consultants, Daviess and Moran, had not identified any Proven or Probable Mineral Reserves in the Temrezli deposit, and more work needed to be done to determine whether production from the mine would be economically viable;

(3) Adur failed to obtain the necessary Environmental Impact Assessment needed to take the project forward;

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[151] **Exhibit RL-0036**, *Fedax N.V.*, para. 43 ("The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.")
[152] **Exhibit CL-0012**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at 130 (describing the practice of tribunals). See also, **Exhibit RL-0073**, *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction, 13 September 2007, para. 96 ("[The] Tribunal decides that Sistem had made an investment, in the form of its investment of know-how and services in the construction of the hotel, its operation of the hotel, its purchase of Ak-Keme's share of the participation in the project, its payment of Ak-Keme's debts, and its reinvestment of (a share of) its profits from the running of the hotel.").
[153] Counter-Memorial, para. 269.
[154] Counter-Memorial, para. 275.
[155] Counter-Memorial, para. 277.

(4) Adur similarly failed to advance beyond the most basic steps in TAEK's complex authorisation procedures;

(5) Adur similarly failed to acquire ownership or lease rights to all the land above the Temrezli mine;

(6) while Westwater contends that it contributed to the economy by "transferr[ing] know-how,"[156] its evidence is limited to one technical presentation in Istanbul by the General Manager of Adur, done in September 2017;[157]

(7) much of Westwater's alleged contribution occurred in the United States (and not in the Republic of Turkey).

144. Westwater contests the relevance and applicability of the *Salini* test[158] but says that in any event, the Respondent concedes that the Claimants' investment satisfies two of the four *Salini* factors, namely that the investment be of a "certain duration" and entail an "element of risk":

(i) as to the "contribution of money or assets," Westwater notes that it acquired an asset in the host state in exchange for consideration; the consideration can take the form of equity, and may be tendered abroad.[159] Westwater satisfied this requirement by paying USD 1,497,000 of cash and issuing over 20.5 million shares

[156] Bifurcation Response, para. 33.
[157] Counter-Memorial, para. 279.
[158] Bifurcation Response, para. 23.
[159] See **Exhibit RL-0011**, *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 229 ("First, the Respondent alleges that none of the Claimants has made a contribution of money or assets. However, as the Tribunal previously concluded, the evidence shows that Quiborax paid for 51% of the shares of NMM. Regardless of where payment was made, this qualifies as a contribution of money because the object of the payment and *raison d'être* of the transaction – the mining concessions – were located in Bolivia. In addition, whereas NMM did not strictly speaking 'purchase' the original seven mining concessions, as the Claimants have alleged, the record shows that it did issue 26,680 shares in exchange for them. Accordingly, Quiborax made a monetary contribution and NMM a contribution of assets."); **Exhibit RL-0038,** *Georg Gavrilovic & Gavrilovic d.o.o. v. Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, para. 205 ("The Respondent argues that there was no contribution in Croatia because the purchase price was directed to a Swiss bank account and not to the bankruptcy accounts of each of the Five Companies.... [T]hat does not in the Tribunal's view change the operative fact that Mr Gavrilović, in purchasing the Five Companies, obtained an asset in Croatia. The modern reality is that payments for assets are not always made to accounts located in the same place as the assets underlying the transaction."); see also **Exhibit CL-0106**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 92, 188(ii), 200 (claimant satisfied *Salini*-test in part because of the resources it committed to the local investment, which included equity contributions).

in order to acquire Anatolia;[160]

(ii) after acquiring Adur, Westwater spent over USD 1.2 million,[161] including paying license fees to MIGEM.[162] It continued paying the salary of Mr. Er, who remained on the ground in Temrezli,[163] and of its other staff members working on the project in Turkey and the United States. The fact that some of these contributions occurred in the United States rather than Turkey is irrelevant[164] because in both cases the expenditures benefitted Turkey;

(iii) even sources cited by the Respondent agree that the proper inquiry is whether *the investment* would have contributed to the hose state's economic development *if the investment had succeeded*.[165] Otherwise an investment which was immediately prevented by wrongful acts or omissions of the host State could never qualify for protection as an investment, although such protection would be most needed in such a case.[166] Here there is no question that, if Westwater had been permitted to put

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[160] See **Exhibit C-0191**, Uranium Resources, Form 8-K, 9 November 2015; VP-28 Westwater Resources 10-K, 2015, 18 March 2016, p. 1.

[161] See **Exhibit VP-028**, Westwater Resources 10-K, 2015, 18 March 2016, p. 53 (listing "Mineral Property Expenses" of USD 407,000 for the Temrezli Project); **Exhibit VP-041**, Westwater Resources 10-K, 2016, 2 March 2017, p. 51 (listing "Operating Expenses" of USD 498,000 for the Temrezli Project); **Exhibit VP-042**, Westwater Resources 10-K, 2017, 1 March 2018, p. 56 (listing "Operating Expenses" of USD 196,000 and "Mineral Property Expenses" of USD 66,000 for the Temrezli Project); **Exhibit VP-043**, Westwater Resources 10-K, 2018, 15 February 2019, p. 51 (listing "Operating Expenses" of USD 117,000 for the Temrezli Project); see also **Exhibit C-0119**, 2015-2018 Detail Budget Variance Reports (ADUR COSTS); Er Second Witness Statement, para. 14.

[162] See **Exhibit C-0025-TUR**, Letter No. 16363374-100-E.443856 from Murat Halit Durceylan (MIGEM) to Adur, 27 December 2016; **Exhibit C-0197-TUR**, Letter from Adur Madencilik re: Administrative Fines, 13 January 2017.

[163] Jones First Witness Statement, para. 31.

[164] **Exhibit CL-0017 FR**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, para. 14(i) ("In other words, the Contractor must have committed outlays, in some way, in order to pursue an economic objective. It is often the case that these investments are made in the country concerned, but that again is not an absolute condition. Nothing prevents investments from being committed, in part at least, from the contractor's home country, as long as they are allocated to the project to be carried out abroad.... The fact that the amounts claimed may, as the Respondent argues, cover primarily expenses incurred in the Claimant's home country is not in itself a determining factor, as noted above.").

[165] **Exhibit RL-0020**, *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras. 2-3, 88 (finding that the Consolidation Agreement – had it been honored – would have contributed to the Slovakian economy because its "goal" was to privatize and re-capitalize CSOB and expand the latter's activity in Slovakia).

[166] **Exhibit CL-0114**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, para. 114; see id. ("The Arbitral Tribunal agrees that a contribution to an actual economic development of the host state is not always a *conditio sine qua non* to qualify as investment under Article 25 of the ICSID Convention.") See also **CL-0115**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 133; **Exhibit CL-0095**, *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009.

the Temrezli mine into production, the mine would have contributed to Respondent's economic development. The Respondent itself viewed the development of its indigenous uranium resources (including those at Temrezli) as part of a "Strategic Plan" to supply its nuclear power plants, reduce its dependency on imported national gas, and meet other goals;[167]

(iv) as to the Respondent's argument that "all of the prospecting and exploration work done by Adur had been completed before Westwater executed the share-swap transaction with Anatolia Energy,"[168] the Respondent itself cites the *Fedax v. Venezuela* and *Ambiente v. Argentine Republic* cases where, the claimants, like Westwater, had purchased a pre-existing asset. In those cases, the pre-existing assets were sovereign bonds that claimants acquired on the secondary market rather than as part of the original issue.[169] Nevertheless, these cases demonstrate that if a pre-existing investment contributed to the host state's economic development, a subsequent purchaser of that investment is credited with that contribution for purposes of assessing whether this "factor" supports a finding that a claimant had an "investment" within the meaning of Article 25 of the ICSID Convention. In this case, because Respondent implicitly concedes that Adur's exploration work prior to its acquisition by Westwater contributed to the development of the Turkish economy, then this factor supports the conclusion that Westwater had an investment under Article 25 of the ICSID Convention;[170]

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[167] See **Exhibit C-0168-TUR**, Ministry of Energy and Natural Resources (MENR) Strategic Energy Plan 2015-2019, pp. 33, 41.
[168] Counter-Memorial, para. 276.
[169] **Exhibit RL-0036**, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras. 37-38, 40; **Exhibit RL-0020**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 500.
[170] Counter-Memorial, para. 276 ("all of the prospecting and exploration work done by Adur had been completed before Westwater executed the share-swap transaction with Anatolia Energy."). Moreover, as described in the second witness statement of Mr. Er, Adur contributed significantly to TAEK's development of regulations applicable to ISR uranium mining with which it had no previous experience.

(v) at bottom, the Respondent's invocation and contortion of the *Salini*-factors are an attempt to distract from the reality that Westwater acquired a Turkish company with valuable assets in Turkey, which is a quintessential investment by any definition.

The Tribunal's Ruling With Respect to *Ratione Materiae*

145. The Tribunal has subject matter jurisdiction. Article VI(1) defines an "investment dispute" as a "dispute involving ... (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."[171] The Tribunal expresses no opinion on the *Salini* test (or any of its may progeny) nor endorses the Respondent's submission that it sets out a legally relevant legal standard. Nonetheless, as it forms the basis of the Respondent's case on this point, the Tribunal will examine the facts as they relate to the so-called *Salini* test as representing the high-water mark of the Respondent's arguments. Therefore, assuming *arguendo* that the so-called *Salini* test's gloss on the meaning of "investment" is accepted, in the Tribunal's view, Westwater's investment passes the test.

146. The Respondent's challenge focuses on two of the four *Salini* criteria. The "duration" and "risk" elements are clearly met.

147. The Respondent's emphasis on the state of the project (*e.g.*, the lack of an adequate PFS) and the amount of work remaining to be done to bring the mine(s) into production (including acquisition of EIA and TAEK permits) relate to the prospects of success not the existence of an investment.

148. On the first prong of the *Salini* test ("a contribution of money or assets"), the Respondent's proposed application of the "contribution of money or assets" criterion to deny protection to the extent "contributions" were made by investors before the Westwater acquisition would seriously affect the liquidity of invested assets in Turkey. Purchasers would not know what Treaty

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[171] Article I(1)(c) defines an "investment" under the Treaty as

> every kind of investment in the territory of one Party owned or controlled, directly or indirectly, by nationals or companies of the other Party, including…
> …
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
> …
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law…

protection (if any) they were buying into. A foreign investor who buys a hotel at the bottom of the market, makes improvements and is subsequently expropriated at the top of the market, is entitled to the Fair Market Value of the hotel as of the Valuation Date, not merely its out-of-pocket expenditure. The Respondent's disaggregation of the investment into "pre" and "post" acquisition costs would seriously undermine achievement of the BIT investment objectives. Investments in Turkey would be rendered less attractive to the nationals of the other Contracting Party. While Westwater did not spend cash in the share swap, it paid for its investment in the form of its Treasury Shares (whether or not a share issue can constitute an actual "investment **cost**" will be considered later). Westwater brought to Turkey considerable uranium mining expertise and know-how as well as USD 1,283,000 in development expenditures. The uranium project clearly contributed "money or assets" to Turkey both before and after Westwater's acquisition.

149. In terms of the *Salini* fourth factor (contribution to the host State's "economic development") the Tribunal agrees with Westwater that "acquisition and development of the first uranium mine in Turkey is precisely the type of investment contemplated by the drafters of the Convention."[172]

150. Turkey was in the process of building several nuclear facilities and lacked a domestic fuel supply. The Temrezli mine was sufficiently important to this economic development that Turkey moved aggressively to return uranium mining to State ownership.

151. Accordingly, Westwater has established jurisdiction *ratione materiae*.

(iii) ***Jurisdiction ratione voluntatis***

152. Westwater says the Respondent offered to arbitrate investment disputes in Article VI(3)(b) of the BIT[173] and adhesion to the ICSID Convention. Westwater consented in writing to arbitrate

[172] Memorial, para. 68.
[173] Article VI of the Treaty provides:

> 2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek a resolution through consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such national or company and the Party mutually agree. If the dispute cannot be resolved through the foregoing procedures, the dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures.

this dispute on 13 December 2018, in paragraph 50 of its Request for Arbitration.

153. The Respondent says it never consented to this arbitration because Westwater failed to accept its offer of arbitration by refusing to comply with the 12-month mandatory "negotiating period." The BIT provides:

> 3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for Settlement of Investment Disputes ("Centre") for settlement by arbitration, **at any time after one year from the date upon which the dispute arose** ...[174] (Emphasis added)

154. The Respondent says observance of the mandatory negotiation period is a fundamental pre-condition to its consent to arbitration and Westwater's failure to comply with the mandatory negotiation period therefore deprives the Tribunal of jurisdiction.[175]

155. The Respondent says that it was prejudiced by the early commencement of the arbitration because it ended any prospect of getting from Adur the information on sunk costs necessary to enable the Respondent to make an offer under Article 121(4(a) of the *Mining Regulations*.

(a) The Parties Disagree on When the "Dispute Arose"

156. The Respondent says that the earliest date on which any breach – actual or alleged – could have arisen was the date that the Respondent took the measure at issue in this arbitration by rescinding Adur's licenses: 19/20 June 2018. Prior to 19 June 2018, there was no actionable measure; indeed, Turkey might have decided at any time prior to the cancellations because, as hereinafter discussed, wrongful issuance does not necessarily lead to cancellation.

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[174] **Exhibit C-0001**, U.S.-Turkey BIT, Art. VI(2)-(3).

[175] Counter-Memorial, paras. 287-290. According to the Respondent, mandatory negotiation periods allow a host State to properly examine and attempt to resolve an international investment dispute in a confidential, depoliticized, and non-prejudicial manner away from the public eye. Thus, the Respondent says, at Turkey's insistence, the United States agreed to deviate from its model BIT and extend the usual six-month mandatory negotiation period in its model BIT to one year in the U.S.-Turkey BIT to provide the disputing parties with "every possible opportunity for a bilaterally negotiated settlement before escalating the dispute to third-party procedures." Westwater responds that there is no obligation to pursue negotiations that are clearly futile.

157. Westwater maintains that the "'investment dispute' within the meaning of Article VI(1)(c) of the [BIT] arose when Respondent decided that it would expropriate Claimant's investment ... [and that] Respondent's statement of its intention to breach the [BIT] is sufficient to cause an 'investment' dispute.'"[176] Westwater says the trigger occurred on 24 January 2018 when Turkish officials of MIGEM informed Adur that in the Government's view, the licenses had been issued in error and Mr. Er clearly expressed Adur's disagreement with MIGEM's position.[177]

158. Generally speaking, a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons;"[178] in order for a dispute to exist "[i]t must be shown that the claim of one party is positively opposed by the other."[179]

159. Article VI of the Treaty however provides that "[**f]or purposes of this Article** [*i.e.*, the dispute resolution provision] an **investment dispute** is defined as a dispute involving (a) the interpretation or application of an investment agreement…(b) the interpretation or application of any investment authorization…or (c) an **alleged breach** of any right conferred or created by this Treaty with respect to an investment."[180] (Emphasis added)

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[176] Bifurcation Response, para. 54.

[177] [redacted].

[178] **Exhibit CL-0005**, *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924 PCIJ Ser. A No. 2, p. 11.

[179] **Exhibit CL-0006**, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Reports 319, p. 328; **Exhibit CL-0009**, *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 83, ("***Tulip Real Estate***"). Westwater relies on the Ruling in *Tulip Real Estate* interpreted a provision worded identically to Article VI of the BIT:

> In this regard, Article 8(2) does not require the investor to spell out its legal case in detail during the initial negotiation process. Nor does Article 8(2) require the investor, on the giving of notice of a dispute arising, to invoke specific BIT provisions at that stage. Rather, what Article 8(2) requires is that the investor sufficiently informs the State party of **allegations of breaches of the treaty** made by a national of the other Contracting State that may later be invoked to engage the host State's international responsibility before an international tribunal. (Emphasis added)

The Respondent notes the reference is "to allegations of breaches of the Treaty" not to threats that **if** carried out might result in a breach of the Treaty.

[180] **Exhibit C-0001**, Treaty between United States and Turkey:

> Article VI:
> 1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

160. For present purposes, the issue is when did there arise "an alleged **breach** of any right conferred by the Treaty"?

161. Westwater's version is that during the meeting between [redacted] and the General Director and Deputy General Director of MIGEM,[181] they focused on a disagreement on a point of law or fact namely whether Adur's licenses were legally invalid and subject to cancellation. Westwater says [redacted] "challenged" MIGEM's interpretation of the Turkish law.[182] [redacted] then told the representatives of MIGEM that cancellation of Adur's licenses would expose the Respondent to international arbitration, which could only mean arbitration under the Treaty.[183]

162. Thus, as of 24 January 2018, Westwater had communicated its view to Respondent, to which the latter objected, that cancellation of Adur's licenses would constitute a breach of Respondent's obligations under the Treaty "that may later be invoked to engage [Respondent's] international responsibility before an international tribunal."[184]

163. The Respondent disagrees with this interpretation of events. In the first place, a disagreement on a point of law or fact does not of itself constitute an "investment dispute" within the definition of this particular treaty to which the Respondent's consent to jurisdiction depends. Secondly, MIGEM could not have been decisive on 24 January 2018 because matters were still at a preliminary stage. Erroneous issuance would not necessarily result in cancellation. The Respondent contends[185] that despite erroneous issuance, MIGEM was attempting in good faith to find a lawful way to avoid cancellation As [redacted] testified at the hearing:

[redacted]

[181] [redacted]

[184] **Exhibit CL-0009**, *Tulip Real Estate*, para. 83.

[185] Respondent's Rejoinder, 15 July 2021 paras. 348-349 ("**Rejoinder**").

[redacted]

164. The Respondent's position is that MIGEM gave notice on 24 January 2018 to Adur only that it had discovered that uranium licenses had been issued in error to private companies, and that those licenses *may* need to be rescinded and invited Adur to set out its position *vis-à-vis* the right of private companies to acquire a license to mine uranium under Turkish law.[187] The Respondent says that MIGEM hoped Westwater would come up with legal arguments to persuade senior Ministry officials **not** to cancel Adur's licenses.

165. MIGEM made no decision until it received a legal opinion from the Office of the Legal Counsellor of MENR (the parent Ministry) which on 18 May 2018 stated that the licenses were wrongfully issued and flagged the issue of reimbursing the investment costs of the license holders.[188]

166. It was not until 8 June 2018 that MIGEM constituted a Commission to decide formally whether to rescind all licenses held by private companies for uranium mining.[189] It was only after the Commission's report that MIGEM sent out the rescission letters on 19/20 June 2018 and on 12 July 2018 cancelling all uranium licenses held by private companies.[190]

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[186] [redacted]

[188] **Exhibit R-0063**, Letter from the Office of Legal Counsellor of MENR to the Office of the Minister entitled "Re. Uranium Licenses" (No: 50875018-045.02-E-1197).

[189] [redacted]

The Tribunal's Ruling on When the Dispute Arose

167. The relevant dispute concerns cancellation of the licenses because Westwater could live with an esoteric legal disagreement about wrongful issuance so long as it did not lead to cancellation.

168. While the Claimant made clear its opposition to cancellation from January 2018, the Respondent's position remained in doubt.

169. The Tribunal is satisfied on the evidence that while MIGEM expressed its view on wrongful issuance, it did not communicate (because it had not made) a decision on cancellation on 24 January 2018. It was not in a position to do so. MIGEM is a Directorate within the Ministry, and did not (it says) until May 2018 obtain an authoritative opinion from the Ministry's lawyers as to whether the licenses were issued in error and if issued in error the appropriate remedy, and if cancelled, whether compensation was called for, and if so, the basis on which compensation would be calculated. MIGEM did not want to make a decision on cancellation until assured of its authority.

170. In the Tribunal's view, the "dispute" within the meaning of the BIT did not crystallise until June 2018, when despite Westwater's warnings, MIGEM dispatched the cancellation letters.

171. It is likely that the Turkish Government actors were not all of one mind. While the political leadership appeared to have wanted to restore the state monopoly over uranium mining,[191] it seems the concern of MIGEM officials was to have the resource developed, not sit idle, and private developers might be more likely than the state apparatus to get the job done.

172. [redacted]

[191] [redacted]

[192] Westwater Post-Hearing Submission, para. 62.

[193] [redacted]

173. The Tribunal is therefore not persuaded that a decision had been taken on revocation or cancellation as of January 2018. In any event prior to June 2018 there was no "**alleged breach of any right conferred or created by this Treaty with respect to an investment**" within the meaning of Article VI(1) of the BIT.

(b) The Futility of Negotiations

174. Westwater's position is that:

(1) there is no obligation to pursue negotiations that are clearly futile. The negotiating period is designed to allow the parties to avoid arbitration by resolving their dispute amicably[194] but "[i]ts purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible;"[195]

(2) moreover, Westwater says, upholding the objection would also be wasteful. The one-year waiting period (which began at the latest on 19 June 2018) has long since expired. A successful objection to admissibility based on the waiting period "would simply mean that [Westwater] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage."[196] Westwater relies on *Casinos Austria v. Argentine Republic* where the tribunal observed:

> Consequently, if it is clear, at the time the international arbitral tribunal decides on its jurisdiction and on the admissibility of the claims, that the period the BIT required domestic recourses to be pursued has passed without the dispute having been settled, the purpose of the domestic-remedies-first requirement cannot be

[194] **Exhibit CL-0010**, *Mesa Power Group, LLC -v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 296.
[195] **Exhibit CL-0011**, *Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343 ("***Biwater Gauff***").
[196] **Exhibit CL-0019**, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 100, 102 ("***Bayindir***"); see also **Exhibit CL-0011**, *Biwater Gauff*, para. 343 ("Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including: ...[F]orcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.").

> achieved anymore. To still insist on strict compliance with it by dismissing the dispute in the present proceedings as inadmissible, would be an exaggerated procedural formalism that is incompatible with the fair administration of international justice in investment treaty disputes and the principle of good faith, which govern the settlement of international disputes.[197]

(3) Westwater contends that the Respondent waived its right to object to the admissibility of Westwater's claims when, at the Tribunal's procedural conference on 5 September 2019, counsel for the Respondent was invited to describe generally any objections to jurisdiction and admissibility that the Respondent anticipated it might raise that would justify bifurcation and failed to bring forward its "negotiating period" complaint.[198]

175. Westwater also says that it is entitled to "rely on any more favorable terms in other BITs to ... cure the alleged defects or provide shorter waiting periods."[199] However, according to the Respondent, an MFN clause in a BIT will only incorporate by reference an arbitration clause from another BIT "where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties."[200] Nothing in the wording of Article II(2) of the BIT indicates that the Contracting Parties intended the MFN clause to apply to the procedure for dispute resolution.[201]

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[197] **Exhibit CL-0020**, *Casinos Austria*, para. 319.

[198] Recording of the First Procedural Conference, 27:30-28:30.

[199] Memorial, para. 97. Westwater says the MFN obligations in Article II(2) of the BIT apply to "the treatment...accord[ed] to Westwater's investment with respect to dispute resolution under Article VI."

[200] See Counter-Memorial, paras. 309-312. *See, e.g.,* **Exhibit RL-0078**, *Vladimir Berschader & Moïse Berschader v. The Russian Federation*, Case No. 080/2004, Award, 21 April 2006, para. 181; **Exhibit CL-0035**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 223 ("[A] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.")

[201] The Respondent notes that the MFN clause in the U.S.-Turkey BIT does not state that it encompasses dispute resolution provisions. The MFN clause also does not state that it covers "all matters" governed by treaty, a critical distinction that has heavily influenced numerous investment tribunals in deciding whether an MFN clause encompassed dispute resolution provisions. See, *e.g.*, **Exhibit RL-0077**, *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction, 26 July 2016, para. 102 ("Venezuela and Barbados have...agreed *expressis verbis* that the MFN treatment clause shall apply to Article 8, *i.e.*, to dispute settlement provisions and conditions for resorting to international arbitration thereunder.") See, *e.g.*, **Exhibit CL-0025**, *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the

176. Westwater says negotiations were futile in any event and that disputing parties cannot be "forced" to pursue futile negotiations.[202] In determining the consequences of an investor's failure to abide by the entire waiting-period prescribed by the treaty, Professor Schreuer observes:

> It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile.[203]

177. According to Westwater, it approached the negotiations in good faith and was open to any reasonable offer of compensation. It soon emerged however that Westwater insisted on fair market value (which it asserted to be USD 267 million).

178. The Respondent's position is that its consent to arbitration is conditional on a one year negotiation period and ought not to be denied the benefit of this provision simply by Westwater's intransigence.

Tribunal on Objections to Jurisdiction, 25 January 2000, para. 60 ("[O]f all the Spanish treaties it has been able to examine, the only one that speaks of 'all matters subject to this Agreement' in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that 'this treatment' shall be subject to the clause, which is of course a narrower formulation."); **Exhibit CL-0031**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 104 ("[T]he Tribunal considers that excluding the 18-month requirement from the application of the MFN clause would not be justified in view of the explicit applicability of the clause to 'all matters' regulated by the BIT, as stated in Art. IV.2 of the same. Other BITs concluded by Argentina, which are the basis of disputes brought by foreign investors against Argentina and currently pending at ICSID, do use a different language.").

[202] Counter-Memorial, para. 299.

[203] **Exhibit CL-0012**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), 239. See also **Exhibit CL-0013**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras. 188-191; **Exhibit CL-0014**, *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, paras. 318-319; **Exhibit CL-0011**, *Biwater Gauff*, paras. 343-348; **Exhibit CL-0015**, *Link-Trading Joint Stock Company v. Department for Customs Control of Republic of Moldova*, UNCITRAL, Decision on Jurisdiction, 16 February 2001, p. 6; **Exhibit CL-0016**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 123; **Exhibit CL-0004**, *SGS Société Générale de Surveillane S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras. 183-184; **Exhibit CL-0017-FRA**, *Consortium Groupement L.E.S.I.-DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Award, 10 January 2005, para. 32(iv); **Exhibit CL-0018**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, paras. 94-95; **Exhibit CL-0008**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 126.

The Tribunal's Ruling on Westwater's Failure to Allow a Year for Negotiations

179. In the Tribunal's view, the MFN clause as worded does not permit a claimant to 'cherry pick' various procedural provisions in other BITs to override the procedure specifically negotiated in the US-Turkey BIT. There is no clear enabling language in this BIT. This conclusion is reinforced by the negotiating history where the parties to this BIT bargained for a longer negotiating period than had been utilized in other BITs to which Turkey and the United States were parties.

180. In the result, the Tribunal agrees with the Respondent that the "negotiating period" did not commence until 19/20 June 2018 and was cut short by Westwater's Request for Arbitration on 13 December 2018.

181. The Parties were obliged to make a genuine effort to engage in good faith negotiations before resorting to international arbitration.[204] The Respondent acknowledges that a "patent unwillingness of the counterparty to negotiate in any meaningful way" would justify a termination of negotiations.[205]

182. Even if USD 267 million was a much-inflated figure (Westwater now claims USD 30.5 million), the hurdle to meaningful negotiations was not the amount but the methodology. At no time did Westwater indicate any willingness to compromise on its view of entitlement to fair market value nor did the Respondent budge from its insistence that compensation must be limited in accordance with Article 121 paragraph 4a of the *Turkish Mining Regulations* to certain "investment costs."

183. The history of the "negotiations" makes it clear that neither side was interested in what the other side was saying:

(i) [redacted]

[204] **Exhibit RL-0010**, *Murphy Exploration & Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 154.
[205] **Exhibit RL-0052**, *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, para. 98.

[redacted]

(ii) [redacted]

(iii) [redacted]

(iv) On 11 October 2018, Westwater again wrote to MIGEM stating that the amount of compensation *must* reflect the fair market value of Adur, in accordance with principles of international law (including Article 3(2) of the Treaty), and could not be limited by the Turkish mining regulations cited in MIGEM's 9 September 2018 letter.[211]

(v) After almost six weeks had passed, [redacted] again met with MIGEM and MENR and demanded compensation that reflected fair market value. [redacted] says MIGEM promised a written offer of compensation to Adur[212] but there was no promise of fair market value.

206 [redacted]

(vi) On 25 November 2018, Westwater wrote to MIGEM again, "to encourage [it] once again, to make a meaningful offer of compensation for the cancellation of Adur's seven uranium mining licenses."[213]

184. The Respondent was equally adamant:

(i) MIGEM wrote to Adur on 9 September 2018 stating that it would "determine the amount invested"[214] in accordance with Article 121 paragraph 4a of the *Turkish Mining Regulation*.

(ii) On 11 September 2018, MIGEM met with [redacted] and insisted that Article 121 paragraph 4a of the Turkish *Mining Regulation* was applicable.[215] [redacted] stated that if MIGEM did not make an offer of compensation that reflected the fair market value of Westwater's investment in Turkey,[216] Westwater would initiate arbitration.[217]

185. The Respondent itself seemingly acknowledges in this arbitration the futility of negotiations when it points out what it calls Westwater's exaggerated claim in the negotiations for compensation of USD 267 million and reiterated its own refusal to pay more than a small fraction of that amount on the basis of *Regulation 121*.[218]

186. In the Tribunal's view, it had become apparent by December 2018, that further negotiations would be futile because the disagreement between the Parties over the standard of compensation was fixed and immoveable. They were not talking on the same plane.

187. The Respondent is correct that "negotiations" on its Article 121 basis could not progress because of Westwater's refusal to supply data on its investment costs, but this simply affirms the entrenched and immovable position of both sides and the futility of further negotiations.

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213 [redacted]

218 **Exhibit BD-0016**.

188. As to the Respondent's claim that it was prejudiced by the early commencement of the arbitration because it prematurely ended the possibility of getting from Adur the information on investment costs, the alleged "prejudice" presupposes the correctness of the Respondent's model of compensation which Westwater had rejected. The alleged "prejudice" simply highlights the futility of negotiations going forward. It also ignores the fact that nothing prevented the Respondent at any time from paying to the Claimant the amount that the Respondent accepted it was required by its own law to pay it.

189. In the circumstances, the Tribunal concludes that Westwater was justified in cutting short the negotiation period because the parties insisted on different compensation methodologies which produced wildly divergent sums, and neither was prepared to compromise on its approach.

(iv) ***Jurisdiction ratione temporis***

190. The only temporal objection raised by the Respondent has just been dealt with under the heading of jurisdiction *ratione voluntaris*. The Respondent has expressed no other concerns regarding the timing of the arbitration. The alleged treaty violations occurred with the cancellation letters dated 19/20 June 2018 and the arbitration was initiated (prematurely the Respondent says) on 18 December 2018. The Tribunal is satisfied on the facts that it has jurisdiction *ratione temporis*.

Conclusion on Jurisdiction Under Article 25(1) of the ICSID Convention

191. The Centre, and thus the Tribunal, has jurisdiction to adjudicate Westwater's claims.

PART 5 - LIABILITY

A. The Respondent's Alleged Breaches of the Treaty

192. Westwater says that the cancellation of Adur's licenses to the Temrezli and other projects and failure to pay compensation thereafter constituted an unlawful expropriation in violation of Article III of the Treaty. It also constituted a breach of the Respondent's obligation under Article II(3) to accord Westwater's investment fair and equitable treatment.

193. The onus is on Westwater to establish any alleged breaches of the Treaty to a standard of a balance of probabilities.

194. The alleged legal error put forward by the Respondent to justify the cancellation was not an error at all, according to Westwater, but a pretext for Turkey to take back State ownership and control of the country's uranium mining assets despite consistently treating Adur's licenses as valid and subsisting, including by the collection of license royalties.

195. The Respondent's position is that even though, on its view, the licenses were void *ab initio*, and that Turkey acted properly throughout the events in question, Turkish law nevertheless required compensation to Adur for its investment costs.[219] On the other hand, the Respondent denies liability for any loss measured by discounted cash flow because firstly it did not violate the BIT and secondly Westwater's loss of future cash-flow was wholly caused by Westwater's own financial weakness and mismanagement of the project.

B. Did Westwater's Licenses Constitute Compensable Rights?

196. Westwater's argument is that its licenses combined with its other assets in the uranium mining venture constituted a protected investment. The assets without the licenses were without value for their sole purpose – the uranium project – whereas the licenses coupled with assets collectively constituted Westwater's investment.[220]

197. MIGEM's position is that the licenses were void *ab initio* because Article 2 of the *Law No. 2840* of 1983 prohibited the private mining of uranium.[221] There is a manifest conflict, it says,

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[219] Counter-Memorial, para. 334:

> Critically, the Republic has not even suggested that the fact that the licenses are void ab initio excuses the Republic's responsibility to compensate Adur under Turkish laws; to the contrary, from the moment the licenses were rescinded, the Republic has endeavoured to compensate Adur for its investment costs incurred in relation to the licenses pursuant to Turkish law.

[220] **Exhibit CL-0042**, *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, para. 81. The tribunal found an expropriation to have occurred as of the date when:

> the practical and economic use of the Property by the Claimant was irretrievably lost, notwithstanding that CDSE remained in possession of the Property. As of 5 May 1978, Claimant's ownership of Santa Elena was effectively blighted or sterilised because the Property could not, thereafter, be used for the development purposes for which it was originally acquired (and which, at that time, were not excluded) nor did it possess any significant resale value.

[221] [redacted]

between Article 2 of *Law No. 2840* of 1983 and Article 50 of the *Mining Law of 1985*. *Law No. 2840* being *lex specialis* prevails over the general provisions of the *Mining Law*.[222] The prohibition in the private mining of uranium was confirmed, the Respondent says, by *Law No. 3971* of 1994. Accordingly, Adur's licenses were void *ab initio* and by reason of their non-existence in law were incapable of being the subject matter of an expropriation.

198. Westwater argues that the licenses are perfectly valid because the *Mining Law of 1985* was enacted subsequent to *Law No. 2840* and represented a change in Government policy to permit (indeed to encourage) the private mining of uranium as confirmed by the Constitutional Court of Turkey in 1986.

199. Further, Westwater argues[223] that even if MIGEM had issued Adur's licenses in error, Adur's rights under the licenses have long since vested and revocation of the licenses in 2018 was still unlawful because under Turkish law: (i) an individual administrative act (such as granting a license to an entity) can be revoked only within a reasonable time (60 days); and (ii) thereafter only an administrative act that involved manifest error (or, the Respondent says "explicit error")[224] can be revoked at any time.[225] Westwater contends that the Respondent's acceptance of the validity of the licenses for decades until suddenly reversing its stance in 2018, demonstrates that any alleged error in issuing the licenses was certainly not manifest.[226]

200. In the same vein, Westwater argues that States are precluded from challenging the validity of a claimant's rights under domestic law, when the State gave the claimant every reason to believe

[222] [redacted]
[223] Reply, para. 241.
[224] Rejoinder, para. 387.
[225] [redacted]
[226] Reply, para. 242.

that the rights underlying the claimant's investments were valid under domestic law.[227]

(i) Were the Licenses Issued in Error?

201. Experts in Turkish law were called by both Westwater and the Respondent to determine which of Article 2 of *Law No. 2840* and Article 50 or the *Mining Law* is more special and whether Article 50 of the *Mining La*w was itself overtaken by *Law No. 3971* of 1994.[228]

202. Article 2 of *Law No. 2840* of 1983 reads:

> Exploration and operation of boron salts, trona (natural soda), asphaltite, **uranium** and thorium minerals shall be carried out by State. Licenses shall be granted to the real and private legal entities for these mines in accordance with the Mining Law No. 6309 are cancelled. (Emphasis added)

203. The original version of Articles 49 and 50 of the *Mining Law of 1985* read as follows:

> Article 49 – The provisions of the Law numbered 2840 are reserved. However, exploration and operation activities concerning boron, trona and asphaltite mines that are found after the entry into force of this [Mining] Law are subject to the provisions of this Law.
>
> * * * * *
>
> Article 50 – Exploration and operation activities concerning thorium and **uranium mines after the entry into force of this Law are**

[227] See **Exhibit CL-0044**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge Unv. Press 2006), 141-142. See **Exhibit CL-0045**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para. 43 ("***Southern Pacific Properties***"). **Exhibit CL-0046**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 86-94 ("***ADC Affiliate***"). **Exhibit CL-0047**, Stephan W. Schill, *Illegal Investments in Investment Treaty Arbitration*, 2012 L. Prac. Int'l. Cts. Trib. 281 (2012) 281, 303. **Exhibit CL-0049**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 118 ("***Desert Line***").

[228] The Respondent notes that the Turkish law experts agree that, under Turkish law, conflicts between laws are resolved through the application of canons of interpretation and by reference to the hierarchy of norms, including *lex posterior derogat legi priori* (later law repeals an earlier law) and *lex specialis derogat legi generali* (special law repeals general laws). [redacted]

> **subject to the provisions of this Law**. The ore that is produced shall be sold to the State or places designated by the Council of Ministers. (Emphasis added)

204. *Law No. 3971* of 1994 provides:

> **ARTICLE 1.-** First sentence of the 2nd article of the 06.10.1983 dated and 2840 numbered Law Regulating the Operation of Boron Salts, Trona and Asphaltite Minerals and Nuclear Energy Raw Materials, and Regulating the Return of Certain Lignite and Iron Sites is changed as follows.
>
> Boron salts, uranium mineral and thorium mineral are explored and mined by the State.
>
> **ARTICLE 2.-** This Law enters into force on the date of its publication.
>
> **ARTICLE 3.-** Council of Ministers enforces the provisions of this Law.

205. [redacted]

206. The Parties agree that *Law No. 2840* of 1983 singled out a handful of critical minerals, including uranium, that could be developed only by State-owned entities. The Respondent says

[229] [redacted]

that when *Law 3971 of 1994* intentionally reproduced the entire provision of Article 2 of *Law No. 2840* with the sole modifications being the removal of the references to trona and asphaltite, the legislature signalled its intention to maintain uranium mining within the scope of *Law No. 2840*.[230]

207. Westwater's expert on Turkish law, [redacted], testified that Turkish law subsequent to 1983 revised this selected list of minerals and permitted the private mining of uranium and the Constitutional Court of the Republic of Turkey in 1986 so interpreted it. In addition, the legislative history since 1985 supports the continued legality of the private mining of uranium.

208. The 1986 judgment of the Constitutional Court of Turkey involved an annulment action concerning the constitutionality of some of the provisions of the *Mining Law*. The Court reviewed the interplay between *Law 2840* and Article 50 of the *Mining Law*.[231]

209. According to [redacted], the judgment confirmed that Article 50 terminated the State monopoly on the exploration for and exploitation of uranium and thorium. At the same time, according to [redacted], Article 49 established a hybrid system that permitted the private sector to mine boron, trona and asphaltite minerals that were discovered after the entry into force of the *Mining Law*.[232]

210. The Respondent's expert, [redacted] that to the extent the Constitutional Court decision determined that private uranium mining was permitted under Article 50 of the *Mining Law* despite *Law No. 2840*, the Court's decision was rendered obsolete in 1994 with the passage of *Law No. 3971*, which amended Article 2 of *Law No. 2840* and reinstated the State's monopoly on uranium mining.[234] Therefore, by the time Adur obtained the first of its exploration licenses in 2007, the legislature had long since reasserted its intent to prohibit private uranium mining.[235]

[230] **Exhibit BD-**0025, *Law No. 3971 of 1994*.

[231] [redacted]

211. The 1994 amendment to Article 2 of *Law No. 2840* addressed trona and asphaltite.[236] According to [redacted]

[redacted]

212. Further, he testified, neither the 1994 amendment itself nor the reasons submitted in its support either expressly or implicitly refer to or in any way limit the authority of Article 50 of the *Mining Law of 1985*.[238]

213. In cross-examination, [redacted] conceded that the "only" purpose and effect of the 1994 amendment was to privatize the mining of trona and asphaltite, *not* to address or reinstate a monopoly on uranium.[239] He acknowledged that the Commission Report submitted with the amendment made no mention of uranium.[240]

214. [redacted] says his conclusion is reinforced by the legislative amendment of Article 49 of the *Mining Law* in 2004[241] to remove:

> … trona and asphaltite from the scope of Article 49 of the *Mining Act of 1985*.[242]

215. While this amendment modified the list of minerals covered by Article 49 of the *Mining Law*, it left standing the text of Article 50, which provides for the private mining of uranium. [redacted]

[redacted]

236 [redacted]

[redacted], affirming in 2004 the Government support for the private mining of uranium.

216. Westwater also relies on the view of TAEK which was in regular communication with, and supplied data to, the International Atomic Energy Agency (IAEA).[244] The 2018 IAEA Red Book contained the following entry pertaining to Turkey, which was approved in advance by MENR:

> Mining Law numbered 3213 (dated 4 June 1985) classifies uranium reserves under the 6th group of mines together with all other radioactive minerals and ***supersedes law number 2840***. Article 49 of law number 3213 states that provisions under law number 2840 are preserved, although private companies are now allowed to explore for and operate thorium and uranium mines. Article 50 states that exploration and operation of thorium and uranium mines are subject to this law and the minerals extracted can only be sold to entities determined by the Council of Ministers.[245] (Emphasis added)

217. Westwater points to the inconsistency that in the very year its licenses were cancelled due to a supposed ban on the private mining of uranium, MENR approved an IAEA statement that *Law No. 2840*'s prohibition had been superseded by the *Mining Law of 1985*.

218. More recently, Articles 49 and 50 were amended in July 2018. Article 50 now reads "the ore that is produced shall be sold to the State or places designated by the President of the Republic"[246] (the earlier version stipulated designation by the Council of Ministers). [redacted] says that if uranium mining could be conducted only by the State in July 2018, then it would be meaningless to require the ore recovered to be sold to the State or a party approved by the President, because the ore would already belong to the State.[247]

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243 [redacted]

219. The uranium royalty was also amended in 2010, 2015 and 2019.[248] [redacted] points to the ongoing royalty structure as confirmatory of the private mining of uranium because

[redacted]

220. [redacted]

The Tribunal's Ruling on the Validity of Adur's Licenses

221. The Tribunal prefers the evidence of the Claimant's expert, [redacted] over that of the Respondent's expert, [redacted]. Both Article 2 of *Law No. 2840* and Article 50 of the *Mining Law* refer explicitly to uranium mining. Neither is more *specific* than the other. The *Mining Law* of 1985, being subsequent in time, prevails and has superseded any subsequent developments. In the Tribunal's view, the Adur licenses were valid.

222. The Tribunal is persuaded that the *Mining Act of 1985* represented a change of Government policy towards the private mining of uranium, and the 1985 privatization policy was not reversed by the 1994 amendment to *Law No. 2840* whose purpose and intent had nothing to do with uranium mining. Subsequent legislative amendments in 2004 and 2018, and the amendments to uranium royalties in 2010, 2015 and 2019 are consistent with the ongoing legislative endorsement of private uranium mining. Indeed, the change to the uranium royalty in 2019 in effect contradicted the legal basis for the cancellations put forward by MENR the previous year.

[248] [redacted]

(ii) The Principle of Consistency in International Law

223. Westwater says that for over a decade the Respondent gave Adur every indication to believe that its licenses were validly issued under Turkish law.[251] MIGEM itself issued the licenses – first the exploration licenses from 2007 to 2011 and then the operating licenses in 2013 and 2014.[252] It collected hundreds of thousands of dollars in annual licenses fees from Adur since issuing the licenses.[253] It also assessed administrative fees against the licenses that Adur duly paid.[254]

224. The Tribunal agrees with the Respondent that this argument relates more properly to the legitimate expectation branch of Fair and Equitable Treatment and will be dealt with under that heading.

(iii) Non-Revocability Under Turkish Law

225. Westwater argues[255] that even if MIGEM had issued Adur's licenses in error, Adur's rights under the licenses have long since vested and no cancellation of the licenses was lawfully available after 60 days[256] unless the Government was able to demonstrate manifest error (or, the Respondent says "explicit error")[257] in their original issuance.

[251] Memorial, para. 137.

[252] [redacted]

[255] Reply, para. 241.

[256] [redacted]

[257] Rejoinder, para. 387.

226. [redacted] says his conclusion that there was no "manifest error" is reinforced by email correspondence between the Respondent's officials from 7-8 May 2018 just prior to cancellation [redacted]

[redacted]

227. Therefore, according to Westwater,[259] even if MIGEM "discovered" that Adur's licenses had been issued by "mistake" due to confusion between Article 2 of *Law 284*0 of 1983 (including the 1994 amendment) and Article 50 of the *Mining Law of 1985*, Turkish law permitted MIGEM to rescind those licenses only within 60 days of their issuance.

228. The Respondent contends[260] that MIGEM's issuance of uranium mining licenses to private companies was an "*explicit error*" under the case law of the Danıştay, the Council of State and the highest administrative court.[261] As a result, MIGEM was not bound by a 60-day time limit for reversing itself.[262] [redacted] opinion:

(1) [redacted] assertion that the "existence of Article 50" alone demonstrates the lack of explicit error[263] is wrong because that provision directly conflicts with Article 2 of *Law No. 2840*;[264]

(2) [redacted] argument that the acts of the Republic over the course of 33 years between 1985 and 2018 all indicated that private uranium mining is permitted[265] is misleading given that very few uranium mining licenses have ever

258 [redacted]

been issued, and therefore the subject of the legal basis for issuing private uranium licenses is not one that came up frequently for MIGEM;[266]

(3) the issuance of licenses was rare and as a result evaded scrutiny for many years;[267]

(4) MIGEM's request for a legal opinion by the OLC[268] does not show the absence of "explicit error" given that legal departments of Turkish ministries routinely provide legal opinions on various matters in the exercise of their duties;[269]

(5) the letter from MIGEM to the Nuclear Division of MENR in 2013[270] is irrelevant to whether there was explicit error because MIGEM's conclusion was not based on substantive legal review;[271] and

(6) the Constitutional Court decision[272] does not evidence a lack of explicit error because that decision was overtaken by *Law No. 3971* in 1994, which amended Article 2 of *Law No. 2840*.[273]

229. [redacted]

266 [redacted]

The Tribunal's Ruling on Irrevocability

230. While it is not strictly necessary to rule on this ground, which would only be relevant if (contrary to the Tribunal's view) Westwater's licenses had been wrongly issued, the Tribunal agrees with Westwater that the alleged "error" was neither "manifest" nor "explicit". MIGEM required two external assessments of the question[275] firstly from MIGEM to MENR's Legal Counseller, and secondly from the latter to an outside law professor. MENR explicitly stated in its request that the question under consideration was "unclear" and "uncertain".[276]

231. Indeed, the Respondent's review of the events between Westwater's meeting with MIGEM on 24 January 2018 and the cancellation of the licenses on 19/20 June 2018, which the Respondent says (and the Tribunal agrees) showed that no "dispute" crystallised within the meaning of the BIT until MIGEM had worked through the legal issues, demonstrated that the Respondent's so-called "error" was the subject of lively dispute. If the legal answer had been obvious explicit and manifest it would not have taken MIGEM and its officials and legal advisors almost six months (they say) to figure it out.

(iv) Were Turkey's Reasons for Cancellation Pretextual?

232. In Westwater's view,[277] Turkey simply made a policy choice to reassert its historical monopoly over uranium mining.[278] The Respondent's claim that it was "dutybound" under Turkish law to revoke Adur's licenses because they had allegedly been issued in error,[279] was simply a pretext designed to camouflage a political decision.[280]

[275] [redacted]

[277] Reply, para. 246.

[278] [redacted]

[279] Counter-Memorial, para. 360.

[280] Reply, para. 247.

233. The Respondent says that the legal error was the true basis of the cancellation. On the other hand, the Respondent also acknowledges that uranium is "a mineral the Republic considers to be a strategic material given its use in nuclear weapons and as fuel in nuclear sectors."[281]

The Tribunal's Ruling on "Pretext"

234. Having held the licenses to be valid and the cancellation wrongful on other grounds, it is not necessary to decide this issue. Nevertheless, the Tribunal notes [redacted]

[redacted]

235. The Tribunal is not satisfied that the Respondent's reason for cancellation were mere pretext.

Conclusion

236. Westwater's indirect investment in Adur, in association with the assets employed in advancing the licensed uranium project, constituted a compensable investment that was taken away by their cancellation of Adur's licenses on 19/20 June 2018.

C. Expropriation

237. Article III prohibits a Contracting Party from expropriating an investment, unless the Contracting Party complies with certain requirements[283] including the payment of compensation "equivalent to the **fair market value** of the expropriated investment."

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[281] Counter-Memorial, para. 337.

[282] [redacted]

[283] **Exhibit C-001**, U.S.-Turkey BIT, Article III(1)-(2):

238. Westwater says that the Respondent's revocation of Adur's licenses constituted an expropriation of Westwater's investment.[284] As the Respondent did not comply with the requirements of Article III for lawful expropriation, it violated Article III of the Treaty.

239. Westwater characterizes the revocation of Adur's licenses as a direct expropriation of those assets, because Turkey transferred to itself Westwater's uranium project. In addition, Westwater says the Respondent's revocation of Adur's licenses also constituted an indirect expropriation of Westwater's shareholding in Adur. While Westwater technically retains its shareholding, its shares have been deprived of all value, because the value of Adur rested entirely on the prospect of developing a uranium mine at the Temrezli and Sefaatli sites. Westwater's investment in Adur is now worthless.

240. The Respondent says that Westwater's expropriation claim must fail because "Westwater did not have any right to develop the mining projects that was capable of being expropriated."[285]

(i) Argument on Direct Expropriation

241. Westwater says its investment consisted of the permits combined with the assets employed in the exploitation of those permits. Cancellation of the license was a direct expropriation that was intended to and did transfer to the Respondent Westwater's investment in the uranium project. The Respondent positioned itself to move forward with development by the State in significant part based on Adur's work and field knowledge. The cancellation demonstrated the Respondent's "open, deliberate and unequivocal intent…to deprive [Westwater]" of its investment.

242. According to the Respondent, however, cancellation did not result in any change in the ownership of Adur's assets. The Respondent denies[286] Westwater's claim of direct expropriation

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2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known. Compensation shall be paid without delay; be fully realizable; and be freely transferable. In the event that payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favorable than the position in which he would have been, had the compensation been paid immediately on the date of expropriation.

[284] Memorial, para. 127. Westwater contends that the Respondent cancelled "a valid legal right under Turkish law to operate the Temrezli mine" or at least the right to apply for a permit to do so and that "[b]y revoking these licenses, Respondent expropriated this right and, by extension, Westwater's investment under the Treaty."
[285] Turkey's Post-Hearing Submission, para. 33.
[286] Counter-Memorial, para. 236.

because, it says, all direct expropriations entail a situation in which "the government measures ... result in a state sanctioned compulsory transfer of property from the foreigner" to the State or a State-mandated third party.[287] There cannot be a direct expropriation without a "forced transfer of property"[288] that is accompanied by an "open, deliberate and unequivocal intent ... to deprive the owner of his or her property."[289] No such transfer occurred by virtue of the cancellation of Adur's permits.

243. Moreover, according to the Respondent,[290] direct expropriation entails the "deprivation of a foreign investor's acquired rights" and Adur had no "acquired rights" to operate a uranium mine. Under Turkish law, a mining company needs an operating **permit** to operate a mine. But Adur only held operating **license**s which did not give Adur any *right* to operate the mines. Rather, they merely gave Adur the opportunity to apply for the authorisations necessary to operate the mines (including the operating permits), the granting of which was not automatic and entirely dependent on Adur timely submitting proper and complete applications that met the requirements under Turkish law (which Adur did not do and was never in any position to complete).[291]

244. Potential interests, such as the opportunity to apply for an ongoing permit, do not constitute rights protected under the BIT. The cancellation of Adur's operating licences, according to the Respondent, did not constitute an expropriation of a property right to operate the mines.

245. Westwater responds that the fact that it did not have an operating permit to commence mining does not detract from what it *did* have which is operating and exploration licenses, an

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[287] **Exhibit RL-0014**, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, at 324 (2009). See also **Exhibit RL-0051**, *LG&E Energy Corp., LG&E Capital Corp., & LG&E Int'l, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 187; **Exhibit RL-0026**, *BG Group Plc. v. The Republic of Argentin*a, UNCITRAL, Final Award, 24 December 2007, para. 259 (noting that expropriation is "understood as the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action").

[288] **Exhibit RL-0014**, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, at 340 (2009).

[289] **Exhibit CL-0052**, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, at 7 (2012).

[290] Counter-Memorial, para. 322.

[291] Some tribunals have found that a right that allegedly was expropriated did not exist. See, e.g., **Exhibit RL-0059**, *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 301 ("The Arbitral Tribunal is of the opinion that a right to formal negotiations cannot be subject to an 'expropriation' in the sense of Article 5 of the BIT, **because it lacks the nature of proprietary right**, *i.e.,* of 'asset' in the sense of Article 5(2) of the BIT. Finding otherwise by following Claimant's reasoning would be to assume that the State had an obligation to conclude an agreement at specific conditions.").

opportunity to work towards regulatory approval and a corporate infrastructure designed to carry the project forward.

(ii) Argument on Indirect Expropriation

246. Westwater says[292] that the revocation of Adur's licenses also constituted an indirect expropriation of Westwater's shareholding in Adur because when Adur lost its licenses, its investment in Turkey lost all of its value.[293] Investment treaty arbitration tribunals accept that an indirect expropriation occurs when, although the investor retains title to an asset as a matter of law, the host State has taken measures that deprive that asset of its value and render it practically useless.[294]

247. The Respondent acknowledges that an indirect expropriation occurs where there is "total or near-total deprivation of an investment but without a formal transfer of title or outright seizure"[295] or a Government's measure "although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits."[296]

248. Westwater says an expropriation occurred even though it had not yet acquired all the permits or licenses necessary to begin operating the mine. The BIT explicitly protects "licenses."[297] The Respondent deprived Westwater's subsidiary of these licenses, and the economic value they represented.[298]

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[292] Reply, para. 250.
[293] Memorial, paras. 101-102, 105.
[294] Memorial, para. 101. See also **Exhibit CL-0039**, *AIG Capital Partners Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.3.1 (holding that investors' rights and the obligations of the treaty parties "apply to direct and indirect measures (of the State) tantamount to expropriation or nationalization...which result in substantial deprivation of the benefit of an investment without taking away of the title to the investment."); see also **Exhibit CL-0040**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 151 (expropriation occurs when "an effect of the measures is that the claimant is deprived substantially of the use and benefits of the investment.") ("***R.R. Dev. Corp.***"). See also **Exhibit CL-0041**, *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103.
[295] **Exhibit CL-0052**, Expropriation: UNCTAD Series on Issues in International Investment Agreements II (2012), p. 7.
[296] **Exhibit RL-0014**, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, at 323 (2009).
[297] **Exhibit C-0001**, U.S.-Turkey BIT, Art. I(1)(c)(v).
[298] In the cases Respondent cites (Counter-Memorial, paras. 328-330), the claimants alleged the expropriation of rights that either did not exist under domestic law (*i.e.,* the 'right' to be considered favorably in a tender, in *Emmis v. Hungary* and *Accession v. Hungary*) or lacked any enforceable content (as in the 'right' to pursue negotiations with the host

249. Westwater cites the *Tecmed v. Mexico* tribunal for the proposition that the direct expropriation of one asset could simultaneously constitute the indirect expropriation of other assets whose value depended on the first asset.[299]

250. The Respondent says[300] that Westwater was not substantially deprived of the economic use or enjoyment of its shares in Adur. It retains control and the ability to direct the day-to-day management of Adur outside uranium and for those other purposes can freely utilise Adur and its data, equipment, employees, and know-how. The Respondent has not assumed supervisory powers over Adur or its employees, interfered with the appointment of directors or management, arrested and detained Adur officials or employees, or impeded the distribution of dividends.[301] Moreover, Westwater could "use Adur as a vehicle for other mining investments."[302]

251. Westwater responds that it acquired its interest in Adur solely to develop the Temrezli, Sefaatli and Sorgun-Cigdemli uranium deposits, not for the theoretical possibility of finding some other economic activity in Turkey, and without those rights Westwater never would have sought to acquire Adur through its acquisition of Anatolia.[303]

The Tribunal's Ruling on Expropriation

252. The Tribunal views Westwater's investment as being its shares in Adur, which gives it an indirect interest in the fate of Adur's licenses and the physical Adur assets used in advancing the uranium project. So viewed, the cancellation effected a direct expropriation of Adur's assets, but

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state to conclude a contract, in *Oxus v. Uzbekistan*). These differ in kind from Adur's mining interests, a property right that would have allowed Adur to conduct mining operations (subject to fulfillment of certain conditions).

[299] **Exhibit CL-0043**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003. The claimant acquired a permit to operate a landfill and "land, buildings and other assets" necessary to operate the landfill. Mexico issued a resolution denying renewal of the claimant's permit to operate the landfill. The tribunal held that this constituted not just a direct expropriation of the claimant's operating permit, but also an indirect expropriation of its other real property assets, because the claimant could no longer use these assets for the purpose for which it acquired them:

> The Claimant … invested in such assets only to engage in hazardous waste landfill activities and to profit from such activities. When the Resolution put an end to such operations and activities at the [landfill] site, the economic or commercial value directly or indirectly associated with those operations and activities and with the assets earmarked for such operations and activities was irremediably destroyed.

[300] Counter-Memorial, para. 341.

[301] **Exhibit RL-0063**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 100.

[302] Counter-Memorial, para. 342.

[303] Memorial, para. 105; Counter-Memorial, para. 340.

not of Westwater's investment. Turkey transferred to itself the uranium project including the benefit of Adur's development work.

253. In fact, the cancellation of Adur's licenses constitutes an indirect expropriation of Westwater's investment, being its shares in Adur, which have lost all their value. The taking of the license deprived Adur and its uranium project of any value and as a consequence deprived Westwater's share of their value. In terms of compensation, the result is the same.

254. The Tribunal rejects the Respondent's factual characterization of Adur as a generic mining company which after the cancellation could reasonably have been used by Westwater "for other mining investments". Adur's business was uranium and cancellation took away its business. The Tribunal also rejects the idea that even were if Adur were a "generic" mining company as contended by the Respondent, it would have had any relevance to the outcomes on jurisdiction, merits or quantum.

(iii) Was the Expropriation Conducted in Accordance with the BIT?

255. Article III of the Treaty prohibits direct or indirect expropriations "except for a public purpose, in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)." The compensation, in turn, "shall be equivalent to the fair market value of the expropriated investment at the time the expropriatory action was taken or became known."[304]

256. The Respondent says[305] that Westwater bears the burden of proving that the preconditions for a legal expropriation were not met[306] and, it says, none of Westwater's objections have been established.

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[304] See **Exhibit C-0001**, U.S.-Turkey BIT, Art. III(1) and III(2).
[305] Counter-Memorial, para. 345.
[306] **Exhibit RL-0075**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 121 (confirming that in the context of a claim of direct and indirect expropriation, "the burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of *onus probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals."); see also **Exhibit RL-0080**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 428.

(a) The Public Purpose

257. Westwater argues that the stated justification for rescinding Adur's licenses – to comply with the requirements of *Law No. 2840* – was pretextual and designed to favour a State-owned enterprise. A pretextual reason cannot satisfy the public purpose requirement. No public purpose was served by wrongfully terminating Adur's legitimate and lawful development plans.

258. The Respondent says the cancellation was for a public purpose. "After the Republic discovered that it had issued uranium licenses to private companies, including Adur, it was dutybound to follow its laws and rescind the licenses that had been issued in error."[307]

259. The Respondent also says that "[u]ranium is a strategic and radioactive mineral, the mining, exploitation, and commercialisation of which must be regulated and carefully carried out by the State to preserve its security interests."[308] It is in furtherance of these interests that Turkey legislatively enacted its public policy of prohibiting the operation and exploitation of uranium mines by private parties through *Law No. 2840*. Westwater counters that Turkey is free to change its public policy but only on the basis of compensation at fair market value.

260. **The Tribunal accepts that both** (i) regularizing permits in accordance with what it understood to be the law or (ii) asserting Government control over uranium supply as a strategic asset, qualify as legitimate public purposes.

(b) Discrimination

261. Further, according to Westwater,[309] the Respondent's expropriation of Westwater's investment was discriminatory. Adur was the only private holder of a uranium operating license whose license area was active as of 2018 and had any prospect of going into production. Westwater was therefore, as a practical matter, the only entity affected by Respondent's cancellation decision. Where the sole effect of an expropriatory act is to dispossess a foreign investor in favor of the State or a State-owned company, the expropriation is discriminatory.[310]

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[307] Counter-Memorial, para. 360.
[308] Counter-Memorial, para. 360.
[309] Reply, para. 266.
[310] **Exhibit CL-0061,** *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, para. 1336; **Exhibit CL-0046**, *ADC Affiliate*, paras. 441-442.

262. The Respondent disagrees on the facts.[311] It says the review process that resulted in the rescission of Adur's licenses did not target Adur or any particular mining company in any way. After determining that uranium licenses should not have been issued to private companies under Turkish law, MIGEM rescinded all such licenses across the board. In total, 13 mining licenses were rescinded in 2018 as the result of MIGEM's review.[312] In addition to visiting the Temrezli, Sefaatli, and Sorgun-Cigdemli sites, the MIGEM compensation delegation also visited mining sites belonging to the other licenses holders whose uranium licenses had been rescinded, namely, Benü Madencilik, Yasar Coban, and Amr Madencilik İşlet.[313] The treatment was not discriminatory.

263. However, Westwater responds that the four "cancellation letters" the Respondent produced with its Rejoinder (pertaining to non-uranium mines) were *all dated in the past year*, after the Claimant raised the issue of lack of enforcement and "appear to have been created and sent specifically so [the] Respondent could rely on them in this arbitration."[314]

264. **The Tribunal accepts** that although the cancellation may have impacted different licenses differently, the cancellation was general. Westwater has not established that it was singled-out from other interested parties for adverse treatment.

(c) The Expropriation Was Not "In Accordance With Due Process of Law"

265. Article III(1) of the Treaty requires that any expropriation by a Contracting Party to be "in accordance with due process of law." Westwater says this obligation has two parts. First, the BIT requires the Respondent to comply with its own domestic laws on expropriation. Second, Article III(1) required the Respondent to comply with minimum standards of due process recognized in

[311] Counter-Memorial, para. 367.
[312] **Exhibit R-0075**, Report on the Determination of Investment Costs, 10 October 2018, at 6.
[313] [redacted]
[314] Westwater's Post-Hearing Submission, para. 62. [redacted]

international law[315] which independently establish a minimum level of due process that Respondent must afford American investors.[316] The Respondent complied with neither.

266. Westwater says it did not receive any semblance of due process.[317] Although it was invited to "provide [the General Director of MIGEM] with a reason" why he should not proceed with his decision to revoke the licenses,[318] the General Director's "request" for a reason not to cancel the licenses, and his refusal to share any of the supposed legal opinions justifying the cancellation, show (in Westwater's view) that he had already made up his mind and his mind was closed to further reasoning. Accordingly, the entire process was a charade.[319]

267. As to domestic law, the *Mining Law* provides at least four circumstances in which mining licenses may be cancelled. These circumstances generally involve some kind of misconduct by the license holder.[320] The Respondent does not allege any such misconduct against Westwater.

268. The Respondent's resort to Article 121 of the *Mining Regulation* was improper. The Article 121 procedure allows MIGEM to exercise powers of eminent domain when a mine conflicts with "investment activities that have public benefits."[321] Westwater says Article 121 is inapplicable because there was no public project that conflicted with the Temrezli mine. The inapplicability is manifest on the face of Article 121 itself. For example, Article 121 requires a report, *e.g.*, detailing how there is no alternative place for a public highway to be built. Article 121

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[315] **Exhibit CL-0046**, *ADC Affiliate*, para. 435:

> "[D]ue process of law," in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.

[316] **Exhibit CL-0052**, Expropriation: UNCTAD Series on Issues in International Investment Agreements II (2012), p. 36 ("The due-process principle requires...that the expropriation comply with procedures established in domestic legislation and fundamental internationally recognized rules in this regard....").

[317] Memorial, para. 152.

[318] [redacted]

[321] See **Exhibit BD-0003-TUR**, *Regulation on Mining* entered into force on 21 September 2017 published in the Official Gazette No. 30187.

thus addresses a very different situation than exists here where, Westwater says, the Government simply expects to or has already reassigned the mining licenses to a State-owned entity.[322]

269. The Respondent thus denied Westwater due process by insisting that any compensation must be governed by an inapplicable regulatory scheme while at the same time refusing to provide a plausible offer under such scheme or otherwise to negotiate fair market value compensation in good faith. Accordingly, Westwater says[323] the Respondent's expropriation did not comply with its own domestic law.

270. According to the Respondent, Westwater has not established a lack of due process. It was advised of the Respondent's legal view on 24 January 2018 and invited to respond. There followed lengthy interactions with MIGEM in which Westwater made claims but provided no legal justification for its position that the license was valid. Westwater's insistence on valuing its claim as USD 270 million made negotiations impossible. The fact the outcome was unsatisfactory to Westwater does not mean it was denied due process.

271. **In the Tribunal's view**, Westwater has not established a lack of due process in the events leading up to the cancellation. It was told the case it had to meet and was given an opportunity to respond and in fact did respond. Westwater's essential complaints are matters of substance, not lack of a proper procedure.

(d) Turkey Has Not Provided Prompt, Adequate and Effective Compensation

272. Westwater says the Respondent never offered "prompt" and "adequate" compensation, as required by Article III(1) of the Treaty. In particular, Turkey refused to provide compensation "equivalent to the fair market value of the expropriated investment," as required by Article III(2). Thus, according to Westwater,[324] the Respondent's expropriation of Westwater's investment breached Article III of the Treaty.

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[322] [redacted] see also **Exhibit C-0027**, Energy Raw Materials, Mining Turkey, Journal of Mining and Earth Sciences, 15 October 2018.
[323] Memorial, para. 147.
[324] Memorial, para. 154.

273. The Respondent relies on its willingness to pay sunk costs "by analogy" with the Article 121 process, which it regards as fair and adequate in the circumstances.

The Tribunal's Ruling on Whether the Expropriation Complied with the Treaty

274. To be lawful, the expropriation must satisfy all of the BIT criteria. The BIT calls for compensation at fair market value and the Respondent never agreed even to negotiate fair market value let alone make a settlement proposal on that basis. Moreover, its approach to compensation did not even cover all investment **costs**. The expropriation was a violation of the BIT and Westwater is entitled to compensation for breach of the BIT.

D. Fair and Equitable Treatment

(i) Elaboration of the Position of the Parties

275. The Parties do not dispute the content of the Fair and Equitable Treatment standard found in Article II(3) of the BIT.[325] The Respondent agrees that a "State must act transparently, in good faith, not in an arbitrary, unfair, or unjust manner, and in a manner respecting procedural propriety and due process."[326]

276. Westwater says that even if the Respondent made a good faith legal error in issuing Adur's licenses, the fact that the licenses were granted and the Respondent's subsequent face-to-face encouragement of Adur in particular to explore and operate uranium mines for 33 years, created a legitimate expectation in Westwater that Adur's licenses were valid.[327]

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[325] Counter-Memorial, para. 363 (Westwater's "description of the FET standard is not controversial.").
[326] Counter-Memorial, para. 363. The Respondent noted that Westwater cited paragraph 609 of the *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICISD Case No. ARB/05/16 ("***Rumeli***") in identifying this standard. Counter-Memorial, n. 690. That same paragraph of *Rumeli* also states that "[t]he case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations." **Exhibit CL-0053**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICISD Case No. ARB/05/16, Award, 29 July 2008, para. 609 ("***Rumeli***").
[327] See Westwater's Request for Arbitration, 13 December 2018, paras. 57-58 (Respondent violated its FET obligation because it "frustrated the Claimant's legitimate expectations that it would honour the Licences accorded to Adur under Mining Law 3213.").

(a) Arbitrariness and Bad Faith

277. Westwater says[328] the Respondent failed to act transparently and in good faith when MIGEM, after 33 years of consistent policy and prior acknowledgements of its authority to issue uranium mining licenses to private parties, suddenly claimed to have "discovered" in early 2018 that the private licenses had been issued by mistake. The subsequent decision by MIGEM's special commission to rescind those licenses was, Westwater says, arbitrary, unfair, unjust, and made in a manner that failed to respect procedural propriety and due process.

278. According to Westwater,[329] the Respondent acted neither transparently nor in good faith when it allowed Westwater to use its technical expertise to develop the Temrezli site only to cancel the licenses that gave Westwater the ability to reap the benefit of its investment.

279. The Respondent proceeded in bad faith in claiming justification for cancelling the licenses and denying Westwater the use and enjoyment of its investment on the pretext that Turkish law prohibits uranium mining by private companies. In fact, the Respondent's strategy was to prevent a private company from reaping the benefit of its work and investment in developing the potential of the deposits and to reassign those benefits to a State-owned entity.

280. According to the Respondent,[330] Westwater has not justified its allegation of arbitrariness and bad faith:

(1) MIGEM representatives met with Adur's representatives on numerous occasions in 2018. During these meetings, MIGEM explained the Government's position that the licenses had been issued in error and asked Adur to respond with its own legal analysis, which it declined to do (apart from referencing the 1996 Constitutional Court decision).

(2) The Government manifested its good faith in its willingness to provide compensation under Article 121 but to do so required Westwater's cooperation which was not forthcoming.

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[328] Reply, para. 269.
[329] Memorial, para. 155.
[330] Counter-Memorial, para. 369.

(3) Instead, Westwater's strategy was to avoid meaningful negotiations and go to arbitration as soon as possible seeking an unsubstantiated windfall payment of USD 267 million (which was the total cash flow calculated in the Pre-Feasibility Study, not even discounted to the Net Present Value).

(4) Negotiations require good faith on both sides and Westwater acted in bad faith by putting forward in negotiations the USD 267 million demand that manifestly did not represent Westwater's lost profits.

(5) There were adequate mechanisms under Turkish law for Adur to challenge the recission of its licenses. But Westwater chose not to do so.

281. **In the Tribunal's view**, Westwater has not established arbitrariness or bad faith. Although the Tribunal has rejected the Respondent's position on the "mistaken" issuance and cancellation of the licenses, the position was not arbitrary but grounded on a serious (if ultimately unpersuasive) legal argument. The Respondent's view of the applicable law was endorsed as correct in this arbitration by [redacted]. Advancing the position did not manifest bad faith.

(b) Discrimination

282. As discussed above in relation to expropriation, the Tribunal accepts that the license cancellations were general and did not single out Westwater for adverse treatment.

(c) Legitimate Expectations

283. Westwater argues[331] that the fair and equitable treatment standard prohibited the Respondent from rescinding Adur's licenses on the grounds that they were illegally issued, because doing so contradicted Westwater's legitimate expectation induced by the Respondent that these licenses were valid under Turkish law.[332]

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[331] Reply, para. 272.

[332] Reply, para. 272. **Exhibit CL-0045**, *Southern Pacific Properties*, para. 81; **Exhibit CL-0048**, *Kardassopolous*, para. 194; **Exhibit CL-0046**, *ADC Affiliate*, para. 475; **CL-0129**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 144; see also **Exhibit CL-0049**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 118.

284. There were frequent direct dealings between Westwater and Adur and the Respondent explicable only by MIGEM's representations that the licenses were valid. MIGEM collected hundreds of thousands of dollars in annual licenses fees from Adur.[333] It also assessed administrative fees against the licenses that Adur duly paid.[334] In 2013, MIGEM sent a letter to the Nuclear Energy Project Implementation Department that stated "[b]ased on [Article 50 of the *Mining Law*], it was concluded that there is no legal restriction on issuing uranium and thorium exploration and operation licenses to domestic or international private companies or persons."[335] Adur had this letter in its files.[336]

285. Westwater says[337] that the Respondent also worked closely with Adur during the latter's efforts to develop the uranium deposits in its license areas. In 2013, "Adur arranged for six representatives from MIGEM and MTA to travel to Wyoming to visit an operational uranium mine utilizing ISR technology,"[338] to assist these agencies in understanding how ISR would work at the Temrezli site. In October 2015, Adur arranged a technical visit by TAEK officials to two different ISR uranium mines in the United States.[339] In December 2016, TAEK solicited information from Adur about "the operating status, the annual production capacity, the production amount, the uranium and thorium contents of ores" at Adur's license areas, in order to send the data to the

[redacted]

[333] [redacted]

[334] See **Exhibit C-0025-TUR**, [redacted]

[336] [redacted]

[337] Reply, para. 275.

[338] [redacted]

International Atomic Energy Agency (IAEA)[340] as a correct description of current lawful mining activity in Turkey.

(ii) The Protocol Argument

286. Westwater makes the additional argument[341] under Protocol 1(c) to the Treaty which provides:

> Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of any laws, regulations and policies limiting the extent to which investment of nationals or companies of the other Party may within its territory establish, acquire interests in or carry on investments.[342]

287. The Treaty entered into force on 18 May 1990.[343] *Law No. 2840* was enacted on 13 June 1983, seven years earlier.[344] The Respondent says *Law No. 2840* prevented American companies and their Turkish subsidiaries from acquiring interests in any uranium properties in Turkey. Thus, according to Westwater, the Protocol(c) required Turkey to "notify" the investors of the alleged barrier to the mining project. If the Respondent had done so, American companies such as Westwater would have been on notice that their interest in uranium properties in Turkey would not be protected. However, the Respondent made no such notification.

288. Therefore, Westwater says,[345] even assuming *arguendo* that the Respondent made a good faith legal error in issuing Adur's licenses, their cancellation violated Westwater's legitimate expectation that the licenses were valid.

289. The Respondent argues that Westwater's legitimate expectations claim must fail because the Government did not make any specific representations to Westwater prior to its acquisition of

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[340] **Exhibit R-0042**, Letter from TAEK to Adur entitled "AP Notifications" (No: 21534910-130.02[EKP] – 72465), 20 December 2016.
[341] Reply, para. 279.
[342] **Exhibit C-0001**, U.S.-Turkey BIT, Protocol, paras. 1(c). The Protocol is an integral part of the Treaty.
[343] **Exhibit C-0199**, A List of Treaties and Other International Agreements of the United States in Force on 1 January 2020, United States Department of State, Treaties in Force, p. 449.
[344] See **Exhibit BD-0024**, Law of 10 June 1983 numbered 2840 published in the Official Gazette No. 18076 and entered into force on 13 June 1983.
[345] Reply, para. 280.

Adur that could give rise to legitimate expectations. Host State representations must be specific and addressed to a particular investor **prior to the making of the investment** to reasonably justify reliance.[346]

290. Adur's licenses could not have created any legitimate expectation because they are two-page documents that do not contain any representations, let alone any "*specific*" representations, that the Republic would refrain from rectifying any errors discovered in the application of its mining laws.[347] But even if the licenses were construed to contain such representations, the representations were made to Adur, to whom the licenses were issued. Moreover, even if a specific representation is not necessary to give rise to a legitimate expectation, the investor's expectation and reliance must be "reasonable."[348]

The Tribunal's Ruling on Fair and Equitable Treatment

291. The Tribunal concludes that the Respondent denied Westwater fair and equitable treatment. The Respondent's argument is based on the theory that Westwater's investment was complete in 2015 when Westwater stepped into the shoes of Anatolia Energy, and that there must be proof of "specific" representation before that date. However, Adur's investment continued after 2015 including expenditures on work that was undertaken and various fees paid, and in the course of that development work further representations were made as to the validity of the licenses by MIGEM officials, which in turn led to further investment.

292. [redacted] testified about his interactions with Government officials before and after 2015 (for example with EIA and TAEK officials). In this respect, the ongoing interaction of Westwater and Adur with Government officials both before and after November 2015 differentiates this from the situation of an investor who relies on general laws or generic Government pronouncements. The Temrezli project was of high importance as the first uranium mine in a country that had embarked

[346] The *El Paso* tribunal explained that a specific representation is "directly made to the investor, on which the latter has relied." **Exhibit RL-0030**, *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 376 ("[I]n order to prevent a change in regulations being applied to an investor or certain behaviour of the State, there can indeed exist specific commitments directly made to the investor...and not simply general statements in treaties or legislation which, because of their nature of general regulations, can evolve. The important aspect of the commitment is...that it contains a specific commitment directly made to the investor, on which the latter has relied.").
[347] **Exhibit R-0189**, Exploration Licenses Previously Held By Adur.
[348] **Exhibit RL-0122**, *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340.

on the construction of nuclear power plants. Senior Government officials at MNER, MIGEM and MTA were involved with Westwater and Adur in face-to-face encouragement of the project. In doing so, they led Westwater to expect, and rightly so, that Adur's licenses were valid and Westwater continued to increase its investment on that basis. MIGEM collected hundreds of thousands of dollars in annual licenses fees from Adur.[349] Over a period of more than 10 years, it also assessed administrative fees against the licenses that Adur duly paid.[350] Then, in 2018, Adur's licenses were wrongfully cancelled, and the legitimate expectation of Adur and its owner Westwater were pre-emptively repudiated.

293. Accordingly, the Tribunal concludes that the Respondent violated the BIT obligation to afford Westwater's investments fair and equitable treatment.

PART 6 - COMPENSATION

294. There is no dispute about the obligation of the Respondent to make reparation to Westwater for any **injury** caused by its breaches of the Treaty. "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[351] Westwater says[352] that if the Respondent had not unlawfully revoked Adur's licenses to the Temrezli, Sefaatli, and Sorgun deposits, Westwater would have developed these deposits. "There can be no serious dispute" Westwater says, "that it was Respondent's decision in June of 2018 to declare Adur's mining licenses void ab initio that **caused** Westwater's investment in Turkey to lose all of its value." Moreover, the Respondent's argument that Westwater could not have brought the mine into operation by 2023 is, apart from just being wrong as a factual matter, purely speculative."[353]

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[349] [redacted]

[350] See **Exhibit C-0025-TUR**, Letter No. 16363374-100-E.443856 from [redacted] (MIGEM) to Adur, 27 December 2016; **Exhibit C-0197-TUR**, [redacted], 13 January 2017.

[351] ILC Article 36 confirms the obligation to pay compensation:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

[352] Reply, para. 281.

[353] Reply, para. 284.

295. Westwater claims[354] that if the Respondent had not unlawfully revoked Adur's licenses to Westwater's investment as of 20 June 2018, had a fair market value according to Westwater[355] of no less than USD 30,512,139 (before interest).[356] Therefore, the Respondent must make full reparation by compensating Westwater in this amount, plus interest from 19 June 2018.[357]

296. The parties agree that the onus is on Westwater to establish on a balance of probabilities the claimed loss resulting from the Respondent's breaches of the Treaty. It is also agreed that in assessing the probabilities the only information that is relevant is that "which is 'known or knowable' at the Valuation Date."[358]

297. The Respondent's position is that it ought not to be held liable for breaches of the BIT but:

(i) nevertheless: "the Republic has not even suggested that the fact that the licenses are void ab initio excuses the Republic's responsibility to compensate Adur under Turkish laws; to the contrary, from the moment the licenses were rescinded, the Republic has endeavoured to compensate Adur for its investment costs incurred in relation to the licenses pursuant to Turkish law".[359]

(ii) on the other hand, according to the Respondent, the claim based on the discounted value of lost profits should be rejected as that loss was self-inflicted and was not contributed to by the Respondent's misconduct. Westwater forfeited any claim to "lost" profits by its lack of diligence in pursuing the uranium project. The project was abandoned by Westwater before its licenses were cancelled. Losses were the direct result of Westwater's own actions and omissions and not caused or

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[354] Reply, para. 281.

[355] Under the *Chorzow* standard the relevant inquiry is the value that the investment would have had in the hands of the particular investor, taking into account the investor's synergies and other specific characteristics. By contrast, a valuation of the fair market value of the investment (*i.e.,* the standard established for a lawful expropriation under the Treaty) does not take into account investor-specific characteristics, because it asks what a hypothetical willing buyer would pay for the investment. See *infra* Part V.B.1.

[356] [redacted]

[357] The amount due as a result of the Respondent's breach of Article II(3) is the same as a result of its breach of Article III of the Treaty.

[358] [redacted]

[359] Counter-Memorial, para. 334.

contributed to by the cancellation of the licenses or any other act of the Respondent; and

(iii) a DCF analysis presupposes that a casual link is established between the loss and the Respondent's breach of the Treaty but here no causation is established and Westwater is entitled to nothing based on "lost profits" or "lost opportunities".

298. In light of these arguments, the Tribunal will now proceed in two stages. *Firstly*, the Tribunal will address Westwater's claim for "sunk costs" in light of the Respondent's acknowledged liability for "investment costs." On this branch of the claim, Westwater does not have to establish that its uranium project would have progressed to operation. Turkey's obligation to pay flows directly from the cancellation without reference to the odds for or against a successful project.

299. *Secondly*, the Tribunal will address Westwater's claim to lost profits calculated by means of a discounted cash flow analysis keeping in mind Westwater's decision in 2016 to mothball the project due to historically low uranium prices and the project's continued moribund status as of the Valuation Date.

A. The Respondent's Obligation to Pay Investment Costs

300. In its Counter-Memorial,[360] under the heading "MIGEM Sought to Compensate Adur in Accordance With the Republic's Laws", the Respondent stated (consistently with the BIT obligation to make reparation) that MIGEM undertook "to reimburse the former license holders for their investment costs associated with the rescinded licenses."[361] In order to fulfill its legal obligation, MIGEM decided to apply a procedure by analogy with a procedure frequently used in the situation of public infrastructure or overlapping licenses[362] under Article 121 of the *Mining*

[360] Counter-Memorial, para. 210.
[361] **Exhibit R-0072**, MIGEM Commission Resolution, 12 July 2018; [redacted], para. 20.
[362] For example, in situations in which one company initiated an irrigation project in a mining field in which another company already held a mining license, MIGEM would determine which of the overlapping projects would proceed and reimburse the owner of the rescinded license's investment costs

Regulation[363] because there was no specific regulation that applied directly to the cancellation of licenses that in its view had been issued in a manner contrary to law. The Respondent states:

> In other words, even though MIGEM knew that Article 121 did not directly apply, because MIGEM wanted to compensate the license holders for their loss appropriately, it looked for an existing framework through which to provide such compensation.[364]

301. Article 121 addressed the problem raised where private mining activities conflict with public interest projects (roads, railways, airports, etc.), and mining "becomes impossible." In such cases the displaced mining investor is entitled by Turkish law to "investment costs." Here Westwater's mining activities were displaced not by a public interest project but by a policy of State ownership adopted in the public interest. The principle expressed in Article 121 is reimbursement of out-of-pocket "investment costs". In fact, MIGEM made field visits to the various mining sites belonging to the former licenses holders to determine their investment costs.[365] The MIGEM delegation visited the Temrezli, Sefaatli, and Sorgun-Cigdemli sites.[366] Adur's representative was present for the site visits.[367]

302. The Tribunal is not concerned with the mechanical operation of Turkish law. The relevant obligation to pay compensation is created by the BIT.

The Tribunals' Ruling on Turkey's Obligation to Pay Investment Costs

303. Westwater has established that the cancellation of Adur's licenses caused Westwater to lose the value of its investment in the uranium project. One element of its claimed loss is the "investment costs". In accordance with the BIT and the applicable principles of international law, the Respondent is obliged to reimburse "investment costs" not *ex gratia* but as a matter of substantial legal obligation. MIGEM adopted Article 121 as a convenient ("by analogy") procedure. The Respondent failed to discharge its legal obligation whether analysed under the BIT, international law or, indeed, Turkish law. It made no offer of compensation even for

[363] [redacted]
[364] Counter-Memorial, para. 210.
[365] [redacted]

"investment costs" and its calculation was neither fair nor equitable. The Respondent attributes its failed performance to Westwater's lack of cooperation (except for attending the site visits) but much of Adur's financial information was already in the Respondent's possession in regulatory filings. The Respondent was in a position to make a realistic offer but instead offered at most the equivalent of about USD 190,000, a derisory sum in the circumstances.

B. Calculation of Investment Costs

304. Westwater's quantum expert, [redacted] testified[368] that Westwater completed the acquisition of Anatolia for a total consideration of USD 22.2 million and while she believed "there is sufficient evidence to perform a DCF analysis," she writes:

[redacted]

Table 21: Historical Amounts Invested, 2015-2018

Cost Category	Year	Amount Invested (USD)
1. Adur Acquisition	2015	21,039,892
2. Project Development Costs	2015	407,000
3. Project Development Costs	2016	498,000
4. Project Development Costs	2017	261,000
5. Project Development Costs	2018	117,000
Total:		22,322,892[369]

368 [redacted]

305. [redacted]

306. The Respondent says that Weswater incurred no "investment cost" in issuing additional common shares. Westwater was not out of pocket. It made no "contribution of money and assets" within the meaning of the *Salini* test. Westwater simply exchanged its shares for the equivalent paper value of Antalia shares. Adur was no better off financially than it was before the "swap." The acquisition gave Turkey no new foreign investment.

307. The Respondent points out that MIGEM initiated its standard process of preparing an investment cost determination report.[372] Article 121 provides for an on-site evaluation by MIGEM, which was done. According to Article 121, "investment expenses are determined according to the invoice or receipt"[373] showing out-of-pocket expenditures but Adur declined to cooperate. The initial MIGEM site report assessed investment costs at TL 645,676.26[374] later increased to include license application fees and costs of preparing studies and reports[375] together with an estimate of the amount which Adur paid to its consulting firms,[376] thus proceeding an estimate of approximately TL 1,000,000 [equivalent at the time to about USD 190,000].

The Tribunal's Ruling on Investment (or "Sunk") Costs

308. In the Tribunal's view, Westwater's "share swap" did not result in an "investment cost" within the scope of the Respondent's obligation to pay compensation. This element of the claim is therefore disallowed.

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376 [redacted]

309. Westwater was prepared to gamble some Treasury shares on the possibility that improved uranium prices would pay off. The uranium prices did not increase sufficiently within the time permitted by the licenses to give Westwater a reasonable chance to resurrect and progress the project. In effect, the Respondent is being asked to pay USD 21,039,892 for Westwater's high-risk investment opportunity which did not involve Westwater in out-of-pocket costs. It was a paper transaction and the related transaction costs did nothing to advance realization of the uranium mine. The arbitration should not put Westwater in a better position than if there had been no Government misconduct.

310. On the other hand, the legal obligation under the BIT to pay compensation in respect of the expropriation and breach of the duty of law and equitable treatment remains operative. This obligation[377] coupled with the [redacted] analysis of Westwater's financial statements for quantification of "investment costs", justifies an award of investment costs in the sum of USD 1,283,000.

C. Analysis of Potential Compensation Beyond "Investment" or "Sunk Costs"

311. Westwater's position continues to be that it is entitled to USD $30.5 million in compensation for the Temrezli project alone based on estimated future net cash flows predicated on bringing the uranium mine to successful operation. Westwater's position is that whether or not it is sufficiently certain that the mine could have begun operating and generating profits but-for the breach bears on the appropriate way to determine this value but does not call into question the fact that the investor has lost the "opportunity" value of its investment.[378]

312. The key to the Respondent's position is its denial that Westwater has established proof of causation.

313. The Respondent argues that the cancellation caused no loss because in fact the "investment" had no market value in June 2018. The Turkish uranium project was a gamble that failed to pay off. The cancellation of Adur's licenses did not cause any injury to Westwater, because "the true causes of Westwater's alleged losses are the collapse of the uranium market and

[377] Counter-Memorial, para. 334.
[378] Westwater Post-Hearing Submission, para. 36.

the significant risks inherent in the project."[379] In the Respondent's view, "Westwater would not have been able to obtain any of its regulatory permits and approvals, obtain financing, and put the mine into operation prior to the expiration of its operational licenses in 2023 and 2024."[380]

(i) The Burden and Standard of Proof

(a) Burden of Proof

314. Westwater acknowledges that a claimant is entitled to be compensated "only for those losses that were **caused** by the Respondent's breaches of the treaty.[381] Causation is a major point of contention between the parties.

315. Westwater says investment treaty arbitration tribunals have distinguished between the *fact* and the *quantification* of damages when determining the standard of proof. Westwater acknowledges it must establish it suffered damages "**as a result of** a host State's breach (*i.e.,* the *fact* of damage, or causation) with certainty, [but] the quantification of these damages only with reasonable confidence."[382]

316. Westwater cites[383] *Crystallex v. Venezuela*,[384] for the test of causation that "there [must be] sufficient certainty that it had engaged or would have engaged in a profitmaking activity **but for** the Respondent's wrongful act, and that such activity would have indeed been profitable."[385] (Emphasis added).

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[379] Counter-Memorial, paras. 376, 382.
[380] Counter-Memorial, para. 399.
[381] **Exhibit CL-0060**, *Tethyan Copper* citing:

> … the Tribunal considers it sufficient to recall the Parties' agreement that Claimant must show that Respondent's breaches caused its losses. In other words, Claimant is entitled to compensation in the amount of the value that its investment would have had but for Respondent's breaches. If and to the extent the Tribunal is not convinced that a specific risk or downside affecting Claimant's investment would not have existed in the but-for scenario, it will make the appropriate deduction in order to determine those, and only those, losses that were caused by Respondent's breaches of the Treaty.

[382] Memorial, para. 166.
[383] Memorial, para. 168.
[384] **Exhibit CL-0059**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 708 ("***Crystallex***").
[385] **Exhibit CL-0059**, *Crystallex*, para. 875.

317. Westwater also relies on the statement in *Tethyan Copper v. Pakistan*[386] as follows:

> The first key question is whether, based on the evidence before it, the Tribunal is convinced that **in the absence of [the] Respondent's breaches, the project would have become operational and would also have become profitable**. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation.[387] (Emphasis added)

(b) Standard of Proof

318. Westwater says that to meet the standard of proof, a claimant need only show that there were no "fundamental uncertainties" that the project would have reached the operational stage and would have been able to generate profits." *Tethyan Copper v. Pakistan* is then cited on the question of permits:

> Claimant does not have to show that it already '*had the necessary permits*' in order for [its valuation] methodology to be applicable. Claimant rather has to establish that it was prepared for what a buyer would have expected when purchasing a project at the development stage of [the mine], *i.e.*, that **relevant permits and approvals had either already been obtained or that Claimant had a reasonable plan and schedule to obtain them in time for the project to start construction and, subsequently, mining operations**. (Emphasis added)
>
> * * * * *
>
> In the Tribunal's view, the viability of the project could be affected only if there are specific indications supported by concrete evidence that a certain permit or approval could not be obtained or at least

[386] See **CL-0060**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 ("***Tethyan Copper***").
[387] **Exhibit CL-0060**, *Tethyan Copper*, para. 330.

> could not be obtained within an economically reasonable timeframe.[388]

319. Westwater's argument[389] is that it was sufficiently certain at the time of the breach that Westwater would have profitably operated the mine but-for the State's breach,[390] and thus in the words of the International Law Commission, "an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable."[391] If not, Westwater acknowledges[392] "**a negative answer means that an investor is not entitled to receive compensation that includes the investment's potential future cash flows, because the existence of these cash flows is too uncertain**."[393]

320. Westwater points out that the Respondent's cancellation deprived Westwater of the chance either to succeed or to fail. [394] As a result, no one will ever know how Westwater and Adur might have fared. [redacted] testifies that, working with a good faith regulator, he could have obtained all of the necessary licenses and permits before the expiration of Adur's licenses in 2023 and 2024.[395] The Respondent claims this would have been impossible in the five years remaining between 2018 and 2023.[396]

321. Westwater argues that project uncertainties have legal relevance only for determining the method of valuation following a treaty breach not whether a State's breach caused a claimant's loss, "these questions are at most relevant to whether a claimant may sustain a claim for lost future profits through a DCF valuation of its investment."[397]

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[388] **Exhibit CL-0060**, *Tethyan Copper*, paras. 1208-1209.
[389] Reply, para. 288.
[390] Memorial, paras. 168-183.
[391] Counter-Memorial, para. 400 (quoting **Exhibit RL-0043**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 104, para. 27).
[392] Reply, para. 288.
[393] Reply, para. 288.
[394] Reply, para. 285.
[395] [redacted]
[396] Counter-Memorial, paras. 388-399. Westwater says "the project risks and uncertainties identified by [the] Respondent might e legally relevant to the determination of the value of Westwater's investment [on 19 June 2018] including whether lost future profits could be determined with a sufficient degree of certainty. However, those uncertainties and risks cannot operate, as [the] Respondent argues, as an intervening cause of Westwater's loss where a state has breached an obligation it owes under an investment treaty." Reply, para. 285.
[397] Reply, para. 291.

322. The Respondent's position is that Westwater had no "reasonable plan and schedule" to bring the mine to operating status. Westwater's "schedule" was simply to wait and see if uranium prices improved significantly, and if they did (which in fact they did not by the Valuation Date of 19/20 June 2018) then Westwater would *begin* to try to put financing together based on the thoroughly inadequate 2015 PFS.

The Tribunal's Ruling on the Burden and Standard of Proof

323. The Tribunal accepts the proposition that the first question of **causation** must be determined before the second question of **quantum** arises, as stated in the passage from *Tethyan Copper v. Pakistan*[398] cited by Westwater:

> The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent's breaches, the project would have become operational and would also have become profitable.

324. Only if causation is established need the Tribunal concern itself with whether "it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation."[399]

325. On the important issue of permits and regulatory approval, the Tribunal notes the standard of proof proposed by Westwater itself quoting[400] *Tethyan Copper v. Pakistan*

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[398] **Exhibit CL-0060**, *Tethyan Copper*, para. 330 as follows:

> The first key question is whether, based on the evidence before it, the Tribunal is convinced that in the absence of Respondent's breaches, the project would have become operational and would also have become profitable. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation. (Emphasis added by Westwater]

[399] **Exhibit CL-0060**, *Tethyan Copper*, para. 330.

[400] As already reference **Exhibit CL-0060**, *Tethyan Copper*, paras. 1208-1209:

> Claimant does not have to show that it already 'had the necessary permits' in order for [its valuation] methodology to be applicable. Claimant rather has to establish that it was prepared for what a buyer would have expected when purchasing a project at the development stage of [the mine], *i.e.,*, that **relevant permits and approvals had either already been obtained or that Claimant had a reasonable plan and schedule to obtain them in time for the project to start construction and, subsequently, mining operations**. (Emphasis added)

> that relevant permits and approvals had either already been obtained or that Claimant had a reasonable plan and schedule to obtain them **in time for the project to start construction** and, subsequently, mining operations. (Emphasis added)

326. In the present case, "in time" delivery means prior to expiry of Adur's existing permits in 2023/2024.

(c) Shifting Evidentiary Onus

327. Westwater contends that "once a *prima facie* causal link is established between the host State's breach and the claimant's loss, the State bears the burden of proving that other causes severed this link"[401] citing *Lemire v. Ukraine*[402] which rejected an approach that

> place[s] on the aggrieved party the burden of proving that such intervening causes were not the immediate cause for the damage. This Tribunal, however, sees no reason to deviate from the generally accepted principle *alleganti probatio incumbit*. If the offender claims that other intervening causes exist, which are the superseding cause for the damage, it is for such offender to marshal the necessary evidence.[403]

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[401] Reply, para. 298.

[402] **Exhibit CL-0057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ("***Lemire***").

[403] **Exhibit CL-0057**, *Lemire*, para. 246. Westwater also relies on the proposition in *Stati v. Kazakhstan* that

> The Parties agree, and so does the Tribunal, that, as reflected in Art. 36 and 39 ILC Articles on State Responsibility, Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct...And the Tribunal agrees with Claimants that the burden then may shift to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged.

Exhibit CL-0132, *Stati and others v. Kazakhstan*, SCC Arbitration V (116/2010), Award, 19 December 2013), paras. 1330-1332.

And *Yukos v. Russian Federation* which observed:

> it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate.")

Exhibit CL-0133, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1775 ("the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage.)

The Tribunal's Ruling on Shifting the Onus

328. In the Tribunal's view, care must be taken to avoid reversal of the onus of proof without justification. The burden of establishing causation lies on Westwater (*i.e.,* the "first question" posed by *Tethyan Copper v. Pakistan* and accepted by Westwater). Westwater acknowledges that it must at least prove that the Respondent's Treaty breaches **caused** Westwater's loss of profits. Westwater further accepts the proposition in *Tethyan Copper v. Pakistan* that it must establish

> … that relevant permits and approvals had either already been obtained or that Claimant ha a reasonable plan and schedule to obtain them in time for the project to start construction and, subsequently, mining operations.

329. Accordingly, the issue of onus resolves itself into:

(i) has Westwater established that on 19/20 June 2018, it had a reasonable plan and schedule to obtain regulatory approval **and the reasonable prospect of financial backing** in time for the uranium mine to become operational [*i.e.,* prior to expiry of the existing permits in 2023/2024] and thereafter to operate profitably; if so,

(ii) the evidentiary onus then shifts to the Respondent to establish that Westwater's mining project, viewed as of the Valuation Date, would on a balance of probabilities have failed for causes other than the push into oblivion administered by MIGEM's cancellation of Adur's permits.

330. If (and only if) Westwater satisfies its burden of establishing *prima facie* that the Respondent's misconduct caused the loss, the onus switches to the Respondent to establish that irrespective of the wrongful cancellation of the licenses, the project would never have resulted in a profitable operating mine for reasons unrelated to the Respondent's misconduct. As will be seen, Weswater did establish that the Respondent's Treaty breaches caused it financial loss, at which point the onus shifted to the Respondent to demonstrate, and the Respondent did demonstrate, that the uranium project would never have become operational, and thus would never have earned income (much less would it have earned any profit), because of Westwater's own management

decisions to mothball the project until uranium prices rose, its failure to generate a marketable PFS, or otherwise to advance the project in a timely way.

331. [redacted] contended that compensation should not be limited to "sunk costs" but:

(i) assessed in light of lost profits measured by the Discounted Cash Flow ("DCF") methodology;

(ii) confirmed by her "market analysis".

332. The DCF Approach involves projecting the future cash flows that the project will generate, and then discounting the expected future cash flows to present value using a risk-adjusted discount rate. [redacted], the DCF Approach was the most appropriate method for valuing the Temrezli project "because of the advanced-stage of the exploration of the property, with established uranium resources and project designs for the recovery of uranium."[404] Additionally, in her view, it is possible to reliably forecast the future revenues and costs of the mine, based on the assumptions determined in the pre-feasibility study conducted by independent consulting and engineering company, Tetra Tech, in 2015.

333. [redacted]

[redacted]

The Tribunal' Ruling on a Market Approach

334. While Westwater identified a number of "comparables" in its analysis of a market approach, the Respondent's experts convincingly argued that the "comparables" were not at all comparable. The selected transactions, the Respondent's experts say, were: (i) low-risk consolidation deals between uranium juniors; (ii) driven by synergies that often included proximate land holdings; (iii) primarily located in proven uranium basins in the United States and Australia; (iv) included significant conditions such as contingent payments based on milestone achievements; and (v) largely involved stocks and only included limited cash consideration.[407] Westwater chose not to challenge this evidence at the Hearing.[408]

335. **The Tribunal rejects** the Respondent's market approach (and notes that Versant itself suggested only that "the market approach is something that should be applied to test the Sanity of our DCF conclusion").[409] Westwater has not met its burden of proof to establish the relevance of its "market" analysis. The "comparables" were shown not to be comparable in the testimony of [redacted] which the Tribunal accepts as correct.

336. The next question is whether Westwater has met the onus of establishing the prerequisites for the application of the DCF analysis or whether the Respondent's liability is limited to investment costs.

337. At this point, the Tribunal recalls the roadmap provided by Westwater from *Tethyan Copper v. Pakistan*[410] as follows:

> The first key question is whether, based on the evidence before it, the Tribunal is convinced that **in the absence of [the] Respondent's breaches, the project would have become operational and would also have become profitable**. The second key question is whether the Tribunal is convinced that it can, with reasonable confidence,

[407] **RD-0003**, [redacted]
[408] Respondent Post-Hearing Submission, para. 128.
[409] [redacted]
[410] See **CL-0060**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 ("***Tethyan Copper***").

> determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation.[411] (Emphasis added)

D. First Key Question: Did the Respondent's Cancellation of the Licenses "Cause" the Loss of Projected Profits?

338. The Tribunal is satisfied in the first instance that *prima facie* the cancellation damaged Westwater. This much is acknowledged by the Respondent's acceptance of the obligation to reimburse Westwater's investment costs.

339. Westwater asserts that but-for the Respondent's breach, the Temrezli project would have become operational and profitable. Cancellation of its licenses in violation of the BIT deprived it of the opportunity to bring the uranium mine at Temrezli to operation. Westwater says that on 19/20 June 2018, it had a "reasonable plan and schedule" to do what it had to do in time to avoid expiry of its existing licenses.

340. According to the Respondent[412] however, "Westwater was in dire circumstances, which led it to ignore the warnings of external consultants, its Chief Geologist, its largest shareholder, and technical and regulatory experts that it was not feasible to develop the Temrezli project economically."[413] Nevertheless, Westwater plunged on regardless of the expert advice and predictably the project failed by reason of its own internal problems which had nothing to do with the Respondent and everything to do with Westwater's management misjudgments and omissions.

(i) Westwater Says That If Necessary, It Would Have Proceeded Regardless of Price

341. Westwater contends that even if uranium prices did not achieve the "hurdle" rate of USD 30 per pound, Westwater could and would have brought the mine into operation, even if that meant

[411] **Exhibit CL-0060**, *Tethyan Copper*, para. 330.
[412] Respondent Post-Hearing Submission, para. 71.
[413] See, *e.g.*, **Exhibit R-0140**, [redacted]

operating at a loss for some time, as a matter of basic economic logic if the alternative was losing the operating permits and Westwater's entire investment in Turkey.[414]

342. [redacted]

343. The Respondent states that this position is contradicted by all Westwater's contemporaneous actions and records. Prior to 2018, Westwater regularly explained to its investors that the company would require at least USD 30 per pound to **begin** investment to restart the project and USD 35 to make the mine profitable and, according to the Respondent, uranium prices never met Westwater's hurdle rate.[418] If, as [redacted] now conveniently claims, work would have

[414] [redacted]

[418] **Exhibit R-0019**, *The Street Sweeper*, Uranium Resources: No Production, No Good Options Left, SEEKING ALPHA, 13 November 2014; **Exhibit R-0008**. Peter Epstein, Uranium Resources' Merger with Anatolia Energy a Clear Winner, Epstein Research (undated). These hurdle rates were consistent with the pricing in Westwater's sales contracts before the company stopped producing uranium in 2009. For example, Westwater's sales with Itochu Corporation contained a spot price floor of USD 37 per pound and a ceiling of USD 43 per pound. **Exhibit R-0015**, Westwater Resources, FY 2009 Form 10-K, at F-15.

gone ahead in 2018 regardless of price, there was no sign of such a plan in Westwater's records as of June 2018.

344. Moreover, there is no contemporaneous evidence that as of the Valuation Date, 19/20 June 2018, Westwater had any present expectation that its "hurdle rate" of USD 30 per pound would be achieved in the foreseeable future. The project continued to slumber in a holding pattern just as it had since 2016.

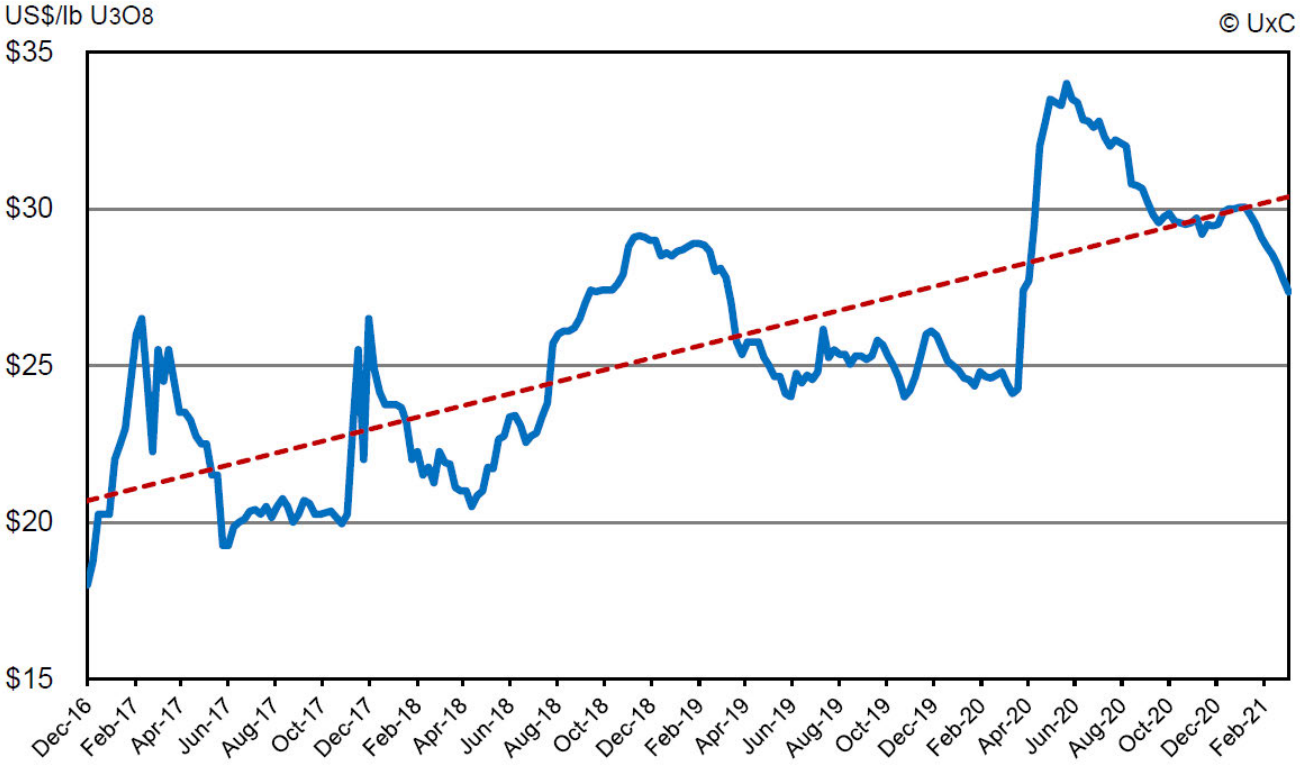
345. The Respondent points out that since the global financial crisis of 2008, and even more so in the years following the Fukushima disaster in 2011, global uranium prices fell precipitously, dropping to a low of USD 17.75 per pound in November 2017.[419] In terms of contemporaneous documentation, Adur wrote to TAEK on 14 November 2017, explaining that "the significant drop in global uranium market resulted in our suspension of the Project's advancement."[420] And on 9 January 2018, Adur reported to MIGEM that it could not move forward with the Temrezli project unless the price of uranium increased: "It is impossible to operate the ore at Temrezli economically with current prices and to fund the project. **Investments in this project can only begin when prices exceed $30 per pound.**"[421] (Emphasis added)

[419] **Exhibit R-0048**, U.S. Uranium Production, Prices, and Employment All Fell In 2016, U.S. ENERGY INFORMATION ADMINISTRATION, 23 June 2017.

[420] **Exhibit R-0002**, [redacted]

[421] **Exhibit R-0059**, Adur's Request to Consolidate Group IV(ç) Licenses, 9 January 2018, at 40.

Figure 22. Uranium Spot Price Trend, December 2016-March 2021



346. Westwater's witness [redacted] illustrated the trending spot prices from 16 December to March 2021 as follows:

347. The Respondent's position is that in June 2018, Westwater, apart from waiting in the hope prices would improve, had neither a plan nor a schedule to move ahead with the project. Indeed, the Respondent says[422] that by 2017, anticipating (correctly) that the uranium market would not recover, Westwater closed the door on any possibility of advancing the Temrezli mine to construction and production by shifting all of its efforts and resources into the lithium business elsewhere in the world.

The Tribunal's View of Westwater's Assertion That it Would Have Proceeded With the Project Regardless of a Price below USD 30 if Necessary to Save the Licenses

348. As part of its affirmative case on quantum, Westwater says that "but for" the Respondent's misconduct, it could and would have been in a position financially and otherwise to move the

[422] Counter-Memorial, para. 398; **Exhibit R-0003**, Historical Spot Market Prices, Cameco.

project to a successful completion. However, the Tribunal is unable to reconcile Westwater's position that it would have proceeded regardless of the price of uranium with its representation to the Government in January 2018 that "investments in this project **can only begin** when prices exceed $30 per pound" (Emphasis added) and the lack of any "plan or schedule" other than a vague aspirational assertion from [redacted] that what needed to be done would somehow get done.

349. In his second witness statement, [redacted] sought to demonstrate that the uranium project was advancing and on track to become a successful operating mine but everything hinged on uranium prices. [redacted]

[redacted]

350. The price of uranium never "reached" USD 30 per pound prior to 19/20 June 2018 and [redacted] reports to the Westwater Board[424] confirm that significant work stopped in 2016:

[redacted]

423 [redacted]

(1) only 11 employees were at work in 2016;

(2) the "database of nearby land owners" projected in 2016 was not done and [redacted] again emphasized that the price of uranium did not support "immediate" action;[425]

(3) the updates of the PFS projected for completion in 2016 was never done;

(4) the Board entry for 2017 recorded [redacted] pointing to low uranium prices to explain lack of activity;

(5) Westwater **would not begin to "move towards financing"** until uranium traded towards USD 35 a pound;

(6) there were inconclusive reports of a search for a "strategic partner" in 2016 that continued in 2017 apparently without a successful conclusion.

351. [redacted] always qualifies his projected activities by reference to "once the price of uranium recovered."[426] There is no convincing evidence that Westwater had any expectation of the necessary "uptick" in uranium prices as of the Valuation Date, 19/20 June 2018 or if an uptick occurred, Westwater had the plan and/or capacity to carry it out.

352. On 9 January 2018, Adur noted that uranium prices had fallen to USD 22.10/lb in 2017 and USD 24.50/lb in 2018, well below what Westwater had set as the trigger.

353. [redacted]

[redacted]

[redacted]

354. Thus, as Westwater could not promise "a return on investment" at prevailing prices, there was no financing (and in any event, the project had been insufficiently "de-risked" to attract equity investors) and there would be none at prevailing prices and Westwater had neither the internal finances nor access to external finances to proceed without market support.

355. Moreover, to the extent funds were available to Westwater, [redacted]

[redacted]

356. In these circumstances, the Respondent has satisfied the Tribunal that Westwater would not have been able or willing to finance significant work on the uranium project unless and until the price of uranium rose to at least USD 30 per pound and prices could reasonably be expected

[redacted]

not to decline below that level but, instead, could be expected to advance to the "operational" threshold of USD 35 per pound. None of these circumstances were satisfied as of the Valuation Date. Westwater's gamble had not paid off and its attention and energy had been decisively redirected to other projects.

(ii) Westwater's Contention That the License Expiry Dates in 2023/2024 Were Not a Serious Deadline

357. Westwater says the Respondent exaggerates[430] the likelihood that Adur's licenses would have been cancelled if it failed to obtain an operating license by the expiry dates. Other tribunals have rejected allegation by States that in the but-for scenario the investor's license would not have been renewed where the host State had readily renewed licenses in the past.[431] Here, Westwater says, MIGEM had never before rescinded a uranium license on the ground that the license had expired. Rather, it had allowed other private holders of uranium licenses to retain their licenses for years after these licenses expired, and failed to rescind them when legal grounds for rescission in connection with the expiration arose.[432]

[430] Reply, para. 303 *et seq*.
[431] See **Exhibit CL-0137**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2013, para. 605 ("Generally, broadcasting licenses in Europe are renewed as a matter of ordinary administrative practice and the parties could identify to the Tribunal only one known case (an English broadcasting license) in Europe in which a broadcasting license was not renewed, although the license requirements were fulfilled by the licenses owner."); **Exhibit CL-0138**, *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Award, 27 September 2019, para. 209 (citing the fact that Ecuador had extended its contracts with all other incumbent operators as support for its conclusion that the investor's contract would also have been extended).
[432] See Reply, para. 307. See also **Exhibit R-0006**, Table of estimated investment expenses of license holders; **Exhibit R-0075**, Report on the Determination of Investment Costs, 11 October 2018, Annex 1 pp. 1, 3-4. All six other uranium licenses that had been issued to private companies besides Adur had already expired long before 19-20 June 2018. Table 3 (reproduced below) lists these licenses and their expiration dates:

Tab 3: Other Private Holders of Uranium Exploration Licences

License-Holder	License Number	Expiration Date
Yaşar Çoban	20060335	17 January 2011*
Benü Madencilik ve San. Tic. Ltd. Şti.	200802475	31 March 2013*
Benü Madencilik ve San. Tic. Ltd. Şti.	200802477	31 March 2013*
Benü Madencilik ve San. Tic. Ltd. Şti.	200802262	25 March 2013*
Benü Madencilik ve San. Tic. Ltd. Şti.	200802275	25 March 2013*
AMR Madencilik İşl. San. A.Ş.	201101217	18 October 2014

358. Westwater notes that the six other uranium licenses issued to private companies apart from Adur had already expired long before 19-20 June 2018.

359. The Respondent's witness, [redacted]

360. Westwater's position is that in the "'but for' scenario", Adur would have been working closely with MIGEM, TAEK and the Respondent's other agencies to make the Temrezli project successful. MIGEM would not suddenly have brought all progress to a halt for the sole purpose of strictly enforcing the "paper" expiration date of Adur's licenses. MIGEM had never once enforced such provisions in the past.[435]

361. Thus, Westwater says, "MIGEM's practice with respect to the license-holders other than Adur casts substantial doubt on the Respondent's assumption that MIGEM would have revoked Adur's licenses as soon as their term came to an end in 2023 and 2024, let alone that it would have done so immediately on the first date of expiry."[436] Instead, Westwater contends that, in the but-

* Denotes that the license-holder had applied for an operation license

See Reply, paras. 307-314. Westwater says that MIGEM should have rescinded the exploration license of AMR [redacted]

[436] Reply, para. 315.

for scenario, MIGEM, either as a deliberate choice or out of inertia, would have allowed Adur to retain its licenses until Adur secured an operating permit.

362. The Respondent says it was clear as a result of Adur's discussions with MIGEM from 24 January 2018 to early June 2018 that as of the Valuation Date, the Turkish government had shown its intent to take uranium mining back into State ownership. It was manifest to Westwater regardless of past MIGEM practice, and to any interested purchaser viewing the situation as of 19/20 June 2018, that the licenses would have been cancelled had Adur not met its 2023/2024 deadlines.

The Tribunal's View on License Cancellation

363. Westwater's own position is that this entire dispute over its licenses resulted from the Government's change of policy in early 2018 to prohibit the private mining of uranium. In its view, "but for" the government's change of policy and cancellation, the licenses would never have been cancelled. In the past, even when licenses had expired, it was never the government's policy to cancel them.

364. The Tribunal rejects the argument based on the Government's history of non-cancellation. As of the spring of 2014, the government policy was clear and manifest that it wished to end the private mining of uranium. There was no reason to believe as of the Valuation Date that had the licenses not been cancelled, the Respondent would have overlooked Adur's failure to fulfill the conditions of its licenses. The Tribunal is satisfied that the expiry dates in 2023 and 2024 were "hard deadlines."

E. At this Point, the Respondent Assumes the Onus of Demonstrating on a Balance of Probabilities That Even Without (i.e. "But For") its Misconduct, the Westwater Project as of the Valuation Date was Irretrievably Incapable of Revival Within the Time Permitted by the Licenses.

365. In this respect, it is necessary to examine:

(a) Land acquisition;

(b) EIA approval;

(c) TAEK approval;

(d) Financing.

366. One difficulty in assessing these arguments is that the proposed "reactivation" date is unknown and unknowable. There never was a reactivation. The evidence does not disclose even a plan of action. All depended, according to [redacted], on if, as and when the price of uranium reached USD 30 per pound.

(a) Land Acquisition

367. Westwater says[437] "there was no hint of opposition from the local community or national government for the [Temrezli] project."[438] Beginning in 2014, Adur collected comments from local community members to understand their initial concerns, holding public meetings that explained the ISR process, and conducting follow-up surveys and interviews.[439] Furthermore, Westwater says, the Temrezli project was estimated to provide approximately 30 to 50 temporary construction jobs for up to one year, and then up to 57 permanent jobs in the Yozgat region, with the majority if not all of these jobs being local hires whose wages and benefits would be competitive for the region.[440] If necessary, Westwater would have utilized the Government's fast track expropriation powers to complete the acquisitions in time. According to Westwater, [redacted], an advisor in the Mining Bureau Permitting Department at the Ministry of Energy, explained in 2015 that once the land needed for a mining project is identified, the ministry undertakes to acquire the land, if necessary by expropriation: "This has been applied at many projects in Turkey, and there have been no issues so far."[441]

368. The Respondent says[442] Westwater could not have acquired the rights to the land before its operating licenses expired. Westwater's estimate of USD 5 million to acquire all the requisite

[437] Memorial, para. 192.
[438] [redacted]
[440] **Exhibit C-0021**, Anatolia Energy Pre-Feasibility Study, pp. 163-164.
[441] **Exhibit C-0099**, Critical Resource, Anatolia Energy's Temrezli Project, Assessment of Stakeholder, Political and Reputational Risk, 15 May 2015, pp. 79-80.
[442] Counter-Memorial, para. 392.

land[443] (over 800 acres of land belonging to over 500 landowners)[444] was inadequate. Several villagers viewed the Temrezli project as a way of extracting high payments for their land.[445] Some villagers raised serious concerns regarding health and environmental safety. [redacted] contended that Westwater could not have availed itself of the "fast track" or "urgent expropriation" procedure under Article 27 of *Law No. 2942* (the *Expropriation Law*) to expedite the expropriation process[446] because no extraordinary circumstances, such as situations involving national security or an emergency situation subject to a Presidential Decree, are present in Westwater's case.

369. In its Post-Hearing Submission, the Respondent said that the "process could be time-consuming, financially draining, and could play out over the course of four or more years."[447] [redacted] acknowledged these difficulties during the Hearing.[448]

370. The Respondent notes that Westwater submitted no contemporaneous evidence that it had prepared a realistic plan to complete the land acquisition process by October 2023.[449]

The Tribunal's Ruling on Westwater's Land Acquisition

371. Land acquisition was a critical condition precedent to moving ahead with the uranium mine. [redacted] testified that by 2018 some meetings had taken place in the affected communities but the uranium price did not justify more effort and therefore he acknowledged

[redacted]

[443] [redacted]
[444] **Exhibit C-0061**, Adur Land Acquisition Plan, at 1.
[445] **Exhibit R-0026**, Minutes of Public Participation Meeting for the Temrezli Uranium Solution Mining and Concentrate Facility Project (Adur Madencilik Ltd. Sti.), 10 July 2015.
[446] [redacted]
[447] Respondent Post-Hearing Submission, para. 99; **Exhibit C-0099**, Critical Resource, Anatolia Energy's Temrezli Project, Assessment of Stakeholder, Political and Reputational Risk, 15 May 2015, at 28-30; **Exhibit R-0142**, [redacted], 23 January 2015, at 2; **Exhibit R-0152**, Report Regarding Appraisal of Land, Undated; **Exhibit C-0061**, Adur Land Acquisition Plan, April 2016.
[448] [redacted]

372. In fact, by 2018 Westwater had a list of "non-landowners" but lacked even a list of the landowners whose properties would have to be acquired.[451]

373. In June 2018, Westwater did not have any financing in place or any plan to move ahead with land acquisition which was little more than an "action item." In the absence of Government support for use of the "fast track" expropriation procedure, which the Respondent says would not have been available, the hurdles to timely land acquisition would have been formidable. However, the Respondent has not persuaded the Tribunal that in all probability Westwater would have failed to acquire the necessary land *assuming* Westwater had secured financial backing. It is the assumption of "financial backing" that is the Achilles heel of Westwater's case.

(b) Obtaining an Environmental Impact Assessment Approval

374. Westwater says[452] that Adur had already completed approximately 80% of the process for getting its EIA approved,[453] and the Company had even anticipated much of the content that the MEU ended up requiring in the Terms of Reference it ultimately issued.[454]

375. Westwater had already obtained two of the required four permits from TAEK once it obtained an approved EIA. Westwater says it would have been able to obtain the remaining two without difficulty in parallel with moving forward with construction.[455]

[451] [redacted]

[452] Memorial, para. 189.

[453] [redacted]

376. Westwater says it acted responsibility in relation to its shareholders by putting a hold on the regulatory process until the spot price of uranium rose above USD 30.[456] As in *Tethyan Copper v. Pakistan*, Westwater says it would have been "premature and cost-inefficient" to have completed these permitting steps as of the Valuation Date given the price of uranium.[457]

377. An approved EIA was a prerequisite to proceed with both the TAEK and MIGEM permitting process. Westwater says,[458] that the Respondent has not pointed to a single environmental issue that would jeopardize approval of the EIA. Witnesses from both parties agreed that ISR mining is less environmentally sensitive than open pit uranium mining.[459] Westwater contends that the Respondent has not established any tangible risk to the EIA process and instead pointed only to steps in the process that Westwater already undertook or was preparing to take once uranium prices recovered.[460] The Respondent argues that, on the contrary, the EIA requirements were particularly significant given that the project involved mining uranium oxide, which is a radioactive substance, and the Temrezli mine would be the first uranium mine in Turkey. Unique health, safety and environmental challenges would have to be addressed.[461]

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[456] [redacted]

[457] **Exhibit CL-0060**, *Tethyan Copper*, para. 1210.

[458] Westwater Post-Hearing Submission, para. 50.

[459] [redacted]

[460] See **Exhibit R-0059**, Adur's Request to Consolidate Group IV(ç) Licenses, ss. 2.3 (9 January 2018).

[461] **Exhibit RL-0022**, Bylaw on EIA, Articles 2, 4, 8-13. The by-law governing Environmental Impact Assessments requires five distinct steps in the EIA process:

(a) **First**, Adur was required to initiate the EIA process by filing an EIA application with the MEU;

(b) **Second**, the Department of Environmental Impact Assessment for Mining Projects would establish a Review and Assessment Committee comprised of relevant Government agencies that had oversight or expertise regarding the project. The MEU would also notify the public of the existence of the project and that the EIA process had begun;

(c) **Third**, the Provincial Directorate of the MEU would organize a Public Consultation meeting in a village close to the mining area, during which the project owner would be given an opportunity to present its project to the local residents of the mining area and receive the public's comments;

(d) **Fourth**, upon submission of the EIA report to the MEU, the report is published online, and the public is given an opportunity to file petitions commenting on the project or the contents of the EIA report;

(e) **Fifth**, the MEU would solicit comments from the relevant agencies that were part of the Review and Assessment Committee as well as the public regarding concerns relating to the project. The MEU would prepare a Terms of Reference for the project, taking any submitted comments into account. The Terms of Reference would define the specific issues that the project owner must address in the EIA report. The project owner is then given 18 months from receipt of the Terms of Reference to submit its EIA report;

(f) **Sixth**, the Review and Assessment Committee then evaluates the EIA report, taking into consideration several criteria, such as whether the findings in the report are supported by sufficient data and documentation; whether the environmental risks have been adequately examined; whether measures necessary to address environmental risks have been identified; and whether concerns identified by the public have been sufficiently resolved;

378. According to Westwater, it needed only "one month of additional work costing around USD 100,000 to complete and submit the EIA"[462] including reports on groundwater contamination and site restoration.[463]

379. The Respondent says that Westwater's prediction is wholly unrealistic. [redacted] acknowledged that he had never worked on a uranium project anywhere before Temrezli; nor had he ever been involved in obtaining an approved EIA from any jurisdiction concerning a mine for a radioactive mineral such as uranium.[464] Its contemporaneous project documents indicate that Adur had not completed six of the 11 baseline environmental studies it needed to submit with its EIA report (including its critical studies on Hydrology, Hydrogeology, Meteorology, Radiological, Socio-Economic, and Water Quality). [465]

380. Westwater's deadline for completion of its initial EIA application was 23 May 2017 (being 18 months from receipt of the Terms of Reference). However, after Westwater acquired Adur, Westwater did not advance the EIA process but abandoned it due to depressed uranium prices.[466] Ultimately, the deadline of 23 May 2017 came and went without Adur submitting the EIA application and Adur's unfinished application terminated.[467]

381. If Adur wanted to obtain an operating permit, it would have had to re-start the entire EIA process all over again. But it never did so.

(g) **Seventh**, if the Review and Assessment Committee finds deficiencies in the EIA report, the project owner is given limited additional time to address those issues and submit an amended EIA report;

(h) **Eighth**, based on the Review and Assessment Committee's recommendation, the MEU would issue its final decision granting or denying the EIA application.

[462] [redacted]

[463] **Exhibit R-0032**, Summary Opinion of the Directorate General of Mining Affairs (MİGEM) on the Environmental Impact Assessment Application in relation to the "Temrezli Uranium Solution Mining and Concentrate Facility Project", 7 August 2015; **Exhibit R-0033**, Memorandum from TAEK to MEU entitled "Temrezli Uranium Mining and Concentrated Plant Project EIA Report Format" (No: 31212234-120 (ADUR) – 46030), 2 September 2015.

[464] [redacted]

[465] **Exhibit C-0056**, Terms of Reference Document, 6 October 2015. The Respondent says two of the most substantive topics in the Terms of Reference required Westwater to "[e]valuat[e] ... the impacts and mitigation measures during construction and operational period activities," and to present its "monitoring plan during construction, operation and restoration phases of the project." These two topics in the Terms of Reference alone encompassed dozens of subtopics regarding a wide range of human health and environmental safety related issues for which Westwater needed to provide a detailed plan to address. The Respondent says there is no evidence of any progress to advance these issues in the Terms of Reference in Westwater's 2016 draft technical report. The only reasonable inference is that no progress was in fact being made regarding these issues at the time.

[466] [redacted]

[467] **Exhibit R-0046**, Memorandum from Ministry of Environment and Urban Planning, 23 May 2017.

The Tribunal's Ruling on the EIA Process

382. Westwater might be overly optimistic about the ease of obtaining environmental approval for a new (and the first in Turkey) uranium mine, but the Respondent did not establish on a balance of probabilities that it would have failed to do so.

383. Neither Westwater nor the Respondent called any environmental experts to explain in any detail the matters that would have had to be addressed in the EIA and the ease or difficulty of resolving those matters to achieve compliance.

384. [redacted] though not an environmental expert, was experienced in dealing with EIA applications for mines (other than uranium) including "six major mining EIA projects in Turkey."[468] He was well-versed in meeting environmental concerns resulting from mining projects.[469]

385. The Tribunal accepts as reasonable [redacted] evaluation of the EIA situation. If the licenses had not been cancelled, and *assuming* (for the moment) that Westwater would have been able to finance the project on the basis of the plainly inadequate 2015 PFS, it is more likely than not that Westwater, if fairly and equitably treated, would have qualified for EIA approval.

(c) The Necessary Permits from TAEK

386. Westwater acknowledges that it needed to obtain four TAEK permits: (i) approval as the owner of a uranium facility; (ii) approval of quality management systems; (iii) a site approval

468 [redacted]

permit; and (iv) a TAEK operating license (distinct from an operating permit issued by MIGEM under the mining regulation).[470] [redacted]

[redacted]

387. The Turkish Government considered uranium a "strategic asset" and as MIGEM's own witnesses acknowledged, it did not want this valuable resource to sit idle. [redacted] was satisfied that TAEK could move expeditiously if it wanted to. TAEK issued the Akkuyu nuclear plant two of the three licenses it needed in only 2.5 years.[472]

388. The Respondent says the TAEK process is complex and Adur had made no significant progress as of 19/20 June 2018, when Adur's operating licenses were cancelled.[473]

389. The Respondent says that under Turkish law, the process for obtaining a final TAEK operating license consists of 8 distinct steps including obtaining 3 distinct and separate licenses and 3 distinct and separate permits. [474]

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470 [redacted]

390. According to TAEK, its authorisation process would have been expected to take several years[475] taking into consideration the time required to go through various rounds of TAEK's comments or questions at each step of the process (including, for example, to address missing information or deficiencies in reports), and TAEK's shortage of personnel to handle other pending licensing projects.

391. According to the Respondent, Adur's projection in its 9 January 2018 Consolidation Request that it could begin production in September 2021, 28 months after resuming its TAEK authorisation process in May 2019,[476] was unrealistic. Moreover, TAEK testified that it would not have approved installation of the used plant Westwater wanted to import from Rosita, Texas.

The Tribunal's Ruling on the TAEK Process

392. The Respondent has not established on a balance of probabilities that *assuming* Westwater had financing in place, Westwater would have failed to obtain the TAEK permits in time. While the TAEK process could not formally begin until after EIA permission, Westwater would have moved forward with much of the detail already discussed with TAEK engineers. [redacted] testified to his ongoing discussions with technical people at TAEK on "project issues" and, according to [redacted] the TAEK people took a "reasonable approach to resolving those things"

393. While the ISR process was new to Turkey, it was not a novel process, and Westwater was experienced in its operations. All signs at the time were that TAEK wanted the resource developed.

[redacted]

[476] **Exhibit R-0059**, Adur's Request to Consolidate Group IV(ç) Licenses, 9 January 2018.

394. Assuming, as is appropriate, that TAEK officials would have approached the TAEK permits professionally and in good faith, the Tribunal is satisfied that a well-financed Westwater would likely have been successful in obtaining TAEK approvals within the time available.

(d) Construction of the Mine

395. Construction of the physical mine facility was the most capital-intensive challenge to Westwater. A functioning facility was a condition precedent to TAEK approval for an operating permit.

396. Westwater rejects the Respondent's claim that the Rosita plant would not be allowed to be relocated from Texas to Turkey. In Westwater's view, the equipment, which had never previously been used in production,[477] was fit for use at Temrezli.[478] [redacted] met with [redacted] of TAEK in June 2015. There was no suggestion that ISR equipment would have to be specifically built for use at Temrezli in order to be imported; on the contrary, [redacted] indicated that Adur's ISR facility would not constitute "equipment important to safety" as defined in TAEK's procurement regulation, thus removing it from the scope of the regulation's detailed manufacturing notification and approval regime.[479]

The Tribunal's Ruling on Construction

397. The entire Westwater case for construction hinges on the ready availability of financing when (and if) uranium prices reached its self-imposed "hurdle" rate. However, while Westwater assures the Tribunal that financing would have been found in that situation, the supporting evidence relies essentially on bare assertions by [redacted]. There were no conditional commitments from potential investors. There was no conditional financing in place, there were no utility off-take agreements. However, *if* construction had started in 2021 as Westwater predicted, (although, as mentioned, [redacted] DCF model did not contemplate construction

[477] [redacted]

[478] **Exhibit R-0124**, Facility Disassembly & Transport Report, Phase 1: Equipment Inventory and Condition Determination, XStrategic (30 October 2015), p. 1; see also **Exhibit R-0123**. Facility Disassembly & Transport Report, Phase 1: Equipment Inventory and Condition Determination, XStrategic (16 November 2015).

[479] [redacted]

beginning until 2023)[480] the Respondent has not established that construction would not have proceeded in time to satisfy licensing requirements and obtain an operating permit. Westwater claims (quite reasonably) that as a practical matter if the construction were close to completion, the Respondent would not have cancelled the project. The question is whether Westwater's financing efforts would have succeeded to permit construction to begin.

(e) Financing the Project

398. Westwater says there were no "substantial uncertainties" regarding financing the project.[481] As in *Tethyan Copper v. Pakistan*, the fact that the PFS did not address financing, or that the claimant had not identified specific lenders as of the Valuation Date, does not mean, Westwater says, that financing was uncertain.[482]

399. Westwater intended to use the financing model it had used in its past projects, dividing the financing equally in thirds between equity, debt, and offtake contracts.[483] According to [redacted], Westwater's willingness to commit a relatively large amount of equity to the project, and the fact that it had already invested significant sums into the project, made it (in the words of the *Tethyan Copper* tribunal) "improbable that Claimant's owners would not have been able to obtain third-party financing from financial institutions."[484] Westwater's marketing contractor had been retained to identify certain utilities who would be potential counterparties in offtake contracts.[485] Furthermore, Westwater already had financial plans in place to finance the approximately USD 5 million to complete land acquisition and obtain the remaining permits.[486]

400. The Respondent contends[487] that Westwater's precarious financial condition at all relevant times and the lack of a proper PFS would have been fatal to completion of the regulatory and other conditions precedent (such as construction of the facility) to opening a mine.

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480 [redacted]
481 Memorial, paras. 193-195.
482 **Exhibit CL-0060**, *Tethyan Copper*, para. 1414.
483 [redacted]
484 **Exhibit CL-0060**, *Tethyan Copper*, para. 1332.
485 [redacted]
487 Counter-Memorial, para. 114.

(f) Self-Financing

401. The PFS prepared by Tetra-Tech in 2015 estimated the project would require a USD 41 million upfront capital cost to put the Temrezli mine into production.[488] [redacted] acknowledged that "during the time period [2015-2018] funds were admittedly scarce"[489] but he expressed confidence that Westwater could make investment if uranium prices enabled the project to go ahead.

402. The Respondent throws doubt on Westwater's ability to finance anything from its internal resources. Both Westwater and its independent auditor expressed "*substantial doubt about [Westwater's] ability to continue as a going concern*" in the company's public filings in both 2015 and 2018.[490]

403. As to internal financing, Westwater announced on 20 October 2017 that it had delisted from the Australian Stock Exchange. The reason was that "*capital raising efforts in Australia had been unsuccessful*."[491]

404. According to the Respondent,[492] Westwater's financial statements demonstrate that it did not have the working capital necessary to complete its regulatory approval process or begin mining operations at Temrezli. Handcuffed by its own balance sheet and given the historically low prices of uranium in 2016, 2017, and 2018, Westwater had neither the intention nor the means to actually bring into production any of its uranium projects in Turkey, according to the Respondent and this situation had nothing to do with cancellation of the licenses.

The Tribunal's Ruling on Internal Financing

405. [redacted] statement that "starting in about 2018 **and later into 2020 when the price began to look like it was going to support the project**, we would have gone ahead" (Emphasis

[488] **Exhibit C-0003**, Anatolia Energy, Pre-Feasibility Study Demonstrates Robust Economics of the Temrezli Uranium Project, at p. 1.
[489] [redacted]
[490] **Exhibit R-0020**, Westwater Resources, FY 2015 Form 10-K, at 16, 65; **Exhibit R-0057**, Westwater Resources, FY 2018 Form 10-K, at pp. 18, 63.
[491] **Exhibit R-0055**, Westwater Resources, Westwater Resources Reports 3rd Quarter 2017 Results, 13 November 2017, p. 4.
[492] Counter-Memorial, para. 122.

added) is unrealistic. There is no internal evidence as of the Valuation Date that Westwater had any plan to "go ahead."

406. There is no evidence in the Westwater financial statements or otherwise that Westwater had the working capital or other internal financial resources to move the project forward significantly in 2018 even if it had had any desire to do so. The issue is not what [redacted] now says Westwater "would have done" but what, if anything it *did* do to bring (or plan to bring) the project to fruition. The answer is that Westwater neither made nor contemplated any significant effort nor, it seems, had in place any concrete action plan as of the Valuation Date.

(g) External Financing

407. Westwater's position is that the Temrezli project was highly marketable to investors. [redacted]

[redacted]

408. [redacted]

[redacted]

[redacted]

[redacted]

409. According to the Respondent's financing expert, [redacted], in the absence of a proper PFS meant "the Temrezli project was not sufficiently advanced in the de-risking process to be deemed an acceptable candidate for lenders to advance project financing as of the date of valuation."[496]

410. The Respondent notes[497] that Westwater submitted no expert testimony to counter [redacted] testimony. [redacted] confirmed that he had no expertise in capital markets, investment banking, or mining company management, and that he had never conducted any mining project financing.[498] Despite submitting into evidence data regarding capital raisings by junior uranium mining companies during the period after the date of valuation, [redacted] testified that he never "mentioned or said that [Westwater] would be able to raise money in 2018," and he did not have any view on Westwater's financing prospects.[499]

411. The Respondent argues that:

(a) Westwater acknowledged in each of its annual reports between 2015 and 2017 that it "[did] not have a committed source of financing for the development of our Temrezli or Churchrock project." Westwater warned investors in each of those disclosures that "[t]here can be no assurance that we will be able to obtain financing for these projects or our other projects;"[500]

[495] [redacted]

[500] **Exhibit R-0020**, Westwater Resources, FY 2015 Form 10-K, p. 17.

(b) by June 2018, Westwater had reported no uranium off-take or supply agreements that it had entered into; [redacted] But, despite some preliminary marketing efforts, there were apparently no takers.[502] Under Turkish law, only the Turkish Government or buyers authorised by the President of the Republic may purchase uranium mined from Turkey.[503] Westwater made no disclosures of any such sales. Therefore, the Respondent says,[504] it is reasonable to infer that no such off-take or supply agreements existed;

(c) in the end, Westwater never updated its PFS, which [redacted] considered important to "improve Westwater's position for obtaining financing,"[505] nor went the next step to prepare a Definitive Feasibility Study to adequately identify its mineral resource estimates;[506]

(d) With regard to the 2015 Tetra-Tech PFS, the Respondent says Westwater's claim for its credibility is contradicted by its own staff and internal documents. For example, the Gap Analysis of the Tetra-Tech Pre-Feasibility Study performed by Westwater's consultant RPA dated 20 November 2015 stated that "the project is an advanced-stage **exploration project** with established uranium resources and project designs for ISR of uranium."[507] The Respondent considers it pertinent that RPA, after reviewing the Tetratech PFS, did not consider Temrezli to be a **development** project but merely an **exploration** project. On page 24 of the report, RPA states:

> The statement [in the Tetra-Tech PFS] that the Project completion definition is within 15% is not supported by the PFS, nor is the stated

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501 [redacted]
502 [redacted]
504 Counter-Memorial, para. 127.
505 [redacted]
506 Counter-Memorial, para. 397.
507 [redacted]

> accuracy of 25%. RPA recommends accuracy for this PFS of -30% to +50%. Also, there is a greater risk of cost increases as engineering develops and pricing is obtained, and therefore RPA recommends applying a higher contingency, over 20%, based on the information as provided in the PFS and other reports.[508]

412. Westwater attempted to downplay RCF's conclusion that it would not invest in the Temrezli project by alleging that RCF "really [does not have] much in the way of experience [in the mining sector, ISR or otherwise]."[509] On the contrary, the Respondent says,[510] RCF is a private equity firm that **specialises in mining** and has many "degreed scientists" and "engineer[s]" on its investment decision team.[511] RCF insisted that Westwater continue to "conduct ongoing due diligence" and "complet[e]" not merely an updated PFS but a "[Definitive] Feasibility Study."[512]

413. The Respondent contends that despite Westwater's

> repeated disclosures in public filings and internal statements to its Board that it needed to update its PFS and was working to do so to increase its ability to obtain project financing, Westwater apparently abandoned its efforts to update the PFS after it received the gap analysis from its external consultant, RPA, which completely dismantled the PFS, describing the project as an advanced stage" *exploration project*," assigning a confidence level to the PFS inputs of -30% to +50%, and identifying 17 "*gap*" areas requiring further work.[513]

414. In relation to Westwater's claim that IRS technology does not require a high standard feasibility study with declared "mineral reserves", the Respondent says the fundamental

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[508] [redacted]

[509] [redacted].

[510] Respondent Post-Hearing Submission, para. 75.

[511] [redacted]

[512] [redacted]

[513] Respondent Post-Hearing Submission, para. 80.

differences between the Temrezli project and other ISR uranium projects that may have launched without a definitive Feasibility Study is that the ISR uranium projects that have been developed in this manner are located in the experience-rich basins such as Wyoming and Australia where there is considerable knowledge because of continuity from neighboring producing mines.[514]

The Tribunal's Ruling on External Financing

415. The Tribunal is satisfied on a balance of probabilities that Westwater would not have been able to obtain external financing for the project in time to complete the licensing requirements (of which it was aware as of its initial examination of the licenses) before the licenses expired.

416. Westwater's Achilles heel was its decision to abandon plans to update the 2015 TetraTech PFS. [redacted] attempts to downplay RPA's criticism of the 2015 PFS on the basis that RPA was just looking for work[515] but in fact RPA was doing the preliminary evaluation that Westwater had asked it to do and its negative reaction was widely shared by, amongst others, Westwater's in-house technical expert, [redacted]

417. The Tribunal accepts the evidence of the Respondent's expert financing witness [redacted] that based on what was known as of the Valuation Date, the Westwater project was not "an acceptable" candidate for project financing:

… [redacted]

514 [redacted]

[redacted]

418. Westwater's biggest investor, Resource Capital Fund V.L.P., had already declined to finance the project. In a letter dated 18 May 2015 to Westwater it stated:

> RCF expects to conduct ongoing due diligence as the project progresses through to completion of a Feasibility Study including:
>
> - Review of the mining and processing plans, operations and systems;
> - Comprehensive legal due diligence;
> - Other targeted review/evaluation, as necessary.[517]

516 [redacted]

517 [redacted]

419. [redacted] says the lack of interest of its biggest investor related to the structure of its various funds but that is not what RPA said in pointing out the project deficiencies.

420. [redacted]

421. [redacted] testified that Westwater was able to raise money on other projects "starting in about 2018 and later 2020" but the money was raised on other projects and there is no evidence that in those cases Westwater went to market with a PFS as manifestly inadequate as the 2015 TetraTech PFS.

The Respondent is Not Liable to Compensate Westwater for Losses Not Caused by the Respondent's Misconduct

422. The Tribunal has already ruled that Westwater is entitled to be compensated for "investment costs" which the Respondent acknowledges must be paid by virtue of the cancellation irrespective of Westwater's prospects of bringing the uranium project to a successful conclusion.

423. The Tribunal rejects Westwater's claim based on lost profits. The Tribunal is satisfied that in the "but for" scenario (hypothesizing, that is, that the Respondent had never wrongfully

518 [redacted]

cancelled Westwater's licenses) Westwater's uranium project would have failed to meet licensing requirements and deadlines because of factors (particularly lack of financing or any realistic prospect of obtaining the necessary financing) unrelated to the Respondent's misconduct.

424. Westwater had neither the interest nor the resources to bring the project to completion within the time permitted by the licenses:

(i) Westwater had established a "hurdle rate" of USD 30 per pound to reactivate the project it mothballed in 2016 soon after the project was acquired from Anatolia Energy. As Adur had advised MIGEM on 9 January 2018: "Investments in this project **can only begin** when prices exceed USD $30 per pound;" (Emphasis added)

(ii) mothballing the project in 2016 showed Westwater was not prepared to proceed incrementally if to do so would risk throwing good money (which it didn't have) after bad;

(iii) there is no evidence that as of the Valuation Date, 19/20 June 2018, Westwater anticipated a sufficient "uptick" in uranium prices to justify it "to begin" the investment of its own or other people's money. [redacted] did not suggest a date, having regard to the progress of uranium prices through 2018 and onwards, when (if ever) he might have given the order to try to resuscitate the Temrezli project;

(iv) by June 2018, Westwater's interest and activities had been redirected elsewhere;

(v) Westwater's "hurdle rate" had not been achieved as of 19/20 June 2018 and there is no contemporaneous evidence that Westwater was prepared to proceed (or would have had the internal or external financing to proceed or could have attracted equity to proceed) then or in the foreseeable future because as [redacted]

(vi) if potential external financiers had been approached, the Tribunal is satisfied that the manifest inadequacy of the 2015 Tetra-Tech PFS would have been fatal to successful negotiations. Westwater acknowledged to its Board that a proper PFS

519 [redacted]

was required but it never was done. In the end, viewing the matter as of the Valuation Date, Westwater's failure to produce a "marketable" PFS doomed any realistic hope of financing the project within the time available before the licenses expired;

(vii) there is no persuasive evidence that Westwater could have recouped some value by marketing the project to another mine developer;

(viii) as of the Valuation Date, Westwater had effectively left the Turkish uranium project to die a natural death.

425. Westwater says that future project "uncertainties" are irrelevant.[520] A host State's expropriation of an investment necessarily causes injury to the investor in the amount of the value of the lost investment. The breach of a treaty obligation, such as the guarantee of fair and equitable treatment, deprives an investor of its investment. The injury is measured by the value of the lost investment. The only relevant inquiry is what was the value of the investment (and how to determine it).[521]

426. Westwater acknowledges however that a Tribunal finding that the Temrezli mine would not likely have reached production in the but-for scenario means that compensation could not be assessed using the DCF method.[522]

427. In *Khan v. Mongolia*, the State respondent argued that "there is no evidence that the

[520] Reply, para. 287.
[521] Westwater relies on *Bear Creek v. Peru* (**Exhibit CL-0063**, *Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 600 ("***Bear Creek Mining***")) where the tribunal found that "there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation." In *Copper Mesa v. Ecuador* (**Exhibit RL-0027**, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, para. 7.24 ("***Copper Mesa Mining***")), the tribunal found that "the Claimant's chances of moving beyond an exploratory stage were...slender." Yet Westwater notes neither of these tribunals concluded from this finding that the state's breach had not caused the claimants any damages. The *Bear Creek* tribunal held that Peru's breach had nevertheless caused damage to the investor, while the *Copper Mesa* tribunal found, "[t]he Tribunal has no doubt that the Claimant has itself suffered some legal harm. That much is certain. What is uncertain is the proven extent of that legal harm, quantified as compensation payable by the Respondent." *Copper Mesa Mining*, para. 7.26.
[522] Reply, para. 293, citing **Exhibit CL-0063**, *Bear Creek Mining,* paras. 603-604; **Exhibit RL-0027**, *Copper Mesa Mining*, para. 7.26.

Claimants could have taken the mine into profitability."[523] The tribunal disagreed, and found that Mongolia's argument in that case pertained to the valuation methodology, not causation. [524]

428. The tribunal then identified factors that in its view precluded it from valuing the expropriated mine using the DCF method. It then noted, "[t]he combination of these factors does not mean, as the Respondents allege, that the Dornod Project had no value in the Claimants' hands, but it does mean that the level of certainty required for the DCF method to be used has not been attained."[525] It ended up valuing the mine based on offers that had been made to purchase it, and awarded compensation to the claimant on the basis of those offers.[526]

429. In the view of this Tribunal, however, proof that the mine would never have achieved production because of factors unrelated to the Respondent's wrongful conduct is not just a matter of valuation methodology. The Respondent has proven that taking into consideration all of the information available on the Valuation Date, there would in all probability have been no Adur mine irrespective of the Respondent's cancellation of the licenses.

430. The consequence is that Westwater would have lost its entire investment irrespective of the license cancellation and it therefore cannot recover against the Respondent compensation for a loss not caused by the Respondent's misconduct.

431. Nevertheless, the obligation accepted by the Respondent is to reimburse investment costs of a cancelled project, irrespective of the prospects of the project being a success.

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[523] **Exhibit CL-0122**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015, para. 376 ("***Khan Resources Inc.***").

[524] **Exhibit CL-0122**, *Khan Resources Inc.*, paras. 377, 381:

> The Tribunal does not agree. While there may have been a number of uncertainties that needed to be overcome by the Claimants before the mine could come into production – as discussed below – the fact that the Dornod Project itself had a considerable inherent value as at the Valuation Date is clear from the [Definitive Feasibility Study]…
>
> The other issues raised by the Respondents as going to "causation" (*e.g.*, whether financing would have been raised or whether a new joint venture agreement was needed) are relevant to assessing the correct methodology, but do not demonstrate that the Dornod Project had no intrinsic market value as at the Valuation Date.

[525] **Exhibit CL-0122**, *Khan Resources Inc.*, para. 393.

[526] **Exhibit CL-0122**, *Khan Resources Inc.*, paras. 410-421, 409 (the sunk costs approach is not suitable for a project that had moved beyond "a minimal stage of development").

PART 7 - INTEREST

432. In its Memorial, Westwater sought pre- and post-Award interest at a "reasonable commercial rate compounded annually from 27 January 2020 until full payment has been made." (The 27 January 2020 date references the date of the [redacted] suggests that the LIBOR rate as of the date of the Award plus 4% would be a reasonable commercial rate.[527] However, effective January 2023, LIBOR will no longer be used in the issuance of new loans in the United States where Westwater is located. The new benchmark is the Secured Overnight Financing Rate ("SOFR"). In the circumstances, Westwater is entitled to the SOFR rate posted on the first day of each month plus 2% until payment is made.

433. The Respondent objects[528] to the payment of compound interest. In its view, if interest is to be awarded, it should be simple interest. While Westwater claims that had it not invested in Turkey, "it could have invested its money elsewhere – whether in another uranium property or another asset – where it would have grown at a compound rate," the Respondent says that during the period 2015 through 2018, Westwater had so little capital that it was struggling just to continue as a going concern and was relying heavily on debt borrowing or stock issuances to finance its working capital. "There is simply no evidence," the Respondent argues "a company on the verge of collapse, had any other investment opportunities and, therefore, its assertion that it could have invested "elsewhere" is completely baseless."[529] Nevertheless, in the Tribunal's view, Westwater is entitled to compound interest simply on the basis of the time value of money in respect of an unpaid debt. Accordingly, Westwater is entitled to interest at the SOFR rate as of the first day of each month plus 2% compounded annually from the Valuation Date to final payment.

PART 8 - COSTS OF THE ARBITRATION

A. Legal Fees and Expenses

434. Paragraph 1.1 of Procedural Order No. 1 provides that the proceedings will be "conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006" and paragraph 2.1 provides that the Tribunal was "constituted…in accordance with the ICSID Convention and ICSID

[527] Memorial, para. 224.2.
[528] Rejoinder, para. 497.
[529] Rejoinder, para. 498.

Arbitration Rules." Article 61(2) of the ICSID Convention allows the Tribunal to determine "how and by whom…expenses [incurred by the parties in connection with the proceedings], the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid," "except as the parties otherwise agree." The Parties have not otherwise agreed on the apportionment of costs.

435. Success on different issues is divided. Westwater has as a result of bringing and pursuing this arbitration obtained compensation which is much less than its claim but is nevertheless ten times more than the Respondent was willing to pay. While pursing its claim, Westwater met and defeated the Respondent's objections to jurisdiction, its defence to liability and its contention that Westwater's claims to compensation should be altogether dismissed.[530]

436. Westwater requests costs in the total amount of USD 7,140,825.76 consisting of (1) USD 400,000 that the Claimant paid to ICSID in connection with the costs of the arbitration, which amount includes the lodging fee; and (2) USD 6,740,725.76 of their legal fees and expenses in connection with this Arbitration.

437. Westwater's legal fees and expenses consist of three categories:

(a) professional fees and expenses incurred by Hogan Lovells and Hughes Hubbard & Reed LLP in connection with the arbitration (USD 5,696,675.11);

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[530] The Prayer for Relief in the Respondent's Rejoinder dated 15 July 2021 reads as follows:

> VI. Request for Relief
> 500. The Republic respectfully updates its Request for Relief by asking that the Tribunal issue an Award:
> 500.1 In favour of the Republic and against the Claimant, dismissing the Claimant's claims that it had an "investment" under the BIT and the ICSID Convention due to lack of jurisdiction with prejudice;
> 500.2 In favour of the Republic and against the Claimant, dismissing the Claimant's claims for failure to comply with the BIT's Negotiation Period due to lack of jurisdiction with prejudice;
> 500.3 In the event that the Tribunal decides that it has jurisdiction to hear Claimant's claims, rejecting all of Claimants' claims on the merits;
> 500.4 Denying that Claimant has suffered compensable damages for an act by the Republic that violates the Treaty;
> 500.5 Denying all interest claims prior to and after the Award as requested by the Claimant;
> 500.6 Denying an express order that any amounts granted to Claimants would not be subject to taxation nor compensation of that kind in the Republic; and
> 500.7 Ordering Claimant to pay all the costs of this arbitration, including the expenses and legal fees incurred by the Republic.

(b) professional fees and expenses paid to Westwater's expert witnesses (USD 831,236,29); and

(c) costs paid by Westwater in connection with printing, shipping, document production, travel, research fees and translation services (USD 212,914.36).

438. The Respondent argues that the Claimant's "poor and inefficient pleadings" unnecessarily escalated the costs of the arbitration. In addition, the Respondent states that it should be granted its arbitration costs if the Tribunal awards significantly less than USD 267 million Westwater had repeatedly demanded because it shows Westwater's bad faith in claiming such a grossly inflated price, later quantified by the Claimant's own expert at only USD 30.5 million.

439. **In the majority view**, the great majority of Westwater's costs were incurred in respect of issues where it was successful. The modest award of quantum reflects the financial weakness and management decisions of Westwater rather than any vindication of the Respondent's conduct in relation to the uranium project. The Respondent failed to make even a reasonable offer of investment costs as it was obliged to do under Turkish law. On the other hand, the result of the arbitration is that while Westwater succeeded on most of the issues in dispute, it recovered just a faction of its USD 30.5 million claim.

440. In the circumstances, the Tribunal awards Westwater 50% of its legal fees and expenses, namely USD 3,370,362.88.

B. Costs of the Arbitration

441. The costs of the arbitration, including fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' Fees and Expenses	USD 353,988.02
Honourable Ian Binnie, C.C., K.C.	USD 123,550.00
Prof. Robert G. Volterra	USD 118,380.52
Prof. Brigitte Stern	USD 112,057.50

Arbitrators' Fees and Expenses	USD 353,988.02
ICSID's administrative fees	USD 210,000.00
Direct expenses (estimated)	USD 119,138.64
Total	**USD 683,126.66**

442. The above costs of the proceeding have been paid out of the advances made by the Parties in equal parts. The Tribunal notes that ICSID's final financial statement will reflect the full amount of the advance payments received from each Party by ICSID and the final costs of the arbitration proceeding.[531]

443. Accordingly, the Tribunal orders the Respondent to pay Westwater USD **341,563.33** for the expended portion of Westwater's advances to ICSID and USD **3,370,362.88** to cover 50% of Westwater's legal fees and expenses.

[531] The remaining balance in the ICSID case account will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

PART 9 - DISPOSITION

444. For the reasons set forth above, the Tribunal issues the following Award finding that:

a. The Tribunal has jurisdiction over Westwater's claims.

b. The Respondent's cancellation of Adur's licenses on 19/20 June 2018 breached the BIT.

c. The Tribunal accepts the clear and convincing evidence that the Westwater uranium project would never have reached production and made profits regardless of the Respondent's breaches.

d. The Respondent's breaches of the BIT did not cause the Claimant's loss.

e. Westwater is nevertheless entitled to "investment costs" which are assessed at USD 1,283,000.

f. Westwater is entitled to;

    i. legal fees and expenses in the sum of USD 3,370,362.88;

    ii. 50% of the expended portion of Westwater's advance payments to ICSID (*i.e.*, USD 341,563.33).

g. Interest at the SOFR rate plus 2% compounded semi-annually from the Valuation Date to final payment should be added to the sums to be paid to Westwater.

[redacted]

Prof. Robert G. Volterra
Arbitrator
Date: 2 March 2023

Prof. Brigitte Stern
Arbitrator
Date:

Hon. Ian Binnie, C.C., K.C.
President of the Tribunal
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