Excerpts

AINTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ECODEVELOPMENT IN EUROPE AB
ECOENERGY AFRICA AB

Claimants

and

THE UNITED REPUBLIC OF TANZANIA

Respondent

ICSID Case No. ARB/17/33

AWARD

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, QC, *President*
Ms Funke Adekoya, SAN, *Arbitrator*
Dr Stanimir A. Alexandrov, *Arbitrator*

Secretary of the Tribunal

Ms Aurélia Antonietti

Date of dispatch to the Parties: 13 April 2022

REPRESENTATION OF THE PARTIES

Representing Claimants:

Mr Jakob Ragnwaldh
Mr Robin Rylander
Mr David Sandberg
Mr Ludwig Metz
Mannheimer Swartling Advokatbyrå AB
Box 1711
SE-111 87 Stockholm
Sweden

and

Prof Dr Kaj Hobér
3 Verulam Buildings
Gray's Inn, London, WC1R 5NT
United Kingdom

Representing Respondent:

Hon. Judge Dr Eliezer Mbuki Feleshi
Attorney General of United Republic of Tanzania
The Attorney General's Office
Government City
Mtumba, P.O. Box 630
Dodoma
Tanzania

and

Mr Gabriel Pascal Malata, Solicitor General
Dr Boniphace N. Luhende, Deputy Solicitor General
Mr George N. Mandepo, Director of Arbitration
Office of the Solicitor General
10 Kivukoni Road
P.O. Box 71554
11405 Dar es Salaam
Tanzania

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

AfDB	African Development Bank
Agro EcoEnergy	Agro EcoEnergy Tanzania Limited
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BAFF	BioAlcohol Fuel Foundation
Bagamoyo EcoEnergy	Bagamoyo EcoEnergy Limited
BIT	Agreement between the Government of the United Republic of Tanzania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal protection of Investments which entered into force on 1 March 2002
BRELA	Business Registration and Licensing Agency
C-[#]	Claimants' Exhibit
C-Mem. or the Counter-Memorial	Respondent's Counter-Memorial dated 27 May 2019
[redacted]	[redacted]
CL-[#]	Claimants' Legal Authority
CO	Certificate of Occupancy
DCF	Discounted Cash Flow
EcoDevelopment	EcoDevelopment in Europe AB
EcoEnergy	EcoEnergy Africa AB
FMV	Fair Market Value
Hearing	Hearing on Jurisdiction and the Merits held from 27 to 31 July 2020
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
Mem. or the Memorial	Claimants' Memorial on the Merits dated 7 November 2018
[redacted]	[redacted]
NISC	National Investment Steering Committee
R-[#]	Respondent's Exhibit
Rej. or the Rejoinder	Respondent's Rejoinder dated 29 May 2020
Reply	Claimants' Reply on the Merits and Defence to Counter-Claim dated 29 November 2019
RL-[#]	Respondent's Legal Authority
Request	Claimants' Request for Arbitration dated 24 August 2017
SAGCOT	Southern Agricultural Growth Corridor of Tanzania
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[Expert] First ER	First Expert Report [...]
[Expert] Second ER	Second Expert Report [...]
SIDA	Swedish International Development Agency
[redacted]	[redacted]
[redacted]	[redacted]

[redacted]	[redacted]
[redacted]	[redacted]
Transcript, Day [#], p. [#]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 23 February 2018
[redacted]	[redacted]
[redacted]	[redacted]
WS	Witness Statement

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of a bilateral investment treaty entitled the Agreement between the Government of the United Republic of Tanzania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments (the "**BIT**"),[1] which entered into force on 1 March 2002, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the "**ICSID Convention**"). The ICSID Convention entered into force for Sweden on 28 January 1967 and for Tanzania on 17 June 1992.

2. The First Claimant is EcoDevelopment in Europe AB ("**EcoDevelopment**"), a company incorporated in Sweden. The Second Claimant is EcoEnergy Africa AB ("**EcoEnergy**"), which is also a company incorporated in Sweden. There were originally two other claimants: Agro EcoEnergy Tanzania Limited ("**Agro EcoEnergy**") and Bagamoyo EcoEnergy Limited ("**Bagamoyo EcoEnergy**"), both of which are companies incorporated in Tanzania. In Procedural Order No. 2, issued on 18 December 2018, the Tribunal noted the discontinuance of the proceedings with respect to Agro EcoEnergy and Bagamoyo EcoEnergy.

3. The Respondent is the United Republic of Tanzania ("**Tanzania**" or the "**Respondent**").

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

5. [redacted]

[1] Sweden-Tanzania BIT, 1 September 1999 (**C-21**).

[redacted]

II. PROCEDURAL HISTORY

6. On 25 August 2017, ICSID received a Request for Arbitration dated 24 August 2017 from EcoDevelopment, EcoEnergy, Agro EcoEnergy and Bagamoyo EcoEnergy against Tanzania (the "**Request**"). The Request was supplemented on 8 September 2017.

7. On 11 September 2017, the Secretary-General of ICSID registered the Request, as supplemented, 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.

8. On 14 November 2017, the Claimants informed the Centre that they had elected the formula provided for in Article 37(2)(b) of the ICSID Convention for the constitution of the arbitral tribunal.

9. On 17 November 2017, the Claimants appointed Dr Stanimir Alexandrov, a national of Bulgaria, as an arbitrator. Dr Alexandrov accepted his appointment on 21 November 2017.

10. On 19 December 2017, the Claimants filed a request for the Chairman of the ICSID Administrative Council (the "**Chairman**") to appoint the arbitrators not yet appointed, pursuant to Article 38 of the ICSID Convention.

11. On 17 January 2018, the Chairman appointed Ms Funke Adekoya, SAN, a national of Nigeria and the United Kingdom, as an arbitrator. Ms Adekoya accepted her appointment on 18 January 2018.

12. On 22 February 2018, following an unsuccessful ballot, the Chairman appointed Sir Christopher Greenwood GBE, CMG, QC, a national of the United Kingdom, as the

presiding arbitrator. Sir Christopher Greenwood accepted his appointment on 23 February 2018.

13. On 23 February 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Aurélia Antonietti, ICSID Senior Legal Adviser, was designated to serve as Secretary of the Tribunal.

14. On 1 March 2018, the Centre requested that each Party make a first advance payment of USD 150,000 to cover the costs for the first three to six months of the proceedings, including the costs of the first session.

15. On 1 March 2018, the Parties were invited to inform the Tribunal whether they would be prepared to consent to the first session being held by telephone conference.

16. On 14 March 2018, the Tribunal (i) invited the Parties to confirm their availability for a first session on 23 April 2018; and (ii) circulated a draft Agenda and draft Procedural Order No. 1, inviting the Parties to confer and submit a joint proposal advising the Tribunal of any agreements reached and/or of their respective positions where they were unable to reach an agreement by 9 April 2018.

17. On 19 March 2018, the Claimants confirmed their availability for a first session on 23 April 2018.

18. On 9 April 2018, the Centre acknowledged receipt of the Claimants' payment of their share of the first advance.

19. On 10 April 2018, the Claimants submitted their comments on the draft Agenda and draft Procedural Order No. 1.

20. On 13 April 2018, the Tribunal informed the Parties that (i) unless it received the agreement of both Parties to a postponement, it would hold the first session on 23 April 2018; (ii) unless it received the Respondent's observations on the draft Procedural Order No. 1 on 20 April 2018, it would be obliged to hold the initial session and to adopt the Procedural Order

and timetable, without having had the Respondent's input; and (iii) unless the Respondent indicated by 20 April 2018 that it intended to participate in the initial session, the Tribunal would proceed to hold the initial session without the representatives of either Party.

21. On 20 April 2018, the Parties were informed that, since the Tribunal had not heard from the Respondent, the Tribunal would hold the first session on 23 April 2018 without the participation of either Party.

22. On 23 April 2018, the Tribunal held its first session with neither Party attending.

23. On 24 April 2018, the Tribunal issued Procedural Order No. 1 on procedural matters, ordering that these proceedings be conducted in accordance with the Arbitration Rules in force as of 10 April 2006, and setting time limits for the Memorial and the Counter-Memorial.

24. On 19 September 2018, the Centre sent a reminder to Tanzania regarding the finances of the case.

25. On 20 October 2018, the office of the Solicitor General of Tanzania wrote to the Centre asking for an update on the proceedings, which the Secretary of the Tribunal provided on 22 October 2018.

26. On 30 October 2018, the Claimants requested a time extension until 7 November 2018 for the filing of their Memorial, which was granted by the Tribunal on 31 October 2018.

27. On the same day, Tanzania requested a similar extension for its Counter-Memorial. That extension was granted on 1 November 2018.

28. On 7 November 2018, the Claimants filed their Memorial, together with the Witness Statements of [Witness] and [Witness], the First Expert Report of [Expert] ([redacted] **First ER**"), Exhibits C-24 through C-161 and Legal Authorities CL-1 through CL-81 (the "**Memorial**").

29. On 9 November 2018, counsel for the Claimants wrote to the Tribunal indicating that:

> [T]*wo of the Claimants – Agro EcoEnergy Tanzania Limited and Bagamoyo EcoEnergy Limited, both domiciled in Tanzania – hereby withdraw from these proceedings and we respectfully request that the Arbitral Tribunal discontinue the proceedings, without prejudice, as concerns these two Claimants.*

30. On 9 November 2018, Tanzania indicated that:

> [T]*he Respondent takes note of the said withdrawal and is waiting for the directives of the Tribunal on the status of the filed Arbitration case above referred in which the Bagamoyo EcoEnergy Limited was the principal party to the performance agreement with the Respondent in this proceeding as elaborated under paragraph 15 of the Claimants Memorial* [sic] *submitted on 7 November, 2018.*

31. On 14 November 2018, the Tribunal invited Tanzania to say whether it objected to the discontinuance with respect to Agro EcoEnergy and Bagamoyo EcoEnergy.

32. On 16 November 2018, the Respondent requested an extension until 30 November 2018 to confirm its position regarding the discontinuance with respect to Agro EcoEnergy and Bagamoyo EcoEnergy.

33. On 17 December 2018, Tanzania indicated that it "*has no objection to the withdrawal and consequent discontinuation of the proceedings with regard to Agro Ecoenergy Tanzania [L]imited and Bagamoyo Ecoenergy [Limited],*" while reserving its right to comment on the merits of the case at the appropriate time.

34. On 18 December 2018, the Tribunal issued Procedural Order No. 2 whereby it took note of the discontinuance of the proceedings with respect to Agro EcoEnergy and Bagamoyo EcoEnergy.

35. On 28 January 2019, the Centre notified the Parties of the Respondent's default and invited either Party to proceed to the payment of the outstanding amount within 15 days.

36. On 4 February 2019, the Respondent requested an extension to pay its share of the first advance. An extension until 1 May 2019 was granted by the Tribunal on 5 February 2019.

37. On 10 May 2019, the Centre invited the Claimants to pay the outstanding amount within 15 days.

38. On 15 May 2019, the Respondent requested an extension until 27 May 2019 to file its Counter-Memorial.

39. On 16 May 2019, the Tribunal granted the Respondent's extension request. The Tribunal also granted an equivalent extension to the Claimants for the filing of their Reply.

40. On 27 May 2019, the Respondent filed its Counter-Memorial on the Merits, including a counter-claim and a challenge to the jurisdiction of the Tribunal, together with the Witness Statements of [Witness], [Witness], [Witness], [Witness], [Witness], [Witness], and [Witness], Exhibits R-1 through R-32, and Legal Authorities RL-1 though RL-25 (the "**Counter-Memorial**").

41. On 4 June 2019, the Centre acknowledged receipt of the Claimants' payment of the Respondent's share of the first advance.

42. On 28 June 2019, the Claimants wrote to the Tribunal regarding the next steps of the proceedings.

43. On 3 July 2019, the Parties were invited to submit their observations on the next steps of the proceedings by 11 July 2019.

44. On 11 July 2019, the Claimants proposed that each Party be given the opportunity to submit one more written brief – the Claimants by the end of November 2019 and the Respondent by mid-April 2020 – and that a hearing be held in September or October 2020. The Claimants proposed that there should be no bifurcation and that the Respondent's jurisdictional objections should be heard at the same time as the merits of the case.

45. On 15 and 22 July 2019, the Tribunal requested the Respondent's views on the next procedural steps to be followed by the Tribunal.

46. On 1 August 2019, the Tribunal took note of the Claimants' proposed schedule for further pleadings and the fact that the Respondent had not replied despite the Tribunal's invitation to submit its views. The Tribunal indicated that unless either Party, by 8 August 2019, asked the Tribunal to reconsider the schedule and provided good reason for it to do so, the Tribunal would adopt a Procedural Order setting the future schedule as:

- Claimants' Reply: 29 November 2019, and
- Respondent's Rejoinder: 17 April 2020.

47. On 5 August 2019, the Respondent agreed with the Tribunal's proposed schedule. The Respondent further indicated that it disagreed with the Claimants regarding bifurcation and maintained that the Respondent's jurisdictional objection should be heard as a preliminary issue.

48. On 21 August 2019, the Tribunal issued Procedural Order No. 3. In that Order, the Tribunal noted the Respondent's request that its jurisdictional objections be dealt with as a preliminary issue. The Tribunal observed that, under Article 41(2) of the ICSID Convention, it was for the Tribunal to decide whether a jurisdictional objection should be dealt with as a preliminary matter or at the same time as the merits. The Tribunal concluded that the present case was not one in which the effective and economic conduct of the proceedings would be assisted by addressing the Respondent's jurisdictional objections in a preliminary phase. Accordingly, it rejected the Respondent's request for bifurcation and decided that the remaining written pleadings and the hearings would address both jurisdiction and merits. The Tribunal confirmed the timetable for the remaining written pleadings set out in its letter of 1 August 2019 (see para. 46, above).

49. On 16 September 2019, the Parties were invited to consult and give their views on the duration and the venue of the hearing by 23 September 2019.

50. On 23 September 2019, the Claimants informed the Tribunal that they had reached out to the Respondent but had not received any response. The Claimants proposed that five working days (Monday-Friday) be reserved for the hearing, that the following Saturday

and Sunday be held in reserve, and that the hearing take place at the World Bank offices in Paris.

51. On the same date, the Respondent requested a one-day extension of time to submit its views, which was granted by the Tribunal that day.

52. On 24 September 2019, the Respondent agreed to the Claimants' proposal concerning the duration of the hearing but proposed that the hearing be held at the International Dispute Resolution Centre in London.

53. On 29 November 2019, the Claimants filed their Reply and Defence to Counter-Claim, together with the Second Witness Statement of [Witness], the Second Expert Report of [Expert] ("[redacted] **Second ER**"), Exhibits C-162 through C-200, and Legal Authorities CL-82 through CL-136 (the "**Reply**").

54. On 4 December 2019, the Claimants wrote to the Secretary pointing out that they had borne the entire advance costs, notwithstanding paragraph 9 of Procedural Order No. 1 and the Tribunal's repeated reminders to the Respondent regarding its obligation to pay its share of the advance costs. They objected to being required to pay not only the Respondent's share of the advance costs in respect of their claim but also the whole of the advance costs with regard to the counter-claim. They therefore asked the Tribunal to fix a sum to be paid by the Respondent by a specified date to cover its share of the costs relating to the counter-claim. In the event that the Respondent failed to make the payment required, the Claimants asked the Tribunal to stay proceedings on the counter-claim.

55. On 8 December 2019, the Tribunal invited the Respondent to reply to the Claimants' letter by 20 December 2019.

56. On 6 January 2020, the Tribunal issued Procedural Order No. 4 whereby it decided as follows:

> [T]*he Respondent should pay US$200,000 as an advance on costs in respect of the counter-claim. If that payment is not received by close of business (Washington DC time) on 5 February 2020, the proceedings on the counter-claim will be stayed. That will not affect the proceedings on the Claimants'*

claim which will continue in accordance with the schedule laid down in Procedural Order No. 3.

In the event that the Respondent makes the payment stipulated above by the required date, the proceedings will continue with regard to both the claim and counter-claim.

If payment is received after the date specified in paragraph 11, then proceedings on the counter-claim will be resumed. In that event, however, it may not be possible for the Tribunal to hear both claim and counter-claim at the same hearing. Should that be the case, the Respondent's delay in paying its share of the advance on costs in respect of the counter-claim will be a factor that the Tribunal will take into account when it comes to decide how to award costs regarding any subsequent hearing in respect of the counter-claim.[2]

57. On the same date, the Centre requested that the Respondent pay an advance of USD 200,000 by 5 February 2020, in accordance with the Tribunal's decision in Procedural Order No. 4.

58. On 14 January 2020, the Claimants requested that the Tribunal review their availability and provide alternatives to the Parties for a one-week hearing during the autumn of 2020.

59. On 16 January 2020, the Tribunal proposed that the hearing take place in London between 27 and 31 July 2020.

60. On 21 January 2020, the Claimants replied accepting that proposal.

61. On 6 February 2020, the Tribunal confirmed that the hearing would take place from 27 to 31 July 2020 in London, and invited the Respondent to provide an update on the status of its payment by 10 February 2020.

62. On 26 February 2020, the Respondent confirmed its availability on the proposed date for the hearing. The Respondent further indicated that the payment was in process and that it would be deposited to the respective account once it was ready.

[2] Procedural Order No. 4, paras. 11-13.

63. On 19 March 2020, the Claimants inquired as to the status of the Respondent's payment.

64. On 21 March 2020, the Centre informed the Parties that it had not received the payment referred to in the Respondent's communication of 26 February 2020.

65. On 8 April 2020, the Respondent requested an extension until 20 July 2020 to submit its Rejoinder.

66. On 10 April 2020, the Tribunal invited the Claimants to provide their comments on the Respondent's extension request by 17 April 2020. The Tribunal further invited the Respondent to indicate its position concerning the advances requested by the same date.

67. On 15 April 2020, the Claimants provided their comments on the Respondent's request of 8 April 2020.

68. On 22 April 2020, the Tribunal decided to extend the deadline for the Respondent's Rejoinder until 29 May 2020. The Tribunal also indicated to the Parties that it would not entertain Tanzania's counter-claim until payment of the required advance was received in full and that the July hearing would therefore be devoted exclusively to the Claimants' claims and Tanzania's response thereto.

69. On 29 April 2020, the Claimants wrote to the Tribunal proposing that, if the restrictions occasioned by the Covid-19 pandemic rendered it impossible to hold the hearing in London as originally planned, the Tribunal hold the hearing by video conference, rather than postpone the hearing.

70. On the same date, the Tribunal took note of the Claimants' proposal and requested the Respondent's observations on this proposal.

71. On 4 May 2020, the Respondent submitted its observations on the Claimants' proposal of 29 April 2020, which it opposed.

72. On 15 May 2020, following further correspondence from the Claimants, on 7 May 2020, and the Respondent, on 12 May 2020, the Tribunal wrote to the Parties informing them that it intended to hold a test session with the Parties to ascertain whether a video hearing

could be held. The Tribunal further indicated that it still hoped to hold the hearing in person and that a hearing by video conference was a fallback position.

73. On 29 May 2020, the Respondent filed its Rejoinder, together with the Second Witness Statement of [Witness], and Legal Authorities RL-26 through RL-30 (the "**Rejoinder**").

74. On 1 June 2020, the Parties were informed that the next steps of the proceedings would be the notification of witnesses and expert called for cross-examination on 12 June 2020, and a pre-hearing organizational meeting. The Tribunal invited the Parties to indicate their availabilities.

75. On 3 June 2020, the Secretary circulated to the Parties a Draft Agenda for the pre-hearing conference call, inviting the Parties to confer and endeavour to reach agreement on as many matters as possible.

76. On 5 June 2020, the Tribunal held an informal meeting by video with the Parties to test the video link in case it was necessary to hold the hearing scheduled for 27-31 July 2020 by video rather than in person. During the course of that meeting the President asked the Parties to consult, ahead of the pre-hearing conference scheduled for 18 June 2020, about the possible schedules for the hearing. In doing so, he reminded the Parties that the hearing would be devoted to jurisdiction, the Claimants' claims and quantum issues and would not consider the Respondent's counter-claim. When the Respondent objected that it had expected the counter-claim to be considered as well, the President drew the attention of the Parties to Procedural Order No. 4 of 6 January 2020 and the Tribunal's letter to the Parties dated 22 April 2020. He invited the Respondent to make a formal application if it wished the Tribunal to reconsider the decision taken in Procedural Order No. 4.

77. On the same date, the Tribunal advised the Parties that should the Respondent wish to request the reconsideration of Procedural Order No 4 as confirmed in the letter of 22 April 2020, the Respondent had until 8 June 2020 to file such an application. The Claimants would have two days to answer thereafter.

78. On 5 June 2020, the Tribunal confirmed that the pre-hearing organizational meeting would take place on 18 June 2020.

79. On 8 June 2020, the Respondent submitted an application for the Tribunal to reconsider its decision in Procedural Order No. 4.

80. On 10 June 2020, the Claimants submitted its response to the Respondent's application of 8 June 2020 opposing that application.

81. On 11 June 2020, the Tribunal issued Procedural Order No. 5 denying the Respondent's application of 8 June 2020. The Tribunal decided that:

> *(1) in accordance with its earlier decision, the Respondent's counter-claim will not be considered at the hearing fixed for 27 to 31 July 2020;*
>
> *(2) proceedings on the counter-claim remain stayed until such time as the Respondent makes the payment towards the costs of hearing the counter-claim required by PO 4, or the Tribunal decides to terminate the proceedings;*
>
> *(3) the costs of the Tribunal, the Centre and the Parties in addressing the issues raised by the Respondent's application of 8 June 2020 will be considered at a later date.*

82. On 12 June 2020, the Tribunal notified the Parties that it considered that the tests established that a hearing by video conference was possible and that, since an in-person hearing on the dates scheduled was impossible in view of travel restrictions imposed because of the COVID pandemic, the hearing should therefore be held by video conference from 27 to 30 July 2020. The Tribunal invited the Parties to transmit a joint statement indicating areas of agreement and disagreement with regard to the hearing arrangements.

83. On the same date, the Claimants notified the Tribunal that it did not wish to cross-examine any of the Respondent's witnesses or the Respondent's expert while the Respondent indicated that it wished to cross-examine all of the Claimants' witnesses and the Claimants' expert.

84. On 16 June 2020, the Centre requested that each Party pay a second advance payment of USD 175,000 in order to cover the costs of the hearing and the drafting of the Award, by 16 July 2020.

85. On 17 June 2020, the Claimants wrote to the Tribunal attaching a copy of the Draft Agenda annotated by both Parties, which indicated that the Parties had reached agreement on most matters concerning the hearing schedule.

86. On 18 June 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference.

87. On 18 June 2020, the Tribunal issued Procedural Order No. 5 concerning the organization of the hearing.

88. On 30 June 2020, the Centre acknowledged receipt of the Claimants' payment of their share of the second advance.

89. On 10 July 2020, the Claimants wrote to the Tribunal regarding, *inter alia*, the modalities of the examination of the witnesses. They stated that they had informed the Respondent of their views and that they had not received any response from the Respondent. The Claimants reiterated their views with regard to the examination of witnesses on 15 July 2020.

90. On 17 July 2020, the Respondent indicated that it agreed with the Claimants' position with respect to the modalities of examination of the witnesses.

91. On 21 July 2020, the Centre notified the Parties of the Respondent's default for the second advance, and invited either Party to proceed to the payment of the outstanding amount.

92. A hearing on jurisdiction and the merits was held from 27 to 31 July 2020 by video conference (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Sir Christopher Greenwood	President
Dr Stanimir Alexandrov	Arbitrator
Ms Funke Adekoya	Arbitrator

ICSID Secretariat:

Ms Aurélia Antonietti	Secretary of the Tribunal

For the Claimants:

Prof Dr Kaj Hobér	3 Verulam Buildings
Mr Jakob Ragnwaldh	Mannheimer Swartling Advokatbyrå AB
Mr Robin Rylander	Mannheimer Swartling Advokatbyrå AB
Mr David Sandberg	Mannheimer Swartling Advokatbyrå AB
Mr Ludwig Metz	Mannheimer Swartling Advokatbyrå AB
Mr Gustav Sannegård	Mannheimer Swartling Advokatbyrå AB
Mr Wilbert Kapinga	Bowmans Tanzania
[redacted]	Witness
[redacted]	Witness
[redacted]	Expert, [redacted]
[redacted]	Expert (team member)

For the Respondent:

Prof Adelardus Kilangi	Hon. Attorney General
Dr Gabriel Malata	Hon. Solicitor General
Dr Boniphace Luhende	Hon. Deputy Solicitor General
Mr George N. Mandepo	Principal State Attorney
Mr Michael Luena	Principal State Attorney
Dr Arnold Gesase	Principal State Attorney
Mr Ernest Doriye	Principal State Attorney
Mr Abubakar Mrisha	Principal State Attorney
Mr Sylvester Mwakitalu	Principal State Attorney
Ms Irene Lesulie	Principal State Attorney
Ms Ponziano Lukosi	Principal State Attorney
Ms Mussa Mbura	Principal State Attorney
Ms Consesa Kahendaguza	Senior State Attorney
Mr Baraka Nyambita	State Attorney
Ms Lydia Thomas	State Attorney
Ms Rehema Mtulya	State Attorney
Ms Neisha Shao	State Attorney
Ms Hellen Philip	State Attorney
Mr Erigh Rumisha	State Attorney
Ms Joyce Yonas	State Attorney
Ms Alice Mtulo	State Attorney
[redacted]	IT Technician
	Expert

Court Reporter:

Mr Trevor McGowan

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

On behalf of the Claimants:

[redacted]

94. On 31 July 2020, the Parties indicated their preferences with regard to the submission of post-hearing briefs.

95. On 31 July 2020, the Tribunal wrote to the Parties concerning the next procedural steps. In particular, it invited the Parties to submit their corrections to the transcripts by 28 August 2020 and their statements of costs by 11 September 2020. The Tribunal also informed the Parties that there would not be post-hearing briefs.

96. Regarding the counter-claims, the Tribunal, in its letter of 31 July 2020, invited the Respondent to indicate whether it intended to pay the call for funds issued in relation to the counter-claims and, if it did so intend, when it would do so. Finally, the Tribunal stated that the Respondent would have until 30 October 2020 to make the payment, and that, failure to do so would result in the counter-claims not being addressed by the Tribunal in its Award and therefore not being dealt with in these proceedings.

97. On 14 August 2020, the Centre acknowledged receipt of the Claimants' payment of the Respondent's share of the second advance.

98. On 28 August 2020, the Claimants transmitted their proposed corrections to the transcripts.

99. On the same date, the Respondent informed the Secretary that it accepted the Claimants' proposed corrections, and submitted its proposed corrections to one of which the Claimants objected on 31 August 2020.

100. On 8 September 2020, the Tribunal decided on the disputed corrections to the transcripts.

101. On 9 September 2020, the final version of the transcripts was circulated to the Parties.

102. On 11 September 2020, the Parties filed their respective statements of costs.

103. On 18 September 2020, the Claimants requested leave from the Tribunal to submit new exhibits.

104. On the same date, the Tribunal invited the Respondent to provide its comments of the Claimants' request, which it did on 25 September 2020.

105. On 28 October 2020, the Tribunal declined the Claimants' request to admit new evidence.

106. On 12 November 2020, the Tribunal informed the Parties that, having had no response to its letter of 31 July 2020, and no payment having been received from the Respondent, the Tribunal would not be able to consider the counter-claim and would proceed to issue its ruling on the other issues before it.

107. On 5 May 2021, the Centre requested that each Party pay a third advance payment of USD 20,000 in order to cover the costs associated with drafting of the Award, by 7 June 2021.

108. On 4 and 15 June 2021, the Centre acknowledged receipt of, respectively, the Claimants' and the Respondent's payment of their share of the third advance.

109. The proceedings were closed on 18 March 2022.

III. FACTS

A. THE RELEVANT CORPORATE STRUCTURE

110. It is useful to begin by considering the different companies primarily concerned with the dispute and to determine the precise nature of the corporate structure, some elements of which are in dispute between the Parties.

111. [redacted]

[redacted]

112. [redacted]

113. [redacted]

[redacted]

[redacted]

114. [redacted]

115. [redacted]

116. [redacted]

117. [redacted]

[redacted]

[redacted]

B. HISTORY OF THE ALLEGED INVESTMENT

118. The Tribunal turns next to the history of the Claimants' alleged investment in Tanzania. The Tribunal notes that the Respondent denies that the Claimants made an investment, within the meaning of the BIT, in Tanzania. That is a legal question which the Tribunal will examine in Part IV of this Award. The present section deals only with the factual material put before the Tribunal.

(1) Early Stages

119. [redacted]

120. [redacted]

[redacted]

[redacted]

121. [redacted]

[redacted]

[redacted]

122. [redacted]

123. [redacted]

[redacted]

[redacted]

[redacted]

124. [redacted]

125. [redacted]

126. [redacted]

[redacted]

[redacted]

127. [redacted]

128. [redacted]

(2) The Change in Focus of the Project

129. [redacted]

[35] C.-Mem., paras. 24 and 147-148.

[redacted]

[redacted]

130. [redacted]

131. [redacted]

[redacted]

[49] Paragraph 113.

[redacted]

132. [redacted]

133. [redacted]

(3) Developments between 2011 and 2014

134. [redacted]

[redacted]

[56] Mem., n. 74.

[redacted]

[redacted]

135. [redacted]

136. [redacted]

137. [redacted]

[redacted]

[redacted]

[redacted]

138. [redacted]

139. [redacted]

140. [redacted]

141. [redacted]

[redacted]

[redacted]

142. [redacted]

143. [redacted]

144. [redacted]

[redacted]

[redacted]

[redacted]

145. [redacted]

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146. [redacted]

147. [redacted]

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148. [redacted]

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151. [redacted]

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152. [redacted]

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158. [redacted]

159. [redacted]

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160. [redacted]

161. [redacted]

[redacted]

[redacted]

[redacted] [redacted]

162. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

163. [redacted]

(4) Closure of the Project: The Events of 2015-2017

164. [redacted]

165. [redacted]

166. [redacted]

[redacted]

167. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

168. [redacted]

169. [redacted]

170. [redacted]

[redacted]

[101] Emphasis in the original.

[redacted]

[redacted]

171. [redacted]

[redacted]

172. [redacted]

[redacted]

[redacted]

[redacted]

173. [redacted]

174. [redacted]

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175. [redacted]

[redacted]

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176. [redacted]

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177. [redacted]

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190. [redacted]

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194. [redacted]

195. [redacted]

196. [redacted]

197. [redacted]

[redacted]

[redacted]

198. [redacted]

199. [redacted]

200. [redacted]

C. THE INITIATION OF ARBITRATION PROCEEDINGS

201. On 13 December 2016 a Notification of Dispute pursuant to Article 7 of the BIT was sent to the Government of Tanzania by EcoDevelopment in Europe AB, EcoEnergy Africa AB, Agro EcoEnergy and Bagamoyo EcoEnergy.[153] The Notification accused Tanzania of breaches of Articles 2, 3 and 4 of the BIT and averred that the Claimants were entitled to compensation under the BIT and customary international law.

202. The Notification continued:

[redacted]

[153] Notification under the Sweden–Tanzania BIT from the Claimants to Tanzania, 13 December 2016 (**C-22**).

> *The undersigned companies hereby notify the United Republic of Tanzania pursuant to Article 7(2) of the* [BIT] *and invite authorized representatives of the United Republic of Tanzania to commence negotiations with a view to trying to reach a settlement of the dispute. We still hope a collaborative approach could be found where this project could find a successful way to be implemented. Should no agreement or settlement be reached, or be possible, the undersigned companies reserve the right to commence arbitration pursuant to the* [BIT].

No reply was received from Tanzania.

203. On 16 January 2017 Mr [redacted], on behalf of Agro EcoEnergy and Bagamoyo EcoEnergy, wrote to the Attorney-General (with copies to the Prime Minister and several other Ministers) enclosing a copy of the Notification and requesting a meeting "*to kick start the process of amicable resolution of the dispute*".[154] On 25 January 2017 a meeting took place between representatives of the four companies and a Mr [redacted] of the Attorney-General's Chambers.[155]

[redacted]

[154] Letter from Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 16 January 2017 (**C-167**).

[155] Rej., para. 29. This meeting is referred to in Exhibit **C-168** (Letter from EcoDevelopment, EcoEnergy Africa, Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 9 June 2017).

[156] Letter from EcoDevelopment, EcoEnergy Africa, Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 9 June 2017 (**C-168**).

[redacted]

IV. JURISDICTION

A. INTRODUCTION

207. The Claimants seek to base the jurisdiction of the Tribunal upon Article 25(1) of the ICSID Convention together with Article 7 of the Sweden-Tanzania BIT. Article 25(1) of the ICSID Convention provides:

> *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. When the parties have given their consent, no party may withdraw its consent unilaterally.*

The ICSID Convention entered into force for Sweden on 28 January 1967 and for Tanzania on 17 June 1992.

208. Article 7 of the BIT provides in relevant part:

> *(1) Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.*
>
> *(2) If any such dispute cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification to the Contracting Party, each Contracting Party hereby consents to the submission of the dispute to the International Centre for Settlement of Investment Disputes (ICSID) for settlement by arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States …*
>
> *If the parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall have the right to choose.*
>
> …

> *(3) For the purposes of this Article and Article 25(2)(b) of the said Washington Convention, any legal person which is constituted in accordance with the legislation of one Contracting Party and in which, before a dispute arises, an investor of the other Contracting Party held a predominant interest shall be treated as a legal person of the other Contracting Party.*
>
> *...*
>
> *(5) The consent given by each Contracting Party in paragraph (2) and the submission of the dispute by an investor under the said paragraphs shall constitute the written consent and written agreement of the parties to the dispute to its submission for settlement for the purposes of Chapter II of the Washington Convention (Jurisdiction of the Centre) ...*

209. The BIT was concluded on 1 September 1999 and entered into force on 1 March 2002.

210. Tanzania contests the jurisdiction of the Tribunal on three grounds:-

(1) that the Claimants are not investors entitled to claim on the basis of their shareholdings in Agro EcoEnergy and Bagamoyo EcoEnergy;

(2) that the dispute is not an investment dispute within the meaning of the BIT; and

(3) that the Claimants acted prematurely in referring the dispute to arbitration when it had not been established that it could not be settled amicably.

211. The Tribunal will consider each of these jurisdictional objections in turn. Before doing so, however, it is necessary to make some brief observations on certain arguments of a jurisdictional character raised by the Respondent in its closing submissions on the last day of the Hearing.[157]

212. In their closing submissions, counsel for the Respondent, advanced the following arguments:-

[157] Transcript, Day 5, pp. 67-74.

(1) that the Claimants had failed to prove that the Respondent had received either the Notification of Dispute dated 13 December 2016 or the subsequent letter dated 16 January 2017;[158]

(2) that the Claimants had failed to prove that they held at the relevant times the shares which they claimed to hold in Agro EcoEnergy and Bagamoyo EcoEnergy;[159]

(3) that the Performance Contract contained provisions for the settlement of disputes which had not been exhausted before the Request for Arbitration was submitted to ICSID;[160] and

(4) that the Claimants lacked standing in relation to the proceedings because they acquired such shares as they held in Agro EcoEnergy and Bagamoyo EcoEnergy only in 2009, while one part of the claim concerns events occurring before those dates.[161]

213. The Claimants objected that these arguments had not been advanced in either the Counter-Memorial or the Rejoinder and that it was too late for the Respondent to introduce them in closing submissions.[162] The Respondent denied that they were new arguments and maintained that they were developments of the objections to jurisdiction made by the Respondent in its written pleadings.[163]

214. The Tribunal agrees with the Claimants that the Respondent was not entitled to raise fresh objections to jurisdiction at the Hearing.[164] Rule 41(1) of the ICSID Arbitration Rules provides:

> *Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the*

[158] Transcript, Day 5, pp. 68-71.
[159] Transcript, Day 5, pp. 72-73.
[160] Transcript, Day 5, pp. 71-72.
[161] Transcript, Day 5, p. 74.
[162] Transcript, Day 5, pp. 104-107.
[163] Transcript, Day 5, pp. 107-109.
[164] Transcript, Day 5, pp. 112-113.

> *objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.*

215. Tanzania objected to the jurisdiction of the Tribunal in the Counter-Memorial. The fact that it did so does not mean, however, that it was free to introduce wholly novel jurisdictional objections at the Hearing. The Tribunal understands Rule 41(1) as requiring that each and every objection to jurisdiction must be made as early as possible. While a party may refine the arguments which it advances in support of a particular objection in its later submissions, it may not introduce a new objection unless that is based upon facts which were unknown at the time that the Counter-Memorial was submitted.

216. Of the four arguments summarised in paragraph 212, above, the Tribunal considers that the second (namely that the Claimants had failed to prove that they held at the relevant times the shares which they claimed to hold in Agro EcoEnergy and Bagamoyo EcoEnergy) and third (namely that the Performance Contract contained provision for settlement of disputes which had not been exhausted before the Request for Arbitration was submitted to ICSID) are clearly new objections which are nowhere mentioned in Tanzania's written submissions. Nor can they be regarded as based upon facts which were unknown to Tanzania at the time it filed its Counter-Memorial. The Tribunal therefore concludes that these objections have been made too late.

217. Even if that were not the case, however, the Tribunal considers that these objections are without foundation. [redacted] It follows that the record establishes that, at the relevant times, both Agro EcoEnergy and Bagamoyo EcoEnergy were owned and controlled by the Second Claimant, EcoEnergy, which was itself owned and controlled by the First Claimant, EcoDevelopment.

218. The third argument is based upon two fundamental misunderstandings. First, the present claim is not brought as a claim for breach of the Performance Contract (a matter considered further below), to which, as the Respondent rightly points out, the two Claimants are not parties in any event. The claim is for breach of the BIT, a matter to which the dispute settlement clause in the Performance Contract is irrelevant. Secondly, there is no requirement in Article 7 of the BIT that an investor must exhaust local remedies before bringing a claim within ICSID.

219. Accordingly, even if the second and third arguments raised by the Respondent during its closing submissions had not been made too late, the Tribunal would have dismissed them.

220. The fourth argument, properly understood, is not a jurisdictional argument at all since it would not – if successful – bar the Claimants from claiming with regard to events which occurred before the acquisition of shares in 2009 but only limit the scope for recovery by excluding losses emanating from earlier events. Nevertheless, it is an argument which was not advanced in the written pleadings and should not have been introduced at the very end of the oral proceedings. For the reasons given below (see para. 263), the Tribunal considers that the argument is without merit.

221. The first argument advanced in the closing submissions is in a rather different category. The Tribunal considers that it might be regarded as a refinement of the objection, advanced in the Counter-Memorial and the Rejoinder, that the Claimants failed to comply with the requirements of Article 7(1) to attempt a negotiated settlement before commencing arbitration proceedings. It will therefore be considered in relation to the Respondent's objection that the Claimants' recourse to arbitration was premature (see paras. 244 to 260, below).

B. THE OBJECTIONS THAT THE CLAIMANTS ARE NOT INVESTORS AND THAT THEY DID NOT POSSESS AN INVESTMENT WITHIN THE MEANING OF THE BIT

222. Tanzania's first and second objections to jurisdiction (para. 210, above), namely that the Claimants are not investors and that they did not have an investment within the meaning of the BIT, are closely related and it is convenient to deal with them together.

(1) Positions of the Parties

a. The Respondent

223. The Respondent begins by arguing that the Claimants' case is based upon the Performance Contract[165] concluded between Bagamoyo EcoEnergy and the [redacted].[166] The importance, for Tanzania, of the Performance Contract is emphasized in a later part of the pleadings which, although not expressly directed to jurisdiction, nonetheless develops Tanzania's argument on the jurisdictional issues. Responding to the Claimants' argument that their claim is one for breach of the BIT, not for breach of contract, the Respondent states:

> *The Claimants*['] *assertion is very wrong as in order for one to claim for investment protection in the BIT there must be an investment contract between the parties to the dispute. Assume that there was no any investment contract between Tanzania and* [Bagamoyo EcoEnergy] *how could they claim any damages from Tanzania ? Would they file this arbitration proceeding claiming that Tanzania breached BIT agreement ? Under what bases ? If we buy the Claimants*['] *idea, it means because Tanzania has BIT agreement with Sweden any Swedish company can come and claim that Tanzania has breached some conditions in BIT.*[167]

224. The Respondent then makes the following submissions:-

(1) The Claimants have failed to establish that they are properly to be regarded as Swedish companies under the terms of the BIT;[168]

(2) Neither the BIT nor the ICSID Convention permits a company to claim as an investor for a wrong done to a locally incorporated subsidiary company. In this context, the Respondent argues that any wrong done (and it denies that there was any) can only have been done to Bagamoyo EcoEnergy, which alone was party to the Performance Contract. The Respondent relies upon the judgment of the International Court of Justice in the *Barcelona Traction Company* case[169] as

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[165] Performance Contract (**C-8**).

[166] C-Mem., para. 42.

[167] Rej., para. 187.

[168] C.-Mem., para. 18.

[169] *Barcelona Traction, Light and Power Company* (*Belgium v. Spain*), ICJ Reports 1970, p. 3 ("Barcelona Traction") (**RL-7**).

authority for the proposition that, in international law, a shareholder cannot bring a claim for a wrong done to the company.[170] The Respondent also invokes various scholarly writings which it claims support this proposition in the sphere of investor-State dispute resolution;[171]

(3) There was no evidence that Agro EcoEnergy, as the principal shareholder in Bagamoyo EcoEnergy, had authorized the commencement of proceedings;

(4) For these reasons, the Claimants do not qualify as investors within the terms of the BIT;

(5) The [redacted] project was a joint initiative between Bagamoyo EcoEnergy (a Tanzanian company) and the Government of Tanzania. Accordingly, it did not qualify as an investment of a Swedish investor for the purposes of the BIT;

(6) The Claimants had not in fact invested anything in the [redacted] project;

(7) Until the conclusion of the Performance Contract and the grant of the CO, there was nothing which could be regarded as an investment in any event. The Tribunal did not have jurisdiction over claims in respect of the [redacted] farm [redacted]. Nor did it have jurisdiction over claims relating to the original project [redacted]. Finally, there could have been no investment after the Government accepted what the Respondent characterizes as the decision to terminate the project in 2015;

(8) Accordingly, the Claimants had no investment within the meaning of the BIT and the dispute submitted to arbitration did not concern an investment as required by Article 7 of the BIT.

[170] C-Mem., paras. 48-51; Rej. paras. 7-18.

[171] See in particular the reference in Rej., para. 13 to works by Douglas and Bottini. Unfortunately these are difficult to trace as the Respondent does not give precise citations but merely cites to an article by another writer which refers to these works. The copy submitted (**RL-26**) is incomplete and does not have the precise citations.

b. The Claimants

225. The Claimants maintain that they meet the requirements for being investors under the BIT and that they had an investment within the terms of the BIT.

226. With their Reply, the Claimants produced documents evidencing their incorporation in Sweden.[172] They also adduced evidence that both companies had their head offices in Sweden and were at all relevant times owned and controlled by Swedish nationals.[173]

227. Contrary to the position advanced by the Respondent, the Claimants maintain that the BIT permits indirect claims by shareholders. They argue that the *Barcelona Traction* case related to the requirements of diplomatic protection under general international law and had no bearing upon the question of standing in the present case, which was expressly regulated by the BIT.[174]

228. The Claimants maintain that they claim in their own right. Accordingly, no resolution of Agro EcoEnergy is required. Moreover, the Performance Contract is not the basis of the claim. The claim is for breach of the provisions of the BIT, specifically, Articles 2, 3 and 4. In response to the point made at paragraph 187 of the Rejoinder (quoted in para. 223, above), the Claimants argue that the ability of any Swedish company to bring proceedings against Tanzania for breach of the BIT is precisely what the BIT envisages.[175]

229. The Claimants thus contend that they fall squarely within the definition of an investor in Article 1(2)(b) of the BIT.

230. They also maintain that they have an investment within the meaning of Article 1(1) of the BIT.[176] They invoke their shareholding, directly or through Agro EcoEnergy, in Bagamoyo EcoEnergy (Article 1(1)(b) of the BIT) and the land and other rights held by Bagamoyo EcoEnergy which they ultimately controlled (Article 1(1)(a) of the BIT). In this context,

[172] See para. 110, above and Certificate of Registration, [redacted] and Certificate of Registration [redacted].

[173] Reply, paras. 27-31.

[174] Reply, paras. 17-25.

[175] Transcript, Day 1, pp. 14-15.

[176] Reply, paras. 32-36.

they argue that "*investment*" has to be given the meaning set out in that clause and is not dependent upon there having been a financial contribution by the investor, although they maintain that they did indeed make such a financial contribution. They deny that the [redacted] farm [redacted] is to be regarded as an entirely separate project since its sole purpose was to provide the seed to be used in the [redacted]. [redacted][177] [redacted]

(2) Analysis of the Tribunal

231. It is useful to begin with the provisions of the BIT which define investor and investment. Article 1(2) defines investor as follows:

> *"investor", with regard to either Contracting Party, shall mean:*
>
> ...
>
> *(b) any legal person organized in accordance with the laws and regulations of that Contracting Party; and*
>
> *(c) any legal person not organized under the laws and regulations of that Contracting Party but in which an investor of that Contracting Party has a predominant interest,*
>
> *provided that the investor of one Contracting Party as defined under (a), (b) and (c) makes an investment in the territory of the other Contracting Party.*

232. Article 1(1) defines investment as follows:

[177] [redacted] answer to the President, Transcript, Day 2, p. 103.

(1) "investment" shall mean any kind of asset owned or controlled, invested directly or indirectly by an investor of one Contracting Party in the territory of [the] *other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively:*

(a) movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights;

(b) a company or shares, stock and any other kind of participation in companies;

(c) title to money or any performance having an economic value;

(d) intellectual property rights, technical processes, trade names, know-how, goodwill and other similar rights;

(e) any right conferred by law or contract or by virtue [of] *licences or permits including concessions to search for, develop, extract or exploit natural resources.*

Goods, that under a leasing agreement are placed at the disposal of a lessee in the territory of one Contracting Party by a lessor being an investor of the other Contracting Party shall be treated not less favourably than an investment.

A change in the form in which assets are invested does not affect their character as investments.

233. These are provisions of broad scope which are similar to those found in numerous other BITs. The Tribunal considers that the Claimants clearly fall within the definition of "investor" in Article 1(2)(b). Both are legal persons organized in accordance with the laws and regulations of Sweden. The doubts on that score initially expressed by Tanzania were not followed up and, in any event, could not be sustained in face of the evidence of their incorporation which was submitted by the Claimants (see para. 110 and footnotes 3 and 5, above). Neither the BIT nor the ICSID Convention contains any additional requirement that the Claimants be owned and/or controlled by Swedish nationals, or that they have their head offices in Sweden. However, had there been such a requirement, it would have been satisfied, since the evidence provided by the Claimants with the Reply shows that both

companies are owned by Swedish nationals, have their head offices in Sweden and that there is no question of "*forum shopping*".[178] In their dealings with Tanzania, the Claimants were represented principally by Swedish nationals. Tanzania knew and acknowledged that it was dealing with investors from Sweden. [redacted]

234. The Tribunal is unable to read Article 1(1) and 1(2) of the BIT as excluding a claim by a body which falls within the definition in Article 1(2)(b) simply on the basis that the claim is brought for a wrong done to a subsidiary company. The famous judgment of the International Court of Justice in *Barcelona Traction*,[180] to which the Respondent refers, is not about the standing of a company to claim under a BIT but about the right of a State, under general international law, to exercise diplomatic protection on behalf a company. When the Court reaffirmed that Judgment in a later case, it made clear that this question was separate and distinct from the system of protection which applies under treaties like the present BIT.[181] As a leading commentary states, the *Barcelona Traction* rule has not been applied by BIT tribunals.[182] In the present case, there could be no reason to apply the *Barcelona Traction* rule, since the definition of an investment under Article 1(1)(b) of the BIT includes a company.

235. For the avoidance of doubt, the Tribunal is not here relying on the provisions of Article 1(2)(c) of the BIT, quoted above, and the second clause of Article 25(2)(b) of the ICSID Convention, which permits jurisdiction over a claim brought by "*a juridical person which had the nationality of the Contracting State party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of [the] Convention*". Those provisions would have

[178] See [redacted]

[179] [redacted]

[180] *Barcelona Traction*, p. 4 (**RL**-7).

[181] *Ahmadou Sadio Diallo* (*Guinea v. Democratic Republic of the Congo*), ICJ Reports, 2007, p. 582 at paras. 88-90.

[182] McLachlan and Others, *International Investment Arbitration* (2nd ed), paras. 6.118-6.123 (**CL**-**82**).

been significant had the claims by Agro EcoEnergy and Bagamoyo EcoEnergy been maintained but they have not been.

236. The Claimants here, EcoDevelopment and EcoEnergy are Swedish companies. The evidence establishes that they owned and controlled two Tanzanian subsidiaries, Agro EcoEnergy and Bagamoyo EcoEnergy (see paras. 112 to 117, above). Those subsidiaries constituted an investment within Article 1(1)(b) of the BIT, which includes as one instance of an investment "*a company or shares, stock and any other kind of participation in companies*". In addition, Article 1(1) of the BIT defines as an investment "*any kind of asset owned or controlled, invested directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party*." The Claimants were the ultimate owners and controllers of Bagamoyo EcoEnergy. It follows that the assets of that company, including its rights in movable and immovable property (Article 1(1)(a) of the BIT) constitute an investment by the Claimants in Tanzania. The Claimants are entitled under the BIT and the ICSID Convention to claim in respect of wrongs allegedly done to the two Tanzanian companies. In doing so, they are asserting their own claims for wrongs allegedly done to their investment, not claiming on behalf of the subsidiary companies.

237. It is, therefore, irrelevant whether or not there was a resolution of Agro EcoEnergy authorizing the bringing of the present proceedings. A company does not require the authorization of its subsidiary to bring arbitration proceedings respecting its investment in that subsidiary.

238. Nor does it make any difference that [redacted] was to be a joint initiative of the Government of Tanzania and Bagamoyo EcoEnergy. The investment by an investor of one State in the territory of another may frequently involve a degree of partnership with the host State's government. That does not take the investment, or the investor, outside the scope of the provisions of Article 1 of the BIT.

239. Here, as elsewhere, Tanzania has made the mistake of defining the investment by reference to the Performance Contract alone. The BIT does not require an agreement between the investor and the government of the host State. The Claimants' investment in Tanzania consisted of their ownership of the two subsidiary companies and its value was bound up

with the land and other rights acquired by those companies and in which funds (the extent of which will be considered below) had been invested. That investment predated the conclusion of the Performance Contract and continued even after that Contract had been terminated. Moreover, it is important to note that the preliminary work done by the Claimants on [redacted] was done at the express request of the Respondent (see paras. 124 et seq.).

240. Nor does the Tribunal accept Tanzania's argument that there were "*two separate projects*" only one of which can fall within the jurisdiction of the Tribunal. [redacted]

241. Lastly, the Tribunal does not accept the Respondent's argument that the Claimants had made no investment in Tanzania because they had not themselves provided the finance for the project. The definition of an investment in Article 1 of the BIT does not require a contribution of finance from the investor, only that the investor possess an investment as defined in Article 1(1). Additional criteria, such as those suggested in *Salini,*[184] have not been accepted in all cases and are difficult to reconcile with the language of the BIT in the

[183] [redacted]' answer to the President, Transcript, Day 2, p. 103.

[184] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction,16 July 2001 (**CL-93**).

present case, which refers to ownership of an asset rather than the source of funding for its acquisition.

242. Nevertheless, even if the Tribunal were to apply the *Salini* criteria, the evidence shows a substantial commitment of funds for the preliminary work [redacted] The Claimants' expert, [Expert], [redacted][187] While the Tribunal will discuss at a later stage of the Award the precise figures involved, it accepts that the evidence demonstrates that the Claimants, whether directly or through their Tanzanian subsidiaries, had invested a substantial amount of money in the project by the time it was allegedly expropriated by Tanzania. Given the chain of ownership of the four companies, it is unnecessary for the Claimants to prove from which company's bank account the sums invested were drawn.

243. The Tribunal therefore concludes that (a) the Claimants were Swedish investors within the meaning of Article 1(2) of the BIT and that (b) they made an investment, within the meaning of Article 1(1) of the BIT, in Tanzania.

C. WHETHER THE PROCEEDINGS ARE PREMATURE

(1) Positions of the Parties

a. The Respondent

244. The Respondent[188] maintains that, under Article 7 of the BIT, the Tribunal will have jurisdiction only if (a) the Claimants have raised the dispute with the Respondent, (b) it has been impossible to settle the dispute amicably, and (c) at least six months have elapsed. Tanzania draws attention to the wording of Article 7(1) of the BIT, that "*any dispute* ...

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185 [redacted] enditure Incurred to 31 December 2012 by the Promoters on Bagamoyo EcoEnergy Project, 25 July 2013 (**KS-74**).

186 [redacted]

187 [redacted] First ER, paras. 105-107.

188 C-Mem., paras. 74-93; Rej. paras. 25-31.

shall, if possible, be settled amicably". According to Tanzania, the use of the word "*shall*" indicates that the provision is mandatory and imposes a binding obligation to comply with the pre-arbitration steps set out in Article 7(1) and (2). In that context, Tanzania refers to the awards in *Wintershall Aktiengesellschaft v. Argentine Republic*[189] and *Enron Creditors Recovery Corporation v. Argentine Republic*[190] as authorities for the proposition that "*a cooling off provision is 'very much a jurisdictional one', such that 'failure to comply with that requirement would result in a determination of a lack of jurisdiction'*."[191]

245. In its Counter-Memorial, Tanzania argues that the cooling-off period started to run from the letter sent by the Claimants to the Government on 13 December 2016[192] setting out details of the dispute and inviting negotiation.[193] It maintains, however, that *"[d]uring this period, both the investor ('Claimants') and the host State ('Respondent') should have engaged with each other in a good faith effort to resolve the dispute*"[194] but that "*after sending a letter of 13 December 2016, the Claimants took no effort to follow up the letter until when they decided to serve a Request for Arbitration*"[195] with the result that "*there is no record to show that the parties attempted to negotiate in good faith to resolve the alleged dispute before going to arbitration*".[196]

246. [redacted]

[189] *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award, 8 December 2008, paras. 119-122 (**RL-16**).

[190] *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (**RL-17**).

[191] C-Mem., para. 91.

[192] Notification under the Sweden–Tanzania BIT from the Claimants to Tanzania, 13 December 2016 (**C-22**).

[193] C-Mem., para. 85.

[194] C-Mem., para. 85.

[195] C-Mem., para. 86.

[196] C-Mem., para. 87.

[197] Letter from EcoDevelopment, EcoEnergy Africa, Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 9 June 2017 (**C-168**).

[redacted]

248. The Respondent also maintains that the letter of 16 January 2017, assuming it to have been delivered, was from Agro EcoEnergy and Bagamoyo EcoEnergy, neither of which is now a claimant. Accordingly, it should not be regarded as an attempt by the present Claimants to settle the dispute.

[198] Rej., para. 29.

[199] Transcript, Day 5, pp. 69-70.

b. The Claimants

249. The Claimants maintain that they have complied with the requirements of Articles 7(1) and (2) of the BIT.[200] They contend that Article 7(1) requires only that a dispute be settled amicably "*if possible*". According to the Claimants that means only that they had an obligation to seek negotiations, not that they and Tanzania must have engaged in negotiations. To hold otherwise would "*have the absurd effect that the host State unilaterally could prevent an arbitration by refusing to negotiate*".[201]

250. The Claimants point to the fact that they wrote to the Respondent notifying it of the dispute on 13 December 2016, more than six months before they initiated arbitration. In that letter they proposed negotiations but received no reply. They followed up that letter with further letters on 16 January 2017 [202] and 9 June 2017.[203] According to the Claimants, however, Tanzania did not respond until 21 September 2017, one month after the Arbitration had been initiated. Negotiations then took place on 3-4 July 2018 and 23-24 November 2018 but no solution was reached.[204]

251. In any event, the Claimants maintain that a cooling-off requirement is not a bar to jurisdiction, [205] especially where the host State has not even responded to the notification of the dispute.[206]

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[200] Mem., paras. 269-270; Reply, paras. 37-43.

[201] Reply, para. 38. The Claimants refer in support of this interpretation to the award in *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, 7 December 2011, para. 335 (**CL-30**) and the decision in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 125 (**CL-92**).

[202] Letter from Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 16 January 2017 (**C-167**).

[203] Letter from EcoDevelopment, EcoEnergy Africa, Agro EcoEnergy and Bagamoyo EcoEnergy to the Attorney General, 9 June 2017 (**C-168**).

[204] Reply, paras. 40-42.

[205] Reply, para. 43 and authorities cited at n. 49.

[206] The Claimants rely, in particular, on *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan,* SCC Case No. V (064/2008), Partial award on jurisdiction and liability, 2 September 2009 (**CL-99**) at para. 154: "*In cases where the State did not react to the notice of dispute, tribunals have considered that dismissing the claim and asking Claimant to resubmit it would be an unnecessary formality*".

(2) Analysis of the Tribunal

252. The Tribunal will first consider the Respondent's assertion – advanced for the first time in its closing submissions – that the Claimants have failed to prove that the Notification of Dispute or the subsequent letters were received by Tanzania.

253. The Claimants have put before the Tribunal documents – in the form of the Notification of Dispute and the subsequent letters – the authenticity of which has at no point been disputed. They assert that these documents were sent to the relevant Tanzanian Government departments. In the absence of evidence to the contrary, that is sufficient to establish on a balance of probabilities that the Notification and the letters were sent to the Government of Tanzania. If Tanzania believed that those documents had not been received, it should have said so at the earliest opportunity. It did not do so. Indeed, it never asserted that they were not received, only that the Claimants had failed to furnish proof of their receipt. As the transcript excerpt set out above records, counsel for Tanzania's position is that [redacted]

254. That assertion is, however, flatly contradicted by the pleadings submitted by the Respondent. Both the Counter-Memorial and the Rejoinder assume that the Notification at least was received by Tanzania. Thus, the Counter-Memorial asserts that "*the cooling-off period begun to run from 13 December 2016*" (the date of the Notification of Dispute).[207] Even more striking is the following passage from the Rejoinder:

> *The word "**if possible**" in* [Article 7(1) of the BIT] *was placed purposely for circumstances where the host state refuses to negotiate, hence not applicable in this case. To the contrary, the Respondent has welcomed negotiation and has participated effectively in initiation for an amicable settlement; this can be seen through the Claimants' letter dated 9th June 2017. The Claimants in the letter acknowledge that they had met with the representative from the Office of the Attorney General to discuss the dispute. It thus came as a surprise to the Respondent that the Claimants opted to institute this matter while there were ongoing negotiations between the parties.*[208]

[207] C-Mem., para. 85.

[208] Rej., para. 29; emphasis in the original; footnote omitted.

255. These statements cannot be reconciled with the position taken by the Respondent at the Hearing. It is difficult to see how the Respondent could have engaged in negotiations with the Claimants regarding a dispute of whose existence it was unaware. The Tribunal has no hesitation in holding that the Claimants have offered sufficient proof that the Notification and the later letters were received by the Respondent and the Tribunal is frankly very surprised that the Respondent's counsel should, at the very end of the Hearing, have sought to cast doubt on that fact.

256. The next task is to examine the implications of Article 7(1) of the BIT for the jurisdiction of the Tribunal. According to that provision:

> *Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.*

257. Provisions of this kind are commonplace in BIT dispute settlement provisions. While the use of the word "*shall*" suggests that the provision has a mandatory rather than a purely exhortatory character, the term "*if possible*" makes clear that the provision does not impose a duty to achieve an agreed settlement. Like all treaty obligations, it must be performed in good faith.[209] In the view of the Tribunal, Article 7(1) imposes an obligation, not only upon the investor but also upon the host State, to engage in good faith in negotiations to achieve an amicable settlement. If no such agreement has been reached within six months of the notification of the dispute, the investor may then invoke the arbitration provisions of Article 7(2).

258. Arbitral tribunals have differed (as the authorities invoked by the Parties in the present case demonstrate) in their views of whether non-compliance with provisions like Article 7(1) operates to preclude jurisdiction. The present Tribunal considers it unnecessary to enter into this debate, because it has no doubt that the Claimants complied with the requirements of Article 7(1). [redacted]

[209] Vienna Convention on the Law of Treaties, 1969, Article 26. This provision is accepted as declaratory of customary international law.

[redacted]

260. The Tribunal therefore dismisses the third jurisdictional objection.

D. MISCELLANEOUS ISSUES

261. Two further matters require brief comment.

262. First, the Respondent has raised various allegations of breaches of Tanzanian law by the Claimants or their subsidiaries, such as failures regarding the proper registration of changes in shareholdings in the two Tanzanian companies. Tanzania has not developed these allegations into a jurisdictional objection to the effect that any investment was not made in accordance with Tanzanian law. Nevertheless, the Tribunal considers it appropriate to make clear that, even if such an objection had been made, it would hold that the breaches alleged are insufficiently serious to render the investment itself unlawful. In this connection, the Tribunal notes that there is no evidence that Tanzania accused the Claimants of acting unlawfully in relation to share registration and compliance with Tanzanian company law at the time that it took action regarding the investment.

263. Secondly, the Tribunal has already noted (para. 220, above) that the argument raised by the Respondent in its closing submissions – that the Claimants could not claim in respect of events prior to 2009 – is not strictly speaking a jurisdictional objection. The Tribunal also considers that it is an argument without merit. The Claimants are not claiming for wrongs allegedly committed before that date. They refer to events occurring before that date as part of the factual matrix, including an account of the early stages of the investment. That is something which they are entitled to do, notwithstanding that the events preceded the restructuring which gave rise to the corporate chain relevant to these proceedings.

E. CONCLUSIONS ON JURISDICTION

264. For the reasons set out above, the Tribunal rejects the Respondent's objections to jurisdiction and holds that it possesses jurisdiction with regard to the claims brought by the Claimants.

V. MERITS

A. THE ALLEGED BREACHES OF THE BIT

265. The Claimants allege that Tanzania expropriated their investment, contrary to Article 4(1) of the BIT, which reads:

> *(1) Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:*
>
> *(a) the measures are taken in the public interest and under due process of law;*
>
> *(b)* [t]*he measures are distinct and not discriminatory;*
>
> *(c)* [t]*he measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without any delay in a freely convertible currency.*

266. The Claimants also allege that the Respondent violated the requirement of fair and equitable treatment in Article 2(3), which reads:

> *Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof nor acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.*

The Claimants further maintain that the Respondent breached the duty in this provision not to impair the management, maintenance, use, enjoyment or disposal of the investment by unreasonable measures.

267. Finally, the Claimants contend that Tanzania treated them in a discriminatory fashion on the ground that it confiscated their interest [redacted] so as to give that land and the benefit of the work done by the Claimants to a Tanzanian investor, thereby violating the non-discrimination provision of Article 2(3) and the national treatment provision of Article 3, which reads:

> *Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party a treatment which is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is the more favourable.*

B. THE POSITIONS OF THE PARTIES

(1) The Claimants

a. Expropriation [210]

268. According to the Claimants,[211] the Government of Tanzania expropriated Bagamoyo EcoEnergy's [redacted]

[210] Mem., paras. 287-318; Reply, paras. 238-270

[211] Mem., para. 289.

[212] [redacted]

[213] [redacted]

[214] [redacted]

269. The Claimants maintain that Bagamoyo EcoEnergy's [redacted] was an asset, within Article 1(1) of the BIT ("*movable and immovable property as well as any other property rights such as mortgage, lien, pledge, usufruct and similar rights*") and that the "*rectification*" of the land register to remove that title amounted to an expropriation of that asset. The loss of the land also entailed the loss of [redacted] both of which also constituted assets ("*any right conferred by law or contract by virtue* [of] *licences or permits*").

270. In addition, the loss of the [redacted] amounted to the total, or near-total, taking of the entire project, since the project could not proceed without the land and the [redacted] farm was intended only as an adjunct to the main projec [redacted]. The result was that the Claimants' investment in Bagamoyo EcoEnergy was deprived of almost its entire value since that company existed only for the purpose of the one project.

271. The Claimants contend that the measures taken by Tanzania violated Article 4 of the BIT, because they were not taken in the public interest, were not in accordance with due process and were not accompanied by prompt, adequate and effective compensation. In addition, although the Claimants maintain that these are not necessary elements of expropriation, they argue that the taking was not carried out in good faith and was discriminatory.

272. The Claimants deny that Bagamoyo EcoEnergy had irrevocably withdrawn from the project as a result of its letter of 25 March 2015 to the President of Tanzania.[215] They describe this letter as a "*cry for help*"[216] and point to the extensive negotiations with various arms of the Tanzanian Government following that letter, which, the Claimants suggest, evidenced a clear intention on the part of both the Claimants and their subsidiaries and the Government to keep the project going.[217] The Claimants therefore reject Tanzania's

[215] [redacted]

[216] [redacted] answer to the President, Transcript, Day 3, p. 82.

[217] See paras. 168 et seq., above.

argument that the letter estopped them from advancing their present claim, as well as contending that the requirements for an estoppel were not, in any event, met.[218]

273. They also reject the suggestion by Tanzania that the rectification of the register was a lawful action under Tanzanian law taken because of the Claimants' breach of various terms of the CO, the Performance Agreement and other agreements and shortcomings in relation to finance and other arrangements which called into question the viability of the project. The Claimants maintain that none of these allegations were raised by Tanzania at the time and that they are, in any event, unfounded.

274. Finally, the Claimants maintain that whether or not the taking was lawful is a question to be determined not by Tanzanian law but by the BIT.

b. Fair and Equitable Treatment[219]

275. The Claimants contend that Tanzania's treatment of their investment was contrary to the requirement of fair and equitable treatment ("FET") in Article 2(3) of the BIT.

276. According to the Claimants, the FET standard prescribed by Article 2(3) and referred to in the Preamble of the BIT "*grants considerable discretion to tribunals to review the 'fairness' and 'equity' of government actions in light of all the facts and circumstances of the case*".[220] They rely upon the awards of the arbitral tribunals in *MTD v. Chile* [221] and *LGE&E v. Argentina* [222] for the proposition that the FET standard includes:

(i) a duty to protect the investor's legitimate expectations;

(ii) an obligation to act in good faith;

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[218] Reply, paras. 221-234.

[219] Mem., paras. 319-417; Reply, paras. 271-289.

[220] Mem., para. 322, quoting Redfern & Hunter, *Redfern and Hunter on International Arbitration* (6th ed), OUP, p. 476 (**CL-14**).

[221] *MTD Equity Sdn. Bhd. and MTD Chile SA v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 (**CL-11**).

[222] *LG&E Energy Corp., LG&E Capital Corp. And LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/01), Decision on Liability, 3 October 2006 (**CL-16**) ("*LG&E v. Argentina*").

(iii) an obligation to act in a transparent manner;

(iv) an obligation to uphold due process; and

(v) a duty not to act arbitrarily or unreasonably.

The Claimants maintain that Tanzania's treatment of their investment contravened all five of these obligations.

277. The Claimants argue that the duty to respect an investor's legitimate expectations is "*the dominant element*" of the FET standard.[223] Such expectations could arise after the initial investment was made. In the present case, the Claimants maintain, they had a legitimate expectation that Tanzania would actively support the project, refrain from preventing its progress and take the steps necessary to resolve the issues which were still outstanding at the end of 2014. They contend that Tanzania failed in all three respects, despite the encouraging messages which it had continued to send to the Claimants even after receipt of their letter of 25 March 2015.[224]

278. The Claimants also maintain that Tanzania, by cancelling Bagamoyo EcoEnergy's [redacted] while the Claimants were in negotiation with the Government and were being encouraged to believe that the outstanding issues which had been identified as obstacles to the completion of the project were in the process of being resolved, failed to act in good faith.[225] In this context, the Claimants suggest that the use of a power to "*rectify*" title when what was actually involved was a revocation of a title which had been properly granted was itself a breach.

279. According to the Claimants, Tanzania failed to behave in a transparent and coherent manner, with some branches of Government sending to the Claimants messages about the

[223] Mem., para. 325, citing *Saluka Investments BV v. Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 302 (**CL-17**) and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, para. 348 (**CL-18**).

[224] Mem., paras. 325-357.

[225] Mem., paras. 358-367.

continuation of the project at the same time as others were taking covert steps to terminate the [redacted] on which the future of the project was wholly dependent.[226]

280. The Claimants also maintain that Tanzania failed to observe due process in terminating Bagamoyo EcoEnergy's title. They contend that, by taking refuge in the rectification process, when what was involved was really revocation, and denying Bagamoyo EcoEnergy a realistic chance of contesting the decision of the Commissioner of Lands, Tanzania violated minimum standards of due process under both international law and Tanzanian law.[227]

281. Finally, the Claimants accuse Tanzania of having acted arbitrarily and unreasonably, since the termination of title to the land was in fact carried out for reasons quite different from those that were advanced at the time. They also allege that the termination of the title and withdrawal of support for the project were not reasonable and proportionate reactions to objectively verifiable circumstances and served no discernible public purpose.[228]

c. Unreasonable and Discriminatory Measures and the Alleged Failure to Comply with the Requirement of National Treatment

282. The third strand in the claim is the allegation that Tanzania acted in an unreasonable and discriminatory fashion and failed to comply with the obligation to treat the Claimants at least as well as it treated investors of Tanzanian nationality.[229]

283. To some extent, this part of the case overlaps with the claim for breach of the FET standard. However, the Claimants make a distinct allegation that Tanzania terminated the [redacted] because the Claimants were foreign investors and proceeded to transfer the land to a Tanzanian investor, Mr [redacted] and that a desire to transfer the land to him lay behind the decisions regarding [redacted].

[226] Mem., paras. 368-375.
[227] Mem., paras. 376-389.
[228] Mem., paras. 390-415.
[229] Mem., paras. 418-428.

(2) The Respondent

a. Estoppel

284. In responding to the Claimants' claims, Tanzania first maintains that the Claimants are estopped from advancing those claims, because the letter sent by Bagamoyo EcoEnergy to the President of Tanzania on 25 March 2015 indicated that the Claimants would irrevocably cease all work on, and would effectively abandon, the project with effect from 30 April 2015.[230]

285. According to the Respondent, the concept of estoppel under international law is a flexible one based on good faith.[231] It relies on the description of estoppel in Judge Sir Percy Spender's opinion in the *Temple* case:

> *The principle* [of estoppel] *operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and did in fact rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.*[232]

286. By stating that they intended to wind up the project by 30 April 2015, Tanzania maintains that the Claimants made an unequivocal statement of intention on which Tanzania was entitled to, and did, rely. Moreover, according to Tanzania, the evidence shows that the Claimants had already acted to wind up the project even before writing the letter of 25 March 2015:

> *... at the time the letter was written,* [Bagamoyo EcoEnergy] *had no employee, no offices and no contractual obligation in fact the project was wound up. It thus came as a surprise that the Claimants allege that the project was expropriated in* [sic] *Tanzania. It is the Respondent submission*

[230] C-Mem., paras. 94-108; Rej., paras. 93-111.

[231] The Respondent cites Wagner, "Jurisdiction by Estoppel in the International Court of Justice", 74 Cal. Law Rev. (1986), p. 1777 and *Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador* (UNCITRAL), Partial Award, 30 March 2010 (**RL-27**).

[232] *Temple of Preah Vihear* (*Cambodia v. Thailand*), *ICJ Reports, 1962*, p. 6 at pp. 143-144 (**RL-28**).

that the Claimants themselves had expropriated [Bagamoyo EcoEnergy] *activities in Tanzania*.[233]

In these circumstances, Tanzania argues that the Claimants are estopped from advancing their claims in the present case.

b. The Claimants' Alleged Breach of their Contractual Obligations

287. In any event, Tanzania maintains that the Claimants breached their obligations under the the MOU, the CO and the Performance Agreement, thereby justifying Tanzania in taking the steps which it took.[234]

288. First, Tanzania argues that the MOU committed the Claimants' predecessors, and by implication the Claimants, to securing and maintaining financing for the project and that the Claimants had failed .[235] In this regard, Tanzania draws attention to the draft report by which makes a number of criticisms of Bagamoyo EcoEnergy.

289. Secondly,

290. Thirdly, Tanzania argues that the requirement was not dependent upon the conclusion of the shareholders agreement and the implementation agreement. Rather, it imposed upon the Claimants an obligation to issue the shares which was never complied with.[238]

[233] Rej., para. 102.

[234] C.-Mem., paras. 197-212.

[235] C.-Mem., paras. 200-201.

[236] Transcript, Day 1, pp. 139-140.

[237] C.-Mem., paras. 202-203.

[238] C.-Mem., paras. 204-206.

291. By contrast, Tanzania maintains that it complied with all of its obligations under the Performance Agreement[239] but that:

> *... the Claimants misdirected themselves by claiming that financial closure depended on resolving the land issues, share subscription, signing of shareholder agreement, implementation agreement and power purchase agreement.*[240]

292. Lastly, the Respondent maintains that – quite apart from its argument regarding estoppel – the Claimants' action in winding up the project and their letter to the President of 25 March 2015 together with their subsequent actions amounted to a repudiation of their contractual obligations.[241]

293. In light of these factors, Tanzania maintains that it was entitled to rectify the register of title.[242] It argues that the steps taken by the Acting Commissioner for Lands constituted a rectification, not a revocation of title, which the Commissioner was entitled to take, because of the failure of the Claimants to issue the shares in Bagamoyo EcoEnergy as required by the CO. It points to the distinction under Tanzanian law between rectification and revocation and contends that the conditions set by Tanzanian law for rectification of title were met. Tanzania also argues that there was no violation of due process, since (a) the Claimants should have realized [redacted] that steps, which might include rectification, would be taken with regard to [redacted] and (b) that even if the Claimants were unaware of the rectification until 9 November 2016, it was still open to them to appeal against the decision.

c. Expropriation

294. The Respondent denies that its conduct amounted to a breach of the BIT.[244]

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[239] C.-Mem., paras. 207-212.

[240] C.-Mem., para. 212.

[241] C.-Mem., paras. 213-228.

[242] C.-Mem., paras. 229-253.

[243] [redacted]

[244] C.-Mem., paras. 254-285; Rej., paras. 112-177.

295. In this connection, the Respondent relies on a number of the points recited above. Tanzania denies that the Claimants made an investment.[245] It also argues that the rectification of title did not amount to an expropriation as it was a lawful measure under Tanzanian law and justifiable for the reasons already explained.[246] Tanzania also refers to the alleged breaches of contract by the Claimants referred to above and to what it describes as a fraud by the Claimants since, according to Tanzania, they had never intended to comply with the requirement of the CO.[247]

296. Moreover, since Bagamoyo EcoEnergy and Agro EcoEnergy have withdrawn from the arbitral proceedings, it is only any investment by the two remaining Claimants that is at issue; the investment which they claim is their shareholdings in Bagamoyo EcoEnergy and Agro EcoEnergy. According to Tanzania, those shareholdings have not been expropriated and, Tanzania maintains, the Claimants have failed to show the complete deprivation of the value of their shareholdings in those two companies.[248]

297. Finally, Tanzania contends that the right of occupancy granted to Bagamoyo EcoEnergy by the CO was not capable of being expropriated.[249]

d. Fair and Equitable Treatment

298. The Respondent accepts that the duty, under Article 2(3) of the BIT, to accord an investor and its investment fair and equitable treatment includes the five elements identified by the Claimants (see para. 276, above).[250] It maintains, however, that "*the Claimants were accorded a fair and equitable treatment in all of these respects*" and that Tanzania's treatment of the Claimants at no time fell below the international minimum standard for fair and equitable treatment and was rational, non-discriminatory and designed to protect the public interest.[251]

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[245] Rej., paras. 120-121.
[246] C.-Mem., para. 255; Rej., paras. 122-129.
[247] Rej., para. 127.
[248] C.-Mem., paras. 257-258.
[249] Rej., paras. 130-133.
[250] C.-Mem., para. 260.
[251] C.-Mem., para. 261.

299. With regard to the Claimants' argument based on a legitimate expectation of Government support for the project, the Respondent argues that:

> *... in order for the investment to qualify for protection, the investor's expectations must be reasonable, based on the conduct of the State and reliance by the investor in making the investment on the outlined conditions that investors* [sic] *fair expectation must have based on the conditions offered by the host state at the time of the investment. Basing on such principle, it is clear that the claimants' expectations on the intended project were not reasonable and did not follow the conditions offered by the host state at the time of the investment.*[252]

300. According to Tanzania, "*the Claimants received support they needed for the Project from the Respondent and their expectations were protected until they decided to wind up the Project*".[253]

301. The Respondent maintains that Tanzania acted throughout in a transparent and coherent manner. The actions which it took to rectify the register of title following Bagamoyo EcoEnergy's letter of 25 March 2015 were in keeping with the law of Tanzania, which governed the investment.[254]

302. Tanzania also rejects the suggestion that there was any denial of due process. Under Tanzanian law, the Respondent had acted lawfully in rectifying the [redacted] and the Claimants could have had resort to the Tanzanian courts to challenge the decision but opted not to do so.[255]

303. Finally, the Respondent maintains that its actions were at all times fair and reasonable. It denies that its actions regarding the [redacted] were arbitrary and points to the fact that it had other land at its disposal which it could have allocated to other investors had it wished to do so.[256]

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[252] Rej., para. 137.

[253] C.-Mem., para. 263.

[254] Rej., paras. 144-145.

[255] Mem., paras. 229-253; Rej., paras. 146-149.

[256] Rej., paras. 150-153.

e. Discrimination and National Treatment

304. Tanzania also denies that it has acted discriminatorily or has violated the national treatment requirement of the BIT.[257] It rejects the allegation that the rectification of [redacted] was carried out in order to allocate the land to a Tanzanian investor. The evidence before the Tribunal does not, according to the Respondent, establish any such intention. Tanzania maintains that the argument to the contrary advanced by the Claimants is unsubstantiated and designed to distract from their own failures which were the real cause of the decision on rectification. Once the rectification of title had taken place, it was open to any investor – whether Tanzanian or foreign – to bid for it.

C. ANALYSIS OF THE TRIBUNAL

(1) Preliminary Questions

305. There is a degree of overlap between the different claims advanced by the Claimants and the responses thereto from Tanzania. Before turning to the specific claims, therefore, the Tribunal will examine the following questions:-

(1) whether the Claimants were in breach of their obligations under the CO and the various agreements with Tanzania and, if so, whether Tanzania's actions were a response to those breaches;

(2) whether the letter of 25 March 2015 and the subsequent communications between the Parties show that the Claimants withdrew from the project; and

(3) what was the precise character and effect of the action of the Acting Commissioner for Lands regarding [redacted].

a. Whether the Claimants were in breach of their obligations under the CO and the various agreements with Tanzania and, if so, whether Tanzania's actions were a response to those breaches

306. Tanzania's complaint that the Claimants breached their contractual obligations revolves around two distinct allegations: that the Claimants failed to grant to Tanzania the

[257] Rej., paras. 154-177.

shareholding stipulated [redacted] breached the financial [redacted] by failing to secure suitable partners and a firm financial foundation for the project and by mismanagement of the project's finances. These will be considered separately.

(i) The A[redacted]coEnergy

307. With regard to the alleged breach of the CO, the Tribunal recalls that the consideration which Bagamoyo Eco[redacted]t of occupancy of the [redacted] included the grant of a specified portion of the shares in the company. While the Claimants maintain that there was no obligation to grant the shares until agreement had been reached on a variety of issues relating to the project, the Respondent argues that the obligation to grant the shares was not conditioned in this way and that the failure to grant the shares to Tanzania was a sufficient reason for the "*rectification*" of the register which took place in 2016.

308. The Tribunal considers that the text of Article 2 of the CO is not clear on this point. Tanzania's original proposal appears to have been that

.[258] In the final version of Article 2 of the CO, however, the obligation to grant the shares

[259]. No indication is given of the criteria

. The subsequent behaviour of Tanzania and Bagamoyo EcoEnergy, however, discloses that they were in no doubt that the shares were only to be granted once the shareholders agreement and the implementation agreement were concluded. Bagamoyo EcoEnergy and Tanzania conducted extensive negotiations between the grant of the CO on 8 May 2013 and the letter of 25 March 2015 in which Bagamoyo informed the Government that it was putting in hand steps to terminate the project (see paras. 147 to 164, above). It was during this period that the Performance Contract was concluded and that negotiations took place for the shareholders agreement and the implementation agreement. The record plainly shows that Bagamoyo EcoEnergy

[redacted]

considered that the obligation to grant the shares to Tanzania was conditional upon the successful conclusion of those two agreements which was, in turn, contingent upon resolving the issues necessary to ensure financial closure. There is nothing in the record to show that, at any point in these negotiations, any instrumentality of the Government of Tanzania ever suggested that it took a different view. There is no document in the record in which Tanzania suggests to Bagamoyo EcoEnergy that the latter should grant the shareholding stipulated in Article 2 even if the other agreements had not been concluded. On the contrary, the letter of 4 November 2015 from the Treasury Registrar stated that:

> *You will recall that the Government had offered land as its contribution to equity subject to finalisation of Shareholders Agreement and other investment processes. With the winding up of Bagamoyo EcoEnergy Ltd the Government withdraws its offer accordingly.*[260]

309. The contemporary documentation thus supports the Claimants' interpretation of Article 2.

310. Tanzania nevertheless now maintains that it was the failure of Bagamoyo EcoEnergy to grant the shares to Tanzania which was the reason for the decision of the Acting Commissioner for Lands to rectify the register by removing Bagamoyo EcoEnergy's right of occupancy.

311. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

312. [redacted]

313. [redacted]

[redacted]

[redacted]

314. [redacted]

[redacted]

315. [redacted]

316. In these circumstances, the Tribunal does not accept either that Bagamoyo EcoEnergy was in breach of the obligation under Article 2 of the CO, or that any allegation of such a breach was the basis for the decision to remove its right of occupancy through "rectification" of

[redacted]

the register of title. Whatever argument to that effect Tanzania may have chosen to advance in these proceedings is inconsistent with the contemporary record.

317. [redacted]

[redacted]

318. This point was not developed in argument and, in any event, there is nothing in the contemporary documentation submitted to the Tribunal to suggest either that Tanzania complained about the composition of the Board and management of Bagamoyo EcoEnergy between 2013 and 2016 or that concerns about their composition formed any part of the decisions which Tanzania took regarding the termination of the project and the change in the register of title.

(ii) The Alleged Breach of the Financial Obligations of the Claimants

319. So far as the financial obligations of Bagamoyo EcoEnergy and the Claimants are concerned, Tanzania raises two distinct, though related, arguments.

(a) The Scale of the Claimants' Investment

320. Tanzania first maintains that the Claimants themselves invested no significant funds in the project [redacted][268] and refers to complaints about lack of progress on the ground. That letter also raised concerns about the failure of Bagamoyo EcoEnergy to find suitable partners in time to allow the Government to engage in due diligence [redacted]

[redacted]

[redacted] The record thus shows that this issue was raised by Tanzania at the time of termination of the project.

321. [redacted]

322. [redacted]

[redacted]

323. [redacted] The Tribunal will discuss the significance of these mixed messages from Tanzania in the next sub-section of the Award. For now it suffices to say that they reinforce the conclusion, reached on the basis of the rest of the record, that Tanzania had always understood that most of the funding would come from governmental and inter-governmental bodies and that it understood that financial closure required action from Tanzania which had not been completed by March 2015.

324. [redacted]

[redacted]

325. [redacted]

326. [redacted]

[redacted]

[redacted]

(b) Allegations of Financial Mismanagement

327. [redacted]

b. Whether the letter of 25 March 2015 and the subsequent communications between the Parties show that the Claimants withdrew from the project

328. [redacted]

329. [redacted]

[redacted]

[275] Transcript, Day 1, pp. 124-125.

[276] [redacted] answer to the President, Transcript, Day 3, p. 82.

[redacted]

330. In light of this passage, the Tribunal concludes that the letter was not stating an irrevocable decision but inviting further discussion in the hope of avoiding closure. More importantly, that was clearly how it was construed by the Government. Although there was no reply from the President's office to the letter, the following actions by Tanzania are explicable only on the basis that the Government considered that the letter did not close the door and that the project could continue:-

- [redacted]

[redacted]

- [redacted]

[redacted]

[redacted]

331. [redacted]

332. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

333. [redacted]

334. [redacted]

[redacted]

[redacted]

335. [redacted]

336. [redacted]

337. That suffices to dispose of the estoppel argument advanced by Tanzania (see paras. 284 to 286, above). Even if the statements in the letter of 25 March 2015 as to the future intentions of Bagamoyo EcoEnergy and its owners could give rise to an estoppel in international law – as to which the Tribunal need not take a position – it is plain that the language of that letter was not sufficient to amount to the representation alleged by Tanzania. Moreover, Tanzania's conduct for many months after receipt of that letter shows that it had not relied upon the representation which it now claims was contained in that letter but had treated the letter as meaning something quite different. The Tribunal therefore rejects the Respondent's defence of estoppel.

c. What was the precise character and effect of the action of the Acting Commissioner for Lands regarding [redacted]

338. The Parties differ over the precise character and effect of the action of the Acting Commissioner for Lands regarding the [redacted] The Claimants characterize that action as a revocation of the right of occupancy granted to their subsidiary, Bagamoyo EcoEnergy, by the CO and consider the description of the action as "*rectification*" of the title to be a cloak to disguise what was really being done. For Tanzania there is a clear distinction in Tanzanian law between rectification and revocation and the action in the present case clearly fell within the first category.

339. The Tribunal does not consider it necessary to engage in a debate about the Tanzanian law regarding title to land. What matters for the purposes of these proceedings is the effect in international law of the actions taken.

340. [redacted]

341. Nor does the Tribunal consider it necessary to enter into the debate about whether, under Tanzanian law, Bagamoyo EcoEnergy still had a right to appeal against the decision once it learned of it (some six months after the Registrar had amended the Register in accordance with the Acting Commissioner's request). Even assuming that there was such a right of appeal, the BIT contains no requirement of a prior exhaustion of local remedies and the Claimants were therefore entitled to raise the matter in arbitration proceedings without recourse to the courts of Tanzania.

(2) Expropriation

342. The Tribunal has already held (see paras. 236 to 239, above) that the Claimants' investment in Tanzania consisted of their shares, held directly or indirectly, in Bagamoyo EcoEnergy Limited, together with the assets of that company, which are property that the Claimants indirectly owned or controlled. The Claimants' case is that the actions of Tanzania in depriving Bagamoyo EcoEnergy of its right of occupancy of the [redacted], its strategic investor status and the water permits which it had been granted amounted to an expropriation of their property without compensation.

343. The Respondent denies that there was any expropriation. According to Tanzania, it acted throughout in accordance with the law of Tanzania. It maintains that the rights under the CO were incapable of expropriation and that, in any event, Tanzania did not remove those rights, it merely rectified the register of title. In addition, Tanzania argues that the Claimants' shareholding in Bagamoyo EcoEnergy remained untouched.

344. Since the Parties differ over whether the applicable law is international law (as the Claimants contend) or Tanzanian law (on which the Respondent relies), the Tribunal will begin by examining that question.

345. Article 42(1) of the ICSID Convention provides:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

346. In the present case, the Parties have not agreed upon an applicable law, so that it is the second sentence of Article 42(1) which determines the law that the Tribunal must apply. That sentence refers to both national law and international law. The claim before the Tribunal is for the alleged breach of a treaty (the BIT), an instrument governed by international law. It follows that the meaning of the term "*expropriation*" in the BIT has to be determined by reference to international law. Moreover, it is a well established principle of international law that a governmental act may constitute expropriation in international law even though it is lawful under the law of the State taking that act.

347. Accordingly, the Tribunal considers that if the actions of Tanzania regarding the Claimants' investment constitute unlawful expropriation under international law, they will contravene the BIT even if they were lawful under the law of Tanzania.

348. The question, therefore, is whether Tanzania's actions constitute, as a matter of international law, the expropriation of all, or part, of the Claimants' investment. In this context, the Tribunal recalls that it has held (para. 236, above) that the Claimants' investment consisted of their interests in Bagamoyo EcoEnergy and Agro EcoEnergy, which fall within Article 1(1)(b) of the BIT, and the assets of Bagamoyo EcoEnergy, including its rights in movable and immovable property, which fall within Article 1(1)(a) of the BIT.

349. Article 4 of the BIT (the text of which is set out at para. 265, above) is in broad terms. It prohibits a Contracting Party from taking "*any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment*" unless the three conditions set out in sub-paragraphs (a) to (c) are met.

350. The Tribunal has carefully examined the record of Tanzania's treatment of Bagamoyo EcoEnergy and, in particular the grant of the CO and the later "*rectification*" of the register of title. It has already explained why it considers that the grant to Bagamoyo EcoEnergy of the CO conferred on Bagamoyo EcoEnergy a right in [redacted] which could be mortgaged and had financial value (see para. 340, above). That right was indirectly owned or controlled by the Claimants through their ownership and control of Bagamoyo EcoEnergy. The effect of Tanzania's actions in 2015-16 was to deprive Bagamoyo EcoEnergy and, therefore, the Claimants, of that right.

351. The Tribunal has already rejected Tanzania's argument that Bagamoyo EcoEnergy had violated the terms of the CO, or that other conduct on the part of the Claimants or Bagamoyo EcoEnergy justified Tanzania's actions (see paras. 306 to 327, above). The Tribunal has also rejected Tanzania's submission that the Claimants and Bagamoyo EcoEnergy had voluntarily withdrawn from the project [redacted] (see paras. 328 to 337, above). There was no legal justification for the "*rectification*" of the register and the abrogation of Bagamoyo EcoEnergy's [redacted]. The

Tribunal is, therefore, satisfied that Tanzania's actions amounted to an expropriation under international law.

352. Since no compensation was paid (as required by Article 4(1)(c) of the BIT), it is unnecessary for the Tribunal to determine whether the measures taken by Tanzania were "*taken in the public interest and under due process of law*" (as required by Article 4(1)(a)) or whether they were "*distinct and non-discriminatory*" (as required by Article 4(1)(b)); the three conditions are cumulative and all must be satisfied if the taking is not to violate Article 4. The Tribunal therefore concludes that Tanzania expropriated rights in immovable property indirectly owned and controlled by the Claimants and that it did so in breach of Article 4 of the BIT.

353. Moreover, the taking of the rights to the [redacted] does not stand alone. The abrogation of Bagamoyo EcoEnergy's rights to the [redacted] meant that the entire project collapsed, since without the land the project could not go ahead [redacted]

354. [redacted]

355. [redacted]

356. The Tribunal therefore concludes that the effect of the actions of Tanzania was to deprive the Claimants of the rights in the [redacted] and the investment at [redacted] The result was to put an end to the entire project and thus deprive Bagamoyo EcoEnergy of its

[redacted]

principal asset. The Claimants' claim for expropriation in violation of Article 4(1) of the BIT is therefore allowed.

(3) Fair and Equitable Treatment

357. Since the Tribunal has upheld the Claimants' expropriation claim, it is not strictly necessary to decide the other claims as to doing so will not affect the compensation to be awarded. Nevertheless, those claims were fully argued by both Parties and the Tribunal will briefly set out its decision and reasoning with regard to each of them.

358. The fair and equitable treatment standard was summed up by the tribunal in *LG&E v. Argentina* in the following terms:

> *... this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the foreign investor.*[292]

359. The record set out above reveals that Tanzania's behaviour towards the Claimants and Bagamoyo EcoEnergy was anything but "*consistent and transparent*". [redacted]

360. [redacted]

- [redacted]

[292] *LG&E v. Argentina*, para. 131 (**CL-16**).

[redacted]

361. [redacted]

362. [redacted]

- [redacted]

[redacted]

- [redacted]

[redacted] [redacted]

[redacted] [redacted]

363. [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[302] See para. 185, above

[303] See para. 186, above.

[304] See para. 187, above.

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364.

366.

367. The Tribunal must also take into account that Tanzania has now offered a very different explanation of why and how the project was terminated from that which appears in the contemporary correspondence.[309]

[305] See para. 188, above.

[306] See para. 189, above.

[307] See para. 189, above.

[308] See para. 184, above.

[309] See paras. 307 to 316, above.

368. The Tribunal concludes that Tanzania's treatment of the Claimants lacked both consistency and transparency. It also considers that the way in which the Government behaved amounted to arbitrary and unreasonable conduct. Consequently, there was a clear breach by Tanzania of the duty under Article 2(3) of the BIT to accord fair and equitable treatment to the Claimants' investment.

(4) Discrimination

369. The Claimants have also advanced a case that the Respondent's treatment of them was discriminatory and thus violated the prohibition on discrimination in Article 2(3) of the BIT and the duty in Article 3 to accord to investors of Sweden the same treatment as it gives to Tanzanian investors.

370. The Tribunal notes the evidence advanced by the Claimants in support of their allegation that the Government confiscated their [redacted] because it wished to grant that title to a Tanzanian investor.

371. [redacted]

372. The evidence raises concerns about the motivation of the Government of Tanzania, especially in view of the findings already made as to the way in which the Government behaved, but the Tribunal does not consider that it is sufficient to prove discrimination. The Claimants' claim of discrimination is therefore dismissed.

(5) Conclusions on the Merits

373. For the reasons set out above, the Tribunal finds that:-

(a) the Respondent expropriated the Claimants' investment in breach of Article 4(1) of the BIT;

(b) the Respondent violated its obligation to accord the Claimants' investment fair and equitable treatment in breach of Article 2(3) of the BIT;

[310] Mem., paras. 397-400

(c) the Claimants' claims of discriminatory treatment under Articles 2(3) and 3 of the BIT are dismissed.

VI. QUANTUM

A. INTRODUCTION

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. THE POSITION OF THE PARTIES

(1) The Claimants

a. The Claimants Assert that the FMV of their Investment should be determined by a Discounted Cash Flow (DCF) Analysis

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. Alternatively, the Claimants Request Damages Corresponding to their Amounts Invested with a Reasonable Rate of Return

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

c. The Claimants Request Compounded Pre-Award and Post-Award Interest

[redacted]

[redacted]

[redacted]

d. The Claimants Argue They Are Entitled to a Tax-Gross Up to Offset the Difference in Tax Treatment of Dividends and Damages, Respectively, for Swedish Claimants

[redacted][346]

[redacted]

[redacted]

[redacted]

(2) The Respondent

[redacted]

[redacted]

a. The Respondent Argues that the DCF Method is not Appropriate to Determine the FMV of the Investment.

[redacted]

b. The Respondent Asserts that the Nominal Damages Method is Appropriate, but that the Claimants Include Several Non-Compensable Sums in their Amounts Invested Figure.

[redacted]

[351] C.-Mem., para. 288, *citing* [redacted] WS, para. 7; Rej., paras. 182-185.
[352] C.-Mem., para. 289, *citing* [redacted] WS, para. 8.
[353] C.-Mem., para. 290, *citing* [redacted] WS, para. 9.
[354] Rej., para. 182.
[355] C.-Mem., para. 291, *citing* [redacted] WS, para. 10.

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

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356 C.-Mem., para. 293, *citing* [redacted] WS, para. 11; Rej., paras. 186-189.

357 Rej., para. 187.

358 C.-Mem., para. 294, *citing* [redacted] WS, para. 12.

359 [redacted] WS, para. 13.

360 C.-Mem., para. 296, *citing* [redacted]

361 Rej., para. 190.

362 C.-Mem., para. 297, *citing* [redacted] WS, para. 16; Rej., para. 190.

[redacted]

(3) The Claimants' Response

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. ANALYSIS OF THE TRIBUNAL

(1) Proper valuation standard

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[373] Reply, para. 306; [redacted] Second ER, paras. 62-65.

[374] C.-Mem., paras. 296-299; Rej., para. 190.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[375] *NextEra v. Spain,* paras. 658-661 (**CL-122**).

[376] [redacted] First ER, section VIII.A.

[377] Mem., para. 465, *citing* [redacted].

[378] [redacted] First ER, Table 4, Table 19; [redacted] Second ER, paras. 15, 31, 94.

[redacted]

(2) Pre-Award and Post-Award Interest

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(3) Tax Gross-up

[redacted]

[382] [redacted] Second ER, para. 81 and Appendix H, fn. 3.

[383] [redacted] Hearing Presentation, p. 26.

[redacted]

VII. THE COUNTER-CLAIM

[redacted]

[redacted]

VIII. COSTS

[redacted]

[redacted]

448. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the Parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

[384] Respondent's Statement of Costs, para. 1.

449. This provision gives the Tribunal a broad discretion with regard to the costs of the Arbitration. That discretion is not limited by any presumption in favour of a "*loser pays*" approach such as is found in the UNCITRAL Rules.[385]

450. Those costs fall into two categories. First, there are the costs of the Tribunal and the Centre, including the fees and expenses of the Members of the Tribunal, ICSID's administrative fees and direct expenses. These amount to:

Arbitrators' fees and expenses	
Sir Christopher Greenwood	USD 93,644
Dr Stanimir A. Alexandrov	USD 88,061
Ms Funke Adekoya	USD 62,052
ICSID's administrative fees	USD 210,000
Direct expenses (estimated)	USD 29,465
Total	**USD 483,221**

[redacted]

[385] 1976 UNCITRAL Rules, Art. 40(1); 2010 UNCITRAL Rules, Art. 42(1).

[redacted]

IX. DISPOSITIF

457. For the reasons set out above, the Tribunal DECIDES that:-

(a) The Tribunal has jurisdiction over the Claimants' claims;

(b) The Respondent has expropriated the Claimants' investment in breach of Article 4 of the BIT;

(c) The Respondent has violated its obligation under Article 2(3) of the BIT to treat the Claimants' investment in a fair and equitable manner;

(d) The Claimants' claim for discrimination is dismissed;

(e) The Respondent shall pay to the Claimants [redacted] by way of compensation;

[redacted]

[redacted]

[redacted]

[redacted]

Ms Funke Adekoya
Arbitrator

Date: 13 April 2022

[redacted]

Dr Stanimir A. Alexandrov
Arbitrator

Date: 13 April 2022

[redacted]

Sir Christopher Greenwood
President of the Tribunal

Date: 13 April 2022