

**PCA Case No. 2015-40**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL  
CONSTITUTED IN ACCORDANCE WITH THE UNCITRAL ARBITRATION  
RULES 1976**

**AND**

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF  
INDONESIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE  
PROMOTION AND PROTECTION OF INVESTMENTS  
(1999)**

**BETWEEN**

**INDIAN METALS & FERRO ALLOYS LIMITED (INDIA)  
(The “Claimant”)**

**AND**

**THE GOVERNMENT OF THE REPUBLIC OF INDONESIA  
(The “Respondent” and together with the Claimant, the “Parties”)**

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**AWARD**

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**The Arbitral Tribunal**

Mr Neil Kaplan CBE QC SBS (Presiding Arbitrator)  
The Honourable James Spigelman AC QC  
Professor Muthucumaraswamy Sornarajah

**Secretary to the Tribunal**

Dr Noam Zamir

**Registry**

Permanent Court of Arbitration

**Date:** 29 March 2019



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### Glossary

BIT (also “Treaty”)	The Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments dated 8 February 1999
2007 Investment Law (also “CIL”)	Law of the Republic of Indonesia Number: 25 of 2007 concerning investment (Capital Investment Law)
BKPM	Capital Investment Coordinating Board (Badan Koordinasi Penanaman Modal) of the Republic of Indonesia
BKPM Regulation No 12	The guidance and procedure of investment applications (Regulation of Chairman of the Investment Coordinating Board No. 12/2009)
CIL (also “2007 Investment Law”)	Law of the Republic of Indonesia Number: 25 of 2007 concerning investment (Capital Investment Law)
Clean and Clear	A list containing entities regarded as defect-free IUPs
Government Regulation No 24 of 2012	Government Regulation No 23 of 2010 concerning implementation of mineral and coal mining business activities, as amended by Government Regulation No 24 of 2012
IMFA	Indian Metals and Ferro Alloy Metals Limited
Indmet	Indmet Mining Pte Ltd, Singapore
IUP	<i>Ijin usaha pertambangan</i> , a mining business permit issued pursuant to Law No 4 of 2009 concerning mineral and coal mining (Exhibit CL-3); there are two types of business permits: an Exploration IUP and a Production IUP
KP	Mining Rights (Kuasa Pertambangan)
MEMR	Ministry of Energy and Mineral Resources
PMA company	Foreign investment company, <i>penanaman modal asing</i>
Production IUP	A type of mining business permit for production use issued pursuant to Law No 4 of 2009 concerning mineral and coal mining (Exhibit CL-3)
PT BAB	PT Bintang Awai Bersinar
PT MBM	PT Marangkayu Bara Makarti
PT PAK	PT Puspita Alam Kurnia
PT PBU	PT Putra Bara Utama
PT TBK	PT Tanjung Bartim Kurnia

SRI	PT SRI
SRI Mining Concession	Production IUP No. 569 of 2009 dated 31 December 2009 granted by the East Barito Regent to SRI (Exhibit C-8)
Treaty (also "BIT")	The Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments dated 8 February 1999
VCLT	Vienna Convention on the Law of Treaties (Exhibit CL-30)

**A. Introduction**

**I. The Parties**

1. The Claimant is Indian Metals & Ferro Alloys Limited (“**IMFA**”), a company incorporated as a private limited company under the laws of the Republic of India.
2. The Claimant is represented in these proceedings by Anuradha Dutt, Lynn Pereira and Fereshte Sethna of DMD Advocates, 30, Nizamuddin (East), New Delhi, 110 013, India; and Harish Salve SA of Blackstone Chambers, Temple London, EC4Y 9BW, United Kingdom.
3. The Respondent is the Republic of Indonesia.
4. The Respondent is represented in these proceedings by Renny Ariyanny and Cahyaning Nuratih of the Attorney General’s Office of the Republic of Indonesia, Jl Sultan Hasanudin No 1 Kebayoran Baru, South Jakarta; Dr Stuart Dutson, Amanda Lees, Rina Lee and Rogier Schellaars of Simmons & Simmons LLP, CityPoint, One Ropemaker Street, London EC2Y 9SS; and Dr Teddy Anggoro, Rapin Mudiardjo and Acep Sugiana of FAMS & P Lawyers, Gandaria IX Street Number 5, Kebayoran Lama, South Jakarta 12130.

**II. The Tribunal**

5. The Honourable James Spigelman AC QC was appointed as an arbitrator by the Claimant pursuant to the Notice of Arbitration on 24 July 2015. Mr Spigelman’s contact details are as follows:

The Honourable James Spigelman AC QC  
Suite 515 Eastpoint Tower  
180 Ocean St  
Edgecliff  
Sydney  
NSW  
Australia 2027

6. Professor Muthucumaraswamy Sornarajah was appointed as an arbitrator by the Respondent on 3 May 2016, after Mr Salim Moollan QC, who was appointed by the Secretary-General of the PCA, resigned. Professor Sornarajah’s contact details are as follows:

Professor Muthucumaraswamy Sornarajah  
469G Bukit Timah Road  
Singapore 25977

7. Mr Neil Kaplan CBE QC SBS was appointed as the Presiding Arbitrator in this matter pursuant to Article 7(1) of the UNCITRAL Rules. Mr Kaplan's contact details are as follows:

Mr Neil Kaplan QC CBE SBS  
Arbitration Chambers Hong Kong  
Chinachem Hollywood Centre,  
Suite 803, 1 Hollywood Road,  
Central, Hong Kong

8. On 7 January 2017, the Tribunal asked the Parties' consent to appoint Dr Noam Zamir as Tribunal Secretary. The Claimant consented on 9 January 2017 and the Respondent consented on 13 January 2017.

### **III. The Dispute**

9. A dispute has arisen between the Claimant and the Respondent concerning a mining licence issued by the East Barito Regency in respect of which the Claimant filed a Notice of Arbitration on 24 July 2015 pursuant to Article 9(b) of the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments dated 8 February 1999 (the "Treaty" or "BIT").
10. In accordance with Article 9(b) of the Treaty, these proceedings were conducted under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules").

### **B. Procedural History**

11. The procedural history is a matter of record. The main procedural events are contained in Appendix 1 to this Award which should be read with, and form part of, this Award.
12. Shortly after the President was appointed, he requested that the Parties set out their positions in a three-page document including any jurisdictional arguments. At this stage, the Respondent had not instructed external counsel and was represented by members of the Attorney General's chambers. The Respondent also requested to bifurcate the proceedings; a request to which the Claimant objected. The Tribunal decided to reject the Respondent's request.



13. The Parties served detailed submissions in multiple rounds. There were substantial issues relating to disclosure of documents. The Tribunal benefitted from an early opening at the Peace Palace in The Hague which helped to clarify some issues. At this stage, the Respondent was represented by Simmons & Simmons and the temporal jurisdiction elaborated in the early opening was an additional argument to that which was raised in the three-page document and request for bifurcation submitted by the Attorney General's chambers.
14. The main hearing was held at the Peace Palace in The Hague from 6 to 10 and 14 August 2018, with the following persons in attendance:

**Tribunal**

Mr Neil Kaplan CBE QC SBS (Presiding Arbitrator)  
The Honourable James Spigelman, AC QC  
Professor Muthucumaraswamy Sornarajah

**Tribunal Secretary**

Dr Noam Zamir

**Claimant**

*Counsel, Blackstone Chambers*

Mr Harish Salve, SA

*Counsel, DMD Advocates*

Ms Anuradha Dutt

Ms Fereshte Sethna

Mr Lynn Pereira

Mr Haaris Fazili

Mr Shatadal Ghosh

Mr Kunal Dutt

Mr William A. Sullivan

*Claimant's Representatives*

Mr Prem Khandelwal

Mr Surendra Nath Achary Dakoji

*Fact Witness*

Mr Chitta Ranjan Ray

*Expert Witnesses*

Mr Simon Pepper (DMT)

Mr Gunaseelan Narayanan Thekken (DMT)

**Respondent**

*Counsel, Simmons & Simmons LLP*

Dr Stuart Dutson

Mr Rogier Schellaars

Ms Amanda Lees

Ms Florentine Vos

Ms Andrea Ledward

Ms Melidijana Kljajic

*Counsel, FAMS & P Lawyers*

Dr Teddy Anggoro

Mr Rapin Mudiardjo

Mr Acep Sugiana

Ms Cynthia Ilyas

*Expert Witnesses*

Mr Ricki Beckmann

Mr Julian Hill (Deloitte)

Mr Andrew Flower

Mr Rahmat Soemadipradja

(Soemadipradja & Taher)

*Assistants to Expert Witnesses*

Ms Sharmila Patra (*DMT*)  
Mr Kiran Sequeira (*Versant Partners*)  
Mr Matthew Shopp (*Versant Partners*)

Ms Rachel Situmorang  
(*Soemadipradja & Taher*)  
Mr Jeremiah Purba (*TNB & Partners*)  
Mr Matt Brewer (*Deloitte*)

*Party Representatives, Attorney-  
General's Office*

Manumpak Pane  
Renny Ariyanny  
Cahyaning Nuratih Widowati  
Herry H. Horo  
Bagus Priyonggo  
Carolita Novinia Yuanita  
Erik Meza Nusantara  
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*Party Representatives, Ministry of  
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Hadiyanto  
Tio Serepina Siahaan  
Pangihutan Siagian  
Maria Lucia Clamameria  
Handy Trinova  
Nely Hidayati

*Party Representatives, Ministry of Law  
and Human Rights*

Nurjaman  
Dinda Dian Mega Kartika  
Randy Yulawan

*Party Representatives, Ministry of  
Energy and Natural Resources*

Heriyanto  
Nelyanti Siregar

*Party Representative, Ministry of  
Foreign Affairs*

L. Amrih Jinangkung

*Party Representative, Investment  
Coordinating Board  
Riyatno*

*Embassy of the Republic of Indonesia in  
the Netherlands  
Indra Danardi Haryanto*

**Court Reporters:**

Ms Diana Burden  
Ms Laurie Carlisle

**Law in Order - Electronic Evidence Presentation:**

Mr Faraz Khan (*until 10 August*)  
Mr Jack Dilweg

**Permanent Court of Arbitration:**

Ms Fedelma Claire Smith  
Ms Ashwita Ambast  
Mr Byron Perez  
Ms Camilla Pondel  
Mr Sadyant Sasiprabhu

**C. Factual Background of the Dispute**

15. The Claimant invested in PT SRI (“SRI”), a local Indonesian company, for the purpose of coal mining production. At the time of the Claimant’s alleged investment, SRI held a production licence, Production IUP No 569 of 2009 (“SRI Mining Concession”), which was issued to SRI by the Regent of East Barito in the province of Central Kalimantan on the island of Borneo.
16. The dispute in this arbitration mainly revolves around overlapping licences that were issued by the Respondent to other companies. The overlapping licences rendered SRI Mining Concession useless.
17. The paragraphs below provide the general factual background of the dispute in more detail. To the extent deemed appropriate, the Tribunal will address additional relevant facts in its decision in the following sections of the Award.

### ***The Process of Decentralisation in Indonesia***

18. Indonesia is a very large country consisting of 13000 islands. It has a land mass total of 735,000 square miles and a population in excess of 261,000,000 making it the 4th most populous country in the world. It comprises 300 ethnic groups and its people speak a total of 700 languages or dialects.
19. Until 1998, Indonesia had a highly centralised political system. Following the resignation of President Suharto in 1998, Indonesia started a process of decentralisation of authority.
20. Accordingly, Law No 22 of 1999 transferred most authority and funding from the central government to regencies and municipalities rather than the provincial governments.<sup>1</sup>
21. As explained by the Respondent:

*“Law No 22 of 1999 is a framework law that left many issues for determination in the more detailed regulations that followed. It took some time for these regulations to be drafted and implemented by the central government, while at the regional level regional governments implemented regional regulations for matters that had yet to be regulate centrally. The law has since been amended a number of times, most recently in 2014.”*<sup>2</sup>
22. The Republic of Indonesia has various levels of government. The following levels are noted: (i) Central Government – the President of the Republic of Indonesia holds governmental authority of the State of the Republic of Indonesia; (ii) The Provinces are headed by Governors. They are further divided into regencies and municipalities; (iii) Regencies are headed by Regents and further divided into districts, villages and special areas and urban areas.<sup>3</sup>

### ***The Territory in which the Investment was Made***

23. The island of Borneo is divided between three countries: Malaysia, Indonesia and Brunei. Kalimantan is the Indonesian part of the island of Borneo and covers approximately 73% of the island’s land mass. Within Kalimantan, there are currently five provinces: South Kalimantan, Central Kalimantan, East Kalimantan, West Kalimantan and North Kalimantan (only created in 2012). Central Kalimantan is divided into one municipality

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<sup>1</sup> See **Exhibit CL-6**, Law No 22 of 1999 promulgated on 07 May 1999 by the Republic of Indonesia concerning regional administrations dated 7 May 1999.

<sup>2</sup> Respondent’s Statement of Defence (“SOD”), para. 5.3. See also **Exhibit CL-5**, Law No 32 of 2004 concerning regional administration dated 15 October 2004.

<sup>3</sup> SOD, para. 4.2.

and thirteen regencies, including East Barito Regency (in Indonesian language, Barito Timur), which is the regency that granted the mining licences to SRI, and South Barito Regency. South Kalimantan Province includes the Tabalong Regency.

***SRI's operation in Indonesia***

24. SRI was incorporated as a limited liability company, under the laws of Indonesia, on 12 June 2003.<sup>4</sup>
25. SRI was granted coal exploration licence, through Exploration KP No 185 of 2006 dated 16 June 2006, by the Regent of East Barito, in respect of a land area of 5000 hectares, for a period of 2 years (from 16 June 2006 to 15 June 2008).<sup>5</sup>
26. On 28 March 2008, SRI renewed its coal exploration licence through Exploration KP No 135 of 2008 issued by the Regent of East Barito. The licence was limited to 4000 hectares and valid for one year until 27 March 2009.<sup>6</sup> Condition 8 of the licence stipulated as follows:

*“Given the unclear boundaries based on the spatial layout, i.e. the boundaries with the Barito Selatan Regency of Central Kalimantan Province, and the boundaries with the Tabalong Regency of South Kalimantan Province, in conducting Exploration, there should be coordination with Barito Selatan Regency, Central Kalimantan Province, and Tabalong Regency, South Kalimantan Province. In the event that in such coordination, it turns out that there is an area falling into the area of Barito Selatan Regency of Central Kalimantan Province and Tabalong Regency of South Kalimantan Province, then the holder of Mining Rights shall remove its area falling into another area.”<sup>7</sup>*

27. On 10 November 2008, SRI applied to upgrade its Exploration KP No 135 of 2008 to an Exploitation KP.<sup>8</sup>
28. In addition, the Claimant argues that it applied for renewal of Exploration KP No 135 of 2008 on 22 December 2008. The Claimant relies on Exploration IUP No 463 of 2009,

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<sup>4</sup> **Exhibit C-1**, Deed of Incorporation of the Limited Liability Company, “PT Sumber Rezki Indah” dated 12 June 2003.

<sup>5</sup> **Exhibit C-4**, Decree of the Head of Barito Timur Regency bearing No 185 of 2006 dated 16 June 2006.

<sup>6</sup> **Exhibit C-5**, Decree of the Head of Barito Timur Regency bearing No 135 of 2008 dated 28 March 2008.

<sup>7</sup> **Exhibit C-5**, Decree of the Head of Barito Timur Regency bearing No 135 of 2008 dated 28 March 2008, pp. 6-7.

<sup>8</sup> **Exhibit R-79**, Letter from the Regent of East Barito to SRI in response to SRI’s application to upgrade its Exploration KP No 135 of 2008 to an Exploitation KP dated 11 April 2009.

which refers to an application dated 22 December 2008.<sup>9</sup> The Respondent submits that “it is improbable that such an application was made on that date given that SRI applied for an upgrade of its Exploration KP on 10 November 2008 and the correspondence from the Regent on 11 April 2009.”<sup>10</sup>

29. On 28 March 2009, Exploration KP No 135 of 2008 expired.
30. On 11 April 2009, the East Barito Regent wrote to the Director of SRI in relation to SRI’s application of 10 November 2008. East Barito Regent indicated that SRI’s application for an Exploitation KP could not be considered given that SRI had failed to provide supporting documents, including a “[c]oordination result report on the activities conducted on the border of the Regency of East Barito and the Regency of Tabalong.”<sup>11</sup> The Respondent submits that this reference to the coordination report is “a direct reference to condition 8 of Exploration KP No 135 of 2008.”<sup>12</sup> In any case, the Claimant emphasises that condition 8 of Exploration KP No 135 of 2008 was not included in the succeeding SRI’s licences.<sup>13</sup>
31. On 17 October 2009, the Regent of East Barito issued Exploration IUP No 463 of 2009 to SRI, over the same area of 4,000 hectares identical to that covered by Exploration KP No 135 of 2008. The licence was with effect from 16 June 2009 and valid until 16 June 2012.<sup>14</sup>
32. On 8 December 2009, the Regent of East Barito issued an amended Exploration IUP No 526 of 2009 to SRI in respect of a land area of 3,674 hectares.<sup>15</sup> The licence was valid for a period of 7 years, from 16 June 2009 to 15 June 2016.
33. On 31 December 2009, the Regent of East Barito issued Production IUP No 569 of 2009 to SRI (i.e. SRI Mining Concession), over the same area of 3,674 hectares, for a period

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<sup>9</sup> **Exhibit C-6**, Decree of the Head of Barito Timur Regency bearing No 463 of 2009 (Official Translation) dated 17 October 2009, p.1.

<sup>10</sup> Respondent’s Post-Hearing Brief, para. 15.11 (referring to Rejoinder, para 6.15 and **Exhibit R-79**, Letter from the Regent of East Barito to SRI in response to SRI’s application to upgrade its Exploration KP No 135 of 2008 to an Exploitation KP dated 11 April 2009.)

<sup>11</sup> **Exhibit R-79**, Letter from the Regent of East Barito to SRI in response to SRI’s application to upgrade its Exploration KP No 135 of 2008 to an Exploitation KP dated 11 April 2009.

<sup>12</sup> Respondent’s Rejoinder (“**Rejoinder**”), para. 6.10.

<sup>13</sup> See, e.g., Claimant’s Post-Hearing Brief, paras 92-93.

<sup>14</sup> **Exhibit C-6**, Decree of the Head of Barito Timur Regency bearing No 463 of 2009 (Official Translation) dated 17 October 2009.

<sup>15</sup> **Exhibit C-7**, Decree of the Head of Barito Timur Regency bearing No 526 of 2009 (Official Translation) dated 8 December 2009.

of 10 years, capable of 2 renewals for a period of 10 years, with effect from 8 December 2009.<sup>16</sup>

***The Claimant's Investment***

34. The Claimant entered into a Term Sheet dated 18 September 2009 to acquire a 70% majority equity stake and interests in SRI, for US\$ 8.75 million.<sup>17</sup>
35. On 23 October 2009, the Claimant's Board of Directors decided to invest in coal block in Indonesia, including through a wholly owned investment subsidiary.<sup>18</sup>
36. On 7 June 2010, Indmet Mining Pte Limited Singapore ("**Indmet**"), a subsidiary of Indmet (Mauritius) Ltd, which was the Claimant's subsidiary, entered into a Share Purchase Agreement, for acquiring a 70% interest in SRI.<sup>19</sup>
37. The acquisition of 70% of the shares in SRI was completed when the transfer deeds were executed in favour of Indmet on 27 October 2010.<sup>20</sup> The final and full payment for the shares was made on 4 November 2010.<sup>21</sup>
38. It should be stated that according to the Claimant, at the time of the Share Purchase Agreement dated 7 June 2010 and the acquisition of 70% of the shares in SRI, Indmet was wholly owned by Indmet (Mauritius) Ltd, which was incorporated in Mauritius and wholly owned and controlled by the Claimant. Indmet (Mauritius) was voluntarily dissolved on 30 April 2013.
39. The diagram on the following page illustrates the relevant shareholding of the alleged investment:

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<sup>16</sup> **Exhibit C-8**, Decree of the Head of Barito Timur Regency bearing No 569 of 2009 (Official Translation) dated 31 December 2009.

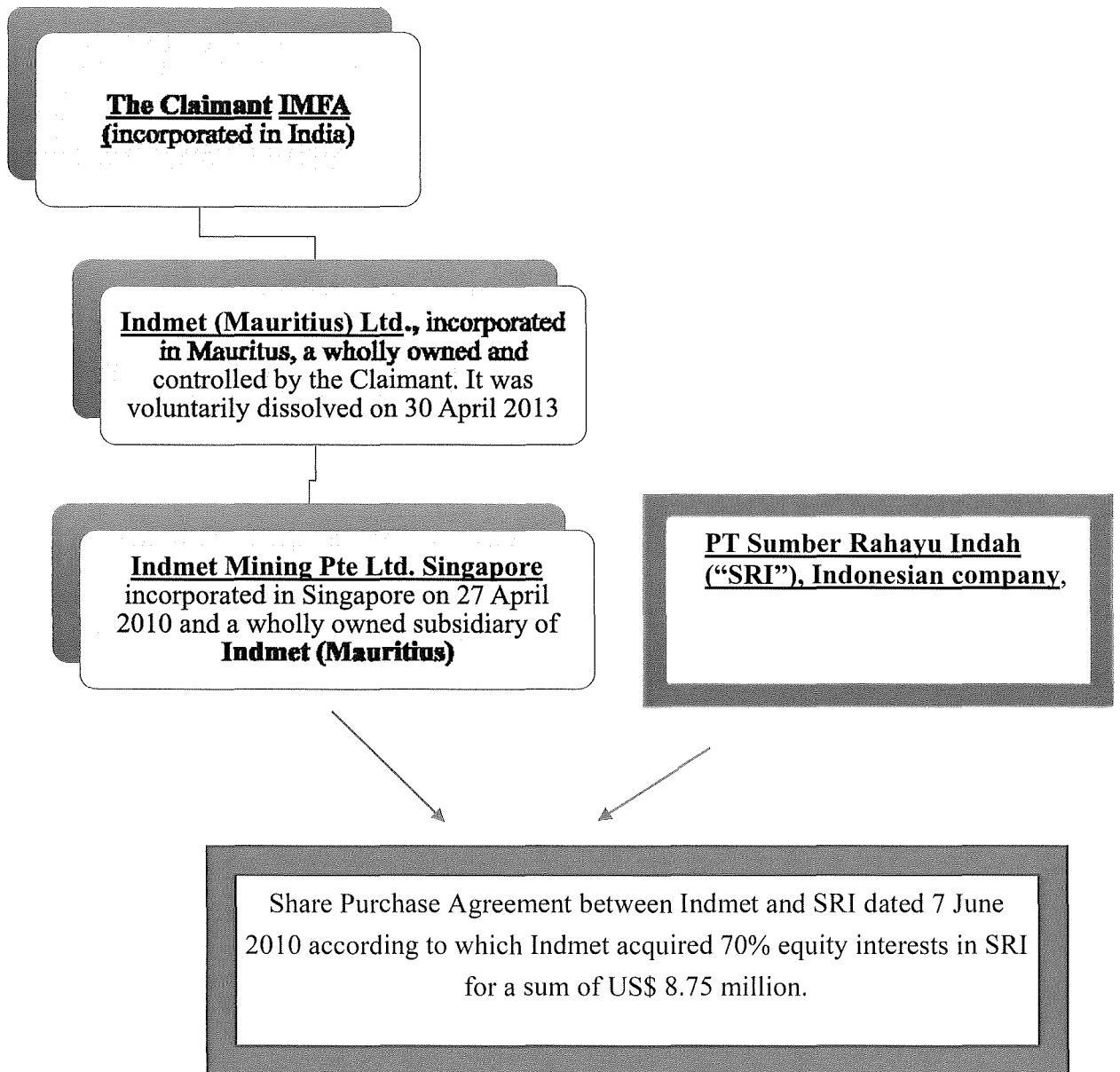
<sup>17</sup> **Exhibit C-9**, Term Sheet entered into by and between SRI and the Claimant dated 18 September 2009.

<sup>18</sup> **Exhibit CRR-107**, Board resolution passed by the Board of Directors of Claimant in regard to investment in coal block in Indonesia dated 23 October 2009.

<sup>19</sup> **Exhibit C-10**, Agreement for sale and purchase of shares in respect of SRI dated 7 June 2010.

<sup>20</sup> **Exhibit C-50**, Deed of Transfer of Shares between Mr. Dedi Mulyadi and Indmet Mining Pte Ltd, dated 27 October 2010; **Exhibit C-51**, Deed of Transfer of Shares between Mr. Rafael Agung Parmanto and Indmet Mining Pte Ltd, dated 27 October 2010. See also Claimant's Post-Hearing Brief, para. 16.

<sup>21</sup> **Exhibit CRR-96**, Debit Advice issued by Standard Chartered Bank to Indmet Mining Pte. Ltd. evidencing the debit of US\$ 4,300,000 to the account of Indmet Mining Pte. Ltd. in favour of H. Widyasakta dated 4 November 2010.



***SRI's Approval as a Foreign Investment Limited Liability Company***

40. In Indonesia, the relevant law concerning foreign investments is the Capital Investment Law No 25 of 2007 ("CIL" or "2007 Investment Law").<sup>22</sup>
41. In accordance with the CIL, the Capital Investment Coordinating Board of Indonesia ("BKPM") supervises and administers all foreign investments in Indonesia except

<sup>22</sup> Exhibit RL-7/CL-2, Capital Investment Law No 25 of 2007.



investments in banks, financial institutions, upstream oil and gas or the ownership of shares in publicly listed companies purchased from the Indonesian stock market.<sup>23</sup>

42. Under Article 5(2) of the CIL, “foreign capital investment is obliged to be in a form of a limited liability company pursuant to Indonesian law and is domiciled in the territory of the Republic of Indonesia, unless stipulated otherwise by a law.”<sup>24</sup>
43. An Indonesian limited liability company with foreign ownership, as approved by BKPM, is known as a foreign investment company, *penanaman modal asing* (“**PMA company**”).<sup>25</sup>
44. On 15 February 2010, SRI requested the Regent of East Barito Regency to recommend the status change of SRI into a PMA company. This recommendation was accorded to SRI by the Regent of East Barito Regency on 21 April 2010.<sup>26</sup>
45. On 5 August 2010, SRI applied to the BKPM for approval of the conversion of the company’s status into a PMA company.<sup>27</sup>
46. Following SRI’s application, BKPM granted approval (Capital Investment Principle Permit) dated 10 August 2010, for amendment of SRI’s company status into PMA company to allow foreign investment into SRI.<sup>28</sup> The Capital Investment Principle Permit records that Indmet Mining will hold 70% of the share capital of SRI.
47. As we shall see below, whether the Claimant’s investment in SRI was approved by BKPM is another important element which is disputed by the Parties.

### ***Overlapping Licences***

48. According to the Claimant, it discovered that SRI Mining Concession overlaps with other licences in April 2011, when its officials attended a meeting at the Forestry Office at East Barito Regency as part of application process of commencing mining activities.<sup>29</sup>

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<sup>23</sup> SOD, para. 8.2.

<sup>24</sup> **Exhibit RL-7/CL-2**, Capital Investment Law No 25 of 2007.

<sup>25</sup> SOD, para. 8.6.

<sup>26</sup> **Exhibit C-11**, Approval letter bearing No. 500/132/EK issued by Barito Timur Regency to SRI (Official Translation) dated 21 April 2010.

<sup>27</sup> See **Exhibit R-33**, Application for capital investment in principle license relating to SRI dated 5 August 2010.

<sup>28</sup> **Exhibit C-12**, Capital Investment Principle Permit (BKPM Approval) No.132/1/IP/I/PMA/2010 to SRI dated 10 August 2010.

<sup>29</sup> Claimant’s Statement of Claim (“**SOC**”), para. 60.

49. On 12 July 2011, the Claimant approached the Ministry of Energy and Mineral Resources (“MEMR”) and obtained a mining concession information map, which showed that the major part of the SRI Mining Concession fell outside the Regency of East Barito and outside the Central Kalimantan Province.<sup>30</sup> The map also showed that the SRI Mining Concession overlaps with mining concessions issued to six companies:
- (i) PT Putra Bara Utama (“PT PBU”) (86.90 ha);
  - (ii) PT Puspita Alam Kurnia (“PT PAK”) (736.6 ha);
  - (iii) PT Tanjung Bartim Kurnia (“PT TBK”) (1,149.23 ha);
  - (iv) PT Geo Explo (41.61 ha);
  - (v) PT Kodio Multicom (1,109.02 ha);
  - (vi) PT Marangkayu Bara Makarti (“PT MBM”) (880.8 ha).
50. On 22 October 2013 Claimant, on application to the Director General of Mineral and Coal, received another mining concession information map,<sup>31</sup> which showed seven overlapping mining concession holders in addition to SRI:
- (i) PT PBU (86.99 ha);
  - (ii) PT PAK (754.85 ha);
  - (iii) PT TBK (1,150.25 ha);
  - (iv) PT Geo Explo (41.61 ha);
  - (v) PT Kodio Multicom (1,109.01 ha);
  - (vi) PT MBM (899.05 ha);
  - (vii) PT Bintang Awai Bersinar (“PT BAB”) (87.16 ha)
51. As we shall see below, the Respondent argues that the Claimant should have been aware of the overlapping licences before it made its investment.
52. In any case, although the Parties disagree on the exact dates and detail of the overlapping licences, it seems clear that by 31 December 2009, SRI Mining Concession was over an

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<sup>30</sup> Exhibit C-14, Map issued by the Director General of Mineral and Coal dated 12 July 2011.

<sup>31</sup> Exhibit C-15, Map issued by the Director General of Mineral and Coal dated 23 October 2013.

area that included:<sup>32</sup>

- (i) Various areas that were outside the boundaries of East Barito Regency;
- (ii) An overlapping area of 87.55 Ha with the licence granted to PT BAB by South Barito Regency;<sup>33</sup>
- (iii) An overlapping area of 46.18 Ha with the licence granted to PT Geo Explo by South Barito Regency;<sup>34</sup>
- (iv) An overlapping area of 1,118.3 Ha with the licence granted to PT Kodio Multicom by Tabalong Regency;<sup>35</sup>
- (v) An overlapping area of 903 Ha with the licence granted to PT MBM by Tabalong Regency;<sup>36</sup>
- (vi) An overlapping area of 87.4 Ha with the licence granted to PT PBU by Tabalong Regency;<sup>37</sup>
- (vii) An overlapping area of 1,155.4 Ha with the licence granted to PT TBK by East Barito Regency;<sup>38</sup> and
- (viii) An overlapping area of 758.23 Ha with the licence granted to PT PAK by East Barito Regency.<sup>39</sup>

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<sup>32</sup> SOD, para. 13.26; **Exhibit R-74**, Map of licences held by SRI, PT BAB, PT Geo Explo, PT Kodio Multicom, PT MBM, PT PAK, PT PBU and PT TBK as of 31 December 2009 by the MEMR.

<sup>33</sup> **Exhibit R-3**, Exploration KP No 167 of 2006 – Issued by South Barito Regency to PT BAB dated 18 March 2006; **Exhibit R-21**, Production Operation IUP No 479 of 2009 – Issued by South Barito Regent to PT BAB dated 16 November 2009.

<sup>34</sup> **Exhibit R-5**, Exploration KP No 199 of 2007 - issued by South Barito Regent to PT Geo Explo dated 10 April 2007; **Exhibit R-20**, Exploration KP No 472 of 2009 (Second Extension) – Issued by South Barito Regent to PT Geo Explo dated 2 November 2009.

<sup>35</sup> **Exhibit R-7**, Exploration KP No 540/KEP/10/DISTAM/2008 – Issued by Tabalong Regent to PT Kodio Multicom dated 23 May 2008.

<sup>36</sup> **Exhibit R-8**, Exploration KP No 540/KEP/11/DISTAM/2008 – Issued by Tabalong Regent to PT MBM dated 23 May 2008.

<sup>37</sup> **Exhibit R-10**, Exploration KP No 540/KEP/26/DISTAM/2008 – Issued by Tabalong Regent to PT PBU dated 26 November 2008; **Exhibit R-17**, Exploration IUP No 188.45/257/2009 (Renewal) - issued by Tabalong Regent to PT PBU dated 9 June 2009.

<sup>38</sup> **Exhibit R-22**, Exploration IUP No 565 of 2009 – Issued by East Barito Regent to PT TBK dated 31 December 2009.

<sup>39</sup> **Exhibit R-23**, Exploration IUP No 568 of 2009 – Issued by East Barito Regent to PT PAK dated 31 December 2009.

53. Based on the Respondent's submission, the table below shows the overlapping licences and their chronology.

18 March 2006	The South Barito Regent issues Exploration KP 167 of 2006 to PT BAB. <sup>40</sup>
16 June 2006	The East Barito Regent issues Exploration KP No 185 of 2006 to SRI <sup>41</sup> that overlaps with the Exploration KP issued to PT BAB.
10 April 2007	The South Barito Regent issues Exploration KP 199 of 2007 to PT Geo Explo <sup>42</sup> that overlaps with Exploration KP No 185 of 2006 issued to SRI.
28 March 2008	The East Barito Regent issues Exploration KP No 135 of 2008 to SRI that renews the coal exploration licence issued to SRI over a smaller area of 4,000 hectares. <sup>43</sup>
23 May 2008	The Tabalong Regent issues Exploration KP No 540/KEP/10/DISTAM/2008 to PT Kodio Multicom <sup>44</sup> and Exploration KP No 540/KEP/11/DISTAM/2008 to PT MBM. <sup>45</sup> Both licences overlap with exploration KP No 135 of 2008 issued to SRI.
10 November 2008	SRI applies to upgrade its Exploration KP No 135 of 2008 (which would expire on 29 March 2009) to an Exploitation KP. <sup>46</sup>

<sup>40</sup> **Exhibit R-3**, Exploration KP No 167 of 2006 – Issued by South Barito Regency to PT BAB dated 18 March 2006.

<sup>41</sup> **Exhibit C-4**, Decree of the Head of Barito Timur Regency bearing No 185 of 2006 dated 16 June 2006.

<sup>42</sup> **Exhibit R-5**, Exploration KP No 199 of 2007 – Issued by South Barito Regent to PT Geo Explo dated 10 April 2007.

<sup>43</sup> **Exhibit C-5**, Decree of the Head of Barito Timur Regency bearing No 135 of 2008 dated 28 March 2008.

<sup>44</sup> **Exhibit R-7**, Exploration KP No 540/KEP/10/DISTAM/2008 – Issued by Tabalong Regent to PT Kodio Multicom dated 23 May 2008.

<sup>45</sup> **Exhibit R-8**, Exploration KP No 540/KEP/11/DISTAM/2008 – Issued by Tabalong Regent to PT MBM dated 23 May 2008.

<sup>46</sup> **Exhibit R-79**, Letter from the Regent of East Barito to SRI in response to SRI's application to upgrade its Exploration KP No 135 of 2008 to an Exploitation KP dated 11 April 2009.

26 November 2008	The Tabalong Regent issues Exploration KP No 540/KEP/27/DISTAM/2008 to PT PBU <sup>47</sup> that overlaps with Exploration KP No 135 of 2008 issued to SRI.
28 March 2009	Exploration KP No 135 of 2008 issued to SRI expires.
17 October 2009	The East Barito Regent issues Exploration IUP No 463 of 2009 to SRI covering an area of 4,000 hectares. <sup>48</sup> The Exploration IUP was valid for 7 years from 16 June 2009.
19 October 2009	The East Barito Regent issues two exploration licences for iron ore which overlap with SRI's Exploration IUP No 473 of 2009; Exploration IUP No 472 of 2009 to PT PAK <sup>49</sup> ; and Exploration IUP No 473 of 2009 to PT TBK. <sup>50</sup>
1 December 2009	SRI applies to the East Barito Regent for an amended Exploration IUP.
5 December 2009	SRI applies to the East Barito Regent for a Production IUP.
8 December 2009	The East Barito Regent issues Exploration IUP No 526 of 2009 covering an area of 3,674 hectares. <sup>51</sup>
31 December 2009	The East Barito Regent issues Production IUP No 569 of 2009, effective from 8 December 2009, covering an area of 3,674 hectares (the same area as granted under Exploration IUP No 526 of 2009). <sup>52</sup> It overlaps with areas granted to PT BAB, PT Geo Explo, PT Kodio Multicom, PT MBM, PT PBU, PT PAK and PT TBK.

<sup>47</sup> **Exhibit R-10**, Exploration KP No 540/KEP/26/DISTAM/2008 – Issued by Tabalong Regent to PT PBU dated 26 November 2008.

<sup>48</sup> **Exhibit C-6**, Decree of the Head of Barito Timur Regency bearing No 463 of 2009 (Official Translation) dated 17 October 2009.

<sup>49</sup> See the recitals in **Exhibit R-23**, Exploration IUP No 568 of 2009 – Issued by East Barito Regent to PT PAK dated 31 December 2009.

<sup>50</sup> See the recitals in **Exhibit R-22**, Exploration IUP No 565 of 2009 – Issued by East Barito Regent to PT TBK dated 31 December 2009.

<sup>51</sup> **Exhibit C-7**, Decree of the Head of Barito Timur Regency bearing No 526 of 2009 (Official Translation) dated 8 December 2009.

<sup>52</sup> **Exhibit C-8**, Decree of the Head of Barito Timur Regency bearing No 569 of 2009 (Official Translation) dated 31 December 2009.

### Indonesia's Attempt to Solve the Overlapping Licences and the Clean and Clear List

54. According to the Respondent, by 2011, overlapping licences became a common and well known problem in Indonesia:

*“Regents were regularly criticised in public and the press for failing to follow the correct procedures to ensure that licences did not overlap, not having the experience to administer mining licensing and not complying with the requirements for issuing licences.*

*To resolve overlapping issues, the company who had the licence could take administrative law action against the regent who issued the licence. [...]*

*In May 2011, MEMR implemented a national reconciliation of data on IUPs [i.e. a mining business permits]. Governors, regents and mayors from across Indonesia were asked to submit data on the IUPs so that MEMR could reconcile the data and create a national mineral and coal mining data base. The purpose of undertaking the reconciliation was to coordinate, verify and synchronize IUPs in all provinces, regencies and municipalities in Indonesia. Through the reconciliation process MEMR is establishing a national IUP information system, determining the national mining area and potential for development of Indonesia's resources.”<sup>53</sup>*

55. In May 2011, the MEMR announced that based on the data collected, out of 8,475 mining business permits (“IUP”), which were issued pursuant to Law No 4 of 2009 concerning mineral and coal mining, 3,971 IUPs were Clean Clear and 4,504 were not Clean and Clear.<sup>54</sup>
56. On 30 June 2011, the MEMR issued the first Clean and Clear lists on its website and announced the criteria of the Clean and Clear process.<sup>55</sup> For a licence to be included as Clean and Clear it had to have no overlapping licences and be issued before 1 May 2010.<sup>56</sup> In this regard, the Respondent explains as follows:

*“[According to the announcement of 30 June 2011] if an IUP is not included in the Clean and Clear list, the holder of the IUP should write to the issuer of the IUP in*

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<sup>53</sup> SOD, paras, 10.1-10.3.

<sup>54</sup> **Exhibit R-43**, Head of Legal and Public Relations Bureau, Sutisna Prawira, ‘Coordination of National Mining Business License Data Collection on 2011’ (MEMR Press Release No 33/HUMAS KESDM/2011) dated 27 May 2011.

<sup>55</sup> **Exhibit R-44**, Director General of Mineral and Coal, Thamrin Sihite, Additional Explanation on the announcement of Mining Business License (IUP) Reconciliation (Announcement, 30 June 2011).

<sup>56</sup> **Exhibit R-44**, Director General of Mineral and Coal, Thamrin Sihite, Additional Explanation on the announcement of Mining Business License (IUP) Reconciliation (Announcement, 30 June 2011; SOD, para. 10.5).

*response, copying the Director General of Minerals and Coal, if the holder would like to have the status of its IUP reconsidered.*

*MEMR has held a number of reconciliation rounds since in which the governors and regents have submitted data on the IUPs issued in their province / regency and this data has been reconciled. Companies were also able to submit documents to the issuer of the IUP and MEMR in order to resolve the problems with their IUPs (for example if the records held by the issuer of the IUP were incomplete). Some companies voluntarily relinquished areas of their IUPs in order to resolve overlapping issues. Once the IUP is assessed to be Clean and Clear this is shown on the MEMR's website.*

*After MEMR has declared an IUP to be Clean and Clear, the IUP holder can then apply for a Clean and Clear Certificate, which is required in order to obtain other licences such as the Borrow Use Permit and to export coal.”<sup>57</sup>*

57. Furthermore, the Respondent elaborates as follows:

*“The MEMR has made other public statements, including many industry presentations, about the process for compiling the Clean and Clear lists and the criteria for assessing Clean and Clear status. [...] MEMR has published the criteria for inclusion on the Clean and Clear list and the process it follows on its website as well as discussing these issues with the industry.”<sup>58</sup>*

58. The SRI Mining Concession has not been in any of the Clean and Clear lists published by the MEMR. As we shall see below, the Claimant argues that the Respondent's failure to reconcile SRI Mining Concession with the overlapping mining concessions through the process of the Clean and Clear lists is another violation of the Treaty. In addition, the Claimant argues that *“the Respondent did not inform the Claimant about the process being followed for issuance of the Clean and Clear list, and the reason for non-inclusion of SRI's Production IUP from the Clean and Clear list.”<sup>59</sup>*

### ***The Divestiture Requirement and Government Regulation No 24 of 2012***

59. Another important element in this case concerns the divestiture obligations regarding foreign ownership in Indonesian companies.

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<sup>57</sup> SOD, paras 10.6-10.8.

<sup>58</sup> SOD, para. 10.9 (referring to **Exhibit R-50**, 'The process and verification of clean and clear mining business licence' by Nelyanti Siregar, Directorate of Fostering of Coal Business (11 October 2012, Jakarta Convention Centre, Senayan - Jakarta); and **Exhibit R-47**, '373 mining companies are clear & clean', Sindonews.com dated 2 March 2012; **Exhibit R-44**, Director General of Mineral and Coal, Thamrin Sihite, Additional Explanation on the announcement of Mining Business License (IUP) Reconciliation (Announcement, 30 June 2011)).

<sup>59</sup> SOC, para. 166 (iv).

60. In January 2009, the Respondent enacted a new mining law on coal and mineral mining – Law No. 4 of 2009.<sup>60</sup> According to the new mining law, foreign shareholders of companies holding IUPs would need to divest their shares after five years of production. However, the law did not set out the percentage of shares that would be required to be divested. This was left to the implementing regulations.<sup>61</sup>
61. Government Regulation No 23 of 2010, with legal effect from 1 February 2010, introduced a divestiture requirement that PMA companies that hold an IUP must, upon 5 years of production, divest 20% of their shares to Indonesian participants.<sup>62</sup>
62. Government Regulation No 24 of 2012 (“**Government Regulation No 24 of 2012**”), which amended Government Regulation No 23 of 2010, required that the foreign shareholdings in a PMA company be reduced on a sliding scale after 5 years of actual production.<sup>63</sup> As explained by the Respondent:

*“Pursuant to Government Regulation No 24 of 2012, Indonesian entities should hold shareholdings in the PMA company which holds the Production IUP as follows:*

<i>Period of actual production</i>	<i>Proportion of shares to be held by Indonesian entities</i>
<i>0-5 years</i>	<i>Nil</i>
<i>6 years</i>	<i>20%</i>
<i>7 years</i>	<i>30%</i>
<i>8 years</i>	<i>37%</i>
<i>9 years</i>	<i>44%</i>
<i>10 years</i>	<i>51%</i>

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<sup>60</sup> **Exhibit CL-3**, Law No. 4 of 2009 promulgated by the Republic of Indonesia concerning Mineral and Coal Mining (Official Translation) dated 12 January 2009

<sup>61</sup> **Exhibit CL-3**, Article 112 of Law No. 4 of 2009 promulgated by the Republic of Indonesia concerning Mineral and Coal Mining (Official Translation) dated 12 January 2009.

<sup>62</sup> **Exhibit CL-9**, Article 97, Government Regulation No. 23 of 2010 dated 1 February 2010.

<sup>63</sup> **Exhibit CL-4**, Government Regulation No 24 of 2012 in regard to the Implementation of Mineral and Coal Mining Business Activities dated 21 February 2012.



*If shares are required to be divested, the shares should be offered to Indonesian entities in the following order:*

*(A) The central government, the provincial government and then the regency / municipality where the mining operations are located;*

*(B) State owned and regional government owned enterprises; and*

*(C) Wholly Indonesian owned private companies.*

*Further regulations this year have clarified that the share pricing is to be determined by fair market value.”<sup>64</sup>*

63. As further explained below, the Claimant argues that by introducing Government Regulation No 24 of 2012 to increase the divestment requirement for foreign shareholding from 20% to 51%, the Respondent has breached the BIT by *inter alia* violating the fair and equitable standard and expropriating the Claimant’s investment.

#### ***The Commencement of Arbitration***

64. On 28 February 2014, the Claimant issued a Trigger Notice to the Respondent, invoking the BIT.<sup>65</sup> After a preliminary meeting held with the Respondent in Jakarta, on 29 August 2014,<sup>66</sup> the Claimant issued a Supplementary Trigger Notice on 3 November 2014.<sup>67</sup> As the Parties failed to resolve the dispute, the Claimant submitted the Notice of Arbitration on 24 July 2015.<sup>68</sup>

#### **D. Relief Requested**

##### **I. Claimant’s Request for Relief**

65. In its Statement of Claim, the Claimant requests an award in its favour with the following relief:

*“(a) A declaration that the Respondent is in breach of its obligations under the BIT, including its obligations under Articles 3, 4, 5 and 7 of the BIT;*

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<sup>64</sup> SOD, paras, 11.5-11.7 (referring to **Exhibit RL-14**, MEMR Regulation No 27 of 2013: Procedure and pricing of share divestment as well as alternation in capital investment in mineral and coal mining business undertaking; **Exhibit RL-19**, MEMR Regulation No 9 of 2017: Divestment procedures and divestment share price fixing mechanism on mineral and coal mining business).

<sup>65</sup> **Exhibit C-30**, Trigger Notice issued by the Claimant to the Respondent dated 28 February 2014.

<sup>66</sup> **Exhibit C-34**, Minutes of the Meeting dated 29 August 2014.

<sup>67</sup> **Exhibit C-37**, Supplementary Trigger Notice issued by the Claimant to the Respondent dated 3 November 2014.

<sup>68</sup> **Exhibit C-28**, Notice of Arbitration issued by the Claimant to the Respondent dated 24 July 2015.

*(b) An award of compensatory damages in favour of the Claimant, in an amount to be assessed, proven and quantified in these proceedings, currently estimated as no less than US\$ 469 million, including, without limitation, the total investment made by the Claimant by way of consideration of shares of SRI and capital inducted in SRI subsequently, expected returns that Claimant would have realized upon implementation of the SRI coal mining concession over the course of its full term;*

*(c) An order that the Respondent pays all costs of, and associated with these arbitration proceedings including the fees and expenses of the Tribunal, and the legal and other expenses of the Claimant, including but not limited to legal fees and expenses of their legal counsel, the fees and expenses of witnesses, experts and consultants, plus post-award interest on those costs so awarded; and*

*(d) Such other and further relief as the Tribunal considers appropriate in the circumstances.”<sup>69</sup>*

66. In its Reply, the Claimant amended the requested damages as follows:

*“The independent valuation expert appointed by the Claimant has valued the SRI mining concession at US\$78.78 million, and computes damages, including pre-award interest at US\$99.14-US\$99.25 million. The Claimant is prepared to restrict its claim to the valuation of the SRI mining concession, and to pursue its claim for interest and costs, until payment/realization.*

*In conclusion, [...] the Claimant respectfully submits that the claim (as restricted in the preceding paragraph, which may be treated as amending the Statement of Claim dated 23 December 2016) is liable to be granted, accordingly.”<sup>70</sup>*

## **II. Respondent’s Request for Relief**

67. The Respondent requests that the Tribunal:

*“(A) Decline jurisdiction in the present case;*

*(B) Order that the Claimant’s claims be otherwise dismissed in their entirety;*

*(C) Order the Claimant to pay the costs relating to this arbitration in their entirety including the fees and expenses of the Members of the Tribunal, the fees and expenses of the Tribunal Secretary, the fees and expenses of the PCA, the Respondent’s legal fees and all other amounts incurred by the Respondent;*

*(D) Order the Claimant to pay post-Award interest on all amounts awarded to the Respondent, including costs, at a commercial rate that the Tribunal considers appropriate; and*

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<sup>69</sup> SOC, para. 228.

<sup>70</sup> Claimant’s Reply (“**Reply**”), paras 390-391.

*(E) Grant any other relief to the Respondent that it deems fit.”<sup>71</sup>*

## **E. Jurisdiction**

68. The Respondent submits that the Tribunal lacks jurisdiction for the following reasons:

(I) The alleged conduct of the Respondent which allegedly constitutes a breach of the BIT occurred before the Claimant became an investor and made its investment under the Treaty (“**the Temporal Objection**”);

(II) The Claimant’s investment has not been “*established or acquired*” in accordance with Indonesian law pursuant to Article 1(1) of the BIT (“**the Legality Objection**”);

(III) The Claimant’s investment has not been “*accepted as such in accordance with [Indonesia’s] laws and regulations in force concerning foreign investments*” within the meaning of Article 2 of the BIT (“**the No Acceptance Objection**”);

(IV) The Claimant’s purported investment was an indirect investment, which is not protected by the Treaty (“**the Indirect Investment Objection**”);

69. At the outset, it is important to note that the Tribunal has had the benefit of extensive written and oral submissions from the Parties. The Tribunal sees no need to summarise each and every submission made by the Parties in the following sections of the Award. For the avoidance of doubt, all submissions of the Parties have been carefully considered by the Tribunal in reaching its decision.

### **I. The Temporal Objection**

70. In essence, the Temporal Objection is based on the allegation that the matters complained by the Claimant occurred prior to the Claimant’s alleged investment. According to the Parties, there are various provisions that are relevant to the Temporal Objection.

71. First, Article 28 of the Vienna Convention on the Law of Treaties (the “**VCLT**”) stipulates as follows:

*“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.”*

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<sup>71</sup> SOD, para. 34.1.

72. Second, Article 13 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts provides that: *“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”*

73. Third, Article 2 of the Treaty provides as follows:

*“This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations in force concerning foreign investments, whether made before or after the coming into force of this Agreement.”*

74. Fourth, Article 9 of the Treaty elaborates as follows:

*“1. Any dispute between a Contracting Party and an investor of the other Contracting Party, concerning an investment of the latter in the territory of the former, be settled amicably through consultations and negotiations.*

*2. If such a dispute cannot be settled within a period of six months from the date of written notification of the dispute, the dispute shall, at the option of the investor concerned, be submitted either to the competent judicial, arbitral or administrative bodies of the Contracting Party which has admitted the investment for settlement in accordance with its laws and the provisions of this Agreement, or to international arbitration or conciliation. The option so exercised under this paragraph shall be final.*

*[...]”*

## **1. Respondent’s Position**

75. The Respondent submits that much of the Claimant’s claim is outside the scope of the Treaty’s protection because the conduct of which the Claimant complains took place before the Claimant made its purported investment in SRI. Thus, a very substantial part of the Claimant’s claim falls outside of the temporal scope of the Respondent’s consent to arbitration, as expressed in Article 9 of the Treaty, and the Tribunal’s jurisdiction.<sup>72</sup>

76. According to the Respondent, the rule against the retroactive application of treaties, as enshrined in Article 28 of the VCLT must be the starting point for the Tribunal’s consideration as to whether the Claimant’s claims are within the temporal scope of protection of the Treaty.<sup>73</sup>

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<sup>72</sup> SOD, para. 22.1.

<sup>73</sup> Rejoinder, paras 17.5-17.6.

77. In relation to the rule against the retroactive application of treaties, the Respondent submits as follows:

*“[...] in the context of a claim under the BIT, what is critical for the purposes of the Tribunal’s temporal jurisdiction is the date on which the putative claimant acquires an investment that falls within the scope of protection of the BIT (assuming that the BIT has already entered into force). It is only after that point that the BIT will apply to regulate the conduct of the host State with respect to that investment, such that the host State’s adoption of measures (i.e., any “act or fact”) may lead to such conduct giving rise to the host State’s responsibility for an internationally wrongful act (i.e., the breach of treaty obligations). That is the general position. Article 28 of the VCLT envisages that some treaties may contain a “different intention” or that such may be “otherwise established”. But this is not so in the case of the Indonesia – India BIT.”<sup>74</sup>*

78. According to the Respondent, the only provision in the Treaty that touches on the temporal application of the Treaty is Article 2, which confirms *“that it does not matter whether a putative claimant made its investment in the territory of the host State before or after the entry into force of the BIT – the putative claimant’s investment will be within the BIT’s scope of protection.”*<sup>75</sup> However, Article 2 does not affect the general position as expressed in Article 28 of the VCLT.<sup>76</sup>
79. Accordingly, the Respondent submits that a putative claimant must demonstrate that it was, for the purposes of the BIT, an “investor” with a protected “investment” at the time of the host State’s alleged breach of its BIT obligation(s).<sup>77</sup> This conclusion is also consistent with Article 13 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>78</sup>

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<sup>74</sup> SOD, para. 22.3.

<sup>75</sup> SOD, para. 22.5.

<sup>76</sup> SOD, para. 22.5 (referring to **Exhibit RL-85**, *Renée Rose Levy and Gremcitel SA v. Peru* (ICSID Case No. ARB/11/17, Award of 9 January 2015), para. 145; and **Exhibit RL-89**, *Ping An Life Insurance Company Ltd v. Belgium* (ICSID Case No. ARB/12/29, Award of 30 April 2015, para. 173).

<sup>77</sup> Referring to the following cases: **Exhibit RL-61**, *Cementownia “Nowa Huta” SA v. Turkey* (ICSID Case No. ARB/06/8, Award of 17 September 2009), para. 112, see also para. 114; **Exhibit RL-74**, *Libananco Holdings Co Ltd v. Turkey* (ICSID Case No. ARB/06/8, Award of 2 September 2011), paras. 127-128, see also para. 131; **Exhibit RL-75**, *Vito G Gallo v. Canada* (Award of 15 September 2011), para. 328; **Exhibit RL-81**, *ST-AD GmbH v. Bulgaria* (Award on Jurisdiction of 18 July 2013), para. 300; **Exhibit RL-85**, *Renée Rose Levy and Gremcitel SA v. Peru* (ICSID Case No. ARB/11/17, Award of 9 January 2015), paras. 146-148, 182; **Exhibit RL-91**, *Philip Morris Asia Ltd v. Australia* (Award on Jurisdiction and Admissibility of 17 December 2015), para. 533.

<sup>78</sup> **Exhibit CL-23**; Rejoinder, footnote 305. See also Hearing Transcript of 14 August 2018, p. 88 (*“It is trite law that a BIT Tribunal has no jurisdiction *ratione temporis* to consider claims where the alleged claim is based on State conduct that occurred prior to the date of the alleged investment. This fundamental principle*

80. Turning to the timing of the Claimant's purported investment and the timing of the Respondent's conduct which allegedly constitutes a breach of the Treaty, the Respondent makes the following submissions.
81. First, the Respondent rejects the Claimant's argument that it made an investment in 2010 by entering into a SPA dated 7 June 2010<sup>79</sup> or on 10 August 2010 when BKPM granted permission to SRI to become a PMA Company,<sup>80</sup> or on 27 October 2017 (when the Share Transfer Deeds and the Subscription for New Shares Agreement were executed).<sup>81</sup> As explained below in more detail, the Respondent argues that the earliest that Indmet became a shareholder in SRI and the Claimant became an indirect shareholder in SRI was 12 May 2011.<sup>82</sup> According to the Respondent, "[i]t is settled in investment arbitration that the date of investment is the date on which the shares vested in the investor."<sup>83</sup> Accordingly, putting aside the Respondent's other preliminary objections, the Respondent submits that the Claimant's shares in SRI did not constitute an "investment" and the Claimant was not an "investor" within the meaning of the Treaty prior to 12 May 2011.
82. Second, the Respondent submits that the alleged Treaty breach, namely the issuing of overlapping licences and boundary issues, all predated 12 May 2011 when the Claimant allegedly became an "investor". They also pre-date the Claimant's alleged investment dates.<sup>84</sup>
83. Third, the Respondent rejects the Claimant's argument that the "critical date" for the Tribunal's consideration of the temporal issue is the date of publication of the impugned measure and/or the date on which the Claimant "became aware" of the alleged treaty breaches.<sup>85</sup> According to the Respondent, the Claimant has failed to cite any authority

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*is expressed in article 28 of the Vienna Convention on the law of treaties, and is present also in the International Law Commission's Articles on State responsibility."*)

<sup>79</sup> SOD, para. 22.15. (referring to SOC, paras 5 and 51).

<sup>80</sup> Rejoinder, para. 17.6 (referring to Reply, para. 286).

<sup>81</sup> Claimant's Reply Post-hearing brief, para. 80.

<sup>82</sup> SOD, para. 22.16; Respondent's Post-Hearing Brief, para. 9.1 ("*Indmet became a shareholder in SRI on 12 May 2011, at the earliest. On this date, the Ministry of Law and Human Rights acknowledges the removal of the provision in SRI's Articles of Association restricting non-Indonesian individuals or entities from becoming a shareholder.*")

<sup>83</sup> Respondent's Post-Hearing Brief, para. 9.4 (referring to *inter alia* **Exhibit CL-37**, *Saluka Investments BV v. Czech Republic* (Partial Award of 17 March 2006), para. 244; **Exhibit RL-59**, *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5, Award of 15 April 2009), paras 68-69; **Exhibit CL-16**, *Société Générale v. Dominican Republic* (Award on Preliminary Objections of 19 September 2008, paras 96, 106-107.)

<sup>84</sup> Rejoinder, para. 17.6; SOD, paras 22.17-22.26.

<sup>85</sup> Rejoinder, para. 17.27.

which supports its argument. Contrary to the Claimant's submission, the *Gremcitel* and *Philip Morris* awards do not support the Claimant's argument.<sup>86</sup> These awards unanimously point to the time that the alleged breach occurred as the "critical date".<sup>87</sup>

84. In this respect, the Respondent also argues that "*it is disingenuous for the Claimant to assert that it knew nothing of the overlapping licences and boundary issues in April 2011.*"<sup>88</sup> According to the Respondent, "*the Claimant knew or ought to have known about these issues long before this.*"<sup>89</sup>
85. Fourth, the Respondent also rejects the Claimant's arguments regarding the conduct that occurred after 12 May 2011 that arguably resulted in a breach of the Treaty.<sup>90</sup> In particular, the Respondent refers to the following events that according to the Claimant resulted in independent "treaty breaches": (a) the publication by the MEMR of its national reconciliation of data on IUPs (which took place in May 2011); (b) the MEMR's publication of the first "Clean and Clear Lists" on 30 June 2011; (c) the publication by the Respondent of various maps in 2011– 2014; (d) the alleged issue of overlapping licences of PT Kodio Multicom and PT MBM in 2014 and PT PBU in 2016. In this regard, the Respondent makes the following submission:

*"(A) The MEMR's 'national reconciliation of data on IUPs' of May 2011 merely consisted of the collation of existing data, rather than the adoption of any new measures (such as the issue of licences) by the Respondent. This process identified what licences already overlapped and whether there were other problems with existing licences, such as boundary issues.*

*(B) The MEMR's publication of 'Clean and Clear Lists' on 30 June 2011 (which naturally followed the "national reconciliation" which was completed in May 2011) also merely consisted of the collation of existing data, rather than the adoption of any new measures.*

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<sup>86</sup> Rejoinder, paras 17.27-17.31.

<sup>87</sup> Rejoinder, para. 17.27.

<sup>88</sup> Rejoinder, para. 17.38.

<sup>89</sup> Rejoinder, para. 17.38. See e.g., **Exhibit R-76**, Letter from SRI to the Regent of East Barito requesting confirmation of the permit area covered by Exploration KP No 185 of 2006 dated 14 June 2007; **Exhibit C-5**, Decree of the Head of Barito Timur Regency bearing No.135 of 2008 dated 28 March 2008 (see condition 8 which stated that the boundaries with the other Regencies were unclear and that some of the licence area granted to SRI may need to be rescinded if the area fell outside the boundaries of East Barito Regency); CRR-61, p. 22 under (c): "*Residential / rural areas located at nearby sites in the mining area of PT SUMBER RAHAYU INDAH are such as the KALAMUS Village and residential area of Misim Village (South Kalimantan).*"

<sup>90</sup> Rejoinder, para. 17.36-17.37; see also SOD, paras 22.25-22.26.

*(C) As for the publication by the Respondent of various maps, it is not the maps that undermine the validity of the Production IUP, but rather the issue of inconsistent licences and the boundary issues. As the Respondent's expert, Mr Beckmann, explains, the existence of inconsistent maps is one of the reasons why it is necessary to collect maps from multiple agencies as part of any due diligence.*

*In light of the nature of these events, it simply cannot be said that the publication of these documents, such as the 'Clean and Clear List' in June 2011 can be characterised as an 'egregious omission and inaction', or as a 'subsequent and independent measure' which could be a breach of the BIT. This is because the publication of the 'national reconciliation' of IUPs, the publication of the 'Clean and Clear Lists', and the publication of the maps merely represented ex post facto the situation that existed prior to those dates – a situation which had been brought about by the unresolved boundary issues and the issue of overlapping mining licences.*

*[...] [Regarding the alleged issue of overlapping licences of PT Kodio Multicom and PT MBM in 2014] [...] the exploration licences were originally issued to PT Kodio Multicom and PT MBM on 23 May 2008. The fact that these exploration licences were upgraded to Production IUPs on 11 March 2014 did not create any additional overlapping areas, which remained the same. This therefore merely continued the position that had existed since 23 May 2008.*"<sup>91</sup>

86. Concerning the Production IUP that was issued to PT PBU on 13 October 2016 by the Governor of South Kalimantan, the Respondent submits that the Production IUP covers a reduced area of 3,930 hectares which no longer overlaps with SRI Mining Concession.<sup>92</sup>
87. Finally, the Respondent argues at length about the temporal nature of its Treaty obligation. Among other things, it states as follows:

*"[...] the Claimant appears to assert that, irrespective of the date of the alleged breaches of the BIT, the Respondent nonetheless has a continuing obligation to resolve the boundary issues and overlapping licences. Thus, it argues that the Respondent's 'constitutional authorities' were 'by the rule of law standard, obliged to*

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<sup>91</sup> Rejoinder, paras 17.36-17.37 and para. 17.39. See also Respondent's Post-Hearing Brief, para. 7.11.

<sup>92</sup> Rejoinder, para. 17.39 and SOD, para. 13.15 ("On 26 November 2008, the Tabalong Regent issued a decree granting a coal mining general investigation licence in Exploration KP No 540/KEP/27/DISTAM/2008112 to PT Putra Bara Utama ("PT PBU") over an area of 3,025 hectares including an area of 348.2 Ha that overlapped with the area granted to SRI in 2008. The coal exploration licence was renewed by way of an Exploration IUP granted on 9 June 2009 by the Tabalong Regent and a Production IUP issued by the Governor of South Kalimantan on 13 October 2016. The Production IUP covers a reduced area of 3,930 hectares which no longer overlaps with that granted to SRI."). See also **Exhibit R-17**, Exploration IUP No 188.45/257/2009 (Renewal) – Issued by Tabalong Regent to PT PBU dated 9 June 2008; **Exhibit R-60**, Production IUP No 188.48/1640/BPTSP/X0/2016 – Issued by the Governor of South Kalimantan to PT PBU dated 13 October 2016.



*reconcile disparate boundaries and inconsistent permits issued by constitutional functionaries’.*

[...]

*Nowhere does the Claimant point to the source of this obligation, other than to vague ‘constitutional obligations’ or ‘declarations in the BIT’. But to the extent that the Claimant is suggesting that the Respondent is in breach of a ‘continuing obligation’ which therefore post-dates its asserted investment, the Claimant is mistaken. This is highly artificial and, if accepted, would be tantamount to suggesting that every breach of an international obligation is a continuing obligation so long as the State which is responsible for the internationally wrongful act has not made reparation.*

*There is an important distinction between an act which has a continuing character, and an act which is already completed, but which continues to cause loss or damage. This is reflected in Article 14(1) of the International Law Commission’s Articles on State Responsibility, which states that ‘[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.’ In accordance with this provision, an act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. The effects or consequences which extend in time are the subject of the responsible State’s secondary obligation to make reparation in respect of its internationally wrongful act. But the extension of such effects or consequences do not mean that the breach itself is a continuing one. [...]*

*In any event, the concept of a ‘continuing breach’ is irrelevant in the present case. As [Professor Douglas QC] notes, where ‘the tribunal’s adjudicative power is conferred by the same international instrument that creates the substantive primary obligation, as is the case with an investment treaty claim, then the concept of a continuing wrongful act serves little purpose.’ Nor can the Claimant argue (if it were minded so to do) that the Respondent’s conduct constitutes a ‘composite breach’, if the first act in the series of acts occurs before the entry into force of the Respondent’s obligations with respect to a particular investment.*

*In the present case, the conduct of which the Claimant complains occurred prior to the point in time at which it (allegedly) established or acquired its purported investment under the BIT (whether that took place on 10 August 2010, on 29 April 2011, or on 12 May 2011). The Respondent’s conduct of which the Claimant complains consists of the issuance of overlapping licences and the boundary issues. Those are acts which were completed, even though their effects and consequences continued to be felt after the Claimant’s alleged acquisition of its purported investment. [...]*<sup>93</sup>

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<sup>93</sup> Rejoinder, paras 17.41-17.44 (referring to Reply, para. 74. and **Exhibit RL-174**, Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009), p. 332). See also Respondent’s Post-Hearing Brief, paras 7.21-7.22.

88. According to the Respondent, the only conduct of the Respondent that is within the Tribunal's temporal jurisdiction is the adoption of Government Regulation No 24 of 2012, which requires that foreign companies which own shares in Indonesian companies reduce their shareholding to 49%.<sup>94</sup> However, as explained below in the Merits section, the Respondent submits that this claim is devoid of any merit.

## 2. Claimant's Position

89. The Claimant rejects the Respondent's Temporal Objection.
90. According to the Claimant, Article 9 of the Treaty, which determines the Tribunal's jurisdiction and the scope of the Parties' consent to arbitration, encompasses disputes that go beyond interpretation and application of the Treaty itself and includes disputes that arise from a contract and other rules of law concerning the investment.<sup>95</sup>
91. In addition, the Claimant submits that Article 9 of the Treaty does not contain any temporal restriction such as a requirement that a dispute concerning the investment should have arisen only after the Claimant established or acquired the investment.<sup>96</sup> In this respect, the Claimant refers to Article 2 of the Treaty which provides that the Treaty applies to investments "*whether made before or after the coming into force of this Agreement.*"<sup>97</sup> Furthermore, the Claimant submits as follows:

*"Even according to the awards relied on by the Respondent, at the highest, the so-called Temporal Objection may require consideration of the applicability and enforceability of the substantive standards of the BIT, 'where the claim is founded upon an alleged breach of the Treaty's substantive standards'."*<sup>98</sup>

92. According to the Claimant, in relation to the treaty claims, the substantive standards of the Treaty became applicable only when the Claimant "*acquired or established*" its investment. According to the Claimant, "*while ordinarily this would have been the date of the SPA, i.e. 7 June 2010, the Claimant proceeds on the basis that its investment was acquired on 10 August 2010, when approval of BKPM was granted, and the Claimant's investment was 'accepted'.*"<sup>99</sup> In its post-hearing briefs, the Claimant modified its

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<sup>94</sup> SOD, paras 22.27-22.28; Rejoinder, para. 17.45.

<sup>95</sup> Reply, para. 284.

<sup>96</sup> Reply, para. 284.

<sup>97</sup> Reply, para. 284.

<sup>98</sup> Reply, para. 285 (referring to **Exhibit RL-85**, *Renee Rose Levy and Grencitel S.A. v. Republic of Peru*, paras 146 to 148; **Exhibit RL-91**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, para. 528).

<sup>99</sup> Reply, para. 286.

position and argued that the investment's date is 27 October 2010 (when the Share Transfer Deeds and the Subscription for New Shares Agreement were executed.)<sup>100</sup> In its post-hearing brief, the Claimant also stated that, in the alternative, "*the date of investment would, at the latest, be 29 April 2011, when all formalities were complete.*"<sup>101</sup>

93. The Claimant claims that the *Gremcitel* and *Philip Morris* awards support its position that the "*critical date*" for the temporal consideration is the date that the impugned measure was published and the claimant "became aware" of the alleged treaty breach.<sup>102</sup>
94. The Claimant submits that it first became aware of the alleged treaty breaches in April 2011:<sup>103</sup>

*"In April 2011, after the Claimant invested in SRI, it sought to initiate the procedure for commencement of mining activities, including obtaining the required Rent-Use Permit. The Claimant's representatives approached the Regency Forestry Office at Tamiang Layang to understand procedural requirements to obtain the required Rent Use Permit under Forestry Regulation 18/2011. However, the officials at the Regency Forestry Office after sighting the copy of SRI's Production IUP informed the Claimant that the mining area had a disputed boundary. The Claimant immediately sought to obtain maps to verify the position from different authorities, including, regional, provincial and central level [...]"*<sup>104</sup>

95. Therefore, according to the Claimant:

*"The 'critical date' (at the earliest) so far as these breaches are concerned is, thus, after the Claimant's investment was "accepted" on 10 August 2010, and after the BIT's substantive standards became applicable. Accordingly, the so-called Temporal Objection is unsustainable, and is liable to be rejected."*<sup>105</sup>

96. In this respect, the Claimant rejects the Respondent's argument that the issues of overlapping licences and uncertain boundaries were a matter of public record prior to 2011.<sup>106</sup>

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<sup>100</sup> Claimant's Post-Hearing Brief, para. 161 Claimant's Reply Post Hearing Brief, para. 80 ("*Accordingly, the Claimant's investments include a 70% majority equity interest in SRI, which the transaction was completed on 27 October 2010.*")

<sup>101</sup> Claimant's Post Hearing Brief, paras 19.

<sup>102</sup> Reply, paras 287-291 (relying on **Exhibit RL-85**, *Renee Rose Levy and Gremcitel S.A. v. Republic of Peru*, paras 146 to 148; **Exhibit RL-91**, *Philip Morris Asia Limited v. The Commonwealth of Australia*).

<sup>103</sup> Reply, para. 291.

<sup>104</sup> SOC, para. 60.

<sup>105</sup> Reply, para. 291.

<sup>106</sup> Reply, para. 292. See also paras 97-119.

97. In addition, the Claimant argues that the Respondent committed acts that resulted in breaches of the Treaty after April 2011. Thus, even assuming *arguendo* that 12 May 2011, as Respondent claims, should be regarded as the date of the Claimant's investment, the Respondent's breaches of the Treaty occurred thereafter, and the Temporal Objection should be rejected.<sup>107</sup> *Inter alia*, the Claimant refers to the following alleged acts.
98. First, the publication in May 2011 by the MEMR of its national reconciliation of data on IUPs.<sup>108</sup>
99. Second, the exclusion of SRI Mining Concession from the Clean and Clear Lists on 30 June 2011.<sup>109</sup>
100. Third, the publication by the Respondent of various maps in 2011– 2014. In this regard, the Claimant argues as follows:

*“On 12 July 2011, 10 February 2012, 22 October 2013 and 16 January 2014 [...] different maps were issued by various instrumentalities of the Respondent, which purported to put the validity of Production IUP No. 569 of 2009 into contention. As the maps issued by the instrumentality of the Respondent varied from time to time (illustratively, maps issued by the Director General of Mineral and Coal on 12 July 2011 and 22 October 2013), the Respondent's contention that the position would have been the same had the Claimant requested such maps in 2009 prior to its investment, is pure conjecture, untenable and cannot be accepted as correct. Further, Production IUP No. 569 of 2009 (including the map attached thereto) was copied to various Central Government and Provincial officers, but there was no protest notified to the Claimant from any instrumentality of the Respondent between the time of issuance of Production IUP No. 569 of 2009 on 31 December 2009 and the acceptance of the Claimant's investment on 10 August 2010, so as to put the Claimant to notice or give reason to the Claimant to request maps during this period.”<sup>110</sup>*

101. Fourth, the alleged issue of the overlapping licences of PT Kodio Multicom and PT MBM in 2014 and PT PBU in 2016. In this respect, the Claimant argues as follows:

*“According to the Statement of Defence, the allegedly overlapping exploration licenses of PT Kodio Multicom and PT Marangkayu Bara Makarti [PT MBM] were converted into Production IUPs on 11 March 2014, notwithstanding the Respondent's knowledge of disputes with the Claimant, including pursuant to the Claimant's Trigger Notice dated 28 February 2014.*

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<sup>107</sup> Reply, paras 293-299.

<sup>108</sup> Reply, para. 293.

<sup>109</sup> Reply, para. 294.

<sup>110</sup> Reply, para. 296.

*The allegedly overlapping exploration license of PT Putra Bara Utama [PT PBU] was converted into a Production IUP on 13 October 2016. It is alleged that the mining area under the aforesaid Production IUP granted to PT Putra Bara Utama no longer overlaps with SRI's mining area. The Respondent is conscious of the aforesaid breaches, but nevertheless contends that no overlapping licenses were issued "to further companies" after 12 May 2011, which is considered, by the Respondent to be the alleged date of the Claimant's investment. [...]"<sup>111</sup>*

102. Finally, as the Respondent acknowledges that the Temporal Objection does not apply to the divestiture requirement pursuant to Government Regulation No 24 of 2012, no response was needed on this aspect from the Claimant.

### **3. The Tribunal's Decision**

103. The Temporal Objection is the core argument that the Respondent has utilised to defend its case.
104. Several tribunals have wrestled with the argument whether an investment made prior to the entry into force of a treaty is covered by the treaty. The answer to that question will depend on the terms of the treaty itself. In the present case, the issue is different, namely whether an investment made after the acts complained of is covered by the treaty.
105. The Tribunal notes that the Respondent's Temporal Objection could be described as an objection which relates to the temporal application of the substantive standards as opposed to jurisdiction *ratione temporis*. If this were to be the conclusion, while the Tribunal would still have jurisdiction, the Tribunal would not find any breach of the treaty in relation to acts that occurred before the Claimant made its investment because at that time that Respondent did not owe any obligations to the Claimant.
106. Nevertheless, in light of the consistent case-law of investment treaty tribunals, the Tribunal shares the view of the tribunal in the *Philip Morris* case that the theoretical distinction between jurisdiction *ratione temporis* and the temporal application of the substantive standards "*is unnecessary when the cause of action is founded upon a treaty breach*".<sup>112</sup>
107. As explained by the tribunal in the *Gremcitel v. Peru* award:

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<sup>111</sup> Reply, paras 296-297 (see **Exhibit R-52**, Production Operation IUP No. 188.45/157/2014 to PT Kodio Multicom dated 11 March 2014; **Exhibit R-53**, Production Operation IUP No. 188.45/158/2014 to PT MBM on 11 March 2014; **Exhibit R-60**, Production IUP No 188.48/1640/BPTSP/X0/2016 - issued by the Governor of South Kalimantan to PT PBU dated 13 October 2016.)

<sup>112</sup> **Exhibit RL-91**, *Philip Morris Asia Ltd v. Australia* (Award on Jurisdiction and Admissibility of 17 December 2015), para. 528.

“[...] it is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty’s substantive standards, a tribunal’s jurisdiction is limited to a dispute between the host [S]tate and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty’s substantive standards affecting that investment.

*This conclusion follows from the principle of non-retroactivity of treaties, which entails that the substantive protections of the BIT apply to the [S]tate conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.*

[...] [A claimant] must therefore prove that [it] had already acquired [its] investment at the time of the impugned conduct.”<sup>113</sup>

108. The approach adopted by the *Gremcitel* award is consistent with the investor-state jurisprudence.<sup>114</sup> Indeed, it is clear that a pre-existing dispute cannot be protected by a treaty if there was no protected investment at the time of its violation. The fact that a protected investor later made an investment in the subject matter of the dispute cannot convert what was not a treaty violation into a treaty violation simply because the affected investment is taken over by a protected investor.
109. The Tribunal was not impressed with the Claimant’s interpretation of the *Gremcitel v. Peru* and the *Philip Morris* awards and the argument that the “critical date” for the temporal consideration is the date when the impugned measure was published and the claimant “became aware” of the alleged treaty breach.
110. Indeed, in the context of dealing with a temporal objection, the tribunal in the *GEA Group AG* case rejected an identical submission concerning the alleged requirement of the claimant’s awareness of the treaty breach and held that “[c]ontrary to the Claimant’s

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<sup>113</sup> **Exhibit RL-85**, *Renée Rose Levy and Gremcitel SA v. Peru* (ICSID Case No. ARB/11/17, Award of 9 January 2015), paras 146-148.

<sup>114</sup> See for example, **Exhibit RL-61**, *Cementownia “Nowa Huta” SA v. Turkey* (ICSID Case No. ARB/06/8, Award of 17 September 2009), paras 112-114; **Exhibit RL-74**, *Libananco Holdings Co Ltd v. Turkey* (ICSID Case No. ARB/06/8, Award of 2 September 2011), paras. 127–128, see also para. 131; **Exhibit RL-75**, *Vito G Gallo v. Canada* (Award of 15 September 2011), para. 328; **Exhibit RL-81**, *ST-AD GmbH v. Bulgaria* (Award on Jurisdiction of 18 July 2013), para. 300; **Exhibit RL-91**, *Philip Morris Asia Ltd v. Australia* (Award on Jurisdiction and Admissibility of 17 December 2015), para. 533.

*assertions, the Tribunal's analysis cannot hinge on whether the Claimant knew of Ukraine's purported treaty violations.*"<sup>115</sup>

111. In light of this consistent case-law, perhaps it is not surprising that the Claimant's Counsel did not repeat this line of interpretation of the *Gremcitel* and the *Philip Morris* awards at the main hearing.
112. While the Parties disagree on the date on which the Claimant made its investment (i.e. 12 May 2011 according to the Respondent and 7 June 2010, 10 August 2010 or 27 October 2010 according to the Claimant), it is clear that the issuance of the overlapping licences, which stands at the centre of the Claimant's claim in its written pleadings, is either outside the scope of the Tribunal's jurisdiction or contrary to the principle of non-retroactivity as enshrined in Article 13 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts.
113. On the other hand, the Tribunal does have jurisdiction in relation to the acts that occurred after the Claimant's alleged investment and may have breached the BIT. Those acts were summarised by the Claimant's Counsel at the main hearing as follows: (i) the failure to resolve the problem of the overlapping licences; and (ii) the divestiture requirement of Government Regulation No 24 of 2012.<sup>116</sup> As both of those acts occurred after 12 May 2011, and in view of the Tribunal's finding on the merits of the case set out below, it is not necessary for the Tribunal to decide between the Claimant's and Respondent's submissions concerning the exact date of the Claimant's investment.
114. The Tribunal notes that while the Respondent accepts that the adoption of Government Regulation No 24 of 2012 is within the Tribunal's temporal jurisdiction, the Respondent submits that the failure to resolve the overlapping boundaries and licences is not an independent treaty breach which is within the Tribunal's temporal jurisdiction.
115. However, in light of the Tribunal's conclusion regarding the merits of the Claimant's case, the Tribunal does not need to decide on the jurisdictional ramifications of the Respondent's distinction between a continuing act and an act which is already completed but continues to cause loss or damage. The Tribunal therefore proceeds on the presumption that it has jurisdiction to examine both the adoption of Government Regulation No 24 of 2012 and the alleged failure to resolve the overlapping boundaries licences.

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<sup>115</sup> **Exhibit RL-154**, GEA Group AG v. Ukraine (ICSID Case No. ARB/08/16, Award of 31 March 2011), para. 170; Rejoinder, para. 17.31.

<sup>116</sup> Hearing Transcript of 14 August 2018, pp. 1101-1105 and Reply, para. 300.

116. Finally, in the context of the jurisdictional Temporal Objection, the Tribunal notes that it is regretted that the Respondent did not bring forward this objection when it made its request to bifurcate the jurisdictional stage from the merits stage. Had the Tribunal and the Claimant known about the Temporal Objection, it is likely that the Tribunal would have accepted the Respondent's bifurcation request or at least suggested to the Parties to bifurcate the quantum phase. The Tribunal will return to this point at the cost section below.

## II. The Legality Objection

117. Article 1(1) of the Treaty provides as follows:

*“Investment’ means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws and regulations of the Contracting Party in whose territory the investment is made.”*

### 1. Respondent's Position

118. The Respondent submits that pursuant to Article 1(1) of the Treaty, protected investments must be *“established or acquired [...] in accordance with the national laws and regulations of the Contracting Party in whose territory the investment is made.”* If an investment is not established or acquired in accordance with Indonesian law, it is not an investment as defined in the Treaty and it is outside the scope of protection of the Treaty.<sup>117</sup>

119. The Respondent avers as follows:

*“The Respondent's case is not that IMFA's alleged investment is illegal; it is merely that its alleged investment is not recognised under Indonesian law and, as a result, it cannot be established or acquired in accordance with Indonesian law and therefore cannot satisfy the legality requirements of Article 1(1) of the Treaty.”*<sup>118</sup>

120. The Respondent claims that the Claimant was obliged to comply with the CIL, BKPM Regulation No 12 of 2009, and Indonesia's Company Law (Law No 40 of 2007) when it established or acquired its purported investment in Indonesia. According to the

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<sup>117</sup> SOD, paras. 19.1 – 19.36; Rejoinder, para. 14.2.

<sup>118</sup> Respondent's Post-Hearing Brief, para. 5.3.



Respondent, the Claimant does not deny that it was obliged to comply with those relevant provisions of Indonesian law.<sup>119</sup>

121. The Respondent submits that the CIL is intended, *inter alia*, to “*subject direct investments in Indonesia to an approval process by BKPM for the purpose of developing the Indonesian economy in a form acceptable to Indonesia.*”<sup>120</sup>
122. According to Article 2 of the CIL, the CIL applies to “*capital investments in all sectors in the territory of the Republic of Indonesia.*” The Elucidation of Article 2 provides that “[i]nvestments in all sectors in the Republic of Indonesia shall mean direct investment by excluding indirect or portfolio investment.”<sup>121</sup>
123. According to the Respondent, the position that Indonesian law does not recognise indirect investments is also supported by other provisions of the CIL such as Article 5(2) of the CIL, which provides in part that “*foreign capital investment is obliged to be in the form of a limited liability company pursuant to Indonesian law*”. Similarly, Article 5(3) identifies permissible means of making a capital investment in Indonesia, which includes “*purchasing shares.*”<sup>122</sup> The requirement to comply with the provisions of Article 5 is underlined by Article 25(1) of the CIL, which elaborates that: “*A capital investor who intends to carry out capital investment in Indonesia shall comply with Article 5 of this Law.*”<sup>123</sup>
124. In the same vein, BKPM Regulation No 12, which was in force at the time of the Claimant’s purported investment, required that a foreign capital investment in the coal mining sector be made in the form of a limited liability company.<sup>124</sup>
125. Therefore, the Respondent submits as follows:

“[...] Indonesian law required the Claimant to make an investment in Indonesia in the form of a ‘limited liability company’ and the Claimant was required to make this investment ‘directly’. But the Claimant’s purported investment was not made by it; rather the only investment in Indonesia in accordance with Indonesian law

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<sup>119</sup> Rejoinder, para. 14.15.

<sup>120</sup> Rejoinder, para. 14.16.

<sup>121</sup> **Exhibit RL-7/CI-2**, Capital Investment Law No 25 of 2007, Article 2 (elucidation).

<sup>122</sup> Rejoinder, para. 14.11. SOD, para. 19.31.

<sup>123</sup> SOD, para. 19.30.

<sup>124</sup> **Exhibit RL-9**, BKPM Regulation No 12 of 2009 was in force from 23 December 2009 – 12 May 2013. See also SOD, para. 19.32.

*was made by Indmet Mining Pte Ltd, a Singaporean company, which acquired 70% of the shares in SRI.”<sup>125</sup>*

126. In addition, the Respondent submits that the Claimant’s purported investment in Indonesia was not “*established*” or “*acquired*” in accordance with Indonesian law because “*it failed to comply with the requirement under Indonesian law that all foreign investment be approved, and in particular that investment in the coal mining sector be approved by BKPM*”.<sup>126</sup> According to the Respondent, only Indmet’s investment was approved by BKPM and not the Claimant’s purported investment.<sup>127</sup> In this respect, the Respondent submits as follows:

*“(A) On 7 June 2010, Indmet allegedly entered into a conditional SPA with Mr Widyasakta and Mr Fanani, neither of whom were at the time shareholders in SRI. In the SPA, Indmet agreed to acquire 70% of the issued share capital of the company. IMFA has not provided any details of Indmet’s actual share acquisition, but based on the records of the Ministry of Law and Human Rights, Indmet may have acquired 1,000 existing shares and subscribed to 2,500 new shares in SRI.*

*(B) On 5 August 2010, SRI applied to the Indonesian Investment Coordination Board, or BKPM, for permission to become a foreign capital investment company (known in Indonesian as a ‘penanaman modal asing’ (‘PMA Company’)), and SRI also applied to BKPM for an ‘in principle licence’ (known in Indonesian as an ‘izin prinsip penanaman modal’) for carrying out its capital investment. Together with its application, SRI provided to BKPM the Memorandum of Association and Articles of Association of Indmet, as well as the Singapore company search report for Indmet. This showed that Indmet (Mauritius) Ltd was the sole shareholder. SRI did not provide any information to BKPM concerning the Claimant.*

*(C) On 10 August 2010, BKPM granted permission to SRI to become a PMA Company, and also granted SRI an “in principle licence”, with a duration of five years, namely from 10 August 2010 until 10 August 2015. Following the grant of the ‘in principle licence’, it was possible for Indmet to acquire shares in SRI.*

*(D) On 29 March 2011, the shareholders in SRI resolved (i) to transfer to Indmet the shares in SRI pursuant to the SPA; and (ii) to increase the capital in SRI for Indmet’s subscription. On 29 April 2011 the Ministry of Law approved the increase in SRI’s capital but Indmet’s subscription to the 2,500 shares could not become effective until SRI’s Articles of Association were amended.*

*(E) SRI’s Articles of Association were amended with effect from 12 May 2011, with the effect of the amendment being that foreign individuals or companies would be able to become shareholders in SRI. Prior to this amendment being made, it was*

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<sup>125</sup> Rejoinder, para. 14.12.; SOD, para. 19.33.

<sup>126</sup> SOD, para. 19.34.

<sup>127</sup> SOD, paras. 19.33-19.34.

*not possible for Indmet (or any other foreign individual or company) to own shares in SRI. Thus, as a matter of Indonesian law, Indmet was not able to acquire shares in SRI before 12 May 2011.*

*As appears from the record, the Claimant, IMFA, never made any application to BKPM to seek approval of its investment in Indonesia. The Claimant's name does not appear on the application to BKPM dated 5 August 2010, and, as noted above, SRI provided no information about the Claimant to BKPM.*

*The simple fact is that the Claimant did not seek the approval of BKPM for its purported acquisition of shares in SRI and its purported interest in the 'Production Operating Mining Business Licence', and BKPM could not, and would not, have given its approval. What is important for BKPM, and Indonesian law, is the identity of the direct shareholder in SRI, which is, of course, Indmet. The Claimant is not in the picture and has therefore not 'established' or 'acquired' an investment in accordance with Indonesian law for the purposes of Article 1(1) of the BIT. The Claimant's purported investment is thus outside the scope of protection of the BIT, and, accordingly, outside the Tribunal's jurisdiction."<sup>128</sup>*

127. Finally, the Respondent explicitly rejects the Claimant's argument that Indonesia's law "are not intended to screen or identify foreign investors."<sup>129</sup> In this respect, the Respondent submits as follows:

*"The Respondent's legislation which governs foreign investment clearly and unequivocally applies to direct investment, and does not apply to indirect investment. Indirect investment is a concept which is not recognised as a matter of Indonesian law. This is why it is not possible for a foreign investor to make an 'indirect investment' into Indonesia. Such an investment would not receive the approval of BKPM.*

*On this issue, a glance at various other BIT claims that have been brought against Indonesia confirm that the accepted structure is for the foreign investor which seeks BIT protection to acquire shares directly in an Indonesian company. Thus, in *Churchill Mining plc v Indonesia*, the claimant, Churchill Mining plc, directly acquired 95% of the shares in the Indonesian PMA company 'PT Indonesia Coal Development'; and in *Planet Mining Pty Ltd v Indonesia*, the claimant, Planet Mining Pty Ltd, directly acquired 5% of the shares in the Indonesian PMA Company, 'PT Indonesia Coal Development'. In the *Rafat Ali Rizvi v Indonesia* case, the claimant had invested indirectly in an Indonesian bank via a company incorporated in the Bahamas, and the ICSID tribunal found that it had no*

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<sup>128</sup> SOD, paras 19.34-19.36. See **Exhibit R-33**, Application for capital investment in principle license relating to SRI dated 5 August 2010; **Exhibit C-12**, Capital Investment Principle Permit (BKPM Approval) No.132/1/IP/I/PMA/2010 to SRI dated 10 August 2010; **Exhibit R-41**, Receipt of notification of the amendments to the Articles of Association of SRI by the Ministry of Law and Human Rights of the Republic of Indonesia dated 12 May 2011.

<sup>129</sup> Rejoinder, paras 14.23-14.24 (citing Reply, para. 184).

*jurisdiction (albeit on grounds which made it unnecessary for it to decide whether the claimant's 'indirect' investment was protected by the BIT.)*"<sup>130</sup>

## 2. Claimant's Position

128. At the outset, the Claimant submits that it has made protected investments in Indonesia within Article 1(1) and Article 2 of the BIT.<sup>131</sup>

129. According to the Claimant, the definition of investment is broad:

*"The definition of 'investment', set forth in Article 1(1) of the BIT, encompasses 'every kind of asset', and as an adjunct, illustrates the broad types of qualifying 'investment', through supplying a list of non-exclusive and non-exhaustive categories of investments. [...] Most notably, Article 1(1) expressly includes both primary assets and rights related to such assets. Both 'shares in' and 'concession', are expressly included within Article 1(1), and rights flowing as a corollary to holding shares and/or a mining concession, are thus eligible to protection under the BIT."*<sup>132</sup>

130. The Claimant describes its protected investments as follows:

*"The Claimant has assets which constitute an investment, both directly and indirectly, in accordance with the national laws and regulations of Indonesia, which fall within the scope of Article 1(1) of the BIT.*

*The Claimant's investment, for the purposes of Article 1(1) of the BIT, include (without limitation) the following:*

*(a) The Claimant's majority equity interests of 70%, held through its wholly owned subsidiary, Indmet (incorporated in Singapore as a special purpose vehicle for purposes of investing in Indonesia), in SRI.*

*(b) The Production Operation Mining Business License/Production IUP/mining concession held by the Claimant, through SRI."*<sup>133</sup>

131. The Claimant rejects the Respondent's submissions regarding the Legality Objection.

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<sup>130</sup> Rejoinder, paras 14.24-14.25 (referring to **Exhibit RL-83**, Churchill Mining plc v. Indonesia (ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Jurisdiction of 24 February 2014), paras. 11-19; **Exhibit RL-158**, Planet Mining Pty Ltd v. Indonesia (ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Jurisdiction of 24 February 2014), paras. 11-19; **Exhibit RL-80**, Rafat Ali Rizvi v. Indonesia (ICSID Case No. ARB/11/13, Award on Jurisdiction of 16 July 2013), para. 37).

<sup>131</sup> SOC, para. 71.

<sup>132</sup> SOC, para. 73.

<sup>133</sup> SOC, paras 74-75. See also paras 91-93.

132. Primarily, it submits that the Treaty does not contain any express exclusion of indirect investments. According to the Claimant, “[a]rbitral tribunals adjudicating bilateral investment treaty disputes have consistently held that indirect investments, such as shares held through intermediary companies, are a protected form of investment absent any limitations in the applicable definition of an ‘investment’.”<sup>134</sup>
133. In this regard, the Claimant argues that the CIL has no application for determining the scope of protection under the Treaty.<sup>135</sup>
134. With regard to the Respondent’s specific claims concerning the Legality Objection, the Claimant cites with approval the *Saba Fakes v. Turkey* award, which states that “a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.”<sup>136</sup>
135. According to the Claimant, it incorporated Indmet “as a vehicle to make its investment in Indonesia. While it was the Singapore company in whose name the shares were acquired, the Claimant was the hundred percent shareholder parent company.”<sup>137</sup>
136. The Claimant rejects the Respondent’s argument concerning the alleged missing information regarding Indmet’s upstream parent company in the application to BKPM dated 5 August 2010:

*“The objection that details of the Singaporean company’s upstream parent company were not filed is not based on any regulatory requirement in Indonesia, and it is not the Respondent’s case that the holding of such upstream shareholding by the Claimant was in breach of the regulatory requirements in Indonesia. There is no suggestion from the Respondent that unrelated to treaty issues, there was*

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<sup>134</sup> SOC, para. 76. (referring to **Exhibit CL-11**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated August 3, 2004, para. 137; **Exhibit CL-12**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction dated July 6, 2007, paras 123-124; **Exhibit CL-13**, *Venezuela Holdings B.V. and others (case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated June 10, 2010, para. 165; **Exhibit CL-14**, *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, dated December 30, 2010, paras 151 – 153; **Exhibit CL-15**, *Guaracachi & Rurelec v. Bolivia*, PCA Case No. 2011-17, Award paras 352-56; **Exhibit CL-16**, *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927; **Exhibit CL-17**, *European American Investment Bank AG (EURAM) v. Slovak Republic*, Award on Jurisdiction, paras 321-326 (UNCITRAL 22 October 2012); **Exhibit CL-18**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, at para. 111).

<sup>135</sup> SOC, para. 89.

<sup>136</sup> Reply, para. 171 (citing **Exhibit RL-68**, *Wena Hotels Limited v. Arab Republic of Egypt* award (ICSID Case No. ARB/98/4) dated 8 December 2008, para. 119).

<sup>137</sup> Reply, para. 175.

*anything amiss in the acquisition of indirect equity interests by the Claimant in SRI – no issue has been raised by the Respondent in this regard, prior to or independent of these proceedings.”*<sup>138</sup>

137. The Claimant also submits that its investment is not an “*indirect investment*” as contemplated in the Elucidation to Article 2 of the 2007 Investment Law, which refers to share acquisitions on the Indonesian stock exchange. In that respect, the Claimant submits as follows:

*“The definition of “investment” in Law No.1 of 1967 – which the Respondent contends is carried into the 2007 Investment Law - does not cover holding shares in a publicly listed company. The Elucidation to Article 2 of the 2007 Investment Law purports to exclude such indirect investments and portfolio investments – the Claimant’s investment does not qualify as an indirect investment. As indirect investments are not administered by the BKPM, the grant of BKPM approval for foreign investment in SRI establishes that such foreign investment is not indirect investment.”*<sup>139</sup>

138. The Claimant claims that its investment in the coal mining sector was approved by BKPM. According to the Claimant, the “*BKPM approval for foreign investment in SRI is on record. The approval is for foreign investment in the coal mining sector, and contains a specific reference to Production IUP No. 569 of 2009.*”<sup>140</sup>
139. Finally, the Claimant rejects the Respondent’s argument that “[w]hat is important for BKPM, and Indonesian law, is the identity of the direct shareholder in SRI.”<sup>141</sup> In this respect, the Claimant submits as follows:

*“As evident from the record, the creation of this structure for the Claimant’s investment was for a genuine corporate purpose, on advice received from PriceWaterhouse Coopers. Accordingly, the proposed acquisition of 70% interests in the coal concession held by PT SRI was routed through wholly owned subsidiaries of the Claimant in Mauritius (Indmet (Mauritius) Ltd.) and Singapore (Indmet Mining Pte Ltd.), a holding structure specifically put into place for this purpose. BKPM Regulation No.12 of 2009 does not prohibit this. Indeed, by permitting foreign investment by a foreign body corporate, BKPM Regulation No.12 of 2009 contemplates that the legal owner of the shares in the PMA Company may well be a wholly-owned investment vehicle of another foreign body corporate.*

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<sup>138</sup> Reply, para. 176.

<sup>139</sup> Reply, para. 180.

<sup>140</sup> Reply, para. 182 (referring to **Exhibit C-12**, Capital Investment Principle Permit (BKPM Approval) No.132/1/IP/1/PMA/2010 to SRI dated 10 August 2010).

<sup>141</sup> Reply, para. 182.

*As the Respondent's laws 'concerning foreign investment' are not intended to screen or identify foreign investors, but are intended to channelize [sic] foreign investment to areas of the Respondent's economy where it is most needed, BKPM Regulation No.12 of 2009 does not concern itself with ownership interests above the legal owner of the shares in the PMA Company. The allegation that BKPM could not have given its approval is incorrect. The allegation that BKPM would not have given its approval, is irrelevant – BKPM has granted its approval for foreign investment in SRI, with knowledge of the upstream beneficial ownership lying in India. The Respondent is unable to identify any reason why the BKPM would have declined permission had it known that the Claimant is the parent company.”<sup>142</sup>*

### **3. The Tribunal's Decision**

140. As acknowledged by the Respondent's Counsel at the main hearing, the Legality Objection is intertwined with the No Acceptance Objection and the No Acceptance Objection is the stronger of the two objections.<sup>143</sup> It is clear to the Tribunal that the Legality is dependent on the No Acceptance Objection. Therefore, the Tribunal will deal with the Legality Objection together with the No Acceptance Objection below.

### **III. The No Acceptance Objection**

141. Article 2 of the Treaty provides as follows:

*“This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations in force concerning foreign investments, whether made before or after the coming into force of the Agreement.”*

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

142. The Respondent submits that the *“requirement that an investment be 'accepted' in accordance with the laws and regulations in force concerning foreign investments is a related, but analytically separate, jurisdictional objection from the Respondent's Legality Objection.”*<sup>144</sup>

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<sup>142</sup> Reply, paras 183-184.

<sup>143</sup> Hearing transcripts of 6 August 2018, pp. 86 (“we have four jurisdiction challenges in the jurisdictional balance, and at least two of them, the no acceptance and the temporal objection, are what we would describe as heavyweight challenges which, in an English-seated arbitration, the Respondent cannot fathom how the Claimant can defeat them and the Claimant's pleadings self-evidently fail genuinely to engage with them”) and 115-116 (e.g. the Respondent's Counsel stating that “I think it's probably fair to say that it's harder for them [the Claimant] to satisfy that test and if they have somehow been accepted, which we say they can't have been, then it would be tough for us to succeed just on the illegality jurisdiction challenge.”)

<sup>144</sup> Rejoinder, para. 15.2.

143. The Respondent maintains that while provisions such as Article 2 of the Treaty are expressed as containing a requirement that qualifying investments be “*admitted*” or “*granted admission*” in accordance with the laws and regulations of the host State, “*it is clear from the arbitral practice on ‘acceptance’ or ‘admission’ provisions that these terms are used interchangeably.*”<sup>145</sup>
144. According to the Respondent, the “*admission*” or “*acceptance*” provisions are considered jurisdictional requirements in light of multiple decisions and awards.<sup>146</sup>
145. The Respondent repeats its argument that the Claimant failed to make its investment directly and therefore the investment was also neither “*accepted*” nor “*admitted*”.<sup>147</sup> In addition, the Respondent submits that the Claimant’s purported investment in Indonesia was neither “*accepted*” nor “*admitted*” in accordance with Indonesian law because foreign investments in the coal mining sector needed to be approved by BKPM in light of the Mineral Resource’s Regulation No 5 of 2010.<sup>148</sup>
146. In response to the Claimant’s argument that “*the BKPM approval for foreign investment in SRI is on record,*”<sup>149</sup> the Respondent repeats the same argument of the Legality Objection, i.e. that it was SRI that applied to BKPM and not the Claimant.<sup>150</sup> In this respect, the Respondent submits as follows:

*“[T]he Claimant’s investment has not been ‘accepted’ within the meaning of Article 2 of the BIT, because it has not been accepted as an ‘investment’ which has been ‘made by investors of either Contracting Party in the territory of the other Contracting Party’. What the Respondent, through the BKPM, has ‘accepted’, or ‘admitted’, or ‘approved’ is an investment of Indmet Mining Pte Ltd, a Singaporean company. This is quite obviously not an acceptance of an ‘investment’ which has been ‘made by [an investor] of [the other] Contracting Party’ for the purposes of Article 2 of the BIT. The Claimant’s purported investment has not been ‘accepted’. Moreover, SRI did not even disclose to BKPM the Claimant’s role as the indirect parent company of Indmet Mining Pte Ltd.*”

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<sup>145</sup> Rejoinder, para. 15.3.

<sup>146</sup> Rejoinder, para. 15.3-15.5. Referring to **Exhibit RL-83**, Churchill Mining plc v. Republic of Indonesia (ICSID Case No. ARB/12/14, Decision on Jurisdiction of 24 February 2014), para. 290; **Exhibit RL-80**, Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13, Award on Jurisdiction of 16 July 2013), para. 65.

<sup>147</sup> SOD, paras 20.25-20.33.

<sup>148</sup> Rejoinder, para. 15.8; SOD, para. 20.33. See also **Exhibit RL-10**, MEMR’s Regulation No 5 of 2010.

<sup>149</sup> Reply, para. 182.

<sup>150</sup> Rejoinder, para. 15.10. SOD, paras 20.35-20.36.



*In sum, the simple fact is that the Claimant never sought the approval of BKPM for its purported indirect acquisition of shares in SRI and its purported interest in the Production IUP No 569 of 2009, and BKPM could not have given its approval. What is important for BKPM is the identity of the direct shareholder in SRI, which is Indmet Mining Pte Ltd. The Claimant and the Claimant's purported investment are therefore outside the scope of protection of the BIT.”<sup>151</sup>*

147. Finally, the Respondent relies on textual interpretation of the wording of Article 2 to support its jurisdictional objection. The Respondent submits that the words “*as such*” refer back to the words “*investment*” and the phrase “*investor of either state*” and accordingly jurisdiction is limited to Indian not Singaporean investors/investments.<sup>152</sup> In this regard, the Respondent further submits as follows:

*“The words ‘accepted as such’ and the specific reference to the host State’s ‘laws and regulations in force concerning foreign investments’ do not appear elsewhere in the BIT. [...] The insertion of these additional words in Article 2 strengthens the Respondent’s case that Article 2 means what it says.*

*While these words ‘accepted as such’ were not present in the UK-Indonesia BIT that was considered in the Rizvi case, the words relied upon by the Rizvi tribunal accepted ‘in accordance with’ are. It was these words which led the Rizvi tribunal to reiterate that the purported investment must actually be accepted to fall within the scope of the BIT under Article 2, it is not enough that the investment was ‘commenced without contradicting’ the host State’s foreign investor law or that the ‘investment is generally lawful.’”<sup>153</sup>*

## **2. Claimant’s Position**

148. The Claimant rejects the Respondent’s No Acceptance Objection, which according to the Claimant is in substance “*a repetition of the allegations relating to the Legality Objection.*”<sup>154</sup>

## **3. Tribunal’s Decision**

149. The Claimant is correct to point out that the Respondent’s No Acceptance Objection and Legality Objection involve the same question: whether the Claimant’s investment, *i.e.* its purchase of shares in SRI, was established and accepted in Indonesia in accordance with the law in Indonesia.

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<sup>151</sup> Rejoinder, paras 15.12-15.13.

<sup>152</sup> The importance of the existence or absence of a comma had fatal consequences in the case *R v. Casement* ([1917] 1 KB 98).

<sup>153</sup> Respondent’s Post-Hearing Brief, paras 6.5 & 6.6.

<sup>154</sup> Reply, para. 191.

150. While the Parties agree that the acceptance requirement in Article 2 of the BIT is a jurisdictional requirement,<sup>155</sup> they disagree whether the Claimant's investment was accepted. The Claimant's argument is that its investment, which was made via Indmet, was accepted by BKPM and therefore the Tribunal should reject the Respondent's No Acceptance Objection and Legality Objection. On the other hand, the Respondent submits that it was Indmet's investment in SRI that was approved by BKPM not the Claimant's investment and therefore the Claimant's investment was neither established nor accepted in Indonesia.
151. Although the Tribunal accepts that the issue whether the Claimant's investment was accepted is highly questionable in view of the language used in Article 2 of the Treaty, nevertheless, this difficult jurisdictional and textual question need not be decided in light of the Tribunal's conclusions below regarding the merits of the Claimant's case concerning the adoption of Government Regulation No 24 of 2012 and the alleged failure to resolve the overlapping licences.

#### **IV. The Indirect Investment Objection**

152. Article 1(1) of the Treaty provides as follows:

*“Investment’ means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws and regulations of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:*

*(i) movable and immovable property as well as other rights such as mortgages, liens or pledges;*

*(ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;*

*(iii) rights to money or to any performance under contract having a financial value;*

*(iv) intellectual property rights, goodwill, technical processes and know-how in accordance with the relevant laws of the respective Contracting Party;*

*(v) business concessions conferred by law or under contract, including concessions to search for, extract and exploit natural resources.”*

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

153. The Respondent submits that the Claimant's asserted investments, namely the shareholding in SRI and the Production IUP No 569, are not held directly by the Claimant.

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<sup>155</sup> Hearing Transcript of 14 August 2018, pp. 1067-1070.

The alleged 70% shares in SRI were acquired by the Claimant's indirect subsidiary, Indmet, which as per the Claimant was at the time of the acquisition a subsidiary of Indmet (Mauritius) Ltd, which was in turn wholly owned and controlled by the Claimant.<sup>156</sup> The shares in SRI are still held directly by Indmet and not by the Claimant itself.<sup>157</sup> As for Production IUP No 569, this is held by the Claimant indirectly via SRI.<sup>158</sup>

154. The Respondent submits that Article 1(1) of the Treaty protects only direct investments, *i.e.* investments that are held directly by the Claimant. As the Claimant does not hold any investments directly, it does not have a protected investment.
155. The Respondent highlights that Article 1(1) of the Treaty does not expressly include investments which are owned or controlled "*indirectly*", which is in contrast with other BITs which do expressly provide for the protection of indirect investments, including (for instance) Indonesia's BIT with Australia.<sup>159</sup>
156. The Respondent relies on the VCLT to support its argument that Article 1(1) does not protect direct investments. Article 31(1) of VCLT provides as follows:

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

157. In addition, the Respondent relies on the principle of effectiveness and claims that the "*good faith*" interpretation of a treaty requires that each provision of the treaty be given a meaning and effect.<sup>160</sup>
158. The Respondent submits the argument that Article 1(1) only protects direct investment is supported by the context of the Treaty.<sup>161</sup> According to the Respondent, relevant "*context*" for the interpretation of Article 1(1) includes in particular Articles 2, 4(1), 5(1), and 5(3) of the Treaty. In this respect, the Respondent argues as follows:

*"(A) Article 2 is the 'scope of application' provision, which provides that the BIT 'shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party'. This indicates that the purported investment must have been actually made by the Indian investor, rather than by an investor of a third State, which is the case as regards the alleged acquisition of*

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<sup>156</sup> SOC, para. 5, footnote 5, see also para. 51.

<sup>157</sup> SOC, para. 5.

<sup>158</sup> Rejoinder, para. 16.1

<sup>159</sup> SOD, paras. 21.5 – 21.7; Rejoinder, para. 16.3

<sup>160</sup> Rejoinder, para. 16.12.

<sup>161</sup> Rejoinder, para 16.13 (citing Article 31(2) of the VCLT).

*shares in SRI. A broader formulation could have been adopted by the Contracting Parties, but they did not do so.*

*(B) Also with regard to Article 2, this requires that the putative investment be made 'in the territory of the other Contracting Party'. But the Claimant, IMFA, did not make an investment in the territory of the Respondent. Rather, it was Indmet Mining Pte Ltd which purportedly acquired shares in the Indonesian company SRI.*

*(C) As for Article 4(1), the Contracting Parties have an obligation under this provision to provide most-favoured-nation treatment to 'investments made by investors of [the other] Contracting Party.' Again, a broader formulation could have been adopted by the Contracting Parties, but they did not do so."<sup>162</sup>*

159. With regard to Articles 5(1)<sup>163</sup> and 5(3)<sup>164</sup> of the Treaty, the Respondent submits as follows:

*"[...] The BIT here makes provision for the situation where the host State of an investment 'expropriates' the assets of a locally incorporated company in which the purported investor holds shares. This is the manner in which the BIT provides protection for assets which are held 'indirectly', and this demonstrates that the Contracting Parties expressly turned their minds to this issue. Thus, Article 5(3) would be applicable if it were the case that the Claimant owned the shares in SRI directly, and the assets of SRI – such as Production IUP No 569 of 2009 – were expropriated. This would activate Article 5(3) of the BIT, and the Respondent would be under an obligation to 'ensure that provisions of [Article 5(1)] [were] applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party [i.e. IMFA] who are owners of those shares [in SRI].'*

*In this scenario, if it were the case that the definition of "investment" already protected such assets (because it includes both "direct" and "indirect" investments), then the inclusion of Article 5(3) would serve no purpose. This would be contrary to the principle of effectiveness (or effet utile) which is an essentially element of the good faith interpretation of treaties."<sup>165</sup>*

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<sup>162</sup> Rejoinder, para. 16.13.

<sup>163</sup> Article 5(1) of the Treaty: "Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation."

<sup>164</sup> Article 5(3) of the Treaty: "Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares."

<sup>165</sup> Rejoinder, paras 16.17-16.18.

160. The Respondent rejects the Claimant's interpretation of Article 5(3) of the Treaty.<sup>166</sup> In particular the Respondent argues that it is *"incorrect to say that Article 5(3) 'is taking a 'belt and braces' approach to the compensation mechanism for expropriation.' To the contrary, Article 5(3) offers protection which is not otherwise available under the BIT."*<sup>167</sup>
161. Similarly, the Respondent rejects the Claimant's argument that Article 5(3) was included *"for the avoidance of doubt."*<sup>168</sup> The Respondent submits that the Claimant's argument is *"inconsistent with the principle of effectiveness in treaty interpretation (effet utile), according to which treaties should be interpreted so as to give each provision meaning."*<sup>169</sup> Accordingly, the Respondent argues as follows:

*"[...] An interpretation that takes the specific inclusion of indirect investments in the expropriation clause to be an exercise in abundant caution can only be justified when the treaty already refers to 'direct or indirect' investments. In this regard, the Claimant also refers to a number of treaties in which the definition of "investment" is silent as to whether it covers indirect investments, but an equivalent provision of Article 5(3) includes the wording 'for avoidance of doubt'. As regards these treaties, this cannot be interpreted as meaning that the term 'investment' already includes 'indirect' investments. To claim that a treaty includes indirect investments – which magnifies the scope of its protection greatly – by way of a backdoor purported 'abundant caution', when it neglects to mention the topic head-on in the relevant provision defining an 'investment' does violence to the text.*

*Thus, where treaties do refer to 'direct or indirect investments', Article 5(3) or its equivalents can possibly be read as confirming what is otherwise present. This comports with the text, by giving an internally coherent meaning to both the definition of 'investment' and the extension of expropriation to 'indirect' investment. But, as in the second class of treaties, where the definition of 'investment' does not include indirect investments, it cannot be said that Article 5(3) is nonetheless an exercise in abundant caution. In such treaties, the natural interpretation must, and can only, be that the definition of 'investment' otherwise excludes 'indirect' investment. Such an interpretation, the Respondent notes, makes sense not only of the divergence in treaty practice on this point, but also provides a meaning that is internally coherent within the text of each treaty."*<sup>170</sup>

162. The Respondent also submits that its proposed interpretation of the term *"investment"* is also consistent with the object and purpose of the Treaty:

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<sup>166</sup> Rejoinder, paras 16.20-16.34.

<sup>167</sup> Rejoinder, para. 16.21 (citing the Reply, para. 246.)

<sup>168</sup> Reply, paras. 254-262.

<sup>169</sup> Rejoinder, para. 16.30.

<sup>170</sup> Rejoinder, paras 16.32-16.33.

*“Importantly, the object and purpose of the BIT is not simply the protection of foreign investment; the preamble of the BIT, which sheds light on the object and purpose, also refers expressly to creating conditions for flow of capital between Indonesia and India and increasing prosperity in both States. In line with the broad objectives of the BIT, the Tribunal is required to adopt a balanced approach in the interpretation of treaties and not interpret its clauses exclusively and / or excessively in favour of investors.”*<sup>171</sup>

163. Finally, in relation to the Claimant’s argument that the definition of “investment” is broad in the sense that it covers a wide range of assets, the Respondent submits that this “cannot be understood as also meaning that the Contracting Parties to the BIT have agreed that it does not matter whether such ‘assets’ are owned directly or not.”<sup>172</sup>

## 2. Claimant’s Position

164. The Claimant rejects the Respondent’s interpretation of Article 1(1) and submits that the Treaty protects direct and indirect investments.<sup>173</sup>
165. According to the Claimant, the parties to the Treaty did provide for the inclusion of indirect investments by adopting a broad definition of investment, which includes “every kind of asset.”<sup>174</sup>
166. Moreover, the Claimant submits that even if assumed *arguendo* that the Treaty is silent on the issue of indirect investment, given the broad definition of investment in the Treaty, the treaty parties should have used clear language to exclude indirect investments.<sup>175</sup>
167. In addition, the Claimant submits that the “absence of the word ‘directly’ is as conspicuous as the absence of ‘indirectly’, that the Respondent chooses to rely upon. In these circumstances, the only appropriate conclusion is that there was no limit on the directness of the way the investment can be held, or exclusion of investments not so held.”<sup>176</sup>
168. Furthermore, the Claimant reiterates its argument that arbitral tribunals consistently held that indirect investments, such as shares held through intermediary companies, are a

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<sup>171</sup> Rejoinder, para. 16.19. SOD, paras 21.24-21.25.

<sup>172</sup> Rejoinder, para. 16.4.

<sup>173</sup> Reply, paras 193-282. See also SOC, paras 71-93.

<sup>174</sup> Reply, para. 197.

<sup>175</sup> Reply, para. 197

<sup>176</sup> Reply, para. 200.

protected form of investment absent any limitations in the applicable definition of an investment.<sup>177</sup>

169. According to the Claimant, the object and purpose of the Treaty is, in the words of the preamble, to “*create conditions favourable for fostering greater investment by investors of one Contracting Party in the territory of the other Contracting Party.*” Such object and purpose would be frustrated by excluding indirect investments, including shareholding investments held through intermediary companies.<sup>178</sup>
170. The Claimant also rejects the Respondent’s argument on the context of the Treaty and its reliance on Articles 2, 4(1), 5(1) and 5(3) of the Treaty.<sup>179</sup>
171. In particular, the Claimant submits that “*it is evident that the use of the words ‘made by’ in Article 2 [of the Treaty] was not with the intention of excluding indirect investments from the scope and applicability of the BIT.*”<sup>180</sup> In addition, the Claimant submits as follows:

*“In any event, the facts and circumstances in the present case establish that the investment in SRI and the corollary interests in Production IUP No.569 of 2009 has been made by the Claimant. It is the Claimant that was considering the acquisition of mines outside India – in Indonesia, Turkey, Albania, Mozambique and elsewhere. It is the Claimant’s employees that conducted prior enquiries into such potential acquisitions. It is the Claimant’s employees that conducted an evaluation of mineral reserves of coal mines being considered for acquisition. It is the Claimant that caused incorporation of Indmet. The Claimant arranged all payments towards acquisition of 70% indirect interests in the SRI coal mining concession, aggregating US\$8.75 million, to be infused into and wired through its wholly owned subsidiaries in Mauritius and Singapore, in manner nominated by sellers of the SRI coal mining concession. The Claimant availed a US\$15 million loan facility from Standard Chartered Bank, Kolkata, India, for funding the acquisition of equity interests in the SRI coal mining concession and related working capital requirements, based on Profitability Projections submitted by the Claimant. The facts on record establish that the investment is made by the Claimant.”<sup>181</sup>*

172. The Claimant also submits there are three main flaws in the Respondent’s interpretation of Article 5(3) of the Treaty: (i) Article 5(3) has a different purpose, (ii), there are numerous treaties containing both an express coverage of direct and indirect investments

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<sup>177</sup> Supra note 134. See also **Exhibit CL-19**, Flemingo Duty Free Shop Private Limited v. the Republic of Poland, Award dated August 12, 2016, para. 305.

<sup>178</sup> Reply, para. 207. See also para. 281.

<sup>179</sup> Reply, para. 206.

<sup>180</sup> Reply, para. 223.

<sup>181</sup> Reply, para. 224.

and a provision equivalent to Article 5(3); (iii) the case-law does not support the Respondent's position.

173. First, the Claimant argues that Article 5(3) of the Treaty has a different purpose than the one suggested by the Respondent.<sup>182</sup> The Claimant submits as follows:

*“The only logical explanation for the existence of this provision is that it makes clear the manner in which the compensation mechanism will operate in relation to a specific set of facts, where the calculation of damage to the value of an investment with different levels of ownership may be complex. This provision sets out unequivocally the parties' intention that compensation in such circumstances should be an ‘equitable compensation’.*

[...]

*This reference to ‘investment’ is not phrased to exclude the assets of the company, or to limit itself to ownership of the shares. Rather, it requires a tribunal to take a holistic view of the investor's “investment” (looking at both the shareholding and the underlying assets) in determining what is required in order to compensate for damage which has been suffered by the investor.*

[...]

*Accordingly, Article 5(3) does not, as the Respondent presents it, extend the availability of compensation for expropriation to circumstances where it would otherwise not apply. It is taking a ‘belt and braces’ approach to the compensation mechanism for expropriation, reflecting the parties' concerns to ensure that investors are fully compensated for expropriatory action and specifically addressing a common structure of investment.”<sup>183</sup>*

174. The Claimant also argues that the inclusion of Article 5(3) in the Treaty is “for the avoidance of doubt”.<sup>184</sup> In this respect, the Claimant argues as follows:

*“Article 5(3) makes clear that compensating the nationalised domestic entity for the assets taken away may not be sufficient for the BIT – it is also necessary to make sure that such compensation was equitable compensation to the owners of the shares. The question as to whether the owners of those shares are the companies or entities which are registered holders of such shares, or holding companies which indirectly own shares through subsidiaries is not addressed by Article 5(3). Thus, if [...] it is held that investments made through subsidiaries are no less entitled to treaty protection, Article 5(3) would still be relevant to ensure that in the event of nationalisation by expropriation of the assets of the domestic company, the ‘owners*

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<sup>182</sup> See Reply, paras 229-253.

<sup>183</sup> Reply, paras 239-246.

<sup>184</sup> Reply, paras 254-262.



*of the shares' (i.e. whether it is the immediate owners or the ultimate owners) are guaranteed 'fair and equitable compensation'. Article 5(3) precludes a contention that no such compensation is payable since it is the assets of the domestic company, and not its shares (constituting the 'investment'), that are the subject of expropriatory measures. The contention that the Claimant's construction would render Article 5(3) unnecessary or redundant is plainly incorrect."*<sup>185</sup>

175. Second, the Claimant submits as follows:

*"The fact that provisions equivalent to the Expropriation Provision [i.e. Article 5(3) of the Treaty] are included 'for the avoidance of doubt' both in treaties (i) that are silent on whether both direct and indirect investments are included, and (ii) that expressly include both direct and indirect investments in their definition of investments, undermines the Respondent's argument that such a provision includes indirect investments, where they are not covered in the definition of 'investment'.*

*The existence of such treaties directly contradicts the Respondent's claim that the purpose of the Expropriation Provision can only be to incorporate protections for certain types of indirect investments where there would otherwise be none. Indeed, the clarificatory nature of a provision similar to the Expropriation Provision is accepted in decisions that the Respondent purports to rely on."*<sup>186</sup>

176. Third, the Claimant submits that *"tribunals which have considered the impact of equivalent provisions on definitions of investment which are silent on the question of whether indirect investments are covered, have rejected similar arguments to those of the Respondent. By contrast, no tribunal has accepted the position for which the Respondent argues."*<sup>187</sup>

### **3. The Tribunal's Decision**

177. It is not necessary for the Tribunal to decide the issue of Indirect Investment in light of the Tribunal's conclusions below regarding the merits of the Claimant's case concerning the adoption of Government Regulation No 24 of 2012 and the alleged failure to resolve the overlapping licences.

178. Nevertheless, the Tribunal feels obliged to state that it was not persuaded by the Respondent's objection.

179. There is a consistent jurisprudence which supports the conclusion that investment treaties, including this BIT, that define investments broadly, protect indirect investments as well.

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<sup>185</sup> Reply, para. 255.

<sup>186</sup> Reply, paras 261-262.

<sup>187</sup> Reply, para. 228(iii).

This is true regardless of whether there is an explicit reference to direct or indirect investments in the treaty.<sup>188</sup> The reasoning of the tribunal in the *Venezuela Holdings B.V.* case is also apposite for this case:

*“The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes ‘every kind of assets’ and enumerates specific categories of investments as examples. One of those categories consists of ‘shares, bonds or other kinds of interests in companies and joint ventures’. The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments. Investments as defined in Article 1 could be direct or indirect as recognized in similar cases by ICSID Tribunals.”*<sup>189</sup>

180. It is true that Article 5 of the BIT may highlight various questions regarding the interpretation of the BIT. However, the Tribunal believes that if the Contracting Parties wanted to exclude indirect investments, in light of the BIT’s broad definition of investments, the Contracting Parties needed to say it clearly in the Treaty.<sup>190</sup>

## F. Merits

181. The Tribunal now turns to consider the various ways in which the Claimant seeks to put its case of treaty violation with regard to the two elements of its case that survive the successful temporal challenge.

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<sup>188</sup> See for example, **Exhibit CL-11**, Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated August 3, 2004, para. 137; **Exhibit CL-12**, Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction dated July 6, 2007, paras 123-124; **Exhibit CL-13**, Venezuela Holdings B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated June 10, 2010, para. 165; **Exhibit CL-14**, Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, dated December 30, 2010, paras 151 – 153; **Exhibit CL-15**, Guaracachi & Rurelec v. Bolivia, PCA Case No. 2011-17, Award paras 352-356; **Exhibit CL-18**, Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, at para. 111).

<sup>189</sup> **Exhibit CL-13**, Venezuela Holdings B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated June 10, 2010, para. 165.

<sup>190</sup> Professor Sornarajah disagrees with this view. In his view, indirect investments are protected only if the treaty expressly states that they are.

182. As explained above, the Claimant refers to the following alleged acts which falls outside the scope of the Temporal Objection and therefore within the Tribunal's jurisdiction:
- (i) The publication in May 2011 by the MEMR of its national reconciliation of data on IUPs,<sup>191</sup>
  - (ii) The exclusion of SRI Mining Concession from the Clean and Clear Lists on 30 June 2011,<sup>192</sup>
  - (iii) The publication by the Respondent of various maps in 2011– 2014;
  - (iv) The alleged issue of the overlapping licences of PT Kodio Multicom and PT MBM in 2014 and PT PBU in 2016; and
  - (v) Government Regulation No 24 of 2012.
183. At the hearing, the Claimant's Counsel clarified that the first four acts can be described as one alleged impugned measure: the alleged failure to resolve the overlapping licences and boundary issues.<sup>193</sup>
184. Therefore, the Tribunal now turns to consider the various ways the Claimant puts its case of treaty breach in relation to the two sole surviving elements of its case after determination of the temporal issue above, namely the (i) alleged failure to resolve the overlapping boundaries and licences, and (ii) the divestiture requirement of Government Regulation No 24 of 2012.
185. The Claimant alleges that the Respondent in violation of its obligations under the Treaty:
- (I) Failed to provide the Claimant's investment with fair and equitable treatment ("FET");
  - (II) Failed to provide the Claimant's investment with full protection and security;
  - (III) Violated the prohibition against unreasonable or discriminatory measures;
  - (IV) Expropriated the Claimant's investment without compensation; and
  - (V) Failed to allow the free transfer of funds related to the Claimant's investment.

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<sup>191</sup> Reply, para. 293.

<sup>192</sup> Reply, para. 294.

<sup>193</sup> Hearing Transcript of 14 August, pp. 1058-1059, p. 1101 (see, e.g., the Claimant's Counsel's statement that the "*failure to resolve the boundary or resolving it in a manner that my permit becomes worthless is the measure.*")

## I. Fair and Equitable Treatment

186. Article 3(2) of the Treaty provides as follows:

*“Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.”*

187. Article 4(1) of the Treaty stipulates as follows:

*“Investments made by investors of either Contracting Party in the territory of the other Contracting Party, shall receive treatment which is fair and equitable and not less favourable than that accorded to investments made by investors of any third State.”*

### 1. Claimant’s Position

188. The Claimant argues that the FET standard is not limited to the famous formula of the *Neer* case of 1926 and the Tribunal should not rely on it.<sup>194</sup>

189. Based on various case-law, the Claimant submits that the FET standard today comprises a set of core investment protections/requirements, including: (1) the protection of the investor’s legitimate and reasonable expectations; (2) the protection against arbitrariness or discrimination; (3) requiring the host state to act transparently and consistently; (4) requiring the host state to act in good faith; (5) due process and procedural propriety; (6) requiring the host state to act proportionally in its dealings with foreign investors.

190. The Claimant submits that the Respondent has violated each of the components of the Treaty’s FET standard.

191. First, the Claimant argues that the Respondent breached the FET standard by violating the Claimant’s legitimate expectations.

192. The Claimant argues that it had the following legitimate expectations:

*“(i) Since the Production IUP was granted by a legal decree issued by the Head of the Regent of [East Barito] Regency, who was conferred autonomous power under the laws in force in Indonesia at the material time, to grant mining licenses, and who at the time of grant of the mining license issued a map which formed an integral part of the legal decree, confirming that the area for which the mining rights were granted fell squarely within [East Barito] Regency, the Production IUP [No. 569 of 2009] was a valid mining license.*

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<sup>194</sup> Reply, paras 301-303.

*(ii) SRI had the exclusive right to undertake mining of coal for earning revenues for a thirty-year term, including two renewals liable to be granted in ordinary course, i.e. for a duration of ten 10 years each.*

*(iii) All authorities in Indonesia performed their functions in tandem with one another and would honour the rights granted under a legal decree issued by the Head of a Regency.*

*(iv) The boundaries of all regencies and provinces within the State would be certain, and the map attached with the Production IUP would be uniform and consistent with all other maps maintained by the Respondent.*

*(v) The Claimant would not be required to divest any shareholding during the initial term of the lease and/or during the period of renewal, as SRI was compliant with the divestment requirements in force at the time of Claimant's investment in SRI.*

*(vi) The Respondent would uphold the assurances and the guarantees under the 2007 Investment Law, amongst others, of legal certainty, business certainty and business safety.*"<sup>195</sup>

193. In addition, based on Production IUP No. 569 of 2009 and the applicable legal framework, the Claimant emphasises that it was assured that:

*"(i) Production IUP No. 569 of 2009 was granted by the competent authority (the Bupati of East Barito) since the Mining Permit Area sought was within the East Barito Regency;*

*(ii) the Bupati of East Barito was the competent authority to determine the applicable regional spatial layout plan, and also authorised to issue the map attached to Production IUP No. 569 of 2009;*

*(iii) the size and boundaries of the Mining Permit Area, as depicted in the map attached to Production IUP No. 569 of 2009 was determined by the Central Government in coordination with the Bupati of East Barito, managed by the Minister for Energy and Mineral Resources;*

*(iv) between the regional administrations, there was joint management of licenses in the use of natural resources.*"<sup>196</sup>

194. The Claimant submits that the Respondent violated the Claimant's legitimate expectations as follows:

*"[...] the authorities in Indonesia, on account of their systemic failure, have defeated the rights that were granted under the legal decree and made the Production IUP wholly unworkable. Subsequent to its investment, the Claimant has*

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<sup>195</sup> SOC, paras 158; Reply, paras 319-331.

<sup>196</sup> Reply, para. 119.

*encountered inconsistent positions adopted by various instrumentalities of the Respondent, wherein it has been claimed that boundaries of various regencies including Barito Timur Regency and the provinces have, to date, not yet been determined, leading to conflicting maps maintained by various authorities of the Respondent, while the mining authorities have knowingly issued multiple mining licenses in respect of the SRI mining concession area, leading to the Production IUP held by SRI being rendered infructuous. A complete lack of coordination exists between the central and regional governments, plagued by utter confusion of authority between the different levels of government.*

*Further, by introducing [Government Regulation No 24 of 2012] to increase the divestment requirement for foreign shareholding from 20% to 51%, the Respondent has breached the Claimant's reasonable and legitimate expectation that the policy in force at the time when the Claimant invested, of 20% Indonesian participation, would remain consistent, and that the Respondent would not introduce laws impairing the Claimant's investment, such that its shareholding would become liable to be substantially reduced to 42.87% from 70%.”<sup>197</sup>*

195. In addition, the Claimant submits that the Respondent has violated the specific assurances and guarantees provided under the 2007 Investment Law by failing:

*“(i) to ensure certainty of the mining rights granted to SRI under the Production IUP No. 569 of 2009;  
(ii) to ensure certainty of boundaries of its regencies and provinces;  
(iii) to ensure safety of the Claimant's interests in the mining business of SRI;  
(iv) to ensure certainty of the divestiture requirement for foreign participation;  
(v) to ensure a stable legal and business framework and regime, such that would safeguard and protect the Claimant's investment.”<sup>198</sup>*

196. Second, the Claimant argues that by issuing multiple overlapping licences in respect of SRI's mining concession area without any legal basis, the Respondent has breached the protection against arbitrariness and discrimination.<sup>199</sup>

197. Furthermore, according to the Claimant, the omission of SRI's Production IUP No. 569 of 2009 from the Clean and Clear Lists published in 2011 violated the protection against arbitrariness and discrimination. In particular, the Claimant elaborates as follows:

*“[...] the only mining permit that pre-dates SRI's mining license, is the alleged Exploration KP No. 167 of 2006, purportedly granted to PT-BAB on 18 March 2006 by the Regent of South Barito. [...] No material has been furnished by the Respondent to the Claimant, or available on the record of this arbitration, from the Respondent, to establish that a valid mining permit in favour of PT-BAB was*

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<sup>197</sup> SOC, paras 159-160.

<sup>198</sup> Reply, paras 332-334; SOC, paras 161-162.

<sup>199</sup> SOC, para. 164.

*granted, and/or that a valid mining permit in favour of PT-BAB was in force on 31 December 2009, when the SRI mining concession was granted. All other allegedly overlapping mining licenses were admittedly granted subsequent to SRI's Exploration KP No. 185 of 2006. The Respondent admits to uniformly applying an alleged 'first come first served' principle for resolving conflicts in cases of overlapping license areas, but fails to explain the basis on which the Respondent failed to reconcile the SRI coal mining concession with other allegedly overlapping mining concessions. [...]*

*When SRI raised the issue of overlapping licenses after it discovered the same in or about April 2011, it is evident that this principle of 'first come first served' was not applied to SRI, and the Respondent maintains that SRI's mining permit is impaired even by subsequently granted mining permits. The non-application of the rules, which the Respondent claims were otherwise followed, is an arbitrary and discriminatory measure which is a clear violation of the FET standard imposed by the BIT.*"<sup>200</sup>

198. Furthermore, Claimant argues that the arbitrary and discriminatory behaviour of the Respondent is clear from the fact that the PT Geo Explo exploration licence No 472 of 2009 was featured in the fifth Clean and Clear List despite the grant of a mining licence after SRI.<sup>201</sup>

199. Finally, in the context of the Respondent's alleged arbitrary and discriminatory behaviour, the Claimant submits that when the two entities which had allegedly overlapping licences in SRI's mining concession area, PT Kodio Multicom and PT MBM, were issued Production IUPs on 11 March 2014, "*SRI already had a valid production license for the mining area and [...] requested the instrumentalities of the Respondent to resolve the issue of non-implementation of license.*"<sup>202</sup>

200. Third, the Claimant submits that the following acts have breached the requirement of transparency and consistency:

*"(i) The Respondent issued overlapping licenses in respect of the area which is squarely within SRI's Production IUP, without the knowledge of the Claimant;*

*(ii) The Respondent failed to notify disputed boundaries of regencies and provinces in Indonesia;*

*(iii) The Respondent increased the divestment requirement by the foreign shareholder after the Claimant's acquisition of 70% shareholding in SRI;*

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<sup>200</sup> Reply, paras 336-337. See also SOC, para. 165.

<sup>201</sup> Reply, para. 338.

<sup>202</sup> Reply, para. 338.

(iv) *The Respondent did not inform the Claimant about the process being followed for issuance of the Clean and Clear list, and the reason for non-inclusion of SRI's Production IUP from the Clean and Clear list.*

(v) *The maps issued by the Respondent showed inconsistent positions with regard to the area under the Production IUP held by SRI.*

(vi) *As seen from the various maps obtained by the Claimant from different authorities, it is clear that while certain divisions of the Respondent have updated their record to reflect the correct status of SRI's mining licence as a Production IUP, other divisions continue to reflect SRI's mining licence at the Exploration stage.*"<sup>203</sup>

201. Fourth, the Claimant submits that the Respondent has not acted in good faith by legislating the 2007 Investment Law, which *inter alia* guaranteed legal certainty, on the one hand, and by introducing Government Regulation No 24 of 2012, which increased the divestiture requirements for foreign investors, on the other hand.<sup>204</sup> In addition, the Claimant argues that the facts that constitute an arbitrary and discriminatory treatment equally constitute a breach of the good faith principle.<sup>205</sup>
202. Fifth, the Claimant argues that the Respondent violated the requirement of due process and procedural propriety "*by failing to honour the legal decree issued by the Head of the Regent of East Barito Regency, leading to non-implementation of the Production IUP No. 569 of 2009*".<sup>206</sup> As with the good faith requirement, the Claimant argues that the same facts that constitute an arbitrary and discriminatory treatment, equally constitute a violation of procedural propriety and due process standards.<sup>207</sup>
203. Sixth, the Claimant submits that the cumulative actions of the Respondent have breached the proportionality principle of the FET standard.<sup>208</sup>

## **2. Respondent's Position**

204. The Respondent denies that it has breached the FET standard under the Treaty.

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<sup>203</sup> SOC, para. 166. Reply, paras 354-356.

<sup>204</sup> SOC, para. 167; Reply, para. 344.

<sup>205</sup> Reply, para. 345.

<sup>206</sup> SOC, para. 168.

<sup>207</sup> Reply, para. 348.

<sup>208</sup> Reply, para. 353.



205. The Respondent submits that the FET standard under Article 3(2) of the Treaty is intended to reflect the customary international law minimum standard of treatment.<sup>209</sup> According to the Respondent, despite the inconsistent arbitral awards practice on the precise content of the FET standard, it *“is clear is that the award of the United States – Mexican Claims Commission in the Neer claim remains influential in identifying what is required of States under that standard.”*<sup>210</sup>
206. The Respondent submits that in determining claims for breach of the FET standard, the Tribunal should bear in mind that BITs are not *“insurance policies”* for bad business decisions and investors must take the host State as they find it. In addition, the Tribunal has to take into account all the relevant facts and circumstances about the host state and the investor’s conduct, including the requirement for investors to carry out due diligence before making an investment decision.<sup>211</sup>
207. In this respect, the Respondent submits as follows:
- “Indonesia went through a reformation of its political system and economy following the 1998 economic crisis and the fall of former President Suharto, which resulted in rapid decentralisation and implementation of regional autonomy. Regencies became responsible for overseeing and regulating areas of activity which had been previously centralised and with which they had no experience. The implementation of regional autonomy had a particular impact on the mining industry and this is the context in which IMFA chose to invest.”*<sup>212</sup>
208. The Respondent rejects the Claimant’s arguments regarding the alleged breaches of the different components of the FET standard.
209. First, in respect of the Claimant’s legitimate expectations argument, the Respondent submits that a legitimate expectation must be based on a specific commitment made by the host State that is reasonable in light of the circumstances and relied upon by the investor when deciding to invest or making the investment.<sup>213</sup>
210. According to the Respondent, the Claimant cannot have any of the legitimate expectations which it claims to have because it failed to undertake the due diligence expected of a

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<sup>209</sup> SOD, paras 23.3-23.4. Rejoinder, paras 18.4-18.6.

<sup>210</sup> SOD, para. 23.3. See also Rejoinder, paras 18.4-18.10 (referring to *inter alia* **Exhibit RL-52**, Glamis Gold Ltd v. United States (Award of 8 June 2009), para. 616).

<sup>211</sup> Rejoinder, paras 18.11-18.32.

<sup>212</sup> Rejoinder, para. 18.19.

<sup>213</sup> Rejoinder, paras 18.51-18.52.

reasonable prudent investor.<sup>214</sup> Had the Claimant made any enquiries prior to its investment at the Ministry of Forestry or MEMR, the Regency Forestry Office or neighbouring Regencies, it would have discovered the boundary issues with SRI's Production IUP.<sup>215</sup> In particular the Respondent submits as follows:

*"The Claimant's failure to undertake proper due diligence is inexplicable given the notorious nature of the overlapping mining licences issue, the difficulties in obtaining a Borrow Use Permit which was required to undertake mining activities in production forests, the well-known potential for regional boundary disputes, the bureaucratic permitting process and the lack of infrastructure and difficulties in developing that infrastructure."*<sup>216</sup>

211. The Respondent denies the Claimant's argument with regard to its legitimate expectation in the context of Government Regulation No 24 of 2012. The Respondent submits that *"it is clear that the protection of legitimate expectations does not amount to an acceptance by the host State that it must refrain from any future legislative amendments."*<sup>217</sup>

212. Moreover, the Respondent states the divestiture requirements under Government Regulation No 24 of 2012 do not apply until five years after coal production has commenced.<sup>218</sup> According to the Respondent, as the Claimant's coal production has not started and the grant of the SRI Mining Concession was just one step in a long process, there were significant legal requirements and practical obstacles to overcome before SRI could undertake any mining activity. Therefore, Government Regulation No 24 of 2012 has no application to the Claimant's claim.<sup>219</sup> In addition, the Respondent submits as follows:

*"[e]ven if the divestiture requirements under Government Regulation No. 24 of 2012 were to apply, those requirements would not apply in full immediately. The percentage of shares which SRI's direct shareholder would have to divest would increase gradually over a five-year period [...]. SRI's direct shareholder would receive compensation for any shares it was required to divest."*<sup>220</sup>

213. The Respondent also submits that the Claimant could not have had any legitimate expectations in respect of 2007 Investment Law because the Claimant was not an investor

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<sup>214</sup> Rejoinder, para. 18.53; SOD, paras 24.3-24.15.

<sup>215</sup> Rejoinder, para. 18.53. See Expert Report of Mr Ricki Stuart Beckmann, pp. 93-105.

<sup>216</sup> Rejoinder, para. 18.37.

<sup>217</sup> SOD, para 24.8.

<sup>218</sup> SOD, paras 11 and 24.8.

<sup>219</sup> SOD, para 24.8.

<sup>220</sup> SOD, para. 24.8.

for the purposes of that law and therefore had no protections under it.<sup>221</sup> In addition, the Respondent states that it does not admit that the Claimant relied on a presumption that Indonesian law would not change.<sup>222</sup>

214. According to the Respondent:

*“Contrary to the Claimant’s allegations, the Claimant’s only legitimate expectation should have been that it would need to satisfy the requirements of all relevant departments and levels of government before its project could proceed. The Claimant has failed to provide particulars of its attempts to satisfy these requirements, which naturally exist in a major project of this type and alleged scale.”<sup>223</sup>*

215. Second, the Respondent denies that it has accorded the Claimant treatment which is arbitrary or discriminatory either generally or with particular respect to the issuance of Clean and Clear lists.<sup>224</sup> According to the Respondent:

*“The SRI Concession was not on the Clean and Clear List because there was an overlap with an administrative area of another Regency or Province and there were also overlapping licences.”<sup>225</sup>*

216. In addition, the Respondent submits as follows:

*“In any event the first come first served principle is of limited assistance to SRI and IMFA as SRI has not held a continuous mining licence over the relevant area, as:*  
*(A) Exploration KP No 135 of 2008 expired on 28 March 2009.*  
*(B) Exploration IUP No 463 of 2009 was only issued on 17 October 2009 and only valid from 16 June 2009.*

*Due to the interregnum in SRI’s mining licences from 28 March 2009 until 16 June 2009 it would not be ‘first come first served’ in relation to licences issued before 16 June 2009 over the area covered by Exploration IUP No 463 of 2009. The licences issued to PT BAB, PT Geo Explo, PT Kodio Multicom, PT MBM and PT PBU were validly issued prior to 16 June 2009 and covered some of the same area that had been covered by Exploration KP No 135 of 2008 and was subsequently covered by Exploration IUP No 463 of 2009.”<sup>226</sup>*

217. Moreover, the Respondent argues as follows:

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<sup>221</sup> SOD, para. 24.9.

<sup>222</sup> SOD, para. 24.9.

<sup>223</sup> SOD, para. 24.15.

<sup>224</sup> Rejoinder, paras 18.55-18.58. See also the text accompanied by *infra* note 235.

<sup>225</sup> Respondent’s Post-Hearing Brief, para. 15.1.

<sup>226</sup> Rejoinder, paras. 11.8-11.9.

*“The Respondent’s case is that it has not treated the Claimant’s investment any differently to other IUPs in East Barito or elsewhere in Indonesia with similar problems. This is supported by the statistics set out in paragraph 10.10 of the Defence. In addition, [...] the principle of “first come first served” was not the only principle applied to the resolution of overlapping IUPs. [...] the “first come first served” principle was not always applied: (1) where the overlap was because of an administrative boundary issue; or (2) where only a small part of the mining area overlapped with other mining areas.”<sup>227</sup>*

218. In addition, the Respondent argues, the fact that the exploration licences of PT Kodio Multicom and PT MBM were upgraded to Production IUPs on 11 March 2014 did not create any additional overlapping areas because their exploration licences existed since 23 May 2008.<sup>228</sup>

219. Finally, in relation to the Clean and Clear list, the Respondent submits as follows:

*“The material criteria which prevented the SRI Concession from appearing on the Clean and Clear List have not changed throughout the Clean and Clear process and can now be found in Article 5(2)(b) of MEMR Regulation 43 of 2015.*

*The licence issued to PT Geo Explo was included on the 5th iteration of the Clear and Clean List but later had its Clear and Clean status revoked due to overlapping licenses. It was not uncommon for the MEMR to re-evaluate the Clear and Clean status if previously unidentified defects or problems with that IUP came to its attention.*

*The overlapping licenses were also validly issued but none of the still overlapping licenses have been granted Clear and Clean status, including the one issued to PT BAB which was prior in time to the SRI Concession. Under the Old Mining Law and New Mining Law, Regents could only issue mining concessions within the territory of the Regency. The Regents that issued the overlapping licenses considered that the licenses issued to PT BAB, PT Geo Explo, PT Kodio Multicom, PT MBM and PT PBU were issued within the administrative territory of the respective Regencies of South Barito (in relation to PT BAB and PT Geo Explo) and Tabalong (in respect of PT Kodio Multicom, PT MBM and PT PBU). The BIG basic map (as used by MEMR) at the time showed that these licenses were within the administrative territories of those Regencies, except for a slight incursion of PT Geo Explo into the Regency of Tabalong.*

*These licence holders applied to the Regent for a KP and then IUP over an area that was in territory recognized by the Central Government as being within that Regency, unlike SRI. Until the respective boundaries are determined by the Minister for Internal Affairs and this results in the areas of the licenses falling outside the*

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<sup>227</sup> SOD, para. 24.17 and Rejoinder Appendix 2, para. 164. See also Rejoinder, para. 11.7.

<sup>228</sup> SOD, paras. 13.13–13.14. Rejoinder, para 18.56.

*respective Regency boundary, the Tribunal cannot declare that the licenses have been invalidly issued. This is acknowledged by the Claimant. Equally the Respondent has not argued that the SRI Concession was invalidly issued, even though only the Regent of East Barito considered that the entire area of the SRI Concession fell within East Barito Regency.*

*A KP holder / IUP holder is meant to hold a continuous mining licence over the relevant area (less reduction or relinquishment). This can be seen in the requirement that a KP or IUP holder has to submit its application for extension / upgrading of its licence prior to the expiration of the KP or the IUP. Only a KP holder that had been issued one category of KP could apply for the next, so for example a KP holder that had a KP for exploration could apply for a KP for exploitation.*

*Under the Old Mining Law, if an exploration KP licence holder applies for an extension prior to its expiry but has not received its decision the holder is allowed to continue mining exploration for a maximum period of one year. The Claimant relies on the alleged application by SRI for a renewal of Exploration KP No 135 of 2008 on 22 December 2008. The Claimant has not produced this application (or indeed any of the applications filed by SRI) and for the reasons set out in the Rejoinder it is improbable that such an application was made on that date given that SRI applied for an upgrade of its Exploration KP on 10 November 2008 and the correspondence from the Regent on 11 April 2009.*

[...]

*The Claimant has not filed any evidence to support its assertion that its licence should be preferred because of 'first come first served' nor has it filed any evidence from any Indonesian lawyer or of Indonesian law that it should be on the Clean and Clear List. This is not surprising given that the SRI Concession had both an overlap with an administrative area of another Regency or Province (on the basis of the recognized temporary boundary) and overlapping licenses."<sup>229</sup>*

220. Third, the Respondent denies that it has failed to act with transparency and consistency. In response to the Claimant's specific claims in that regard, the Respondent submits as follows:

(i) As the overlapping licences were issued before the date of the purported investment, had the Claimant had done proper due diligence, the Claimant could have discovered that SRI Mining Concession was impaired.<sup>230</sup> Furthermore, as the issuance of overlapping

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<sup>229</sup> Respondent's Post-Hearing Brief, paras 15.7-15.11 and 15.13.

<sup>230</sup> SOD, para. 24.20.

licences predated the Claimant's purported investment, this conduct could not be considered a breach of any duties of transparency and consistency.<sup>231</sup>

(ii) Similarly, had the Claimant done proper due diligence, the Claimant could have discovered the uncertainties and disagreements about the boundaries of the regencies and that SRI Mining Concession appears to cover areas outside East Barito.<sup>232</sup>

(iii) Regarding Government Regulation No 24 of 2012, as explained above in the context of legitimate expectations, it has no application to the Claimant's claim.<sup>233</sup> In addition, as explained above, even if the divestiture requirements were to apply, the percentage of shares which SRI's direct shareholder would have to divest would increase gradually over a five-year period and SRI's direct shareholder would receive compensation for any shares it was required to divest.<sup>234</sup>

(iv) Concerning the Claimant's argument regarding the Clean and Clear list procedure, the Respondent submits as follows:

*“(A) The Clean and Clear list procedure has been the subject of public announcements and extensive discussion with the industry. [...]*

*(B) The criteria for inclusion on the Clean and Clear list have been published since 2011 [...] It is evident from those criteria why SRI's Production IUP No 569 of 2009 is not included.*

*(C) IUP holders whose licences were not listed as Clean and Clear were advised to contact the issuer of the IUP about their non-inclusion [...] There is nothing in the Statement of Claim to suggest that SRI or IMFA did this.”<sup>235</sup>*

Moreover, the Respondent submits as follows:

*“SRI's Concession is not on the Clean and Clear list because, it is impaired by overlapping licences and boundary problems and as such is not Clean and Clear. These problems are insuperable because the overlapping licences were issued by other Regencies and those licences were issued within areas recognized by the Central Government and Provincial Governments as within those other Regencies. The East Barito Regent's mistake – it is only the East Barito Regent who thought*

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<sup>231</sup> SOD, para. 24.20.

<sup>232</sup> SOD, para. 24.21.

<sup>233</sup> SOD, para. 24.22.

<sup>234</sup> SOD, para. 24.22.

<sup>235</sup> SOD, para. 24.23.

*that SRI's concession was within East Barito – cannot lead to licence holders in other Regencies who were duly granted licenses, losing them.*"<sup>236</sup>

(v) Regarding the Claimant's argument concerning the maps issued by the Respondent which showed inconsistent positions with regard to the area under the Production IUP held by SRI, the Respondent submits that the Claimant failed to make proper due diligence. Such proper due diligence would have identified that there were unsettled boundaries, and that the SRI Mining Concession covers areas outside East Barito.<sup>237</sup>

(vi) Concerning the Claimant's submission regarding the inconsistency of the Respondent's divisions in showing the status of SRI's mining licence, the Respondent states that this was "*an administrative mistake, which has now been rectified. In any event, the mistake was inconsequential and caused no loss.*"<sup>238</sup>

221. Fourth, the Respondent denies that Government Regulation No 24 of 2012 was motivated by a lack of good faith.<sup>239</sup> In any event the Respondent accepts that it has a duty to perform its treaty obligations in good faith and argues that it has acted accordingly.<sup>240</sup>
222. Fifth, regarding the Claimant's argument concerning procedural propriety and the alleged failure to respect the "*legal decree issued by the Head of the Regent*", which is understood to be a reference to the Production IUP No 569 of 2009, the Respondent states that no particulars of this allegation have been provided and in any case it is without basis and is denied.<sup>241</sup>
223. Sixth, concerning the Claimant's submission on proportionality, the Respondent argues that it is still controversial whether the doctrine of proportionality is relevant in determining a breach of the FET standard.<sup>242</sup> In addition, the Respondent argues that the Claimant did not provide particulars of this allegation and in any case, it is "*wholly unmeritorious and should be rejected.*"<sup>243</sup>

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<sup>236</sup> Respondent's Post-Hearing Brief, para. 7.18.

<sup>237</sup> SOD, para. 24.24.

<sup>238</sup> SOD, para. 24.25.

<sup>239</sup> SOD, para. 24.27.

<sup>240</sup> Rejoinder, para. 18.58. See also SOD, para. 23.33.

<sup>241</sup> SOD, para. 24.29. See also Rejoinder, para. 18.59.

<sup>242</sup> Rejoinder, para. 18.60.

<sup>243</sup> Rejoinder, para. 18.60. SOD, para. 24.29.

### 3. The Tribunal's Decision

224. At the outset, it is important to elucidate briefly the meaning of the FET standard as expressed in the Treaty. The Parties dispute the exact content of the FET standard. While the Respondent argues that the FET standard in the Treaty is intended to reflect the customary international law minimum standard of treatment, the Claimant submits that FET standard is not limited to the customary international minimum standard of treatment or the formula of the *Neer* case of 1926.
225. The Tribunal notes that in contrast to NAFTA or other BITs the Treaty does not expressly limit the FET standard to treatment “*in accordance with international law*” or analogous formulations. Moreover, the Tribunal also notes that several non-NAFTA tribunals that interpreted clauses with such formulations concluded that these formulations should not be understood as limiting the FET to the customary minimum standard of treatment.<sup>244</sup>
226. As rightfully argued by the Claimant, the FET standard encompasses, *inter alia*, the following core principles: (1) the host state must respect the investor’s reasonable and legitimate expectations; (2) the host state cannot act in arbitrary or discriminatory; (3) the host state must act in a transparent and consistent manner; (4) the host state is obliged to act in good faith; (5) the host state must respect due process and procedural propriety; (6) the principle of proportionality.
227. Although the Respondent objects to the relevance of the proportionality principle to the FET standard, the Respondent states in relation to the other principles that it “*generally accepts that a number of tribunals have considered these obligations to form part of the FET standard, although the Claimant misstates the relevant standards which are to be applied.*”<sup>245</sup>
228. Regarding the issue of what state’s conduct constitutes a breach of the FET standard, while the Tribunal accepts that “*the state’s conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard*”<sup>246</sup> it is important to note that not every inconsistency or lack of transparency of the host state will automatically result in an FET breach. The Tribunal notes with agreement the conclusion reached by

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<sup>244</sup> E.g., **Exhibit CL-66**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, No. ARB/97/3, Award (ICSID 20 August 2007), para. 7.4.7; **Exhibit CL-58**, *Total S.A. v. Argentine Republic*, No. ARB/04/01, Decision on Liability (ICSID 27 December 2010), paras 125-127; **Exhibit RL-94**, *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016), paras 530-537.

<sup>245</sup> SOD, para. 23.12.

<sup>246</sup> **Exhibit RL-94**, *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016), para. 543.



the tribunal in the *Joseph C. Lemire v. Ukraine* case regarding the content of the FET:

*“The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following:*

- whether the State has failed to offer a stable and predictable legal framework;*
- whether the State made specific representations to the investor;*
- whether due process has been denied to the investor;*
- whether there is an absence of transparency in the legal procedure or in the actions of the State;*
- whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;*
- whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.*

*The evaluation of the State’s action cannot be performed in the abstract and only with a view of protecting the investor’s rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:*

- the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors;*
- the legitimate expectations of the investor, at the time he made his investment;*
- the investor’s duty to perform an investigation before effecting the investment;*
- the investor’s conduct in the host country.”<sup>247</sup>*

229. After the scope of the FET standard has been defined, the Tribunal can now turn to examine the Claimant’s arguments concerning the alleged breach of the FET clauses in the Treaty.
230. The Claimant’s main case throughout the proceedings has shifted considerably. At the outset, as expressed in the Claimant’s written pleadings, it was clear that the Claimant’s main case referred to the Respondent’s responsibility for the issuance of overlapping licences that arguably rendered the Claimant’s investment worthless. The claim regarding the divestiture requirement of Government Regulation No 24 of 2012 was secondary, at least in terms of the written arguments dedicated to this issue. Similarly, the Claimant

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<sup>247</sup> **Exhibit CL-41**, *Joseph Charles Lemire v. Ukraine*, No. ARB/06/18, Decision on Jurisdiction and Liability (ICSID 14 January 2010), paras 284-285.

dedicated only several paragraphs in its written pleadings to the issue of the Clean and Clear list process.

231. Nevertheless, at the main hearing, the Claimant's Counsel shifted the focus from the Respondent's responsibility for issuance of the overlapping licences to the Respondent's responsibility for the alleged failure to resolve the overlapping boundaries and licences, and the divestiture requirement of Government Regulation No 24 of 2012 – i.e. the two sole surviving elements of the Claimant's case in light of the Tribunal's determination on the Temporal Objection. This shift in focus by the Claimant, perhaps precipitated by the Claimant's Counsel anticipation of the Tribunal's ruling regarding the Temporal Objection, is understandable. However, this cannot change the fact that the Claimant's case as presented moved from the Claimant's main claim to the subsidiary elements of the Claimant's claim.
232. The Tribunal will first deal with the alleged failure to resolve the overlapping boundaries and licences and then deal with the issue of divestiture requirement of Government Regulation No 24 of 2012.
233. At the hearing, the Claimant made it clear that the measure that arguably violated the FET clause of the Treaty, after the Claimant made its investment, is the failure to resolve the overlapping boundaries and licences via the Clean and Clear procedure:

*“Mr Salve: [The] Temporal objection is that the measure is prior to the investment. The Clean and Clear list is not prior to the investment. An unresolved boundary is not the measure. The failure to resolve the boundary or resolving it in a manner that my permit becomes worthless is the measure.*

[...]

MR SPIGELMAN: *Some time ago you gave us a heading saying what is the measure. Do I take it that what you're saying is the measure is the failure to deal with the overlapping boundaries and, therefore, the overlapping permits? Is that your definition of the measure?*

MR SALVE: *Yes, sir. So the failure to – the measures are coming down in a Clean and Clear list starting the process – and I'm going to show that you document in a minute – ending up without resolving the boundary issue, enunciating a principle, first come first served, when you have confusion about the boundaries but completely failing to apply that principle, and resolve the issue of multiple permits within the Republic of Indonesia in a fair and equitable way. And you can have a measure which is continuing, or one time and then continues thereafter, or a*

*measure the effect of which is felt by further acts, and I just want to show that you very quickly.*"<sup>248</sup>

234. Before analysing the Claimant's argument regarding the impugned measure, *i.e.* the failure to solve the problem of conflicting boundaries and overlapping licences, the Tribunal makes a few preliminary observations.
235. First, the Claimant's argument, from the outset, is conceptually paradoxical to some extent. Had the Respondent not attempted to solve the alleged problem of overlapping licences, the Claimant would not be able to complain of any specific alleged measure that occurred after the investment was made. While it is possible to envisage a theoretical claim concerning an omission, *i.e.* a failure to solve the problem which manifested in the Respondent's lack of any attempt to rectify the problem, in such a case, the Tribunal would be more minded to accept the Respondent's argument that the failure to solve a problem is not a new act which gives rise to a new treaty claim but simply the lasting effect of the impugned measure that occurred before the Claimant's investment.
236. As explained above, the Tribunal notes the Respondent's Temporal Objection regarding the Clean and Clear process, *i.e.* that this process is not a new measure but simply the result or effect of the act which already completed before the Claimant's investment, *i.e.* the issuance of overlapping licences. However, as explained above, in light of the Tribunal's ruling in the following paragraphs, it is clear that there is no need to decide the issue of Respondent's jurisdictional objection regarding the alleged failure to solve the problem of overlapping boundaries and licences via the Clean and Clear process.
237. Second, the Claimant has repeatedly raised the issue of the "empty chair" and invited the Tribunal to draw adverse inferences against the Respondent:

*"The notable feature of this arbitration is the unfair conduct of the Respondent, including in the manner in which it has run this case.*

*The Claimant's case is based upon the records available to it, and on the basis of which the Claimant was able to establish that it made an investment and pursued its plan for mining operations to the extent it was possible. All the information – technical and commercial – that it gathered during this period has been fairly placed before the Tribunal.*

*The manner in which permits were issued to the Claimant and to certain other permit holders, the extent of knowledge of the Government, and the steps taken by the Government to resolve the issue of conflicting permits, were all matters within the knowledge of the Respondent, and had to be established by oral and documentary evidence.*

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<sup>248</sup> Hearing Transcript of 14 August, pp. 1058-1059, p. 1101.

*There can be little doubt that this was an attempt to keep the Tribunal in the dark, and to shift focus to the so-called insufficient due diligence and upon the inadequacy of information (alleged by the Respondent) available with the Claimant to establish its case to a higher degree – while the Respondent, who was admittedly possessed of all the information, chose to keep it back from the Tribunal.*

*[...] The Claimant invites the Tribunal to draw adverse inferences [...], on the premise that had a witness been produced, the evidence he would have given would have been against the Respondent.*"<sup>249</sup>

238. While it is true that the Tribunal had, at times, insufficient information regarding Indonesian domestic law concerning the process of solving the overlapping licences and the Respondent could have explained in more clarity the Clean and Clear process, it is not the Tribunal's role to intervene in the Respondent's choices regarding the ways it presented its case. Moreover, the Tribunal believes that part of the problem regarding the presentation of the Clean and Clear process stems from the fact that this process was only a small part of the Claimant's case during the written phase of the proceedings. As explained above, it was only at a later stage that the Claimant shifted the focus of its case from the issuance of overlapping licences to the Clean and Clear process.
239. Therefore, in contrast to the Claimant's argument, the Tribunal did not form the impression that the Respondent has sought to hide anything from the Tribunal. The Respondent was attempting to deal with the pleaded case it had to meet. Accordingly, the Tribunal declines the Claimant's request to draw adverse inferences against the Respondent.
240. Moreover, the Tribunal notes that the Claimant carries the burden of proof to establish treaty breaches. This point is important both considering the threshold of proving a breach of the FET standard and in light of the relatively insufficient information that the Tribunal has had regarding the Clean and Clear process and the process of solving the overlapping licences.
241. Having set out these preliminary observations, the Tribunal can now examine the Claimant's case regarding the failure to solve the problem of overlapping boundaries and licences via the Clean and Clear process.
242. In relation to the Respondent's alleged failure to solve overlapping boundaries and licences via the Clean and Clear process, the Claimant states that its complaint is against the Respondent:

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<sup>249</sup> Claimant's Post-Hearing Brief, paras 2-3, 5 and 7-8.

*“a) In refusing to address the issue of unsettled boundaries, in breach of the Respondent’s obligation to provide favourable conditions for investors and fair and equitable treatment to their investments, including legal certainty and full protection and security of the Claimant’s investment under the BIT, and also in breach of the Claimant’s legitimate expectations based on assurances within the Respondent’s legal framework.*

*b) In professing to apply the principle of ‘first come first served’ – as a fair measure to resolve overlapping permits, but then failing to apply it to the overlapping permits in SRI’s case, so as to bring the Claimant on to the Clean and Clear List.*

*c) In unfailingly breaching domestic legislation commanding settlement of boundaries.*

*d) In failing to restrain Regents of other Regencies from issuing permits AFTER the Claimant’s permit, in respect of the same geographical area, thereby promoting the breach of the ‘first come first served’ principle.”<sup>250</sup>*

243. The Claimant frames each of these complaints as breaches of the various core protections/principles of the FET (e.g. legitimate expectations, good faith etc.). However, based on the available evidentiary record and in light of the general observations stated above, the Tribunal does not find any merit in any of the Claimant’s complaints.
244. First, the Respondent is not bound by international law to reconcile its internal boundaries disputes or overlapping internal licences. The FET standard cannot be interpreted so widely to include such an obligation in this present case. The Tribunal agrees with the Respondent that in light of well-established case-law, *“the Claimant is required to take the Indonesian State as it finds it, to conduct a proper due diligence and it cannot treat the BIT as an insurance policy [...].”<sup>251</sup>*
245. Second, there is no explicit legal obligation in Indonesian domestic legislation which guarantees or warrants any timeframe within which overlapping boundaries are to be resolved.
246. Third, the Tribunal accepts the Respondent’s explanation that it was decided that the *“first come first served”* principle would only be applied by the regencies to resolve

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<sup>250</sup> Claimant’s Post-Hearing Brief, para. 78.

<sup>251</sup> Respondent’s Post-Hearing Brief, para. 1.5(c)(2) (referring to inter alia the following cases **Exhibit RL-45**, *Maffezini v. Spain* (ICSID Case No. ARB/97/7, Award of 13 November 2000), para. 64; **Exhibit RL-140**, *CMS v. Argentine Republic* (ICSID Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003), para. 29; **Exhibit CL-31**, *MTD Equity Sdn Bhd and MTD Chile SA v. Chile* (ICSID Case No. ARB/01/7, Award of 25 May 2004), para. 178; **Exhibit RL-58**, *Olguin v. Paraguay* (ICSID Case No. ARB/98/5, Final Award of 26 July 2001), para. 65(b).

overlapping licences after the regional boundary disputes had been determined.<sup>252</sup> The Tribunal cannot find any violation of the FET standard in such decision.

247. Fourth, the Tribunal did not find any evidence of *de jure* or *de facto* discrimination against the Claimant. The Respondent's explanation concerning the feature and subsequent removal of PT Geo Explo exploration licence No 472 of 2009 from the Clean and Clear list is reasonable. In any case, the mere fact that several licences were featured in one of the Clean and Clear lists is not sufficient evidence, *ipso facto*, to support the Claimant's argument of discriminatory treatment.
248. Similarly, the Tribunal accepts the Respondent's explanation concerning the upgrade of the exploration licences of PT Kodio Multicom and PT MBM to production IUPs in 2014 and that not having Clean and Clear status did not prevent the upgrade of IUPs.<sup>253</sup> Moreover, it is not clear whether the upgrade of the licences had any effect on the SRI Mining Concession. Such upgrade of other licences cannot in and of itself be considered a breach of the FET standard.
249. Finally, the Tribunal notes that the Claimant has not filed any evidence from any Indonesian lawyer which could support its argument that SRI Mining Concession should have been on the Clean and Clear list. Perhaps this might not be surprising in light of the fact that this argument throughout the written proceedings only played a minor part in the Claimant's case. In light of the available evidence, the Tribunal is convinced that SRI Mining Concession is not in the Clean and Clear list because it suffered from two lasting problems: an overlap with an administrative area of another Regency/Province and an overlap with other licences.
250. To conclude, even if the Tribunal were to accept that the Clean and Clear process could have been improved upon, the Tribunal did not find any evidence which suggests a sufficient severity which will justify a holding of a breach of the FET.<sup>254</sup>
251. The Tribunal now turns to the issue of the divestiture requirement of Government Regulation No 24 of 2012.

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<sup>252</sup> Respondent's Post-Hearing Brief, para. 15.4.

<sup>253</sup> The Respondent's Post-Hearing Brief, para. 3.9.

<sup>254</sup> Professor Sornarajah stresses that in his view, the problem of overlapping licences was already known when the Claimant made its investment, which could only be described as a useless investment in light of the overlapping licenses. Therefore, the Claimant could not have had any legitimate expectations in the context of the FET obligation and the Claimant cannot complain as to how the problem of overlapping licences was dealt with by the Respondent.

252. In the absence of a contractual stabilisation clause or an express commitment by the Respondent, the Claimant could not have had any legitimate expectations that the laws of Indonesia would remain exactly the same throughout the life of its investment. In addition, the Tribunal cannot accept the suggestion that the principle of good faith precludes the Respondent from amending its law.
253. In any event, the effect of Government Regulation No 24 of 2012 would not operate until after five years of coal production. Further, the regulation provided for a sliding scale for the next five years and therefore would not reach full effect for ten years and in any event compensation was provided for.
254. Therefore, the Tribunal concludes that the Respondent did not breach the FET standard as elaborated in Articles 3(2) and 4(1) of the Treaty.

## II. Full Protection and Security

255. Article 4(1) of the Treaty stipulates as follows:

*“Investments made by investors of either Contracting Party in the territory of the other Contracting Party, shall receive treatment which is fair and equitable and not less favourable than that accorded to investments made by investors of any third State.”*

256. Article 4(1) of the Indonesia-Germany BIT provides as follows:

*“Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party under the provisions of this Agreement.”*

### 1. Claimant’s Position

257. The Claimant argues that it is entitled to rely on Article 4(1) of the Indonesia-Germany BIT by virtue of Article (4)1 of the Treaty which includes a most-favoured-nation (“MFN”) provision.<sup>255</sup>
258. According to the Claimant, the full protection and security, as expressed in Article 4(1) of the Indonesia-Germany BIT, obliges the host State to provide a stable business environment and it is not limited to physical security.<sup>256</sup>

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<sup>255</sup> SOC, para 175.

<sup>256</sup> Reply, paras, 357-361 (relying *inter alia* on the following cases: **Exhibit CL-66**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, No. ARB/97/3, Award, para. 7.4.12 (ICSID 20 August 2007); **Exhibit CL-26**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, No. ARB/05/22, Award, para. 729 (ICSID 24 July 2008); **Exhibit CL-65**, *Renée Rose Levy de Levi v. the*

259. The Claimant submits that the Respondent has breached the full protection and security obligation by failing to provide for a stable legal, regulatory and business environment in contrast to assurances under the 2007 Investment Law.<sup>257</sup> Moreover, the Claimant argues that the Respondent has breached the full protection and security obligation by (i) “*failing to resolve the issue caused by the grant of overlapping concessions and through multiple definitions of boundaries in different*”;<sup>258</sup> (ii) Government Regulation No 24 of 2012;<sup>259</sup> (iii) “*the inadequate recording of the Production IUP of SRI*”;<sup>260</sup> (iv) “*selectively not resolving issues affecting SRI’s Production IUP No. 569 of 2009, while resolving the issues of other IUP holders who were enabled to feature in the Clean and Clear List, contrary to the Respondent’s own policy of ‘first come first served’*”.<sup>261</sup>
260. In addition, the Claimant argues that all the facts that constitute a breach of the FET standard equally result in a breach of the full protection and security obligation.<sup>262</sup>

## 2. Respondent’s Position

261. The Respondent argues that in contrast to freestanding or unconditional MFN provisions in other investment treaties, the MFN obligation in Article 4(1) of the Treaty is linked to the FET obligation and not to any other standard of protection such as full protection and security.<sup>263</sup>
262. Moreover, the Respondent submits that even if *arguendo* the Tribunal finds that the MFN clause is freestanding, the clause cannot be used to import any additional rights from other BITs beyond those right already contained in the Indonesia – India BIT.<sup>264</sup>
263. Furthermore, the Respondent submits that even if *arguendo* the Tribunal finds that the Claimant is entitled to rely on Article 4(1) of the Indonesia-Germany BIT, the full

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Republic of Peru, No. ARB/10/17, Award, para. 406; **Exhibit CL-62**, Azurix Corporation v. The Argentine Republic, No. ARB/01/12, Award, para. 408 (ICSID 14 July 2006)).

<sup>257</sup> SOC, para. 177.

<sup>258</sup> SOC, para. 177.

<sup>259</sup> SOC, para. 177; Reply, para. 361.

<sup>260</sup> SOC, para. 178.

<sup>261</sup> Reply, para. 362.

<sup>262</sup> Reply, para. 362.

<sup>263</sup> SOD, 25.1-25.2; Rejoinder, paras 19.3-19.4.

<sup>264</sup> Rejoinder, paras 19.6-19.12.



protection and security obligation does not go beyond an obligation to exercise due diligence in the provision of physical protection.<sup>265</sup>

264. Finally, the Respondent claims that the Claimant has failed to articulate precisely how the Respondent had breached that standard of treatment. In any event, the Respondent denies that it had breached the full protection and security obligation.<sup>266</sup>

### 3. The Tribunal's Decision

265. In order to rely on the full protection and security obligation as elaborated in Article 4(1) of the Indonesia-Germany BIT, the Claimant must convince the Tribunal of two arguments: (i) the Claimant can rely on the MFN clause in the Treaty to incorporate Article 4(1) of the Indonesia-Germany BIT to the Treaty and (ii) the Respondent has breached the full protection and security obligation.

266. Even if *arguendo* the Tribunal accepts that the Claimant can incorporate Article 4(1) of the Indonesia-Germany BIT into the Treaty, the Tribunal cannot accept the Claimant's claim regarding the alleged breach of the full protection and security obligation. It is sufficient to make the following short observations.

267. First, the standard of full protection and security requires the host state to exercise due diligence in the provision of physical protection to foreign investments. Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security. This point has been emphasised by various tribunals<sup>267</sup> and precisely elaborated by the tribunal in the *Crystallex International Corporation v. Venezuela* case:

*"The Parties have proposed two different interpretations of the 'full protection and security' provision in Article II(2) of the Treaty. The Claimant submits that 'full protection and security' extends to protection of legal security and the stability of the legal environment, whereas the Respondent contends that such standard should be limited to physical protection and security. The Tribunal is of the view that 'full protection and security' is a distinct treaty standard whose content is not to be equated to the minimum standard of treatment. However, the Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical*

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<sup>265</sup> Rejoinder, paras 19.13-19.17; SOD, paras 25.3-25.5

<sup>266</sup> Rejoinder, paras 19.13 & 19.17; SOD, paras 25.6-25.10.

<sup>267</sup> E.g. **Exhibit CL-25**, *Noble Ventures, Inc v. Romania* (ICSID Case No. ARB01/11, Award of 12 October 2005), para. 164; **Exhibit CL-37**, *Saluka Investments BV v. Czech Republic* (Partial Award of 17 March 2006), para. 484; **Exhibit CL-43**, *Rumeli v. Kazakhstan* (ICSID Case No. ARB05/16, Award of 29 July 2008), para. 668.

*protection and security. Such interpretation best accords with the ordinary meaning of the terms 'protection' and 'security'.*

*Furthermore, this interpretation is supported by a line of cases involving the same or a similar phrase. For example, the tribunal in Saluka noted that '[t]he practice of arbitral tribunals seems to indicate [...] that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force'. And the tribunal in Rumeli held that this standard of treatment 'obliges the State to provide a certain level of protection to foreign investment from physical damage'. Other arbitral decisions are to the same or similar effect. The Tribunal agrees with this line of cases.*

*The Tribunal is mindful that other investment tribunals have interpreted the 'full protection and security' standard more extensively so as to cover legal security and the protection of a stable legal framework. As already noted, the Tribunal is of the view that the more 'traditional' interpretation better accords with the ordinary meaning of the terms. Furthermore, as rightly observed by a number of previous decisions, a more extensive reading of the 'full protection and security' standard would result in an overlap with other treaty standards, notably FET, which in the Tribunal's mind would not comport with the 'effet utile' principle of interpretation. The Tribunal is thus unconvinced that it should depart from an interpretation of the 'full protection and security' standard limited to physical security."<sup>268</sup>*

268. Second, in relation to the two surviving claims of the Claimant, there is nothing to suggest that the Respondent has failed to protect the physical security of the Claimant's investment by failing to resolve the overlapping licences and by issuing Government Regulation No 24 of 2012.
269. Finally, even assuming *arguendo* that the full protection and security obligation extends to protection of legal security and the stability of the legal environment, in light of the Tribunal's finding on the Claimant's FET claim, it is clear that the alleged failure resolve the overlapping licences and Government Regulation No 24 of 2012 cannot be considered a Treaty breach. Indeed, when the Claimant's Counsel was asked directly by the Tribunal whether the full protection and security claim can stand if the Tribunal rejects the Claimant's FET claim, the Claimant's Counsel rightly responded in the negative.<sup>269</sup>

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<sup>268</sup> **Exhibit RL-94**, *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016), paras 632-634.

<sup>269</sup> Hearing Transcript of 14 August, p. 1137 ("PRESIDENT: unreasonable and discriminatory measures, does it add anything to the FET? MR SALVE: There are so many different ways of looking at it. PRESIDENT: Right. Can it exist without a finding of FET on the – MR SALVE: I don't think it's a standalone. FET itself has become such a large claim, and I have not taken up your time addressing you on minimum standards. PRESIDENT: And full protection and security? Same thing? MR SALVE: Yes. We have relied on the MFN for full protection and security. Their answer is it is there but you don't get the benefit of that clause. You have both points of view to deal with.")

270. Thus, the Tribunal has no hesitation in rejecting the Claimant's claim regarding the full protection and security obligation.

### III. Prohibition against Unreasonable or Discriminatory Measures

271. Article 3(2) of the Indonesia-Jordan BIT provides as follows:

*"Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use enjoyment or disposal thereof by those investors."*

#### 1. Claimant's Position

272. The Claimant argues that it is entitled to rely on Article 3(2) of the Indonesia-Jordan BIT as a result of the MFN provision in Article 4(1) of the Treaty.<sup>270</sup> According to the Claimant, Article 3(2) of the Indonesia-Jordan BIT "*prevents all types of discriminatory conduct and not simply discrimination on the basis of nationality.*"<sup>271</sup>

273. The Claimant submits that the Respondent has breached the non-discrimination requirement by "*selectively not resolving the issues affecting SRI's Production IUP, while resolving the issues of other IUP holders who are able to feature in the Clean and Clear List*".<sup>272</sup> This discriminatory conduct has led up to "*impairment of the Claimant's investment in Indonesia, since by not having the benefit of resolution and thereby being placed in the Clean and Clear List, the Claimant has been rendered unable to implement the Production IUP.*"<sup>273</sup>

274. The Claimant denies the Respondent's argument that Article 3(2) of the Indonesia-Jordan BIT imposes a higher threshold for establishing a breach than the threshold under Article 3(2) of the Treaty.<sup>274</sup> Nevertheless, even if Respondent's argument is correct, the Claimant submits that it has managed to meet the test suggested by the Respondent because "*the Claimant (1) holds a qualifying investment, (2) its operation, management, maintenance, use, enjoyment or disposal of that investment has been impaired since it*

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<sup>270</sup> SOC, paras 178-179.

<sup>271</sup> SOC, para. 180.

<sup>272</sup> SOC, para. 182.

<sup>273</sup> SOC, para. 182.

<sup>274</sup> Reply, para. 340.

*made its investment, and (3) such impairment has resulted from inter alia discriminatory measures on the part of the Respondent.*"<sup>275</sup>

## **2. Respondent's Position**

275. Based on the same analysis of Article 4(1) of the Treaty, which was elaborated in the context of the Claimant's attempt to import an obligation of full protection and security, the Respondent repeats its position that Article 4(1) does not give the Tribunal jurisdiction to import the non-impairment obligation contained in Article 3(2) of the Indonesia-Jordan BIT into the Treaty.<sup>276</sup>

276. Even if *arguendo* the Tribunal finds that the Claimant is entitled to rely on Article 3(2) of the Indonesia-Jordan BIT, the Respondent submits as follows:

*"[...] in order for the Claimant to establish a breach of Article 3(2) of the Indonesia-Jordan BIT, it would need to prove that: (1) it holds a qualifying investment, (2) its operation, management, maintenance, use, enjoyment or disposal of that investment has been impaired since it made its investment, and (3) such impairment resulted from discriminatory measures on the part of the Respondent. It therefore imposes a higher threshold for establishing a breach than the already high threshold under the fair and equitable treatment standard in Article 3(2) of the Indonesia-India BIT."*<sup>277</sup>

277. The Respondent submits that the Claimant has failed to satisfy these conditions. In particular, the Claimant has not pleaded any facts which could amount to discrimination in the relevant sense or at all. In addition, the Respondent denies that the Claimant's operation, management, maintenance, use, enjoyment and/or disposal of its alleged indirect investment in SRI and/or the SRI Mining Concession have been impaired due to two main reasons. First, SRI's ability to exploit the Production IUP was already impaired at the date the Claimant acquired its alleged indirect investment. Second, there were still many legal requirements and practical obstacles to overcome before SRI could undertake any mining activity.<sup>278</sup>

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<sup>275</sup> Reply, para. 341.

<sup>276</sup> SOD, paras 26.1-26.2.

<sup>277</sup> SOD, para. 26.3.

<sup>278</sup> SOD, para. 26.4.

### 3. The Tribunal's Decision

278. The Claimant argues that the Respondent, by failing to resolve the overlapping licences via the Clean and Clear procedure, breached the prohibition against unreasonable or discriminatory measures as stipulated in Article 3(2) of the Indonesia-Jordan BIT.
279. In order to address the Claimant's claim concerning Article 3(2) of the Indonesia-Jordan BIT, the Tribunal must address first the Claimant's reliance on the MFN clause to incorporate substantive protections from other treaties into the Treaty.
280. Similarly to the Tribunal's position concerning the full protection and security obligation, the Tribunal is willing to assume *arguendo* that the Claimant is entitled to rely on the MFN clause to incorporate Article 3(2) of the Indonesia-Jordan BIT into the Treaty. However, in light of the Tribunal's finding in relation to the FET standard, it is evident that Article 3(2) of the Indonesia-Jordan BIT cannot assist the Claimant's claim.
281. The Claimant has raised various arguments concerning discrimination due to the alleged better treatment that other licences allegedly received. These arguments were examined and dismissed above in the Tribunal's ruling regarding the FET standard.
282. Nevertheless, the Tribunal feels compelled to note that arguments concerning discrimination or arbitrary treatment are very serious. Therefore, they must be supported by strong evidence. However, from the record of the case, the Tribunal is not convinced that the Clean and Clear process was discriminatory.
283. Finally, the Tribunal accepts the Respondent's argument that Article 3(2) of the Indonesia-Jordan BIT imposes a higher threshold for establishing a breach than the threshold under the fair and equitable treatment standard. Therefore, considering that the Tribunal did not find the Respondent's alleged failure to resolve the problem of overlapping boundaries and licences a breach of the Treaty, it is no surprise that the Claimant's case fails also in relation to the prohibition against unreasonable or discriminatory measures. Indeed, even the Claimant's Counsel acknowledged at the hearing that the claim concerning unreasonable and discriminatory measures cannot stand if the Tribunal rejects the Claimant's FET claim.<sup>279</sup>
284. In conclusion, the Tribunal finds that the Respondent did not breach the prohibition against unreasonable or discriminatory measures.

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<sup>279</sup> Hearing Transcript of 14 August, p. 1137 (“PRESIDENT: *unreasonable and discriminatory measures, does it add anything to the FET? MR SALVE: There are so many different ways of looking at it. PRESIDENT: Right. Can it exist without a finding of FET on the – MR SALVE: I don't think it's a stand-alone. FET itself has become such a large claim, and I have not taken up your time addressing you on minimum standards.*”)

#### IV. Expropriation

285. Article 5 of the Treaty stipulates as follows:

*“1. Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, shall include interest at prevailing rate as agreed upon by both parties until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.*

*2. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.*

*3. Where a Contracting Party expropriates the assets of a company which is incorporate or constituted under the law in force in any part of its territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.”*

##### 1. Claimant’s Position

286. The Claimant states that Article 5 of the Treaty prohibits direct and indirect expropriations unless the conditions for lawful expropriation are met. According to those conditions, the expropriation must be (1) *“for a public purpose in accordance with law”*; (2) carried out on a *“non-discriminatory basis”*; (3) in accordance with the requirement of due process of law; (4) accompanied by *“fair and equitable compensation”*. This compensation must represent the *“fair market value of the investment”* and *“shall be made without unreasonable delay, be effectively realizable and be freely transferable.”*

287. The Claimant submits that its entire investment *“including the shareholding of 70% in SRI and the production mining business licence for coal, is the subject-matter of indirect expropriation by the Respondent.”*<sup>280</sup> In that context, the Claimant refers to Article 1(I)(v) of the Treaty, which defines “investment” as *“business concessions conferred by law or*

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<sup>280</sup> SOC, para. 188.

*under contract, including concession to search for, extract and exploit natural resources.”*

288. According to the Claimant, “[t]he acts of Indonesia’s authorities, by issuing overlapping mining concession to different companies, for SRI’s mining concession area, have had the effect of nullifying SRI’s Production IUP, and amounts to an act of indirect expropriation on account of collective actions of the Respondent.”<sup>281</sup>
289. In addition, the Claimant argues that the Respondent has expropriated the Claimant’s investment by introducing Government Regulation No 24 of 2012.<sup>282</sup>
290. The Claimant states that when examining whether expropriation has taken place, the Tribunal should focus on the effect of impugned measures and not the Respondent’s intent.<sup>283</sup> Nevertheless, without admitting that the Respondent’s expropriatory intent is a relevant consideration, the Claimant submits as follows:

*“[T]he material factors as to the Respondent’s lack of explanation for exclusion of Production IUP No. 569 of 2009 from the Clean and Clear Lists, coupled with upgradation of exploration KPs of PT Kodio Multicom and PT MBM into production IUPs on 11 March 2014, despite allegedly overlapping mining areas with that of SRI’s mining concession area) and recording of the Claimant’s Production IUP No. 569 of 2009 as an exploration license, [...] are acts indicative of intent of the Respondent.”<sup>284</sup>*

291. The Claimant submits that the Respondent’s expropriation has not satisfied any of the conditions under the Treaty for a lawful expropriation. In particular, the Claimant argues that it is “for the Respondent to demonstrate both, that it was acting for public purpose, and further that the measures taken were proportionate to the actual public need.”<sup>285</sup>
292. With regard to the Respondent’s alleged failure to carry the expropriation on a “non-discriminatory basis”, the Claimant argues that the Respondent has conducted a discriminatory expropriation due to Government Regulation No 24 of 2012 and the exclusion of SRI from the Clean and Clear list despite having a valid Production IUP.<sup>286</sup>

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<sup>281</sup> SOC, para. 193.

<sup>282</sup> Reply, paras 373-377.

<sup>283</sup> SOC, paras 192-194.

<sup>284</sup> Reply, para. 376.

<sup>285</sup> SOC, para. 198.

<sup>286</sup> SOC, para. 201. Reply, paras 377-385.

293. Concerning the due-process requirement, the Claimant submits that the “*Respondent has failed to establish any compensation process altogether, much less a procedurally and substantively fair process.*”<sup>287</sup>
294. With regard to the condition of “*fair and equitable compensation*”, the Claimant argues that the Treaty “*requires prompt, adequate and effective compensation to be paid for any expropriation.*”<sup>288</sup> According to the Claimant, it received no compensation for the expropriation of its investment by the Respondent.<sup>289</sup>

## 2. Respondent’s Position

295. The Respondent denies that it has unlawfully expropriated the Claimant’s alleged investments.
296. The Respondent claims that it “*did not, let alone have the requisite intention, to expropriate (or take ‘measures’ with an effect equivalent to expropriation of) Claimant’s speculative alleged investments (which do not qualify as investments under the BIT).*”<sup>290</sup>
297. In particular, the Respondent argues that it did not expropriate the Claimant’s alleged investment through issuance of overlapping licences because those licences were issued before the making of the purported alleged investment.<sup>291</sup> Had the Claimant executed a proper due diligence, it should have been aware of the status of its licences.<sup>292</sup>
298. In addition, the Respondent argues that the SRI Mining Concession was not in the Clean and Clear List “*because, self-evidently, it was not clean and clear at the time of IMFA’s alleged investment.*”<sup>293</sup> Furthermore, the Respondent argues that its response to the existence of overlapping licences has been fair. According to the Respondent, “[t]he intent has been to address this concern. [...] the clean and clear process has been introduced and effectuated in a transparent fashion [...] and the Claimant’s investment has not received treatment in any manner different from other investments.”<sup>294</sup>

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<sup>287</sup> SOC, para. 209.

<sup>288</sup> SOC, para. 203.

<sup>289</sup> Reply, para. 384; SOC, paras 203-205.

<sup>290</sup> Rejoinder, para. 20.3.

<sup>291</sup> SOD, paras 27.12-27.13; Rejoinder, para. 20.8.

<sup>292</sup> SOD, para. 27.13.

<sup>293</sup> SOD, para. 27.14. See also the text accompanied by *supra* note 235.

<sup>294</sup> SOD, para. 27.15.



299. The Respondent also denies that Government Regulation No 24 of 2012 expropriated the Claimant's investment. As the Respondent has argued in the context of the fair and equitable treatment, the divestiture obligations do not affect the Claimant in any relevant time-frame.<sup>295</sup>

300. Furthermore, the Respondent submits that Claimant's argument does not even amount to a future expropriation because the divestiture requirements are conditional upon, and only apply gradually over a number of years after, commencement of production and on payment of fair market value. Thus, the Respondent submits as follows:

*"[b]y definition, the Claimant's assertion that its investment is expropriated in its 'entirety' is, also for this reason, wrong. Indeed, even if Production IUP No 569 of 2009 was not impaired, as 20% of shareholders in SRI are Indonesian companies, Indmet and SRI Indo Capital Ltd (SRI's other foreign shareholder) would only need to divest some of their shareholdings after 6 years of production – leading up to a maximum proportion of shares held by Indonesian entities of 51% after 10 years (post production). SRI's direct shareholder would receive compensation for any shares it was required to divest."*<sup>296</sup>

301. Also, there were still many legal requirements and practical obstacles to overcome before SRI could undertake any mining activity. Given that the SRI Mining Concession is only valid for 10 years, the Respondent submit that *"it was unlikely that the divestment requirement would bite during the lifetime of the licence."*<sup>297</sup>

302. In addition, the Respondent argues that *"the intention of the divestiture requirement is not to expropriate property held by foreign investors. It is the product of the Respondent's legitimate regulatory powers."*<sup>298</sup>

303. Finally, as it is the Respondent cases that no expropriation has taken place, it does not develop the arguments on the legality of the alleged expropriation.<sup>299</sup> However, it does make the following remarks. First, the measures discussed by the Claimant have all been taken in the public interest.<sup>300</sup> Second, the Claimant has failed to make out a case that it

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<sup>295</sup> SOD, para 27.17; Rejoinder, para. 20.10.

<sup>296</sup> SOD, para. 27.18.

<sup>297</sup> SOD, para. 27.19.

<sup>298</sup> SOD, para. 27.20.

<sup>299</sup> SOD, para. 27.23.

<sup>300</sup> SOD, para. 27.24.

has been treated in a manner different from investors in Indonesia that are in a comparable position. Third, compensation is not needed as no expropriation has taken place.<sup>301</sup>

### 3. The Tribunal's Decision

304. In relation to the surviving elements of the Claimant's case after determination of the temporal issue above, the Claimant argues that the Respondent indirectly expropriated its investment via the failure to resolve the overlapping licences via the Clean and Clear procedure and Government Regulation No 24 of 2012.

305. Before examining the Claimant's allegation, the Tribunal recalls that it is well established that an indirect expropriation can occur when there is a substantial deprivation of the value the investment or when the investor loses control over the investment due to the host state's actions. This was adequately summarised by the tribunal in the *Electrabel SA v. Hungary* case:

*"The Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment."*<sup>302</sup>

306. Similarly, in the *ADM v. Mexico* case, the tribunal stated as follows:

*"Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure."*<sup>303</sup>

307. Therefore, the Claimant cannot establish a breach of Article 5 of the Treaty by merely arguing that the value of its investment will diminish in the future due to the Respondent's acts. As rightfully emphasised by various tribunals, a mere loss of value is not tantamount to expropriation, as was stated by the tribunal in the *Mamidoil v. Republic of Albania* case:

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<sup>301</sup> SOD, para. 27.24.

<sup>302</sup> **Exhibit CL-38**, *Electrabel SA v. Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para. 6.62.

<sup>303</sup> **Exhibit CL-83**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, No. ARB(AF)/04/5, Award (ICSID 21 November 2007), para. 240.

*“The definition of expropriation has developed over time and gone beyond the formalistic concentration on title [...] a further extension into the sphere of damages, loss of value and profitability, without regard to the substance and attributes of property, would deprive the claim of its distinct nature and amalgamate it with other claims. Thus, a mere loss of value or a loss of benefits that is connected to and caused by the dissolution of at least one attribute of property, does not constitute indirect expropriation.”<sup>304</sup>*

308. First, while the Clean and Clear procedure might not be perfect and the Respondent has not yet solved the problem of the overlapping licences/boundaries, it cannot be said that this failure has resulted in further deprivation of the Claimant’s investment. Any possible substantial deprivation of the Claimant’s investment due to the overlapping licences had happened before the Claimant made its investment and therefore it is either outside the scope of the Tribunal’s jurisdiction or contrary to the principle of non-retroactivity as enshrined in Article 13 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.
309. Second, in relation to Government Regulation No 24 of 2012, as explained above, in the absence of any explicit contrary representations or stabilisation clauses, the Respondent is entitled to change its laws and regulation. Moreover, as explained above, the effect of Government Regulation No 24 of 2012 would not operate until five years of coal production. Further, the effect was on a sliding scale for the next five years after coal production and in any event the regulation did provide for compensation. While the Claimant might not be content with the amount of compensation or with the divestiture requirement which may affect the value of the Claimant’s investment, Government Regulation No 24 of 2012 cannot be regarded as a measure that will “radically” or “substantially” deprive the value of the Claimant’s investment.
310. Therefore, the Tribunal has no hesitation in finding that the Respondent did not breach Article 5 of the Treaty.

## **V. Free Transfer of Funds**

311. Article 7 of the Treaty states as follows:

*“1. Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to the investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:*

*(a). Capital and additional capital amounts used to maintain and increase investments;*

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<sup>304</sup> **Exhibit RL-87**, Mamidoil v. Republic of Albania, ICSID Case No. ARB/11/24 (30 March 2015), para. 570.

- (b). *Returns including dividends and interest in proportion to their share-holding;*
- (c). *Repayment of any loan, including interest thereon, relating to the investment;*
- (d). *Payments of royalties and services fees relating to the investment;*
- (e). *Proceeds from sales of their shares;*
- (f). *Proceeds received by investors in case of sale or partial sale or liquidation;*
- (g). *The earnings of nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party;”*

2. *Nothing in paragraph (1) of this Article shall affect the transfer of any compensation under Article 6 of this Agreement.*

3. *Unless otherwise agreed to between the Parties, currency transfer under paragraph of this Article shall be permitted in any convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.”*

## 1. Claimant’s Position

312. The Claimant argues that its investment remained “locked up in Indonesia, in violation of Article 7 of the BIT.”<sup>305</sup> In particular, the Claimant submits that the Respondent has violated Article 7 by virtue of Government Regulation No 24 of 2012:

*“[Government Regulation No 24 of 2012] is obviously a discriminatory measure since its promulgation which disproportionately impacts the free transfer of foreign investments, and not that of domestic investment in the same manner.*

*Therefore, it is evident that by this new divestiture requirement, the ability of the Claimant to, for example, pledge its shares to raise capital in order to increase investments has been significantly impaired, thus, violating the Claimant’s rights pertaining to free transfer of funds related to its investment as provided in Article 7 of the BIT. As a result of Indonesia’s discriminatory conduct, the investment of the Claimant, which in the ordinary course was capable of free transfer, remains locked up in Indonesia in stark contrast to the situation prevailing before GR No. 24/2012, and there is no such impact impinging on domestic investments.”<sup>306</sup>*

## 2. Respondent’s Position

313. The Respondent denies that it breached Article 7 of the Treaty and argues that the Claimant’s claim is inadequately particularised.<sup>307</sup>

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<sup>305</sup> SOC, para. 212.

<sup>306</sup> Reply, paras 388-389.

<sup>307</sup> SOD, paras 28.1-28.3; Rejoinder, paras 21.1-21.2.

314. In particular, the Respondent rejects the Claimant's argument concerning Government Regulation No 24 of 2012. As explained above, the Respondent submits that Government Regulation No 24 of 2012 is not relevant to this dispute as it has not been applied to the Claimant nor to its purported investment.<sup>308</sup>

### **3. The Tribunal's Decision**

315. The Claimant's claim concerning Article 7 of the Treaty was always secondary in its scope and level of particularisation in the Claimant's pleadings. Perhaps, it was no surprise that the Claimant's Counsel explicitly withdrew this claim at the hearing:

*"PRESIDENT: In your pleadings you talk about the free transfer of funds point. Are you still relying upon that?  
MR SALVE: I don't think it stands any further."*<sup>309</sup>

316. Therefore, as the Claimant's claim is now moot, the Tribunal need not enter into a detailed analysis of the Claimant's claim concerning Article 7 of the Treaty. Nevertheless, in light of the Tribunal's analysis above, it is apparent that there is nothing in Government Regulation No 24 of 2012 and its effect on the Claimant's investment which could be considered a treaty breach. This is also true in relation to Article 7 of the Treaty.

## **VI. Concluding Remarks**

317. The Tribunal accepts the submissions made by the Respondent that claims against states under BITs are not intended as some form of insurance to keep the investor whole if it transpires that the investments fails. Investments fail for number of different reasons, some of which cannot be attributable to the fault of the relevant host state.

318. Investors, like all contracting parties, need to undertake appropriate due diligence prior to making an investment. Mr Ray told the Tribunal that his legal team carried out a due diligence inquiry. However, the Claimant, as was its right, refused to waive legal professional privilege in relation to that inquiry and consequent advice. Therefore, the Tribunal has not seen evidence as to what inquiry was in fact carried out. On the other hand, the Tribunal has the evidence of Mr Beckmann, an Australian solicitor who has been working in the mining sector in Indonesia for many years. Whilst the Tribunal is prepared to accept that his evidence might have been a counsel of perfection, nevertheless, the Tribunal accepts his evidence that conflicting boundaries and licences were in the public domain and a detailed inquiry should have been made before investing in such a project. The Tribunal is therefore of the view that the Claimant has not established that it

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<sup>308</sup> Rejoinder, para. 21.2.

<sup>309</sup> Hearing Transcript of 14 August, p. 1137.

undertook an adequate due diligence inquiry, and that this omission was the effective cause of any loss claimed.

319. Further, an investor who might have a claim against the vendor of the rights that form the investment cannot ignore attempting to enforce such rights as it might have and turn to the first line of attack against the relevant host state. Mr Ray frankly told the Tribunal that no claims have been intimated against SRI and he added also fairly that the Claimant was on friendly terms with SRI.
320. In the light of the above, it is clear that the Claimant failed to take sufficient steps to protect its own investment and thus has to bear the consequences of those omissions.

## **G. Quantum**

### **I. Damages**

#### **1. The Tribunal's Decision**

321. In the light of the Tribunal's decisions above, the issue of quantum becomes moot. Nevertheless, the Tribunal thinks it only right to comment that it regarded the Claimant's quantum claim as over optimistic. The Tribunal much preferred the Respondent's witnesses on coal production and quantum. Had the Claimant prevailed, the Tribunal would have ordered the return of the Claimant's investment, something in the region of USD 8.75 million, together with interest from the date of the expenditure until payment.

## **H. Costs**

### **1. The Tribunal's Decision**

322. Article 38 of the UNCITRAL Arbitration Rules states that:

*The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:*

*(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*

*(b) The travel and other expenses incurred by the arbitrators;*

*(c) The costs of expert advice and of other assistance required by the arbitral tribunal;*

*(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*

*(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*

*(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.*

323. Accordingly, the Tribunal notes the following.

324. The Parties deposited with the PCA a total of GBP 1,000,000.00 (GBP 500,000.00 from the Claimant and GBP 500,000.00 from the Respondent) for this arbitration. The PCA has advised that the final costs of the arbitration are GBP 849,993.48, including the fees of the arbitral tribunal, which in accordance with Article 38(a) and Article 39 of the UNCITRAL Rules, are fixed as follows:

- a. Mr Neil Kaplan CBE QC SBS – GBP 241,638.16;
- b. The Honourable James Spigelman – GBP 141,625.00;
- c. Professor Muthucumaraswamy Sornarajah – GBP 125,500.

325. The PCA's fees and expenses for registry services amount to GBP 84,878.78.

326. Other Tribunal costs, including for the travel and other expenses incurred by the arbitrators, the fees and expenses of the tribunal secretary, hearing facilities, court reporters, courier expenses, bank costs, communication expenses and supplies, amount to GBP 256,351.54.

327. Accordingly, the costs of the arbitration, including all items set out in paragraphs (a), (b), (c), (d) and (f) of the Article 38 of the UNCITRAL Rules amount to GBP 849,993.48. The unexpended balance of the deposit will be returned to the Parties in equal shares in accordance with Article 41(5) of the UNCITRAL Rules.

328. Pursuant to the Tribunal's directions, both parties filed their Costs Schedule in a timely manner.

329. The Claimant claimed costs and expenses as follows:

- (a) Professional and legal expenses US\$ 3,702,340
- (b) Experts US\$ 461,561
- (c) Witnesses and party representatives US\$ 63,239

(d) Sums paid to the PCA US\$ 667,320

(e) Other expenses US\$ 18,126

**Total US\$ 4,912,585**

330. The Respondent, in its amended Costs Submission of 4 December 2018 claimed as follows:

(a) Professional and legal expenses US\$ 2,200,000

(b) Experts US\$ 1,112,957

(c) Witnesses and party representatives US\$ 155,732

(d) Sums paid to the PCA GBP 375,000 (US\$ 479,214)

(f) Other expenses US\$ 31,331

**Total US\$ 3,979,234**

331. As is apparent from this Award the Respondent is the successful party.

332. The Respondent relies on Article 40 of the 1976 UNCITRAL Rules and Section 61(2) of the Arbitration Act 1996 which provides that costs should follow the event. Accordingly, the Respondent seeks an order that the “*Claimant to pay the costs relating to this arbitration in their entirety including the fees and expenses of the members of the Tribunal, the fees and expenses of the Arbitral Secretary and the fees and expenses of the PCA, the Respondent’s legal fees and all other amounts incurred by the Respondent.*”

333. Although the UNCITRAL Rules provide that costs follow the event, the Tribunal naturally retains a discretion as to the quantum of the claimed costs and can take account, if it deems it relevant, the conduct of the successful party.

334. The Respondent cannot be criticized too harshly for the way in which this case was defended. It should not be forgotten that initially a very substantial claim was made which was not lowered until after the experts had submitted their reports. A fixed fee arrangement seems very reasonable to the Tribunal for a case of this nature.

335. It is true that many Government officials attended the various hearings. This is not surprising given the importance of the matter to the Respondent State and further given that the attendees straddled several government departments.

336. The only criticism that can possibly be levelled against the Respondent is that in its initial response to the Tribunal setting out its jurisdictional objections, it failed to mention the temporal objection upon which it has succeeded. This jurisdictional objection did not



surface until Simmons & Simmons served the Respondent's Defence. Had this jurisdictional objection been included when the Tribunal asked the Respondent to specify its jurisdictional objections the Tribunal believes that it is more likely than not that it would have acceded to the request for bifurcation or at least suggested to the Parties to bifurcate the quantum phase. Had the Tribunal bifurcated issues of jurisdiction from liability/quantum, the Tribunal believes that costs would have been saved. It is not easy to assess this saving but the Tribunal believes that it would be fair in the circumstances to reduce the Respondent's costs by 15% to take this into account.

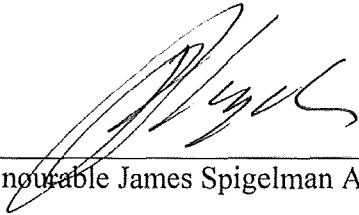
337. In finding that the Claimant's costs were reasonable, the Tribunal takes into account that the Claimant's costs were approximately US\$ 1 million more. This is not to be taken as a criticism of the Claimant's claim for costs which in the opinion of the Tribunal are also not unreasonable. It is just that for the same case the Respondent spent US\$ 1 million less which makes its claim for costs more reasonable.
338. Accordingly, the Tribunal orders the Claimant to pay the sums of US\$ 3,500,020 x 85% = US\$ 2,975,017 and GBP 424,996.74 x 85% = GBP 361,247.23 to the Respondent in respect of the Respondent's costs and expenses and the Respondent's share of the costs of this arbitration as fixed at paragraph 327 above.
339. Finally, both Parties requested post-award interest without indicating the appropriate interest rate. The Respondent, for example, simply stated that the post-award interest should be "*at a commercial rate that the Tribunal considers appropriate.*"
340. In considering the claim for post award interest on the costs award in favour of the Respondent, the Tribunal notes that not all the costs incurred have yet been paid. Further the Respondent gives the Tribunal no assistance with regard to the appropriate interest rate in Indonesia. Still further, it is noted that the Respondent has not paid its share of the deposits in a timely fashion. The Claimant made payment of US\$ 750,000 to the PCA including one payment of US\$ 250,000 on behalf of the Respondent which was later reimbursed two and half months later. All these factors militate against awarding the Respondent post award interest on its costs. Accordingly, the Tribunal declines to order interest on the costs awarded.

## **I. DISPOSITIVE**

341. Having carefully considered the Parties' arguments in their written and oral pleadings, and having deliberated, for the reasons stated above, the Arbitral Tribunal unanimously decides as follows:
- a) To uphold the Respondent's Temporal Objection in relation to the alleged acts that occurred prior to the Claimant's investment.

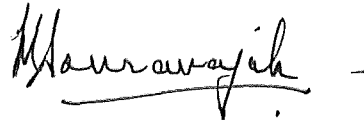
- b) To reject all the Claimant's claims in relation to the Respondent's alleged acts that occurred after the Claimant made its investment.
- c) To dismiss all claims for damages and interest.
- d) The Claimant shall pay the sums of US\$2,975,017 and GBP 361,247.23 to the Respondent in respect of the Respondent's costs and expenses of this arbitration.

Seat of Arbitration: London  
Date: 29 March 2019



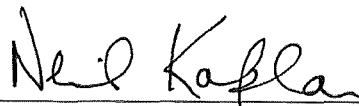
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The Honourable James Spigelman AC QC



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Professor Muthucumaraswamy  
Sornarajah



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Mr Neil Kaplan CBE QC SBS  
(Presiding Arbitrator)



**PCA Case No. 2015-40**

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL  
CONSTITUTED IN ACCORDANCE WITH THE UNCITRAL ARBITRATION  
RULES 1976**

**AND**

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE  
REPUBLIC OF INDONESIA AND THE GOVERNMENT OF THE  
REPUBLIC OF INDIA FOR THE PROMOTION AND PROTECTION OF  
INVESTMENTS (1999)**

**between**

**INDIAN METALS & FERRO ALLOYS LIMITED  
(INDIA)**

**The Claimant**

**and**

**THE GOVERNMENT OF THE REPUBLIC OF INDONESIA**

**The Respondent**

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**APPENDIX 1  
SUMMARY OF THE PROCEDURAL HISTORY**

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**The Arbitral Tribunal**

Mr. Neil Kaplan CBE QC SBS

(Presiding Arbitrator)

Mr. James Spigelman

Professor Muthucumaraswamy Sornarajah

**Secretary to the Tribunal**

Dr. Noam Zamir

**Registry**

Permanent Court of Arbitration



PROCEDURAL RECORD

<b>DATE</b>	<b>PROCEDURAL FACTS</b>
24 July 2015	Indian Metals & Ferro Alloys Limited (“Claimant”) submits its Notice of Arbitration against the Government of the Republic of Indonesia (“Respondent”) under the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (“UNCITRAL Rules”) and pursuant to the Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments dated February 8, 1999 (“Treaty”).
24 July 2015	Pursuant to the Notice of Arbitration, Mr. James Spigelman is appointed as an arbitrator by the Claimant.
6 November 2015	After Respondent fails to appoint an arbitrator, pursuant to Claimant’s request and according to the UNICTRAL Rules, the Secretary-General of the PCA appoints Mr. Salim Moollan QC as a second arbitrator.
15 December 2015	Mr. Spigelman and Mr. Moollan inform the Parties of their appointment of Mr. Neil Kaplan CBE QC SBS as the Presiding Arbitrator in this matter pursuant to Article 7(1) of the UNCITRAL Rules.
23 February 2016	The Respondent submits its Summary of the Objections to the Tribunal’s Jurisdiction and applies to the Tribunal for an order that their jurisdictional issue be heard in advance of the merits of this dispute.
26 February 2016	The Claimant submits its objections to bifurcation.
3 March 2016	Mr. Moollan resigns.
3 May 2016	The Respondent appoints Professor Muthucumaraswamy Sornarajah to replace Mr. Moollan.
24 June 2016	The Respondent serves its Reply to the Claimant’s objections to bifurcation.
21 July 2016	The Claimant serves its Rejoinder on bifurcation.
9 August 2016	The Tribunal issues the Terms of Appointment, which are subsequently signed by the Parties.
2 November 2016	The Tribunal rejects Respondent’s request for bifurcation. The Tribunal directs that the Claimant file its Statement of Claim within forty-five days. Accordingly, the Statement of Claim is due on or before Monday, 19 December 2016.
10 November 2016	The Tribunal directs that the Respondent file its Statement of Defence on or before 6 February 2017.

5 December 2016	The Respondent requests an extension for the filing of Statement of Defence to 21 April 2017.
14 December 2016	The Claimant requests an extension of five days to submit its Statement of Claim.
14 December 2016	The Respondent agrees to Claimant's request of extension for the filing of the Statement of Claim.
23 December 2016	The Claimant serves electronically its Statement of Claim.
7 January 2017	The Tribunal states that it wishes to appoint Dr. Noam Zamir as Tribunal secretary and asks for the parties' consent.
9 January 2017	The Claimant consents to the appointment of Dr. Zamir as Tribunal Secretary.
13 January 2017	The Respondent consents to the appointment of Dr. Zamir as Tribunal Secretary.
13 January 2017	The Claimant consents to the grant of an extension for the filing of the Statement of Defence to 6 March 2017.
16 January 2017	The Tribunal orders the Statement of Defence to be filed on or before 14 April 2017 and fixes 11 May 2017 for the Case Management Conference in the Hague. Subsequently, upon Respondent's observation that 14 April is Good Friday and a public holiday in all relevant jurisdictions, the Tribunal extends the deadline to file the Statement of Defence to 17 April 2017.
1 February 2017	The Tribunal issues Procedural Order 1.
2 February 2017	The Respondent submits two applications to the Tribunal. The first application concerns the Procedural Timetable set in Procedural Order No. 1. The Respondent requests to advance step 10 in the Procedural Timetable (i.e. the exchange of initial witness evidence and expert reports) to mid-February 2018 instead of March 2018. The Respondent also requests that the specific date for step 18 (i.e. the hearing) will be stated explicitly at the beginning of August 2018 because Respondent's counsel has another hearing listed for the last two weeks of August 2018. The Respondent's second application is for production of documents referred to in the Claimant's Statement of Claim.
10 February 2017	The Claimant replies to Respondent's applications of 2 February 2017. The Claimant states that it has no objection to advancing step 10. The Claimant makes no comment in respect of Respondent's request concerning step 18. The Claimant objects to the production of all the documents stated in



	Respondent's application.
15 February 2017	The Tribunal issues Procedural Order 2, which amends the Procedural Timetable in Procedural Order No. 1 in light of Respondent's application of 2 February 2017. The Procedural Order also orders the Claimant to produce the documents that the Respondent had requested in its application of 2 February 2017.
17 April 2017	Respondent submits electronically its Statement of Defence.
28 April 2017	Respondent submits three applications concerning the production of documents, amendment of the procedural timetable and further particulars regarding damages and causation in the Claimant's Statement of Claim. The Tribunal orders the Claimant to reply by 5 May 2017.
5 May 2017	Claimant requests an extension to reply to the three applications and an extension to the deadline to serve out document production requests. The Claimant request to submit its said replies and requests by 8 May 2017. Respondent objects to both requests. The Tribunal allows the Claimant to submit its answer to the applications and the document requests by 8 May 2017 Noon UK time.
8 May 2017	Claimant submits its objections to the three applications of the Respondent's. It states that it cannot serve on time the document requests and it will address this point at the hearing on 11 May.  Respondent replies and asks the Tribunal to make an order that the Claimant is now precluded from serving any requests for documents because it failed to meet the deadline.  The Tribunal states that it is not in a position to make any orders or rulings while preparing to travel to the Hague. All such applications will be dealt with at the hearing on 11 May.
11 May 2017	Hearing in the Hague – the Parties open their case and reach an agreement concerning the Claimant's application.
15 May 2017	The Tribunal issues Procedural Order 3, which was based on consent. The Procedural Order, <i>inter alia</i> , amended the Procedural Timetable.
29 June 2017	After receiving the Parties' comments and consent, the Tribunal issues the Protocol for Expert Witnesses.
30 June 2017	The Parties are due to submit completed Redfern Schedules to the Tribunal including replies to objections on this day. However, owing to efforts by the Parties to minimise the areas on which the Tribunal's ruling may be necessary, the Parties propose to jointly write further to

	the Tribunal in this matter no later than Wednesday, 5 July 2017. The Parties stated that the deadline may be suitably extended.
6 July 2017	The Claimant write to the Tribunal and asks for an extension until 7 July 2017 to submit a join update on the Redfern Document Requests.  The Tribunal grants the request.
7 July 2017	The Claimant notifies the Tribunal that it will file its Redfern Schedule by 10 Monday 2017.
10 July 2017	The Claimant notifies the Tribunal that it will file its Redfern Schedule by 11 Monday 2017.
11 July 2017	The Claimant files its Redfern Schedule
11 July 2017	The Respondent asks for an order from the Tribunal to compel the Claimant to, within 1 week, respond fully to the Respondent's letter of 10 July 2017 and annotate the appendix to that letter to show what documents the Claimant has produced or is unable to produce or objects to producing.  The Claimant asks for until close of Thursday, 13 July 2017, to file its reply to Respondent's application.
12 July 2017	The Tribunal allows the Claimant to respond to Respondent's Application of 11 July 2017 by 13 July 2017.
13 July 2017	The Claimant asks the Tribunal to reject Respondent's Application of 11 July arguing <i>inter alia</i> that " <i>the Claimant has, in strict conformity with the Tribunal's directions accommodated all of the Respondent's reasonable requests, including to provide full particulars and produce documents considered material to its Quantum Submissions over to the Respondent.</i> "
14 July 2017	The Respondent writes to the Tribunal, in reference to Claimant's letter of 13 July 2017, and argues that all it is asking is " <i>for the Claimant to confirm whether it has produced all of the documents requested by the Respondent in the Redfern Schedule other than those said to comprise 'legal advice'</i> ".
14 July 2017,	The Tribunal orders the Claimant to respond fully to the Respondent's letter of 10 July 2017 and annotate the Appendix to that letter to show what quantum documents the Claimant has produced or is unable to produce or objects to producing.

24 July 2017	The Respondent confirms that it did not need to ask the Tribunal for a ruling on its Document Requests in light of the Claimant's confirmation that it had produced all documents that respond to the Respondent's Document Requests other than those that "fall within the ambit of legal privilege".
26 July 2017	The Tribunal decides on Claimant's requests for documents (the Redfern Schedule) in Procedural Order No. 4.
18 September 2017	With reference to paragraph 1 of the Protocol for Expert Witnesses, the Parties provide the relevant information regarding their witnesses.
26 October 2017	The Claimant notifies the Tribunal it engaged with the Respondent around adjusting the Procedural Timetable to accommodate certain unforeseen delays relating to translation of documents, for reasons of which the Claimant seeks to shift the date of filing its Statement of Reply, Witness Statements and Expert Reports (due on 26 October 2017) to Friday, 4 November 2017.
6 November 2017	The Respondent notifies the Tribunal that the Claimant has not filed its Statement of Reply on the date it proposed, Friday 3 November 2017 (and not 4, which was 6 business days after the deadline set out in Procedural Order No 3). The Respondent states that it has not heard from the Claimant as to when it proposes to file the Statement of Reply. The Respondent states that the delay in filing the Statement of Reply will leave very little flexibility in the timetable for any other unforeseen delays in the remaining steps prior to the hearing.
6 November 2017	<p>The Claimant writes to the Tribunal stating that it was under the impression that the Respondent's Counsel has received the Claimant's email notifying that the Claimant will be filing its Statement of Reply on 7 November 2017. The Claimant states that its IT system now indicates that such email has not been transmitted.</p> <p>The Claimant states that it will file its Statement of Reply on 7 November 2017 and will engage with the Respondent as to agreeing on the corresponding extension of timeframe for the Respondent, and aim to revert with an agreed procedural order.</p>
6 November 2017	The Respondent writes to the Tribunal asserting that the "Claimant has again failed to seek either the Respondent or the Tribunal's consent to an extension of time for the filing of the Statement of Reply, as required by paragraphs 79 and 80 of Procedural Order No 1, and has not informed either the Respondent or the Tribunal of the delay until the time for filing has passed. Instead the Claimant has unilaterally extended the deadline without justification."

	The Respondent notes that the Claimant has said that that 'it will engage with Respondent in the matter of agreeing the corresponding extension of timeframe for the Respondent'. The Respondent states that, to-date, the Claimant has not made any effort to engage with the Respondent at all on an amended timetable.
6 November 2017	The Claimant writes to the Tribunal stating that it has "circulated out a draft Procedural Timetable, over to the Respondent, a short while earlier". It states again that the confusion regarding the submission of Statement of Reply "emanates from a (mysteriously) missing email (our IT is looking into this), and in keeping with past philosophy, it will remain the bona fide endeavor of the Claimant to ensure that all such procedural matters are readily agreed consensually, rather than to be escalating matters of this nature over to the Tribunal."
7 November 2017	The Claimant submits its Statement of Reply.
15 December 2017	The Parties agree on revising the Procedural Timetable and ask for the Tribunal's approval.
20 December 2017	The Tribunal accepts most of the proposals regarding the revision of the Procedural Timetable, but decides to keep some of the original agreed dates (i.e. items 14-16 in the revised Procedural Timetable) due to the concern that any change will impinge upon the Tribunal's preparation for the hearing. The Tribunal asks for the Parties' confirmation.
20 December 2017	The Claimant approves the Tribunal's request concerning the Revised Procedural Timetable.
10 January 2018	The Respondent approves the Tribunal's request concerning the Revised Procedural Timetable.
20 February 2018	The Parties agrees on revising the Procedural Timetable and ask for the Tribunal's approval. The Tribunal approves the revised Procedural Timetable on the same day.
13 March 2018	The Respondent request a 1 day extension until 15 March 2018 to file its Statement of Rejoinder and evidence. No other changes to the timetable are proposed. The Claimant states it has no objections to the Respondent's request. The Tribunal confirms the request.
15 March 2018	The Respondent submits its Statement of Rejoinder and evidence.

14 April 2018	The Parties submit the Joint Statements of the valuation and technical experts.
30 April 2018	The Parties agree to revised the Procedural Timetable as follows:  <ul style="list-style-type: none"> <li>- The Claimant files its Witness Statements and Expert Reports in reply on 4 May 2018;</li> <li>- The Respondent files its Expert Reports in rejoinder on Tuesday 19 June 2018.</li> </ul> <p>The remaining steps as per the agreed timetable circulated on 20 February 2018 remain the same.</p>
4 May 2018	The Claimant files the following Witness Statements and Expert Reports in reply:  <p>Second Witness Statement of Mr. Chitta Ranjan Ray dated 4 May 2018;</p> <p>Second Report of Valuation Expert dated 4 May 2018;</p> <p>Second Report of Technical Expert dated 30 April 2018.</p>
19 May 2018	The Respondent submits the Second Report of Andrew Flower dated 19 June 2018; and Exhibits to the Second Report of Andrew Flower.
20 May 2018	The Respondent submits the Second Expert Report of Julian Hill and 12 Exhibits to the Second Expert Report of Julian Hill.
25 June 2018	Pre-hearing conference call with the Presiding Arbitrator.  <p>During the conference call, the Claimant states that it predicts that it may have objections concerning the authenticity/validity of certain documents of the Respondent. The Presiding Arbitrator asks the Parties to prepare a log of the disputed documents. The log should include the reasons why the Claimant objects to each document and the Respondent's response. The Tribunal will decide after the hearing on the status of each document.</p>
27 June 2018	The Claimant submits its Skeleton Arguments

9 July 2018	Pre-hearing conference call with the Presiding Arbitrator.
11 July 2018	The Respondent submits its Skeleton Arguments
12 July 2018	Pre-hearing conference call with the Presiding Arbitrator.
13 July 2018	The Parties submit their agreed list of issues and request an extension of time until close of Monday, 16 July 2018, to submit the Personae, Statement of Non Contentious Facts, Chronology of Key Dates and draft Hearing Schedule
19 July 2018	Further to the instruction of the Presiding Arbitrator given during the conference call of 25 June 2018, the Claimant submits its objections to some of the Respondent's exhibits.
20 July 2018	The Parties submit an agreed list of witnesses.
20 July 2018	The Presiding Arbitrator requests the Parties to send the statement of non-contentious facts before close of business on 23 July 2018, Singapore time.
23 July 2018	The Parties inform the Tribunal that they require additional time to prepare the Statement of non-contentious facts.
23 July 2018	The Presiding Arbitrator requests the Respondent to response to the Claimant's objection of 19 July 2018.
23 July 2018	With regard to the Claimant's objection of 19 July 2018, the Presiding Arbitrator submits a list of questions to the Claimant.
24 July 2018	The Respondent requests to reply to the Claimant's objection of 19 July 2018 after the Claimant addresses the list of questions of the Presiding Arbitrator of 23 July 2018.
24 July 2018	The Claimant submits that it will respond to the list of questions of the Presiding Arbitrator of 23 July 2018 by the close of business. Furthermore, it states that the list of question "is not a matter that justifies another exercise of dilatory tactics by the Respondent."

26 July 2018	The Respondent submits its preliminary observations in relation to the Claimant's Objection.
30 July 2018	The Claimant answers the Presiding Arbitrator's list of questions of 23 July 2018.
1 August 2018	<p>The Presiding Arbitrator sends the Parties the following email regarding the Claimant's Objection of 19 July 2018:</p> <p><i>"[...] The Tribunal will not make any rulings on the Claimant's Objections of 19 July 2018 in advance of, or during, the hearing, for a number of reasons:</i></p> <ol style="list-style-type: none"> <li><i>1. The application disrupts the entire basis on which the proceedings have been conducted.</i></li> <li><i>2. No explanation is offered for the Claimant's considerable delay in raising these issues.</i></li> <li><i>3. No evidence has been adduced in support of the numerous assertions of fact made in the body of the Objections.</i></li> <li><i>4. Permitting this range of matters to be raised at this stage would deny procedural fairness to the Respondent and might jeopardise the hearing which was fixed some time ago, and which might have serious costs consequences.</i></li> </ol> <p><i>Thus, for the hearing, the Tribunal will admit the Respondent's documents. The Tribunal reminds the Parties that the strict rules of evidence do not apply in international arbitrations but the Tribunal will consider what weight, if any, to give to documents in all the circumstances of the case after hearing all the evidence and all the oral and written submissions.</i></p> <p><i>With regard to the documents in Categories 1 and 5, the Tribunal requests the production of the originals at the hearing.</i></p> <p><i>As to point numbered 3 in the Tribunal's request dated 24 July 2018 and the Claimant's response, the Tribunal understands that this is intended as merely demonstrative of material already before the Tribunal. It is the Tribunal's understanding that this is not to be taken as evidence. [...]"</i></p>
6-10 and 14 August 2018	The hearing takes place.

15 August 2018	<p>The Tribunal sends the following email:</p> <p>“The Tribunal refers to Ms Lees' submission yesterday concerning R-50 and the following two documents (p. 1189), which are not part of the record:</p> <p>(1) Decree of Minister of ESDM 1603 of 2003 on Guidance of Reserve Area          (2) Regulation of The Minister of Home Affairs No. 1 of 2006 concerning Guidance of Demarcation Area.</p> <p>The Tribunal asks the Parties whether they will agree for the Tribunal to have copies of the two documents referred above in order to understand better R-50.”</p>
15 August 2018	The Parties accept the Tribunal’s request of 15 August 2018.
10 September 2018	Following the Tribunal’s request of 15 August 2018, the Respondent sends the requested documents.
24 September 2018	The Respondent requests to receive additional time to submit its post-hearing brief due to the Claimant’s late submission of its post-hearing brief on 11 September 2018. In addition, the Respondent requests the Tribunal’s permission to exceed the page limit of the hearing brief.
24 September 2018	The Claimant objects to the Respondent’s request of 24 September 2018 and explains that it did not serve its hearing brief on the Tribunal until 24 September 2018 because it tried to get the Respondent’s consent on amending the procedural time table.
25 September 2018	<p>The Presiding Arbitrator sends the following email:</p> <p>“The Tribunal is not yet prepared to grant the Respondent extra pages for its closing. It accepts that the Respondent will try to stick to the limit. However if it later transpires that this is not feasible the Respondent is given liberty to renew the application with reasons and with an indication of the number of extra pages required.</p> <p>The Tribunal now has Claimant’s closing and understands what transpired.”</p>



25 September 2018	The Respondent sends a letter in response to the Claimant's letter of 24 September 2018 and thanks the Tribunal for its decision.
9 October 2018	The Respondent submits its post hearing brief.
17 October 2018	The Claimant submits its post hearing brief.
18 October 2018	The Respondent requests to submit a reply to the Claimant's post-hearing brief.
19 October 2018	The Claimant objects the Respondent's request of 18 October 2018.
21 October 2018	The Tribunal rejects the Respondent's request of 18 October 2018.
8 November 2018	The Tribunal asks the Parties to submit a statement of the costs incurred and claimed by 30 November 2018.
30 November 2018	The Parties send their statement of costs.
4 December 2018	The Respondent sends its revised statement of costs.
11 December 2018	The Respondent writes in relation to the Claimant's submission on costs. The Respondent notes that the <i>"total costs of the proceedings for the Claimant being US\$4,912,485 are disproportionate compared to the initial alleged investment made by the Claimant (of US\$8.75M) and far exceed the amount spent on the development of the alleged mining project by the Claimant (US\$2.68M – not all of which can be claimed by the Claimant at the alleged expropriation date, see Chapter 10 of Andrew Flower's First Report). The costs are accordingly disproportionate to the value of the Claimant's alleged losses on a cost recovery basis (US\$9.28-9.36M). These costs are also approximately US\$1M greater than the Respondent's costs."</i>
6 January 2019	The Tribunal closes the proceedings.

