In the matter of an arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes

Case No ARB(AF)/07/1

BETWEEN:

(1) PIERO FORESTI
(2) IDA LAURA DE CARLI
(3) DORA FORESTI
(4) MARIA TERESA SUARDO
(5) PAOLA SUARDO
(6) ANTONIO FORESTI
(7) LUIGI FORESTI
(8) MASSIMILIANO FORESTI
(9) FRANCA CONTI
(10) DANIELA CONTI
(11) FINSTONE s.à.r.l

Claimants

AND

THE REPUBLIC OF SOUTH AFRICA

Respondent

AWARD

THE TRIBUNAL

Professor Vaughan Lowe QC (President)
The Hon. Charles N. Brower
Mr Joseph M. Matthews

Date of Dispatch to the Parties: 4 August 2010

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I. PROCEDURAL HISTORY

1) The International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received on 8 November 2006, under cover of a letter of 1 November 2006, a request for the institution of arbitration proceedings under the Additional Facility Arbitration Rules ("the Request") by Piero Foresti, et al. ("the Claimants") against the Republic of South Africa ("South Africa" or the "Respondent"). The Request was filed by eight Claimants including (i) five Italian nationals, members of the Foresti family of Carrara in Italy ("the Marlin Investors"); (ii) two Italian nationals, members of the Conti family of Carrara in Italy ("the RED Investors"); and (iii) a company, Finstone s.à.r.l., incorporated in Luxembourg ("Finstone").[1] A list describing the nature of each Claimant, their address and, where relevant, place of incorporation, was attached to the Request. The proceedings were brought pursuant to the provisions of the Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investments, signed in Rome on 9 June 1997 (the "Italy BIT") and the Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed in Pretoria on 14 August 1998 (the "Luxembourg BIT") (together "the BITs").

2) The Request for Arbitration states that each of the individual Claimants is or was a national of Italy and not a national of South Africa, and that Finstone was organized and exists under the law of Luxembourg.

3) On 15 November 2006, the Centre confirmed its receipt of the Request and the prescribed lodging fee pursuant to Regulation 16 of the Centre's Administrative and Financial Regulations for lodging notices for the institution of proceedings, and transmitted a copy to the South African Government and the South African Embassy in Washington D.C.

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4) On 8 January 2007, the Secretary-General of the Centre approved access to the Additional Facility and notified both Parties of the registration of the Request as provided for in Article 4 of the Additional Facility Arbitration Rules. Additionally and as required by Article 5(e) of the Additional Facility Arbitration Rules, the Secretary-General invited the Parties to constitute an Arbitral Tribunal in accordance with Chapter III of those rules.

5) By letter of 13 March 2007, the Claimants appointed The Honorable Charles N. Brower (a US national) as arbitrator in this proceeding. On 10 April 2007, the Respondent appointed Mr Joseph Matthews (a US national) as arbitrator. The Respondent by letter of 23 August 2007 and Claimants by letter of 24 August 2007,

[1] On 13 July 2009, the Secretary-General of ICSID approved access to the Additional Facility for three additional Claimants, Antonio, Luigi and Massimiliano Foresti, whose joinder had been requested by the Claimants and consented to by the Respondent. The Claimants asserted that all three additional Claimants are or were nationals of Italy and not nationals of South Africa.

agreed on the appointment of Professor Vaughan Lowe QC (a British national) as President of the Arbitral Tribunal. On 18 September 2007, the Tribunal was deemed to be constituted and the proceedings to have begun. Pursuant to Rule 25 of ICSID's Administrative and Financial Regulations, the parties were notified on 28 November 2007 that Ms. Eloïse Obadia, ICSID Senior Counsel, would act as Secretary of the Arbitral Tribunal.

6) In this arbitration proceeding, Claimants have been represented by Mr Peter Leon, Mr Kevin Williams, Mr Vladislav Movshovich, and Mr Jonathan Veeran of the law firm of Webber Wentzel, and by Mr Toby T. Landau QC, Professor Sir Elihu Lauterpacht CBE QC, and Dr. Guglielmo Verdirame. The Respondent has been represented by Mr Jan Paulsson, Mr Georgios Petrochilos, Mr Jonathan Gass, and Mr Ben Juratowitch of the law firm of Freshfields Bruckhaus Deringer, and by Advocate Gerrit Grobler SC, instructed by Mr Sipho Mathebula of the Office of the State Attorney of the Republic of South Africa. The Respondent had also been represented, until December 2009, by Advocate Seth Nthai SC. On 22 December 2009, the Tribunal was notified that Mr Nthai had been withdrawn as a representative of South Africa.

7) The Tribunal held its First Session with the parties on 11 December 2007 in London ("the First Session"). The Claimants were represented at the session by Mr Mario Marcenaro, Mr Shawn Donly, Mr Fabrizio Ponzanelli, Dr. Richard Plender QC, Dr. Guglielmo Verdirame, Mr Peter Leon, and Mr Kevin Williams. The Respondent was represented at that session by Mr Randall Williams, Mr Shaheed Alli, Mr Rob Cannovo, Mr Sipho Mathebula, Mr Pieter Alberts, Advocate Seth Nthai SC, Mr I. Sharma, Mr G. I. Mfetoane, Mr Georgios Petrochilos, Mr Jonathan Gass, Mr Nabil Lodey, and Ms. Lisa Bingham. Ms. Eloïse Obadia, Secretary of the Tribunal, attended via video-conference on behalf of ICSID.

8) At the First Session, the Parties agreed that the Tribunal had been properly constituted and that they had no objections to the appointment of any of its members. It was also agreed that the proceedings would take place in accordance with ICSID Arbitration (Additional Facility) Rules in force since 10 April 2006.

9) At the First Session, the Parties agreed that Article 41(3) of the Arbitration Rules would apply to the filing of written submissions by non-disputing parties ("NDPs"). The Parties also agreed to a procedure to be followed by the Parties and the Tribunal with respect to any NDP seeking to file written submissions and approaching either Party or the Tribunal. Pursuant to the Tribunal's direction at the First Session, the Parties on 28 March 2008 submitted to the Tribunal the Parties' agreed text for distribution to any potential NDP, which provided for the NDP's information: (i) a summary of the Claimants' allegations; (ii) a statement of denial of all claims by the Respondent; and (iii) a reproduction of the procedure for NDPs agreed to by the Parties at the First Session.

10) At the First Session, the Tribunal decided that the legal seat of the arbitration would be England and that the hearing would be held at The Hague, The Netherlands. The Tribunal also decided that the Claimants should file a Memorial by 29 April 2008, that the Respondent should file its Counter-Memorial by 16 September 2008, that the

Claimants should file their Reply by 14 January 2009, and that the Respondent should file its Rejoinder by 14 May 2009.

11) By letter of 15 April 2008, the Claimants asked for an extension of the agreed timetable. By letter of 23 April 2008, the Secretary informed the Parties of the Tribunal's decision to establish a new calendar pursuant to the agreement reached by the Parties. By letter of 1 July 2008, the Tribunal fixed new time limits for the Parties' pleadings, including in particular the Claimants' Memorial due by 31 July 2008.

12) On 31 July 2008, the Claimants submitted an electronic copy of their Memorial on the Merits.

13) In their Memorial, the Claimants also submitted a request that the Respondent consent to join three additional claimants, namely, the three children of Claimants Piero Foresti and his wife Ida Laura De Carli (Antonio, Luigi and Massimiliano Foresti) as additional claimants in the arbitration. The Respondent consented to the Claimants' request and, subsequently, on 13 July 2009, the Secretary-General of ICSID approved access to the Additional Facility for the three additional Claimants.

14) Starting in December 2008, the Respondent requested from the Claimants the production of certain documents. Following these requests, the Claimants produced certain documents and refused to produce other documents. Admirably, the Parties eventually were able to resolve all outstanding issues related to the document requests without the aid of the Tribunal, with one exception. The one outstanding issue was resolved by Lord Bingham, a neutral third party recommended by the Tribunal and agreed upon by the Parties. Eventually, on 21 October 2009, and after conducting a review of certain documents produced by the Claimants but redacted on the ground of irrelevancy, Lord Bingham concluded that some of the Claimants' redactions were appropriate, but that certain other redactions should be disclosed to the Respondent because they were, in fact, relevant and responsive to the Respondent's document request. The Claimants duly accepted Lord Bingham's findings and produced the relevant portions of the documents to the Respondent. The Tribunal thanks Lord Bingham once again for his assistance in resolving this matter.

15) On 10 February 2009, the Tribunal confirmed a procedural calendar agreed by the Parties, which decided, among other things, that the Respondent should file its Counter-Memorial on 27 March 2009.

16) On 26 March 2009, the parties jointly, through counsel, agreed to a two-month stay of proceedings commencing on 28 March 2009 and requested the Tribunal to approve a new schedule. The joint request for stay specifically stated that the parties agreed that any proposals for settlement or discontinuance would be communicated by one party's legal counsel to the other's legal counsel.

17) On 27 March 2009, the Respondent filed its Objection to Jurisdiction and Admissibility and a Counter-Memorial on the Merits.

18) On 30 March 2009, pursuant to the Parties' agreement, the Tribunal issued an order suspending the proceedings for two months until 28 May 2009, so that the Parties might pursue settlement negotiations through counsel.

19) On 27 May 2009, the parties again jointly requested that the stay of proceedings continue for a further three weeks. This joint request again included the agreement that any proposals for settlement or discontinuance would be communicated by one party's legal counsel to the other's legal counsel.

20) On 28 May 2009, again pursuant to the Parties' agreement and for the purpose of settlement negotiations to be conducted through counsel, the Tribunal extended the stay of proceedings for an additional three weeks until 19 June 2009.

21) On 26 June 2009, pursuant to a request from the Tribunal, the Claimants confirmed that the stay of proceedings had expired on 19 June 2009 and that, according to the calendar previously agreed upon by the Parties and ordered by the Tribunal, the Claimants should file their Reply to the Respondent's Counter-Memorial on 15 October 2009.

22) On 6 July 2009, the Claimants requested from the Tribunal an order staying the proceedings for an additional three months, on the ground that the Respondent had recently granted certain disputed new order mineral rights to the Claimants' Operating Companies. According to the Claimants, the grant of those rights might have had an impact on the quantum of damages sought by the Claimants, and the Claimants needed time to assess the extent to which the grant of the new rights (once confirmed, executed, and registered) partially compensated the Claimants for the alleged extinction of certain old order mineral rights by the entry into force of the Mineral and Petroleum Resources Development Act (the "MPRDA") on 1 May 2004.

23) The Respondent objected to any further stay of the proceedings. On 17 July 2009, the Respondent submitted its written opposition in which it argued that the Claimants were wrong to assert that the conversion of their "old order" rights amounted to a settlement of any portion of the disputed BIT claims. The Respondent asserted its belief that the arbitration proceedings had been commenced only as an attempt to put pressure on the Department of Minerals and Energy ("DME") (now the Department of Mineral Resources, "DMR") in respect of the conversion process of mining rights under the MPRDA. The Respondent reminded the Tribunal that the Claimants had chosen to commence this arbitration before completion of the statutory conversion process of "old order" mining rights to "new order" mining rights under the MPRDA and that the Respondent had argued, both before and during the First Session in this arbitration proceeding, that the Claimants' claims were premature.

24) On 31 July 2009, after considering the Parties' submissions on the matter, the Tribunal concluded that it was possible for the Claimants' case to be pleaded on the facts then known, even if some doubts remained as to the precise terms or extent of the conversions. Accordingly, the Tribunal decided that the Claimants' request for a further stay of the proceedings should be denied, and that the proceedings should continue in accordance with the calendar previously agreed upon by the Parties. However, the Tribunal noted that it would allow further pre-hearing and post-hearing submissions on issues of quantum and liability to the extent that it became necessary

to refine pleadings in the light of newly-discovered facts concerning the details of the conversion scheme.

25) On 17 July 2009, four NGOs, led by the Centre for Applied Legal Studies, filed a petition for limited participation in the proceedings as NDPs. On 20 August 2009, an additional entity, the International Commission of Jurists, also filed a petition for participation in the proceedings as an NDP. In accordance with the ICSID Additional Facility Rules and the procedure agreed by the Parties in the First Session, the Tribunal solicited and considered the views of the Parties on the petitions.

26) On 21 August 2009, the Claimants sought an extension of time to file their Reply to the Respondent's Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits, which was due to be filed on 15 October 2009. The Respondent did not agree to this extension. On 11 September 2009, the Tribunal granted the Claimants a two-week extension of time until 2 November 2009.

27) Also on 11 September 2009, the Tribunal decided that the NDPs should be allowed to file submissions, and that they should file their submissions by 21 December 2009. In order that the NDPs might do so, the Tribunal asked that the Parties agree on and file with the Centre by 16 November 2009: (i) redacted versions of the Memorial and Counter-Memorial; (ii) redacted versions of legal opinions; and (iii) a list of witnesses and experts that had provided evidence on facts and quantum (without any description of the content of the report or statement). The Tribunal also decided on a schedule for the Parties to file pre-hearing submissions in response to the NDPs December submissions.

28) On 25 September 2009, the Tribunal issued a further decision on the NDP petitions. First, the Tribunal explained the reasoning behind its 11 September decision to require the Parties to agree on and disclose to the NDPs certain redacted documents. The Tribunal noted that its decision in this regard was animated by two basic principles: (1) that NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties; and (2) where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process. The Tribunal had ordered the Parties to provide the NDPs with certain redacted documents because it had taken the view that the NDPs must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues. The calendar set by the Tribunal for the NDP submissions and the Parties' responses was set because of the Tribunal's view that the NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions.

29) Second, the Tribunal noted that it did not, at that stage, envisage that the NDPs would be permitted to attend or to make oral submissions at the hearing, but that it would make a final decision on those questions after the Parties had responded to the NDP submissions. Third, the Tribunal decided that, in view of the novelty of the NDP procedure, after all submissions, written and oral, had been made the Tribunal would

invite the parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal would then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it. In the absence of consent from the Respondent to the publication of the award, the Centre would publish excerpts of the award pursuant to Article 53(3) of the Arbitration (Additional Facility) Rules, including that section, so that others might benefit from the experience.

30) In October 2009, Mr Mario Marcenaro, the *de facto* CEO of Finstone, decided to attempt to negotiate directly with representatives of the Respondent.[2] According to the unrefuted testimony of Mr Marcenaro, he approached a lawyer named Marizio Mariano, who is one of the key players in a community organization in South Africa called the Hellenic, Italian and Portuguese Alliance.[3] Mr Mariano arranged for Mr Marcenaro to meet directly with Seth Nthai, a member of the legal team acting on behalf of the Respondent in these proceedings.[4]

31) According to Mr Marcenaro's testimony, on Saturday 10 October 2009, Mr Marcenaro met with Mr Nthai at the law office of Mr Mariano.[5] Mr Mariano introduced Mr Marcenaro and Mr Nthai to one another, and then left them alone in his office.[6] According to Mr Marcenaro's statement, Mr Nthai informed him that there was a faction within the South African Government which wanted the matter settled and another which wanted to pursue the matter to finality, including some in the Government who felt strongly that the Respondent should seek costs against the Claimants to "make a statement."[7] According to Mr Marcenaro, Mr Nthai then solicited a bribe from Claimants, requesting that they pay him ZAR 5 million in return for his assistance in convincing the Respondent to permit Claimants to drop the case without paying the Respondent's attorneys fees and costs, instead paying only their own attorneys fees and costs and all ICSID and administrative costs.[8] According to Mr Marcenaro's testimony, he then began to secretly record the conversation with Mr Nthai on his mobile phone.[9]

32) Mr Marcenaro testified that, during the meeting, Mr Nthai informed him that Mr Nthai would be traveling to Italy later in October and Mr Marcenaro said that since Mr Nthai was going to be in the region he should come to Carrera in Italy to see Finstone's and RED's facilities.[10] Mr Marcenaro could not recall whether the

[2] Claimants' Reply to Respondent's Response to Claimants' Request for Discontinuance and Application for Default Award, 26 Jan 2010 (the "Reply"), Exhibit C882, Witness Statement of Mario Vittorio Marcenaro, 25 Jan 2010 ("Marcenaro Statement"), paragraphs 1.1 and 7.8.
[3] Marcenaro Statement, paragraphs 7.7-7.8.
[4] Marcenaro Statement, paragraph 7.9.
[5] Marcenaro Statement, paragraph 7.10.
[6] Marcenaro Statement, paragraph 7.10.
[7] Marcenaro Statement, paragraph 7.10.
[8] Marcenaro Statement, paragraphs 7.11 and 7.15.
[9] Marcenaro Statement, paragraph 7.13. Mr Marcenaro also testified that he was not able to record the entire conversation, but only "twenty minutes or so," as this was the limit of his mobile phone's memory. Marcenaro Statement, paragraph 7.15.
[10] Marcenaro Statement, paragraph 7.17.

discussion of Mr Nthai's travels took place before or after Mr Nthai solicited the bribe.[11]

33) During the next few days, according to Mr Marcenaro's statement, he informed the principals of Claimants of Mr Nthai's proposal and all of the Claimants rejected it.[12] Mr Marcenaro testified that he wished to tread carefully because he did not want to make Mr Nthai angry.[13] According to Mr Marcenaro's testimony, he spoke with Mr Nthai several times thereafter, and although he needed to turn down the bribe proposal he did not want to make an enemy of Mr Nthai.[14] Mr Marcenaro recorded twelve conversations with Mr Nthai between 18 October 2009 and 3 November 2009.[15]

34) According to Mr Marcenaro, Mr Nthai and Mr Marcenaro met at Mr Marcenaro's house in Johannesburg on 18 October 2009 and 20 October 2009.[16] Mr Marcenaro informed Mr Nthai that the Claimants did not agree to his proposal.[17] Mr Marcenaro said he did not want the relationship between Mr Nthai and Mr Marcenaro or the Claimants to go sour, but that the Claimants would not enter into a side deal with Mr Nthai.[18] At the time of the meetings in Mr Marcenaro's home, he thought that it would be better for Mr Nthai to hear the rejection directly from Claimants so he agreed that when Mr Nthai was in Italy later that month he would try to arrange a meeting between Mr Nthai and Claimants; but Claimants informed Mr Marcenaro that they would not meet with Mr Nthai.[19]

35) According to Mr Marcenaro, Mr Nthai arrived in Pisa late in the evening of 28 October 2009 and Mr Marcenaro had dinner with him. Mr Marcenaro again informed Mr Nthai that Claimants would not get involved in any "side deals" but there might be opportunities to work together in the future.[20] Mr Marcenaro continued to believe that the solicitation of the bribe by Mr Nthai should not be disclosed to the Tribunal.[21]

36) Mr Marcenaro says that on Tuesday, 2 November 2009, he was told by the Claimants that they had decided to inform their outside counsel about Mr Nthai's "offer."[22] Copies of the audio recordings of the meetings between Mr Nthai and Mr Marcenaro at Mr Marcenaro's house were provided to Claimants' legal counsel, Mr Jonathan Veeran, on that afternoon.[23] Those recordings were transcribed and, on 4 November 2009, were circulated to the Claimants' entire legal team.[24]

[11] Marcenaro Statement, paragraph 7.17.
[12] Marcenaro Statement, paragraphs 7.19-7.20.
[13] Marcenaro Statement, paragraph 7.17.
[14] Marcenaro Statement, paragraph 7.22.
[15] Reply, Exhibit C887 (recordings of conversations between Mr Marcenaro and Mr Nthai).
[16] Marcenaro Statement, paragraphs 7.25 and 7.27.
[17] Marcenaro Statement, paragraph 7.25.
[18] Marcenaro Statement, paragraph 7.25.
[19] Marcenaro Statement, paragraphs 7.27-7.28.
[20] Marcenaro Statement, paragraph 7.29.
[21] Marcenaro Statement, paragraph 7.29.
[22] Marcenaro Statement, paragraphs 7.32-7.33.
[23] Marcenaro Statement, paragraph 7.34.
[24] Marcenaro Statement, paragraph 7.34.

37) According to Mr Marcenaro's testimony, following the disclosure to the legal team, the legal team advised the Claimants to disclose the information as soon as possible to counsel for the Respondent and to the Tribunal.[25] Mr Marcenaro felt it would be better not to disclose the information.[26] According to Mr Marcenaro's testimony: "Things in South Africa are complicated – you need to be mindful of the political environment in which you are operating. From a safe distance it is easy to say that we should have immediately informed FBD [counsel for the Respondent] and the Tribunal about the Nthai situation, but I felt that this was going to be a bit hazardous and personally I was not too keen to go that way. For this reason, I stayed in touch with Nthai for the next few days and had a number of telephone calls with him. I carried on recording some of these interactions with Nthai in order to protect myself against any allegations that I had been at fault in any way. I informed [Shawn] Donly that I was still in contact with Seth Nthai. Donly told me that he had also indicated to Webber Wentzel [counsel for the Claimants] that I was still in touch with Nthai."[27]

38) On 2 November 2009, the Claimants wrote to the Tribunal and the Respondent soliciting the Respondent's consent to discontinue the proceedings pursuant to Article 50 of the Additional Facility Rules. On 4 November 2009, the Tribunal issued an order inviting the Respondent to state whether it opposed the Claimants' request for discontinuance. On 20 November 2009, the Respondent submitted a Response to Claimants' Request For Discontinuance and an Application For Default Award. The 20 November 2009 submission was co-signed by Adv. Seth Nthai SC.

39) According to Mr Marcenaro's testimony, he spoke with Mr Nthai on 3 November and 4 November 2009.[28] Mr Marcenaro maintained throughout that Claimants should not disclose Mr Nthai's solicitation of a bribe in the arbitration, but ultimately he was overruled by the Claimants who decided, on the repeated advice of external counsel, to give lead counsel Toby Landau QC permission to inform counsel for the Government about Nthai's conduct.[29] This was not done until 8 December 2009,[30] after the Respondent had filed the 20 November submission requested by the Tribunal.

40) After additional submissions by each Party on the issues of discontinuation and fees, the Tribunal and the Parties agreed that they would hold a three day hearing from 12 to 14 April 2010 to resolve these outstanding issues.

41) The hearing was held on 12 to 14 April 2010 at the Peace Palace, Permanent Court of Arbitration, in The Hague, and conducted in English. At the hearing, the Claimants were represented by Mr Toby Landau QC and Dr. Guglielmo Verdirame, and by Mr Peter Leon, Mr Kevin Williams, and Mr Jonathan Veeran, all three from the law firm of Webber Wentzel, and by Mr Mario Marcenaro and Mr Shawn Donly, both of Finstone, and by Mr Fabrizio Ponzanelli and Ms. Franca Conti, both of RED Graniti S.p.A. The Respondent was represented by H.E. Mr Peter Goosen, Ambassador Extraordinary and Plenipotentiary of the Republic of South Africa to the Kingdom of

[25] Marcenaro Statement, paragraphs 7.35-7.36.
[26] Marcenaro Statement, paragraph 7.36.
[27] Marcenaro Statement, paragraph 7.36.
[28] Marcenaro Statement, paragraphs 7.38-7.40.
[29] Marcenaro Statement, paragraph 7.38.
[30] Marcenaro Statement, paragraph 7.38.

The Netherlands, Ms. Aletta Mosidi, State Attorney, Office of the State Attorney, Mr Sipho Mathebula, Attorney of Record, Office of the State Attorney, Mr Tshediso Matona, Director-General, Department of Trade and Industry, Mr Randall Williams, Chief Director: Trade Policy and Negotiations Department of Trade and Industry, Mr Steven Mathate, Deputy Director: Legal, International, Trade and Investment, Department of Trade and Industry, Mr Sandile Nogxina, Director-General, DMR, Ms. Faith Ndzimande, Chief Director: Mineral Policy, DMR, Mr Pieter Alberts, Director: Legal Services, DMR, Ms. Nompumelelo Gaven Deputy Director: Administration, DMR, Mr Ken Terry, Deputy Director-General: Strategy & Operations, The Presidency, Ms. Sibongile Sigodi, Chief Director: Legal & Executive Services, The Presidency, Mr Sello Mabelane Director: Legal Services, The Presidency, Ms. Rebecca Tee, Head of Legal Services, National Treasury, and by Mr Gerrit Grobler, SC Counsel and by Mr Jan Paulsson, Mr Georgios Petrochilos, Mr Jonathan Gass, Mr Ben Juratowitch, Ms. Alexandra van der Meulen, and Ms. Samira Afrasiabi, all six of the law firm of Freshfields Bruckhaus Deringer LLP. The Secretariat was represented by Ms. Aurélia Antonietti.

42) Transcripts of the hearing were made and were distributed to the Tribunal and the Parties at the end of each day of the hearing.

43) On 26 April 2010, the Claimants, at the Tribunal's request during the hearing and with the Respondent's subsequent consent, supplied the Tribunal with an explanation of certain documents provided to the Tribunal during the hearing.

44) On 21 May 2010, the Respondent submitted to the Tribunal its comments on a chart submitted to the Tribunal by the Claimants on the first day of the hearing, as well as corrections to a timeline submitted to the Tribunal by the Respondent during the hearing. On 28 May 2010, the Claimants provided the Tribunal with their response to the Respondent's 21 May letter and attachments.

45) On 17 June 2010, the Parties informed the Tribunal that they would provide the Tribunal with updated schedules of their costs and expenses by 28 June 2010. On 28 June 2010, the Parties submitted these final documents. On 2 July 2010, the Tribunal declared the proceeding closed pursuant to Arbitration Rule 44(1).

II. SUMMARY OF PARTIES'ARGUMENTS

A. The challenge to jurisdiction and admissibility

1. The Respondent's Objections to Jurisdiction and Admissibility

46) The Respondent submitted its Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits on 27 March 2009 (the "Counter-Memorial"). It raised two main objections to jurisdiction and admissibility:

1 that the BITs require a meaningful juridical entitlement over an asset, existing under domestic law, and that the Claimants (as opposed to the Operating Companies) do not have such an entitlement; and
2 that no exceptional circumstances entitle the Claimants to seek redress in the stead of their indirectly held Operating Companies.

47) The Respondent noted, as background to these objections, that the Claimants identified two types of putative investments within the meaning of the Italy BIT and the Luxembourg BIT, and that the Respondent's objections to jurisdiction and admissibility applied to only one of those putative investments.[31] Respondent noted that the Claimants' two putative investments include (i) the common law mineral rights leased or owned by the Operating Companies; and (ii) the shares in those Operating Companies indirectly owned by Claimants.[32] According to the Respondent, the Tribunal lacks jurisdiction over the Claimants' claims, and the Claimants have no standing to bring their claims, with respect to only the first category of putative investments (*i.e.*, the common law mineral rights leased or owned by the Operating Companies).[33] The Respondent emphasized that those claims include the claims of direct and indirect expropriation of the common law mineral rights and the failure to accord fair and equitable treatment to the common law mineral rights, and do not include the remaining claims raised in the arbitration.[34]

a. The BITs require a meaningful juridical entitlement over an asset

48) The Respondent argued that the definitions of "investment" in Articles 1(1) of both the Italy and Luxembourg BITs make clear that, as an elementary jurisdictional requirement, the Claimants must show *inter alia* that the assets alleged to be "investments" under the BITs are owned by the Claimants in a legally relevant sense under the law governing the common law mineral rights (*i.e.*, South African law).[35] This, Respondent contended, the Claimants cannot do.[36]

49) The Respondent argued that South African law did not grant the Claimants ownership or anything akin to it over the common law mineral rights.[37] Instead, it contended that the relevant rights belonged to – or were vested in – the Operating Companies, or more commonly their lessors: they were investments of those companies, not the Claimants.[38] Therefore, the Respondent argued, the common law mineral rights cannot constitute investments of the Claimants under the two BITs, and the Tribunal accordingly lacks jurisdiction under Article 8(1) of the Italy BIT and Article 10(1) of the Luxembourg BIT with respect to the Claimants' claims based on the common law mineral rights.[39]

[31] Counter-Memorial, paragraph 66.
[32] Counter-Memorial, paragraph 67, citing Memorial, paragraphs 71 and 73.
[33] Counter-Memorial, paragraph 66.
[34] Counter-Memorial, paragraph 66.
[35] Counter-Memorial, paragraphs 72 and 75.
[36] Counter-Memorial, paragraph 75.
[37] Counter-Memorial, paragraph 75.
[38] Counter-Memorial, paragraph 75.
[39] Counter-Memorial, paragraphs 75 and 77.

50) The Respondent argued, moreover, that Article 1(3) of the Italy BIT, which provides that "foreign subsidiaries, affiliates and branches controlled in any way" by a natural or legal person of a Contracting Party are deemed to be investors of that Contracting Party, does not allow the Claimants' Operating Companies to be deemed to be Italian investors.[40] In this regard, the Respondent argued that, under the Claimants' own construction of Article 1(3), South African entities are excluded from the scope of that Article.[41] The Respondent noted that the Claimants stated in a memorandum attached to their Request for Arbitration that the term "foreign" in Article 1(3) "plainly means *foreign to the State in which the investment is made*", thereby including only entities of third states.[42] Therefore, according to Respondent, no assets of those Operating Companies, including the common law mineral rights and leases, could qualify as investments within the meaning of the Italy BIT.[43] Accordingly, the Respondent argued that the Tribunal lacks jurisdiction over any claims based on the common law mineral rights.[44]

51) As to admissibility, the Respondent argued that the Claimants, as indirect shareholders of the Operating Companies, lack standing to bring claims based on the common law mineral rights owned or leased by the Operating Companies.[45] Citing to the International Court of Justice's decision in *Barcelona Traction*, as well as other authorities, the Respondent argued that international law makes clear that shareholders and the companies in which they hold shares are distinct entities, and that assets and claims belonging to the companies do not, without more, belong to its shareholders.[46] Therefore, the Respondent argued that the claims based on the common law mineral rights are inadmissible because they have been asserted by individuals who lack standing to bring such claims.[47]

b. No exceptional circumstances entitle the Claimants to seek redress in the stead of their indirectly held Operating Companies

52) Also with respect to standing and admissibility, the Respondent argued that, in the past, investment-treaty tribunals have allowed shareholders to assert claims on behalf of a locally-incorporated company's investments in two exceptional sets of circumstances: (i) where specific BIT provisions protect a wider range of interests than those protected by the Italy and Luxembourg BITs; and (ii) where the claims are based on undertakings or representations by the host state to the claimant itself as to

[40] Counter-Memorial, paragraph 76.
[41] Counter-Memorial, paragraph 76.
[42] Counter-Memorial, paragraph 76 (emphasis in the original).
[43] Counter-Memorial, paragraph 76.
[44] Counter-Memorial, paragraph 76.
[45] Counter-Memorial, paragraph 78.
[46] Counter-Memorial, paragraph 79, citing *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (Preliminary Objections) [1964] ICJ Reports 6. *See also* Counter-Memorial, paragraphs 80 and 82-85, citing, *inter alia*, *Agrotexim and Others v Greece* (App No 14807/89) ECtHR, 26 September 1995; *Asian Agricultural Products Ltd (AAPL) v The Democratic Socialist Republic of Sri Lanka* (ICSID Case No ARB/87/3), 27 June 1990; *BG Group Plc v The Republic of Argentina*, 24 December 2007; *Vladimir Berschader and Moïse Berschader v The Russian Federation* (SCC Case No 080/2004), 21 April 2006; *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No ARB/01/8) Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007, respectively.
[47] Counter-Memorial, paragraph 86.

treatment of local companies on which the claimant was entitled to rely.[48] The Respondent argued that neither set of circumstances is extant in this case.[49]

2. The Claimants Did Not File a Reply

53) Although the Claimants maintained throughout these proceedings that the Tribunal has jurisdiction over the claims and that the claims are admissible, the Claimants did not respond directly to the Respondent's arguments as to jurisdiction and admissibility before seeking, on 2 November 2009, the Respondent's consent to discontinue the proceedings.

B. The claims on the merits

1. Expropriation

a. The Claimants' Memorial on the Merits

54) The Claimants alleged that the Respondent was in breach of the BITs' prohibitions on expropriation (Article 5 of both BITs) in two respects:

- By the coming into effect of the MPRDA on 1 May 2004, which extinguished certain putative old order mineral rights allegedly held by the Claimants; and
- By the coming into effect of the MPRDA, when combined with the Mining Charter dated 13 August 2004, introducing compulsory equity divestiture requirements with respect to the Claimants' shares in the Operating Companies.[50]

In addition, the Claimants alleged "further or alternatively" that the Respondent's failure to comply with certain due process obligations constituted an independent breach of Article 5(9) of the Italy BIT.[51]

55) The Claimants argued that the MPRDA brought to an end the old order mineral law by repealing the common law to the extent that its principles were in conflict with the MPRDA.[52] According to the Claimants, this result has been achieved by necessary implication rather than expressly, by the introduction of the notion of state custodianship of mineral rights on the part of the State and the conferring of extensive new public law powers of control on the Minister which are incompatible with the common law notion of rights to minerals.[53] The Claimants argued that the competence or right of a mineral right holder to prospect or mine as an incidence of

[48] Counter-Memorial, paragraphs 87-96.
[49] Counter-Memorial, paragraphs 87-96.
[50] Memorial, paragraph 632.
[51] Memorial, paragraph 650.
[52] Memorial, paragraph 356.
[53] Memorial, paragraph 360.

his ownership has been destroyed by the MPRDA in the sense that it is removed *in toto* from South African law.[54]

56) The Claimants argued that the Mining Charter, which was concluded by the South African Government, the South African Chamber of Mines, the National Union of Mineworkers, and the South African Mineral Development Association following private talks between these groups,[55] is an attempt to encourage greater ownership of mining industry assets by historically disadvantaged South Africans ("HDSAs").[56] According to the Claimants, the Mining Charter tries to achieve that end by *inter alia*, requiring mining companies to achieve 26% HDSA ownership of mining assets by 2014, and publish employment equity plans directed towards achieving a baseline 40% HDSA participation in management by 2009.[57] The Claimants argue that the Mining Charter states that transactions must take place "in a transparent manner, and for fair market value", and that stakeholders should meet after five years to determine what further steps, if any, need to be taken to achieve the 26% target.[58]

57) As to the concept of expropriation applicable in the case, the Claimants argued that the two applicable BITs accord investors protection from "different methods and gradations of expropriation to an extent that is significantly wider than in most other investment disputes."[59] Specifically, the Claimants argued that the two BITs, taken together with other BITs entered into by South Africa by virtue of the relevant MFN clauses, provide protection from (i) direct expropriation; (ii) indirect expropriation; (iii) measures having an effect equivalent to expropriation ("equivalent measures"); and (iv) measures limiting, whether permanently or temporarily, investors' rights of ownership, possession, control or enjoyment of the investments.[60]

58) The Claimants argued that Articles 5(1) and 5(2) of the relevant BITs specify the four following conditions which must be met if an expropriation is to be considered lawful:
- the expropriation must be "for public purposes or in the national interest"(Italy BIT) or "for a public purpose related to the internal needs of the country" (Luxembourg BIT);
- the expropriation must be on a non-discriminatory basis;
- the Host State must pay "immediate, full and effective compensation" (Italy BIT) or "prompt, adequate and effective compensation"(Luxembourg BIT); and
- the expropriation must be undertaken "under due process of law" (Luxembourg BIT).[61]

The Claimants also noted that Article 5(9) of the Italy BIT contains a separate 'due process' provision which provides that an investor which asserts that all or part of its investment has been expropriated "shall have a right to prompt review by the

[54] Memorial, paragraph 360.
[55] Memorial, paragraph 382.
[56] Memorial, paragraph 388.
[57] Memorial, paragraph 388.
[58] Memorial, paragraph 388.
[59] Memorial, paragraph 605.
[60] Memorial, paragraph 604.
[61] Memorial, paragraph 623.

appropriate judicial or administrative authorities . . . to determine whether any such expropriation conforms to national law principles and international law."[62]

i. Unlawful expropriation of the Claimants' "old order mineral rights"

59) The Claimants alleged that, by reason of the MPRDA's promulgation, the Respondent expropriated all of the Claimants' mineral rights, in their totality.[63] This is so, the Claimants argued, because upon its entry into force the MPRDA extinguished the Claimants' mineral rights and, at the same time, granted them "a procedural right to apply for conversion of their 'old order mineral rights' into much-diminished 'new-order mineral rights.'"[64] The Claimants argued that the procedural right to apply for conversion is, if relevant at all, properly characterized as a form of procedural compensation for the expropriation.[65]

60) More specifically, the Claimants argued that their old order mineral rights were unlawfully expropriated in one of three ways, depending on the particular properties associated with the old order mineral rights. First, the Claimants alleged that the old order mining rights associated with forty-four properties affecting twenty-one quarries have been effectively, definitively, and directly or indirectly expropriated as of 1 May 2004 because, at the end of the conversion process, no new order right has been granted and, thus, no compensation has been granted.[66] The Claimants noted that, with respect to the old order rights associated with some of these properties, the Claimants had not availed themselves of the conversion process because if they had done so they would have been required under the MPRDA to begin prospecting or mining operations within a period of time that was not economically feasible.[67]

61) Second, the Claimants alleged that the old order mining rights associated with five properties affecting four quarries have been directly expropriated as of 1 May 2004 against a measure of compensation that fails to satisfy the standards for compensation required under the BITs.[68] The Claimants argued that these old order mining rights can be said to have been expropriated against an incorrect measure of compensation because, although the old order rights associated with these properties have been converted into new order rights, that measure of compensation (*i.e.*, the value of the new order rights) is insufficient.[69] The Claimants argued that if this second group of expropriations were not direct expropriations, then they were indirect and/or partial expropriations and/or 'equivalent measures', again, taken against inadequate compensation.[70]

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[62] Memorial, paragraph 630.
[63] Memorial, paragraphs 633, 635 (i).
[64] Memorial, paragraph 633.
[65] Memorial, paragraph 635.
[66] Memorial, paragraphs 645(iii), 637.
[67] Memorial, paragraph 645(iii).
[68] Memorial, paragraphs 645(iv), 638.
[69] Memorial, paragraphs 645(iv), 638.
[70] Memorial, paragraphs 645(iv), 638.

62) Third, the Claimants alleged that the old order mining rights associated with fifty properties affecting twenty-five quarries where a decision of the Respondent on conversion was still pending, nevertheless have been directly expropriated against a measure of compensation that is still uncertain but that, at best, will not satisfy the standards for compensation required under the BITs.[71] The Claimants argued that if the cases in this third group of expropriations were not direct expropriations, then they were indirect and/or partial expropriations and/or 'equivalent measures', again, taken against inadequate compensation.[72]

63) The Claimants argued that all of the above expropriations were unlawful, not only because there was insufficient compensation, but also because of a failure of due process.[73]

ii. Expropriation of the Claimants' shares in the Operating Companies

64) The Claimants argued that their shares in the Operating Companies have been expropriated by operation of the Black Economic Empowerment ("BEE") equity divestiture requirements established by the twin operation of the Mining Charter and the MPRDA.[74] The Claimants noted that the Mining Charter requires foreign investors to sell 26% of their shares in relevant mining companies to HDSAs. They also argued that, while the Mining Charter asserts that such shares are to be sold at fair market value, the reality is that such equity divestitures cannot take place at fair market value – even if that value is based on the diminished fair market value of the "new order mineral rights" held by the companies.

65) The Claimants argued that this equity divestiture scheme constitutes a direct and/or indirect and/or partial expropriation of the Claimants' shares in the Operating Companies, or measures of equivalent effect, with the first act of the expropriation being the announcement of the divestiture scheme in the Mining Charter.[75]

66) The Claimants argued that the expropriation of their shares in the Operating Companies is unlawful on the following grounds: (i) failure to pay compensation; (ii) lack of due process; and (iii) discrimination.[76]

b. The Respondent's Counter-Memorial

i. Assuming *arguendo* that the Claimants' investment has been expropriated, that expropriation is lawful

67) The Respondent argued that, assuming *arguendo* that Claimants have a valid claim for expropriation of both old order mineral rights and shares in the Operating

[71] Memorial, paragraphs 645(v), 639.
[72] Memorial, paragraphs 645(v), 639.
[73] Memorial, paragraph 644.
[74] Memorial, paragraph 640.
[75] Memorial, paragraph 641.
[76] Memorial, paragraph 645.

Companies, the expropriation was lawful under the BITs and, therefore, Respondent did not breach the BITs' provisions on expropriation.[77]

68) The Respondent argued that, taken together, the two BITs permit the Respondent to expropriate investments as long as that expropriation meets the four following conditions: (i) the expropriation must be for a public purpose; (ii) the Respondent must provide immediate or prompt compensation that is full or adequate and effective; (iii) the expropriation must be on a non-discriminatory basis; and (iv) the expropriation must be effected under due process of law.[78]

69) The Respondent argued that the alleged expropriation of old order mineral rights and shares in the Operating Companies were undertaken for multiple and important public purposes, and that the Claimants had conceded as much in their Memorial.[79] Specifically, the Respondent explained that the MPRDA and the Mining Charter were promulgated for the purpose, among other things, of: (i) simplifying and modernizing an overly complex legal system; (ii) ameliorating the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular; (iii) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and (iv) protecting the environment and the communities living in the vicinity of mining operations.[80] With respect to the 1991 Mineral Rights Act in particular, which was repealed by the MPRDA, the Respondent argued that the 1991 Act was an instrument that entrenched white privilege in the minerals sector, and that it clearly could not withstand the coming to power of a democratically elected government.[81]

70) The Respondent argued with respect to compensation that the obligation to provide "immediate" or "prompt" compensation is met where: first, the state provides the investor, without undue delay, with access to an effective mechanism for the determination whether compensation is due and, if so, the amount required; and second, if that mechanism determines that compensation is due, it is paid within a short time after the amount has been fixed (and with interest, to take account of the time-value of money).[82]

71) The Respondent argued that South African law complies with these compensation requirements because it provides an effective mechanism for the determination whether compensation is due.[83] According to the Respondent, the Claimants' Companies have knowingly and intentionally refused to use the available domestic procedures and, therefore, the Claimants themselves are the cause of any loss they may have suffered.[84]

72) The Respondent argued, with respect to the question whether the expropriation was non-discriminatory, that the Claimants had implicitly admitted as much with respect

[77] Counter-Memorial, paragraph 556.
[78] Counter-Memorial, paragraphs 559-61.
[79] Counter-Memorial, paragraphs 562, 57-122, 561.
[80] Counter-Memorial, paragraphs 562, 57-122.
[81] Counter-Memorial, paragraphs 21-22, 57-122.
[82] Counter-Memorial, paragraph 565.
[83] Counter-Memorial, paragraph 573.
[84] Counter-Memorial, paragraphs 573, 576.

to the MPRDA.[85] As to the Mining Charter, the Respondent argued that the Mining Charter's divestment requirements treated all investors, whether South African or foreign in precisely the same way.[86] Moreover, the Respondent argued, even if the Mining Charter were found to treat foreign investors differently from South African investors, the difference in treatment would fall well within the Respondent's margin of appreciation for determining which measures are reasonable and justifiable in advancing critical public interests.[87]

73) The Respondent argued, with respect to the due process requirement for lawful expropriation, that both the MPRDA and the Mining Charter comply with the due process requirements of the Italy and Luxembourg BITs.[88] Specifically, the Respondent argued that the Claimants, through their Operating Companies, are entitled within the South African legal system: (i) to pursue a claim for expropriation both administratively and judicially; (ii) to seek judicial review of the DME's exercise of its powers under the MPRDA (as they have done in several instances); and/or challenge the Constitutional validity of the MPRDA and/or the incorporation of the Mining Charter into the MPRDA.[89] According to the Respondent, access to these legal procedures is all that is required; due process does not entitle the Claimants to whatever substantive outcome they might prefer, nor to an individualized hearing by the State before the adoption by the State of a statute that has an expropriatory effect.[90]

ii. There was no direct or indirect expropriation of either the old order mineral rights or the Claimants' shares in the operating companies

74) The Respondent argued that direct expropriation requires the complete deprivation, as a practical matter, of all of the meaningful substantive municipal law rights enjoyed by the investor, along with transfer of ownership and control (or at least some essential component thereof) to a different beneficiary.[91] The Respondent argued that neither complete deprivation nor transfer of ownership can be shown in this case because the Operating Companies have retained the same core entitlement — to prospect for or mine granite on an exclusive basis — albeit under a different name, notwithstanding the fact that the precise nature of the municipal regulatory measures has changed.[92]

75) The Respondent argued that there was no indirect expropriation for three reasons. First, the Respondent argued that a generally applicable and non-discriminatory regulation, such as that in issue here, cannot be expropriatory absent a specific, prior promise that the regulation would not be adopted.[93] Second, the Respondent argued

[85] Counter-Memorial, paragraph 579.
[86] Counter-Memorial, paragraph 582.
[87] Counter-Memorial, paragraph 583.
[88] Counter-Memorial, paragraph 587.
[89] Counter-Memorial, paragraph 587,
[90] Counter-Memorial, paragraphs 588-89.
[91] Counter-Memorial, paragraph 598.
[92] Counter-Memorial, paragraphs 609, 612.
[93] Counter-Memorial, paragraphs 621-23.

that there can be no indirect expropriation unless the investor has been substantially deprived of its rights in the investment.[94] Third, the Respondent argued that there can be no indirect expropriation where, as here, the government action in question is a rational and proportional means of pursuing legitimate public regulatory purposes.[95]

76) The Respondent argued that the Claimants' shares in the Operating Companies were not directly expropriated either in fact (as it was not yet clear whether there would be any divestiture or not) or in principle.[96] The Respondent compared this case to the *Svenska Management Gruppen AB* v *Sweden* case before the European Commission on Human Rights.[97] In that case, Sweden had imposed a 20% tax on corporations and increased social security contributions for the purpose of opening up corporate investment to workers.[98] The European Commission on Human Rights dismissed claims of expropriation as being manifestly unfounded.[99] The Respondent argued that, if there was no expropriation in the Swedish case, there could be no expropriation here, where the Government had only attempted to open up investment, without any additional tax or social security obligations.[100]

77) The Respondent made the same arguments against a finding of indirect expropriation with respect to the Claimants' shares in the Operating Companies as it did with respect to the old order mineral rights.[101] In addition, the Respondent argued that there could be no indirect expropriation of the Claimants' shares in the Operating Companies because, even if there was a 26% divestment (only one of many options under the Mining Charter), the Claimants would still retain control over their investments.[102]

2. Fair and Equitable Treatment and National Treatment Claims

78) In addition to their claims for expropriation, the Claimants alleged that the MPRDA and the Mining Charter breached the Respondent's fair and equitable treatment and national treatment obligations under the Italy and Luxembourg BITS.[103] The Respondent denied the allegations;[104] and each party offered detailed arguments in favour of their positions, in the same tenor as those detailed above with respect to expropriation.

C. Discontinuance

[94] Counter-Memorial, paragraphs 635-36.
[95] Counter-Memorial, paragraphs 637-38.
[96] Counter-Memorial, paragraphs 659-60.
[97] Counter-Memorial, paragraph 662, citing *Svenska Management Gruppen AB* v *Sweden* (App No 11036/84) EComHR, 2 Dec 1985.
[98] Counter-Memorial, paragraph 662.
[99] Counter-Memorial, paragraph 662.
[100] Counter-Memorial, paragraph 663.
[101] Counter-Memorial, paragraphs 664-61.
[102] Counter-Memorial, paragraphs 666-67.
[103] Memorial, paragraphs 651-771.
[104] Counter-Memorial, paragraphs 668-890.

79) On 2 November 2009, the Claimants sought the Respondent's consent to discontinue the proceedings pursuant to Article 50 of the Additional Facility Rules.[105] The Claimants argued that, although they had not been provided with full relief for their alleged injuries, they nevertheless sought discontinuance because, pursuant to a 12 December 2008 agreement between the DMR and the Operating Companies (the "Offset Agreement"), the Respondent had granted the Claimants' Operating Companies new order mineral rights without requiring the Claimants to sell 26% of their shares to HDSAs.[106] Instead, pursuant to the Offset Agreement, the Operating Companies would be deemed to have complied with the Mining Charter by (i) making a 21% beneficiation offset (*i.e.*, beneficiating – processing and adding value to the quarried stone – in South Africa 21% of the stone that it mined in South Africa); and (ii) providing a 5% employee ownership program for employees of the Operating Companies.[107]

80) The Claimants also asserted that they had tried to settle the case with the Respondent, but to no avail.[108] Therefore, the Claimants argued, given that they had received partial relief, and given the costs of the arbitration and current economic conditions, it was now appropriate to seek discontinuance of these proceedings.[109]

81) The Respondent filed its Response to Claimants' Request for Discontinuance and Application for Default Award on 20 November 2009, in which it indicated that it did not consent to the Claimants' request for discontinuance;[110] and, as a consequence of Article 50 of the ICSID Additional Facility Rules, the proceedings continued.[111]

82) The Respondent argued in its Response that the Claimants had sought discontinuance without prejudice, leaving the Claimants free to bring the same claims at a later date and leaving all costs where they lay, and that Respondent could not agree to discontinuance on such terms.[112] However, on 26 January, the Claimants informed the Respondent and the Tribunal that they were willing to agree to discontinuance with an award dismissing their claims with *res judicata* effect.[113]

D. Default Award of Fees and Costs

1. The Respondent's Application for a Default Award

83) In its Response to the Claimants' Request for Discontinuance, the Respondent asked the Tribunal to issue a default award, not on the merits, but only with respect to fees

[105] Claimants' Request for Consent to Discontinuance (the "Request), page 1.
[106] Request, pages 2-3.
[107] Request, pages 2-3.
[108] Request, pages 10-12.
[109] Request, pages 10-12.
[110] Respondent's Response to Claimants' Request for Discontinuance and Application for Default Award (20 November 2009) (the "Response"), paragraph 1.
[111] *See* Additional Facility Rules, Article 50 ("If objection [to a request for consent to discontinue] is made, the proceeding shall continue.").
[112] Response, paragraph 5.
[113] Claimants' Reply to Respondent's Response to Claimants' Request for Discontinuance and Application for Default Award (26 Jan 2010) (the "Reply"), paragraph 13.

and costs.[114] Therefore, in its Request, the Respondent addressed two issues: (i) the Tribunal's power to issue an Award or other enforceable order with respect to the costs of the proceedings without first evaluating the merits of the case; and (ii) in the event that the Tribunal has such a power, the Respondent's entitlement to recover from the Claimants all of the fees and costs the Respondent has expended in connection with the proceedings.[115]

84) With respect to the first issue, the Respondent made the following three, alternative arguments: (i) that Article 48 of the Additional Facility rules permit the Tribunal to issue a default award, in which it considered neither its jurisdiction nor the merits of the case already submitted to it, but instead merely considered the question of costs; (ii) that the Tribunal could render a default award in favour of the Respondent on the ground of Claimants' failure to prosecute their claims; and (iii) that the Tribunal has inherent powers to grant an enforceable order, rather than an Award in terms of Article 52 of the Rules, with respect only to the costs of the proceeding.[116]

85) With respect to the second issue, the Respondent argued that the Respondent should be considered to be the prevailing party, and thus entitled to an award of fees and costs, because the Claimants did not receive anything as a result of the arbitration, but instead merely received the same treatment as was the entitlement of every other mining company that was subject to the process for the conversion of rights.[117] In addition, the Respondent argued that it was entitled to an award of fees and costs because the Claimants had wasted the time, energy, and money of ICSID, the Tribunal, and the Republic by bringing a claim that (i) they never intended to pursue as pleaded, but rather had brought as a mere tactical device, (ii) could have been adequately handled under the Respondent's own laws and procedures, and (iii) was not ripe.[118] Finally, the Respondent also argued that, were there to be a dismissal without prejudice, it would be fundamentally unfair to leave the costs where they lay.[119]

2. The Claimants' Reply

86) In reply to the argument that Article 48 of the Additional Facility Rules permits the Tribunal to issue a default award in which it considers only the question of costs, the Claimants argued first, that a claimant who makes a request under Article 50 is not automatically in default,[120] and second, that the characterization of the proceedings that was put forward by the Respondent was unnecessarily convoluted and fundamentally flawed, albeit a reaction to the unusual nature of the present situation.[121]

[114] Response, paragraph 3.
[115] Response, paragraph 3.
[116] Response, paragraphs 24-35.
[117] Response, paragraphs 20-23.
[118] Response, paragraph 16.
[119] Response, paragraphs 17-18, 24-35.
[120] Reply, paragraph 16.
[121] Reply, paragraph 12.

87) In reply to the argument that the Tribunal could render a default award in favour of the Respondent on the ground of Claimants' failure to prosecute their claims, the Claimants argued that they had no objection in principle to the rendering of a default award on this basis, albeit with prejudice, as long as any order or award (i) was accompanied by a narrative explaining Claimants' justification for failing to pursue the claims,[122] and (ii) followed the final grant of the Operating Companies' prospecting and mining rights by the DMR on the basis of the Offset Agreement.[123]

88) In reply to the argument that the Tribunal has inherent powers to grant an enforceable order with respect only to the costs of the proceeding, the Claimants argued that it is in principle open to the Tribunal to take the view that this unusual situation is not addressed adequately in the Rules, and for the Tribunal accordingly to exercise its inherent powers.[124]

89) In reply to the argument that the Respondent is the prevailing party, the Claimants asserted the opposite.[125] According to the Claimants, they are the prevailing party because their initiation of the arbitration caused the Respondent to (i) enter into the Offset Agreement with the Claimants' operating companies; and (ii) convert the majority of the Operating Companies' new order rights, by both granting and notarially executing those rights in the period between July 2009 and October 2009.[126]

90) The Claimants rejected the argument that they had wasted the time, energy, and money of ICSID, the Tribunal, and the Republic by bringing a claim that they never intended to pursue as pleaded, but rather had brought as a mere tactical device.[127] The Claimants argued that the Respondent had not pointed to any concrete evidence of an intent on the part of Claimants to file the arbitration as a mere tactical device,[128] and that the Respondent's argument made no sense if, as Respondent asserted, it was clear to Claimants from the outset that they would eventually receive what they did receive on the timeline predicted by Respondent.[129]

91) The Claimants also argued that: (i) they had always been open about their desire to receive new order rights, rather than pursue arbitration;[130] (ii) their claims were not vexatious, but were based on the merits and their lawyers' assessment of Claimants' rights under the BITs;[131] and (iii) the statements made by Richard Plender (now Mr Justice Plender) at the First Session in December 2007 — that Claimants had already suffered an injury, but that the amount of the loss might be abated by Government action — was true at the time.[132] Today, the Claimants argued, the loss has been largely abated due to the Offset Agreement and the conversion of the majority of Claimants' old order rights.[133]

[122] Reply, paragraphs 13-14.
[123] Reply, paragraph 79(i).
[124] Reply, paragraph 13.
[125] Reply, paragraph 12.
[126] Reply, paragraphs 24-31, 44, and 47-51.
[127] Reply, paragraphs 33-35 and 63.
[128] Reply, paragraph 16.
[129] Reply, paragraph 63.
[130] Reply, paragraph 33.
[131] Reply, paragraph 34.
[132] Reply, paragraph 35.
[133] Reply, paragraph 35.

92) In reply to the argument that the Claimants' claims were not ripe and could have been adequately addressed by the procedures put in place by the Respondent, the Claimants argued that neither of the BITs requires Claimants to exhaust domestic remedies before approaching a Tribunal constituted under the ICSID Additional Facility Rules,[134] and that both BITs contain a "fork-in-the-road" provision which constrains the ability of claimants to pursue a remedy in the domestic legal system without the risk of losing their right to advance substantially the same claim before an international arbitral tribunal.[135]

93) The Claimants argued that their claims were ripe because they had suffered a loss in 2004, when the relevant legislation was enacted.[136]

94) The Claimants also argued that, had they exhausted the administrative process in South Africa, they would not have received the new order rights on the terms that they have now received them, and that after the grant of new rights their ability to obtain effective relief from the Tribunal would have been limited.[137]

95) Finally, the Claimants argued that acceptance of the Respondent's argument would have the effect of driving a coach and horse through the system of investment protection.[138] According to the Claimants, if the Tribunal accepted the Respondent's arguments, States in future could devise easy "maybe tomorrow" escape routes from their international obligations towards investors, as all they would need to do to avoid accountability would be to leave the door open to the possibility of rectifying their actions by an uncertain measure at an uncertain date.

3. The Parties' Cost Submissions

96) On 28 June 2010, the Respondent filed a statement of its fees and costs up to 30 April 2010. Those costs, in EURO converted from ZAR as of 30 April 2010 at the European Central Bank's Euro exchange reference rate, totalled EURO 5,765,467.12. Deducting Mr Nthai's costs of EURO 432,320.21 from that amount, the Respondent claimed EURO 5,333,146.91 from the Claimants as of 30 April 2010.

97) On 28 June 2010, the Claimants filed a statement of their costs and fees up to May 2010. Those costs and fees totalled EURO 4,374,200.11, as converted from ZAR as of that date.

III. THE TRIBUNAL'S ANALYSIS

98) The Tribunal is unanimous in considering that it may decide the question of costs by an exercise of its discretion.

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[134] Reply, paragraph 37(i).
[135] Reply, paragraph 37(ii).
[136] Reply, paragraph 52.
[137] Reply, paragraphs 52-55.
[138] Reply, paragraph 56.

99) The case was initiated by the exercise by the Claimants of their rights under Article 8 of the Italy-RSA BIT and Article 10 of the Luxembourg-RSA BIT to submit their dispute for settlement to arbitration pursuant to the Rules of the Additional Facility of ICSID.

100) Article 58 of the ICSID Arbitration (Additional Facility) Rules (April 2006) reads as follows:

> **Article 58**
> **Cost of Proceeding**
>
> (1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.
>
> (2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.

101) There is no "agreement otherwise" by the parties. In particular, the Tribunal does not consider that the agreement of the Parties that the seat of the arbitration be London and that the *lex arbitri* be English Law amounts to an agreement that Article 58 of the Additional Facility Rules be displaced by the provision in s. 61(1) of the (English) Arbitration Act 1996, which reads as follows:

> ***Award of costs***
>
> 61.(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.
>
> (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

102) The Tribunal notes that s. 61 is not among the mandatory provisions of the Arbitration Act 1996: see s. 4 and Schedule 1 of the Act. Section 61 therefore applies only if and to the extent that the Parties have not made their own arrangements by agreement. The agreement to arbitrate under the ICSID Additional Facility Rules is such an

arrangement, and constitutes an agreement that displaces the general principle that costs should follow the event by virtue of s. 61(2) of the 1996 Act.[139]

103) Moreover, the Tribunal considers that even if s. 61(2) were applicable it would not be appropriate to apply the general principle set out in that sub-section, because this is not a case in which the Tribunal is mandated (or even authorised) to rule upon the merits of the claim and in which the Tribunal's own decisions determine which parts or elements of the claim succeed, and to what extent, and which do not. Thus, the Tribunal does not consider that it would be bound to apply the principle that costs should follow the event even if it were bound by s. 61 (which it is not).

104) The Tribunal therefore considers that it may and must decide the question of costs as an exercise of discretion.

105) Article 58 of the Additional Facility Rules does not expressly limit that discretion in any way. The Tribunal is not bound to apply any particular rule or principle in exercising its discretion. Nonetheless, the exercise of discretion is not wholly unconstrained. It may not be capricious or arbitrary. It must be the result of the rational consideration of relevant factors.

106) While the Tribunal is not necessarily limited to a consideration of factors upon which the Parties have based their arguments concerning costs, and is not bound to treat every such factor as necessarily relevant to its decision on costs, it will generally be appropriate to give particular consideration to factors which all the Parties agree are relevant.

107) In this case there is no consensus as to the principles governing costs. This is, however, in large measure due to the disagreement between the Claimants and the Respondent concerning the characterization of the ending of the dispute. The Claimants submit that the Respondent has given them what they wanted and that they are therefore the successful parties. The Respondent submits that the Claimants have abandoned their claims and are accordingly the unsuccessful parties.

108) In many contexts it would be a welcome and highly satisfactory feature of the ending of litigation that each side regarded itself as being the winner; but where the implication is that the other, 'losing' party should pay some or all of the costs of the 'winner', such common satisfaction may itself be a cause of discord. Such is the case here.

109) Nonetheless, the fact that both sides placed considerable weight in their submissions on the question of the extent to which each side had 'succeeded' in these proceedings reflects at least an underlying agreement that the degree of success of each party is a factor relevant to the decision on costs.

110) The Tribunal considers that this is correct in principle. Arbitrations such as the present are concerned with the entitlements of the Parties: what Parties are entitled to demand, or to refuse, and what they are not. In principle, if one Party is entitled to something

[139] See, e.g., Section 4(3) of the Act ("The parties may make . . . arrangements [to vary non-mandatory provisions of the Act] by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.").

and that thing is improperly withheld, its remedy should be both what it is entitled to and the costs which that party had to incur in order to obtain its entitlement through the arbitration. Conversely, if one party is entitled to withhold something, and is obliged to defend itself in arbitral proceedings against a demand for that thing, it should not have to bear the costs of defending its right to withhold the thing.

111) In this case the Tribunal has not ruled on the questions of the extent to which the Parties were or were not entitled to the various rights that they claimed. There cannot, therefore, be a simple application of the principle that 'costs follow the event'. What the Tribunal can do, however, is define the boundaries within which 'success' and 'failure' are to be evaluated and to make its own estimate of the degree of 'success' of each Party.

112) While that appraisal is possible, and indeed requested of the Tribunal by the Parties, it must not be allowed to obscure the fact that in this case there is no real winner and no real loser. What has happened is that during the many months over which the arbitration has unfolded both the Claimants and the Respondent have explored ways in which they can best fulfil their respective roles in the development of the new economy of the Republic of South Africa; and their efforts have brought them to a point where their interests are sufficiently closely aligned for there to be no advantage in pursuing these arbitral proceedings any further, and every advantage in rebuilding the relationship of trust and mutual commitment between investor and host Government upon which economic development ultimately depends.

113) The Tribunal is willing, and has been mandated by the parties, to proceed to a decision on the allocation of costs; but it wishes to state in the plainest possible terms that the resolution of this dispute cannot be understood in terms of success or failure for either side, but only in terms of the ultimate success of all parties in their struggle to find a fair, viable structure for the future of this particular part of the South African economy.

114) We start from the view that the question of 'success' is to be addressed within the confines of the arbitration, and not within the broader context of the dispute between the Parties. That broader context may include the pursuit of separate and different procedures in an attempt to secure the best outcome. Typically, the parties will continue to negotiate. In some cases they may pursue claims against insurers or contractual guarantors. While such separate procedures might yield a result which the Party regards as being at least as favourable as the result which it expects to obtain from an arbitration, such a result achieved by the separate procedure is not a success *in the arbitration*. Thus, a party may achieve a 'successful' result in the broad context of the dispute without succeeding in its claims before the arbitral tribunal.

115) This is evident from a simple example. Investor X brings a claim in an arbitration against State Y for $100m for an alleged expropriation of an oil concession. State Y offers to give X a 25-year gas concession if it abandons the claim for $100m, and X accepts the offer. X may consider the gas concession to be worth $110m, and think that it has had a great success in its dealings with State Y – and, moreover, that it has managed to preserve its relationship with State Y. What X cannot say, however, is that it 'won' or 'succeeded in' the arbitration.

116) In the present case, some elements of the Claimants' claim were abandoned rather than 'settled'; and while the new rights given to the Claimants by the Respondent may be regarded by the Claimants as being sufficient to warrant a commercial decision not to proceed further with this arbitration (with all its attendant costs, delays, and risks) those rights do not rectify or even address every element of the claim. There are some elements which the Claimants were willing to give up because the overall outcome was sufficiently attractive to them. Those elements were, in effect, abandoned in return for an acceptable package in respect of other elements of the claim. Had a similar package been awarded by the Tribunal, it would have been evident that the Tribunal had upheld some elements of the claim and dismissed other elements. The Claimants would have succeeded partially but not wholly.

117) It is, moreover, noted that although the Parties could have agreed that the grant of new rights by the Respondent would be dependent upon the definitive abandonment of the claims in the arbitration, no such condition was imposed. That is not easy to reconcile with the notion that there was a 'settlement' of this case. Nor is the fact that the Claimants applied unilaterally for the discontinuance of the proceedings – an application opposed by the Respondent. Indeed, it may also be observed that a 'settlement' might be expected to include an agreement on the question of costs: the very fact that the Tribunal has this issue before it calls into question the idea that there is an agreed settlement terminating these proceedings.

118) The Tribunal, on the basis of the present record, cannot know whether or not a causal link in fact existed between the initiation and maintenance of the arbitration and the grant of rights by the Respondent, which asserts that the grant would have been forthcoming in any event as a result of the ordinary government decision-making process. The arguments made by Claimants in their pleadings concerning the need to see the dispute over the application of the South African legislation in the light of the specific characteristics of the dimension granite industry are as valid in the context of the Claimants' negotiations with the Government as they are in the context of the arbitration: the possibility that the Government was persuaded by and responded to the arguments of the Claimants (who are the leaders in the South African dimension granite industry) cannot be excluded.

119) While understanding the Claimants' concern that they could not assume that an agreed compromise with the Respondent would be implemented and that the arbitration should not be definitively abandoned until the compromise was delivered by the Respondent in a legally-binding form, the Tribunal also considers that it is not established that the Claimants needed to wait as long as they did to inform the Respondent of the solicitation of a bribe by one of Respondent's senior counsel, Seth Nthai, who continued to participate in the preparation of Respondent's pleadings while he was suggesting to the Claimants that he might secure the Respondent's agreement to settle the case without payment by the Claimants of Respondent's costs. Similarly, the Claimants might have been able to inform the Respondent sooner that they were prepared to terminate the arbitration on a 'with prejudice' basis. The Tribunal thinks that the Respondent's costs (and, indeed, the Claimants' costs) would have been smaller if the Claimants had indicated earlier their willingness to settle on a 'with prejudice' basis, and if Mr Nthai's corrupt solicitations had been promptly disclosed. Accordingly, the Tribunal thinks it right that the Claimants should bear responsibility for a portion of the Respondent's costs.

120) The Respondent very correctly and wisely withdrew that element of its claim for costs that was attributable to Mr Nthai's work. A Tribunal cannot properly order that the costs of a Party's adviser who engages in the solicitation of bribes should be recovered from the other Party.

121) The Tribunal has also considered the likely effect upon investment arbitration of various possible approaches to the question of costs. The Tribunal considers that in situations where an arbitration is terminated much the best course is for the Parties to agree upon a settlement of all aspects of the claim, including costs. Failing that, the Tribunal accepts that in principle the recovery of costs should be an element in the calculation of the compensation due to a successful litigant who was unlawfully deprived of its rights; and conversely, there should be no question of establishing a system in which any and all investors can initiate claims against a host State knowing that whether they win or lose the tribunal will order the Respondent State to pay the investor's costs. This case, however, falls between those two poles, and while the Tribunal has sought to satisfy itself that the views on costs that are expressed here do not jeopardize the fair and efficient workings of the investment arbitration regime, it has not found broad questions of policy to be of much help in deciding exactly what reallocation (if any) of costs should be ordered.

122) The portion of the Respondent's expenses that the Claimants should bear is a difficult matter to determine. One approach might be to look at expenses incurred at the time(s) when such expenses could have been averted. The record suggests that had the Claimants given, at the end of June 2009 when they were notified of the conversion of some of their 'old order' rights into new rights, a clear indication of a willingness to settle the case on a 'with prejudice' basis, at least some subsequent costs might have been avoided. In contrast, however, preparations for the scheduled hearing appeared to continue apace. The addition in July 2009 of the New Marlin claimants, Lord Bingham's scrutiny of disclosure requests in September and October 2009, and the Claimants' request for an extension of the deadline for the filing of their Reply are among the indications that the Claimants intended to proceed with the arbitration. Those indications were reversed by the Claimants' request in their letter dated 2 November 2009 for discontinuance of the proceedings in accordance with Additional Facility Article 50.

123) It is true that in June 2009, when invited to do so by the Claimants, the Respondent refused to agree to a further stay of proceedings unless the Claimants paid all of the Respondent's costs, and that the Tribunal refused to order a further stay; on the other hand, the Respondent had consistently maintained that the claim was not 'ripe' and that the Claimants were procrastinating in a situation where the Respondent wished only to have the matter resolved finally and without further delay. Given the delays that had already occurred, the decision to press ahead with the arbitration despite the Claimants' request for a stay was reasonable, and was taken unanimously by the Tribunal at that time.

124) The Tribunal understands that the Claimants may have feared that the promise in June 2009 of the grant of new rights might not be implemented and that it was therefore necessary to keep the pressure on the Respondent. It also understands that the Respondent may have taken an inflexible approach to the payment of its costs as a

condition of any further stay or agreed settlement. Nevertheless, the Tribunal considers that costs could have been avoided and that the Claimants were in a position to avoid them, but decided to keep their options open by pressing ahead (after the Tribunal had refused a further stay) with preparations for a hearing while considering the discontinuation of their claim. The fact that such a strategy might be rational does not mean that it is not wasteful of costs.

125) The Claimants forcefully submitted that the Government had imposed deadlines for applications for conversion of old to new order rights but was unprepared to answer the questions that the Claimants regarded as essential preliminaries to the filing of full, detailed applications. It is certainly evident from the papers that there was a considerable delay in the formulation and announcement of detailed governmental policies that would be applied under the BEE legislation to the dimension granite industry. Given the momentous scale of South Africa's social and economic reforms, it was plainly inevitable that legal processes might be slower than those associated with amendments to regulatory legislation in a longer-established economy. That said, it is also understandable that the Claimants, faced with reforms of great significance to their businesses, should be anxious and wishing fervently for a fuller engagement on the part of the Government with the Claimants' questions and problems and a swifter pace of decision-making.

126) There is, however, a problem with approaching costs questions by looking at dates at which proceedings might have been discontinued or costs might have been frozen or minimised by some other means. It is that the outcome of that approach would be determined by accidents of the work and billing schedules of those involved. Moreover, some such expenses would have been incurred regardless of an earlier disclosure of the corruption or an earlier declaration of the (wholly uncorrupt) willingness of the Claimants to terminate the arbitration on a 'with prejudice' basis. Close scrutiny of the Parties' respective invoices, though no doubt interesting, seems unlikely to result in insights that could lead to a precise quantification of the allocation of costs.

127) Another approach might be to look to the proportion of the Claimants' claims that were 'successful' in the sense that the Respondent granted or conceded rights that corresponded to the relief sought. That, however, would require the Tribunal to form a view on the elements of the claim that might and the elements that might not have been upheld, and on their relative values. That the Tribunal cannot do, the merits having been withdrawn from its consideration.

128) There is another aspect of this point. The prayer for relief in paragraph 818 of the Claimants' Memorial is not precise or detailed. The Claimants are not criticised for this: the basis of the claims against the Respondent is made sufficiently clear for that stage of the proceedings. But it is the case that the pleadings do not lend themselves to a fragmentation of claims and an allocation of costs based upon notional proportions of successes and failures among the claims.

129) Furthermore, there is a paradox. Elements of the claim that were <u>not</u> addressed by the rights granted by the Respondent – for example, the claims for compensation for the loss of unused old order rights – might be said either (a) to be precisely the claims that

the Claimants needed to pursue in the arbitration if they were to be compensated at all, or conversely (b) precisely the claims that were 'abandoned' when the arbitration was terminated.

130) In broad terms, it is evident that while the Claimants may be said to have abandoned some elements of their claim because they consider that they have received new rights that maintain the viability of their investment in South Africa, it is also true that in the eyes of the Claimants, they have accepted less than they had lost, and it would compound their losses to order them to pay any part of the Respondent's costs.

131) In these circumstances, it is unlikely that any decision on costs will derive its strength from its commendation by both Parties, or by an uncontroversial application of some general principle. The most that can be hoped is that the Tribunal makes as fair and reasonable a decision as it can, based upon a principle which is itself fair and resilient.

132) On that basis the Tribunal has decided that it is a fair and reasonable exercise of its discretion to require the Claimant to make a contribution to the costs incurred by the Respondent. The rationale behind this view is the result of a combination of (i) the fact that it was the Claimants who sought the discontinuance of the proceedings under Article 50 of the Additional Facility Rules and that the Respondent opposed discontinuance, (ii) the fact that the Claimants ultimately abandoned some of their claims, and (iii) the view that the Claimants pressed ahead with the arbitration at a time and in circumstances where it was in a position to avert the need for some part of the Parties' expenditure. This approach also reinforces the view that, while claimants in investment arbitrations are in principle entitled to the costs necessarily incurred in the vindication of their legal rights, they cannot expect to leave respondent States to carry the costs of defending claims that are abandoned.

133) Having regard to the way in which the proceedings unfolded during 2009-2010, to the fact that the Claimants explicitly sought a discontinuance of the arbitral proceedings, and that the package that led the Claimants to discontinue the proceedings did not cover all of the claims that they had brought, the Tribunal considers that the Claimants should contribute to the Respondent the sum of EURO 400,000 in respect of the fees and costs now claimed by the Respondent. In deciding this amount, the Tribunal has taken into account the Respondent's legal costs and associated expenses as well as the fees and expenses of the Tribunal and the Centre.

IV. DECISION ON DISCONTINUANCE AND COSTS

For the reasons set forth above, the Tribunal has decided that:

a) the Claimants shall pay the sum of EURO 400,000 to the Respondent in respect of the fees and costs now claimed by the Respondent; and,

b) the Claimants' claims are dismissed with prejudice.

Made as at London, United Kingdom, in English.

[Signed]

Hon. Charles Brower
Date: 28/7/10

[Signed]

Joseph Matthews
Date: 3/08/10
(Subject to the attached concurring statement)

[Signed]

Professor Vaughan Lowe
Date: 26/07/10

Piero Foresti, Laura de Carli and others v. Republic of South Africa

(ICSID Case No. ARB(AF)/07/1)

Concurring Statement of Arbitrator Matthews

Because the Award in this matter requires a two-staged exercise of our discretion, I submit this concurring statement to clarify my exercise of discretion during the second stage of that process. The Tribunal unanimously exercised discretion to require that Claimants make some contribution to the Respondent's costs. That was stage one. Stage two then required a determination of the amount. Although we are unanimous in concluding that 400,000 Euro is an appropriate amount, it is important to explain the manner by which I came to join my colleagues in making that part of the Award unanimous.

As noted in paragraph 129 of the Award, there is a paradox inherent in the Tribunal's exercise of discretion as to the first stage of our analysis. In my view there is an even more difficult paradox in exercising our discretion to determine the amount of our cost award against Claimants. The second paradox follows: Claimants' Operating Companies employ significant numbers of Historically Disadvantaged South Africans in the beneficiation process. The Department of Mineral Resources recognized this in reaching its determination that Claimants' Operating Companies and others in the dimension stone industry should receive a significant beneficiation credit toward the legislative goals of insuring HDSA participation in the mining industries. Claimants submitted financial information supporting their request for discontinuance presumably to indicate that there are some concerns about the financial viability of at least some of the Claimants' Operating Companies.

In exercising my discretion, as one of the three members of this Tribunal, regarding the amount of costs to be reallocated against Claimants, this paradox weighed heavily toward keeping the amount of the cost award against Claimants modest.

[Signed]

Joseph Matthews
Date: 03/08/10