

ALSA INTERNATIONAL MOOT COURT COMPETITION

ALSA INTERNATIONAL MOOT COURT COMPETITION

Case 2018

Yangon, Myanmar

24th to 27th August 2018

Organized by:

Asian Law Students' Association International

alsaimcc@2018@gmail.com

Supported by:

Permanent Court of Arbitration

Samuel Seow Law Corporation

Thailand Arbitration Centre

International Arbitration Asia



Samuel Seow
LAW CORPORATION

THAAC
Thailand Arbitration Center

IAA
International Arbitration Asia

List of documents

1. Claimant's **Notice of Arbitration**;
2. PCA Letter to the Parties acknowledging receipt of the Notice of Arbitration and inviting the Respondent to submit its response within 30 days in accordance with Article 4 of the PCA Arbitration Rules 2012;
3. Respondent's **Response to the Notice of Arbitration**;
4. PCA Letter to the Parties acknowledging receipt of the Response to the Notice of Arbitration;
5. PCA Letter to the Parties announcing that the Tribunal is fully constituted following the appointment of the Presiding Arbitrator by the two co-arbitrators in accordance with Article 9 of the PCA Arbitration Rules 2012;
6. PCA cover letter to Procedural Order No. 1;
7. **Procedural Order No. 1**, signed by the Presiding Arbitrator and issued after the Tribunal's first procedural meeting with the Parties, announcing, among other things, that the Parties have agreed (a) on a procedural timetable pursuant to which the Claimant and the Respondent will simultaneously submit their Memorials in accordance with the Official Rules of the ALSA International Moot Court Competition; (b) that the seat of arbitration shall be The Hague, the Netherlands; and (c) that the hearing will take place in Yangon, Myanmar; and
8. Annexes to Procedural Order No. 1, including:
 - a. A **Statement of Uncontested Facts** (Annex 1);
 - b. The Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Nambia for the Promotion and Reciprocal Protection of Investments dated 14 February 2013 ("**Tranma-Nambia BIT**") (Annex 2); and
 - c. An excerpt from the Nambian Criminal Code (Annex 3).

**IN THE MATTER OF AN ARBITRATION UNDER THE PERMANENT COURT OF
ARBITRATION ARBITRATION RULES 2012 AND THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE REPUBLIC OF TRANMA AND THE GOVERNMENT OF THE
MILLENNIAL REPUBLIC OF NAMBIA FOR THE PROMOTION AND RECIPROCAL
PROTECTION OF INVESTMENTS DATED 14 FEBRUARY 2013**

Between

MENALCORP TRANMA LIMITED
(Claimant)

and

THE MILLENNIAL REPUBLIC OF NAMBIA
(Respondent)

NOTICE OF ARBITRATION

4 December 2017

NDM LLP

221 Signa Drive
Ambro, Saint Cow 20036
Melein

Tel: +20 18 0310 2427
Fax: +20 18 0310 2480
Contact: Vil Mante

1. This Notice of Arbitration is served on behalf of MenalCorp Tranma Limited (“**MenalCorp Tranma**” or “**Claimant**”), a company incorporated under the laws of Tranma, with its registered office in 4 Car Reggy, Vangok 3620DH, Tranma, in accordance with Article 3 of the Permanent Court of Arbitration Arbitration Rules 2012 (“**PCA Rules**”) and under Article 24 of the Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Nambia for the Promotion and Reciprocal Protection of Investments dated 14 February 2013 (“**BIT**”).

INTRODUCTION

2. MenalCorp Tranma is a wholly owned subsidiary of MenalCorp Limited (“**MenalCorp**”), a limited liability company incorporated under the laws of Melein, with its registered office in Saint Cow, Melein. The Claimant invests through its Nambian subsidiary, MenalCorp Nambia limited (“**MenalCorp Nambia**”), which in turn operates a solar power plant in Jenny’s Vineyard, a region located in the territory of the Millennial Republic of Nambia (“**Nambia**” or “**Respondent**”), pursuant to the Agreement for Renewable Energy Supply (“**Energy Supply Agreement**” or “**Agreement**”), dated 21 June 2015.
3. MenalCorp Tranma seeks redress for the significant harm caused to it and its affiliate by Nambia, which unlawfully deprived MenalCorp Tranma of the value of its investment in the Nambian renewable energy sector.
4. MenalCorp and its affiliates have always been committed to promoting the use of renewable energy sources for the benefit of the public at large and for the protection of the environment. In this spirit, MenalCorp has long supported the Nambian Federal Green Party’s “war on air pollution,” including its governmental efforts to develop the Nambian renewable energy sector by implementing an ambitious environmental legal project entitled “Great Expectations: Ensuring an Environmentally Sustainable Energy Supply for Heartland” (“**Great Expectations Project**”).
5. MenalCorp and its affiliates have invested more than US\$40 million dollars in building and operating a solar power plant in Nambia, with the support of the federal Nambian government in the form of premiums awarded in accordance with Ministerial Order 314/2013, which implemented the Great Expectations Project. Thanks to MenalCorp’s entrepreneurial efforts, Nambian renewable energy consumers were set to reduce their electricity cost by at least 45% each year, thereby increasing revenues to be reinvested in the local economy and reducing carbon emissions.
6. Yet, in a strange turn of events, as of mid-2016, the new federal Nambian government led by the protectionist Fed-Up Party (still in power to this date) branded renewable energy providers as enemies in an imaginary “war on Nambian energy” and pledged to “end the war on beautiful coal and its beautiful workers.”
7. Prior to assuming the government office, the Fed-Up Party had unleashed a well-planned campaign of hatred and vilification against renewable energy firms and the Federal Green Party on the spurious grounds that environmental policies such as the Great Expectations Project were unlawful, job-destroying, and bad for competition. Campaign slogans coined by the Fed-Up Party’s staff — such as “GEP OUT” or “Burn our coal, not our jobs” — went viral as an increasing number of Nambian citizens, overly exposed to the Fed-Up Party’s blatant lies on the popular NambyTV, were swayed by the populist message of the Fed-Up Party and its leader (and current Nambian Prime Minister), Mr. Owen Martin Grendall (commonly known as “**OMG**”).
8. On 24 December 2016, only four days after taking office, OMG set a Fed-Up-controlled special committee (“**Committee**”) whose official mandate was to re-evaluate the impact of the Great Expectations Project. However, its true mandate was well known: to manufacture a legitimate reason to overturn the most important environmental policy initiative of the previous Green administration. The Committee issued its final report (“**Report**”) on 31 March 2017, recommending that the Great Expectations Project be virtually abolished.

9. This vicious campaign reached its peak when the Promotion of Clean Coal Energy Act (“**PCCE**”), which implemented the recommendations set out in the Report, came into effect on 3 July 2017. Furthermore, on the same day, a biased panel of Supreme Court judges (comprising five members handpicked by OMG) issued an advisory opinion declaring that the Great Expectations Project was unlawful. The advisory opinion severely undermined the legitimacy of the Great Expectations Project, reinforcing the Fed-Up government’s decision to abolish its opponent’s green legacy.
10. On 4 July 2017, OMG claimed victory in his self-declared war, stating that the Great Expectations Project was “finished.” Having achieved its goal, the Nambian government then proceeded to deny MenalCorp Tranma the benefit of premiums to which it was entitled pursuant to the Energy Supply Agreement and jeopardised MenalCorp Tranma’s financial situation.
11. MenalCorp Tranma has repeatedly attempted to resolve this dispute amicably with Namibia, but to no avail. Accordingly, by this Notice of Arbitration, MenalCorp Tranma demands that the Parties’ dispute be referred to arbitration under the PCA Rules.

PARTIES AND THEIR LEGAL REPRESENTATIVES

12. The Claimant in this arbitration is MenalCorp Tranma, a limited liability company incorporated under the laws of Tranma with its registered address at:

MenalCorp Tranma Limited
4 Car Reggy Street
Vangok 3620DH
Tranma

13. The Claimant is represented by NDM LLP. All communications to the Claimant in relation to this matter should be directed to:

Ms. Vil Mante
Mr. George Brown
Ms. Stephany Hadeth
NDM LLP
221 Signa Drive
Ambro, Saint Cow 20036
Melein
E-mail: vmante@ndm.com
gbrown@ndm.com
shadeth@ndm.com

14. The Respondent is the Millennial Republic of Namibia.
15. Pending notification by Namibia of details of its representation in this matter, all communications to Namibia will be directed to:

Mr. Raj Kapur
Minister of Foreign Affairs
Ministry of Foreign Affairs
90 Havana Road
Ref City, 1Y1 D4D
Namibia

ARBITRATION AGREEMENT

16. Article 24 of the BIT provides in relevant part that:

1. *If an investment dispute cannot be resolved amicably, the disputing investor may submit to arbitration a claim that the disputing Member State has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach; and*
2. *The disputing investor may submit a claim referred to in paragraph 1:
[...]
(c) under the PCA Arbitration Rules.*

NATURE OF THE CLAIM

17. Nambia's unfair, inequitable, and ultimately expropriatory actions with regard to MenalCorp Tranma's investment in its territory contravene Articles 9 and 10 of the BIT. As an enterprise organised under the laws of Tranma, MenalCorp Tranma has recourse to arbitration to remedy Nambia's failure to protect MenalCorp Tranma's investment in accordance with its treaty obligations.

APPOINTMENT OF THE TRIBUNAL

18. Pursuant to Articles 3(4) and 9 of the PCA Rules, the Claimant appoints Mr. Rony B. Chavez, a Tranmian national, as its party-appointed arbitrator.

RELIEF SOUGHT

19. On the basis of the foregoing, the Claimant respectfully requests that the Tribunal:

- a. DECLARE that Nambia has breached Articles 9 and 10 of the BIT;
- b. ORDER Nambia to compensate MenalCorp Tranma for these violations in an amount to be determined at the appropriate stage of the proceedings, plus pre- and post-award interest;
- c. ORDER Nambia to pay all costs of these proceedings, including but not limited to lawyers' fees and expenses; and
- d. AWARD any other relief that the Tribunal may deem appropriate.

20. The Claimant reserves the rights to supplement and amend its claim in the course of the proceedings.

Respectfully submitted,

[signed]

Ms. Vil Mante
Mr. George Brown
Ms. Stephany Hadeth

NDM LLP
221 Signa Drive
Ambro, Saint Cow 20036
Melein



Ms. Vil Mante
 Mr. George Brown
 Ms. Stephany Hadeth
 NDM LLP
 221 Signa Drive
 Ambro, Saint Cow 20036
 Melein

Mr. Raj Kapur
 Minister of Foreign Affairs
 Ministry of Foreign Affairs
 90 Havana Road
 Ref City, 1Y1 D4D
 Namibia

BY E-MAIL: VMANTE@NDM.COM
 GBROWN@NDM.COM
 SHADETH@NDM.COM

BY COURIER

5 December 2017

DIRECT DIAL: +31 12 345 6789
 E-MAIL: KMINH@PCA-CPA.ORG

RE: PCA CASE N°2017-71 – MENALCORP TRANMA LIMITED (TRANMA) V. THE MILLENNIAL REPUBLIC OF NAMBIA

Dear Mesdames,
 Dear Sirs,

1. The International Bureau of the Permanent Court of Arbitration (“PCA”) acknowledges receipt of a Notice of Arbitration dated 4 December 2017 (“**Notice**”) filed by MenalCorp Tranma Limited (“**Claimant**”) pursuant to Article 3 of the PCA Arbitration Rules 2012 (“**PCA Rules**”).
2. By its Notice, the Claimant has commenced arbitral proceedings against the Millennial Republic of Namibia (“**Respondent**”) pursuant to Article 24 of the Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Namibia for the Promotion and Reciprocal Protection of Investments dated 14 February 2013 (“**BIT**”).
3. Article 24 of the BIT provides in relevant part as follows:
 1. *If an investment dispute cannot be resolved amicably, the disputing investor may submit to arbitration a claim that the disputing Member State has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach; and*
 2. *The disputing investor may submit a claim referred to in paragraph 1:*
 [...]
 - (c) *under the PCA Arbitration Rules.*
4. In accordance with Article 24 of the BIT and Article 9(1) of the PCA Rules, the Claimant has appointed as arbitrator Mr. Rony B. Chavez.

5. The PCA notes that Article 9(2) of the PCA Rules provides:

If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

6. Within **thirty days** after the date of receipt of the Notice, the Respondent is kindly requested to notify the Claimant and the PCA of its appointed arbitrator.

7. The PCA also notes that **Article 4 of the PCA Rules** provides:

1. Within 30 days of the receipt of the notice of arbitration, or such other period as may be set by the International Bureau, the respondent shall communicate to the claimant and the International Bureau a response to the notice of arbitration, which shall include:

- (a) The name and contact details of each respondent;*
(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

8. Within **thirty days** after the date of receipt of the Notice, the Respondent is kindly requested to submit its response to the Claimant and the PCA.

9. The Respondent is also invited to inform the PCA of the names and addresses of any persons appointed to represent or assist the Respondent in connection with this arbitration.

10. If you have any questions relating to this letter, please do not hesitate to contact me (+31 12 345 6789; kminh@pca-cpa.org) or my colleague Lavanh Saengtham, Assistant Legal Counsel (+31 12 345 6799; lsaengtham@pca-cpa.org).

Yours sincerely,

[signed]

Kyaw Minh
Senior Legal Counsel

Encl.: Claimant's Notice of Arbitration

cc: Mr. Rony B. Chavez (by e-mail: rchavez@ronychavez.com)

**IN THE MATTER OF AN ARBITRATION UNDER THE PERMANENT COURT OF
ARBITRATION ARBITRATION RULES 2012 AND THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE REPUBLIC OF TRANMA AND THE GOVERNMENT OF THE
MILLENNIAL REPUBLIC OF NAMBIA FOR THE PROMOTION AND RECIPROCAL
PROTECTION OF INVESTMENTS DATED 14 FEBRUARY 2013**

Between

MENALCORP TRANMA LIMITED
(Claimant)

and

THE MILLENNIAL REPUBLIC OF NAMBIA
(Respondent)

RESPONSE TO THE NOTICE OF ARBITRATION

2 January 2018

Ministry of Justice
Department of State Dispute Management
The Millennial Republic of Namibia

I. INTRODUCTION

1. In accordance with the Permanent Court of Arbitration's ("PCA") letter dated 5 December 2017, the Millennium Republic of Namibia ("Namibia") hereby submits this Response ("Response") to the Notice of Arbitration dated 4 December 2017 ("Notice").
2. At the outset, Namibia would like to state that this Response is not intended to be an exhaustive refutation of the Claimant's assertions in the Notice. The Tribunal should not treat the absence of a response by Namibia to any of the claims in the Notice as an admission by Namibia of any of the alleged breaches of the Agreement Between the Government of the Republic of Tranma and the Government of the Millennium Republic of Namibia for the Promotion and Protection of Investments dated 14 February 2013 ("BIT") or of the Energy Supply Agreement dated 21 June 2015 entered into between the Claimant and the Ministry of Energy of Namibia ("Energy Supply Agreement" or "Agreement"). Namibia reserves its right to present in due course evidence, arguments, and defences to any and all of the Claimant's assertions.

II. LEGAL REPRESENTATIVES

3. Namibia is represented in this arbitration by the Department of State Dispute Management of the Ministry of Justice. The contact details of Namibia's legal representatives are as follows:

Ms. Xindy Lo
Mr. Hyong Kook
Ms. Dara Hu
Ministry of Justice
Department of State Dispute Management
102 Santa Fe Road
Ref City, 1Y2 D4D
Namibia
E-mail: xindy.lo@moj.gov.nam
hyong.kook@moj.gov.nam
dara.hu@moj.gov.nam

III. OBJECTION TO THE CLAIMANT'S CLAIMS

A. The Tribunal has no jurisdiction

4. In the Notice, the Claimant submits that Namibia's actions with respect to its investment in Namibia "contravene Articles 9 and 10 of the BIT."¹ Asserting that it is an investor duly organised under the laws of Tranma doing business in Namibia, the Claimant is of the erroneous belief that it may seek recourse to arbitration under the BIT in order to protect its investment.²

¹ Claimant's Notice of Arbitration dated 4 December 2017, ¶ 17; Agreement Between the Government of the Republic of Tranma and the Government of the Millennium Republic of Namibia for the Promotion and Protection of Investments dated 14 February 2013 (Ex. RLA-0001).

² Notice, ¶ 17.

5. Nambbia's consent to arbitration is limited to claims for breaches of the substantive protections afforded by the BIT only. It does not extend to claims for breach of other legal instruments or agreements, such as the Energy Supply Agreement.³
6. In the present case, the Claimant's claim is merely contractual, outside the ambit of the provisions of the BIT. As provided in Section 11 of the Agreement, "any contractual disputes concerning the interpretation and application of this Agreement shall be submitted to the exclusive jurisdiction of the competent administrative courts of Nambbia." Consequently, the Tribunal has no jurisdiction over the subject matter of the present claim.

B. The Claimant's invocation of the BIT constitutes an abuse of process

7. The Claimant acquired its investment in MenalCorp Nambbia only on 20 May 2016 pursuant to a corporate restructuring scheme designed to bring its investment under the coverage and protection of the BIT. In the months preceding that date, the Great Expectations Project, under which MenalCorp made investments in the Nambian renewable energy sector, faced public backlash from the citizenry of Nambbia. In addition, the current Nambian Prime Minister Mr. Owen Martin Grendall ("OMG") (who was then a candidate in the Nambian elections) and his party, the Fed-Up Party, openly expressed their displeasure towards the Great Expectations Project. To protect its investments in the event that OMG and the Fed-Up Party assumed power, MenalCorp Nambbia transferred its shares to the Claimant, who could then claim the protections afforded by the BIT.
8. The Claimant's and MenalCorp's corporate restructuring was motivated solely by a desire to gain access to the BIT, nothing more. It creates an unfair advantage for the Claimant because it really has no intention of performing any economic activity in Nambbia. The Tribunal should not countenance such conduct, as to do so would amount to approval of the Claimant's abuse of process and the disregard of the democratic will of a sovereign people.

C. Nambbia correctly denied payment of the premiums for the year 2016, as well as the demand for reimbursement of the premiums paid to the Claimant on December 2016

9. The Claimant itself recognises in the Notice that the Supreme Court of Nambbia determined that the Great Expectations Project was unlawful.⁴ The necessary consequence of this declaration is the denial of payment thereof to the Claimant.

³ Energy Supply Agreement dated 21 June 2015 (Ex. R-0001).

⁴ Notice, ¶ 9.

IV. APPOINTMENT OF THE TRIBUNAL

10. Notwithstanding its jurisdictional objections set forth above, pursuant to Articles 3(4) and 9 of the PCA Rules, Nambia appoints Professor Duncan Luxenberg, a Nambian national, as its party-appointed arbitrator. Professor Luxenberg's *curriculum vitae* is enclosed herewith. Professor Luxenberg's appointment should not be interpreted as Nambia's acceptance of the Tribunal's jurisdiction.

V. RELIEF SOUGHT

11. Nambia respectfully requests the Tribunal to dismiss the present case, with an award for costs against the Claimant for bringing a frivolous claim.

Respectfully submitted,

[signed]

Ms. Xindy Lo
Mr. Hyong Kook
Ms. Dara Hu

Department of State Dispute Management
Ministry of Justice
Nambia

Encl.: *Curriculum vitae* of Professor Duncan Luxenberg



Ms. Vil Mante
 Mr. George Brown
 Ms. Stephany Hadeth
 NDM LLP
 221 Signa Drive
 Ambro, Saint Cow 20036
 Melein

Ms. Xindy Lo
 Mr. Hyong Kook
 Ms. Dara Hu
 Ministry of Justice
 Department of State Dispute Management
 102 Santa Fe Road
 Ref City, 1Y2 D4D
 Namibia

BY E-MAIL: VMANTE@NDM.COM
 GBROWN@NDM.COM
 SHADETH@NDM.COM

BY E-MAIL: XINDY.LO@MOJ.GOV.NAM
 HYONG.KOOK@MOJ.GOV.NAM
 DARA.HU@MOJ.GOV.NAM

2 January 2018

DIRECT DIAL: +31 12 345 6789
 E-MAIL: KMINH@PCA-CPA.ORG

RE: PCA CASE N°2017-71 – MENALCORP TRANMA LIMITED (TRANMA) V. THE MILLENNIAL REPUBLIC OF NAMBIA

Dear Mesdames,
 Dear Sirs,

1. The Permanent Court of Arbitration (“PCA”) acknowledges receipt of the Respondent’s Response of the Notice of Arbitration (“Response”) submitted pursuant to Article 4 of the PCA Arbitration Rules 2012 (“PCA Rules”).
2. In accordance with Article 24 of the BIT and Article 9(1) of the PCA Rules, the Respondent has today appointed Professor Duncan Luxenberg as the second arbitrator in the above-referenced matter.
3. Pursuant to Article 9(3) of the PCA Rules, the co-arbitrators have thirty days from the appointment of the second arbitrator to agree on the choice of the Presiding Arbitrator. An index of the correspondence to date, as sent to Professor Duncan Luxenberg, is enclosed.
4. If you have any questions relating to this letter, please do not hesitate to contact me (+31 12 345 6789; kminh@pca-cpa.org) or my colleague Lavanh Saengtham, Assistant Legal Counsel (+31 12 345 6799; lsaengtham@pca-cpa.org).

Yours sincerely,

[signed]

Kyaw Minh
 Senior Legal Counsel

Encl.: Respondent’s Response to the Notice of Arbitration (*without enclosures*)
 List of Correspondence

cc: Mr. Rony B. Chavez (*by e-mail: rchavez@ronychavez.com*)
 Professor Duncan Luxenberg (*by e-mail: dluxenberg@dhu.edu*)



Ms. Vil Mante
 Mr. George Brown
 Ms. Stephany Hadeth
 NDM LLP
 221 Signa Drive
 Ambro, Saint Cow 20036
 Melein

Ms. Xindy Lo
 Mr. Hyong Kook
 Ms. Dara Hu
 Ministry of Justice
 Department of State Dispute Management
 102 Santa Fe Road
 Ref City, 1Y2 D4D
 Namibia

BY E-MAIL: VMANTE@NDM.COM
 GBROWN@NDM.COM
 SHADETH@NDM.COM

BY E-MAIL: XINDY.LO@MOJ.GOV.NAM
 HYONG.KOOK@MOJ.GOV.NAM
 DARA.HU@MOJ.GOV.NAM

20 January 2018

DIRECT DIAL: +31 12 345 6789
 E-MAIL: KMINH@PCA-CPA.ORG

RE: PCA CASE N°2017-71 – MENALCORP TRANMA LIMITED (TRANMA) V. THE MILLENNIAL REPUBLIC OF NAMBIA

Dear Mesdames,
 Dear Sirs,

1. On behalf of Mr. Rony B. Chavez and Professor Duncan Luxenberg, the co-arbitrators in the above-referenced arbitration, I am pleased to inform you of their agreement to appoint, in accordance with Article 9(1) of the Permanent Court of Arbitration Arbitration Rules 2012 (“**PCA Rules**”), Ms. Habibi A. Schumacher as the Presiding Arbitrator in this case.
2. Ms. Schumacher has confirmed her willingness to accept the appointment and has declared that she is not aware of any conflicts of interest or other circumstances that would prevent her from serving as arbitrator in the present proceedings. Enclosed with this letter are her signed Declaration of Acceptance and Statement of Impartiality and Independence, her *curriculum vitae*, and a list of relevant correspondence provided to Ms. Schumacher by the Permanent Court of Arbitration (“**PCA**”).
3. Ms. Schumacher’s contact details are as follows:

Ms. Habibi A. Schumacher
 Refec Chambers
 Joshua Place, 25 Anthony Way
 Eleanor M8D3, Zuid Leo
 Cavreo
 E-mail: hschumacher@refec.com

4. On behalf of the Tribunal, I would like to inform you that the constitution of the Tribunal in this arbitration has thus been completed within the period of thirty days after the appointment of the second arbitrator on 2 January 2018, as set forth in Article 9(1) of the PCA Rules.

5. Pursuant to Article 43(1) of the PCA Rules, the International Bureau of the PCA hereby requests that the Parties make an initial deposit of US\$150,000 (US\$75,000 from each Party) as an advance for the preliminary costs of the arbitration by Friday, 20 February 2018 to the following PCA account:

Bank : ABC Bank N.V.
Hofwijckplein 15, 2517 RN,
Den Haag, The Netherlands

Bank Identifier Code (BIC) : ALCRTW

Account number : 0257 1238 84

IBAN : NL56 ABCB 0257 1238 84

Beneficiary : Permanent Court of Arbitration

Reference : PCA Case No. 2017-71 (Claimant/Respondent)

6. The Tribunal and the PCA look forward to working with the Parties in this case and will be in contact shortly to set a date for a preliminary procedural conference.
7. If you have any questions relating to this letter, please do not hesitate to contact me (+31 12 345 6789; kminh@pca-cpa.org) or my colleague Lavanh Saengtham, Assistant Legal Counsel (+31 12 345 6799; lsaengtham@pca-cpa.org).

Yours sincerely,

[signed]

Kyaw Minh
Senior Legal Counsel

Encl.: Signed Declaration of Acceptance and Statement of Impartiality and Independence
Curriculum vitae of Ms. Habibi A. Schumacher
List of correspondence

cc: Ms. Habibi A. Schumacher (*by e-mail*: hschumacher@refec.com)
Mr. Rony B. Chavez (*by e-mail*: rchavez@ronychavez.com)
Professor Duncan Luxenberg (*by e-mail*: dluxenberg@dhu.edu)



Ms. Vil Mante
Mr. George Brown
Ms. Stephany Hadeth
NDM LLP
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Ms. Xindy Lo
Mr. Hyong Kook
Ms. Dara Hu
Ministry of Justice
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102 Santa Fe Road
Ref City, 1Y2 D4D
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BY E-MAIL: VMANTE@NDM.COM
GBROWN@NDM.COM
SHADETH@NDM.COM

BY E-MAIL: XINDY.LO@MOJ.GOV.NAM
HYONG.KOOK@MOJ.GOV.NAM
DARA.HU@MOJ.GOV.NAM

10 March 2018

DIRECT DIAL: +31 12 345 6789
E-MAIL: KMINH@PCA-CPA.ORG

RE: PCA CASE N°2017-71 – MENALCORP TRANMA LIMITED (TRANMA) V. THE MILLENNIAL REPUBLIC OF NAMBIA

Dear Mesdames,
Dear Sirs,

1. I write on instruction of the Tribunal in the above-referenced matter.
2. Please find enclosed Procedural Order No. 1 issued today by the Tribunal.
3. The Permanent Court of Arbitration also takes this opportunity to inform the Parties that the Terms of Appointment have now been signed by both Parties and by the Tribunal. Signed hard copies of the Terms of Appointment will be distributed to all concerned in due course.
4. If you have any questions relating to this letter, please do not hesitate to contact me (+31 12 345 6789; kminh@pca-cpa.org) or my colleague Lavanh Saengtham, Assistant Legal Counsel (+31 12 345 6799; lsaengtham@pca-cpa.org).

Yours sincerely,

[signed]

Kyaw Minh
Senior Legal Counsel

Encl.: Procedural Order No. 1 dated 10 March 2018

cc: Ms. Habibi A. Schumacher (*by e-mail: hschumacher@refec.com*)
Mr. Rony B. Chavez (*by e-mail: rchavez@ronychavez.com*)
Professor Duncan Luxenberg (*by e-mail: dluxenberg@dhu.edu*)

PCA Case No. 2017-71

**IN THE MATTER OF AN ARBITRATION UNDER THE PERMANENT COURT OF
ARBITRATION ARBITRATION RULES 2012 AND THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE REPUBLIC OF TRANMA AND THE GOVERNMENT OF THE
MILLENNIAL REPUBLIC OF NAMBIA FOR THE PROMOTION AND RECIPROCAL
PROTECTION OF INVESTMENTS DATED 14 FEBRUARY 2013**

Between

**MENALCORP TRANMA LIMITED
The Claimant**

and

**THE MILLENNIAL REPUBLIC OF NAMBIA
The Respondent**

PROCEDURAL ORDER NO. 1

Arbitral Tribunal

**Ms. Habibi A. Schumacher (Presiding Arbitrator)
Mr. Rony B. Chavez
Professor Duncan Luxenberg**

Registry

Permanent Court of Arbitration

10 March 2018

WHEREAS the Parties and all members of the Tribunal have signed the Terms of Appointment dated 1 March 2018; and

WHEREAS this Procedural Order records the agreement of the Parties on procedural matters set out herein, as reached on 5 March 2018 through *inter partes* negotiations,

THE TRIBUNAL HEREBY ORDERS:

Place of Arbitration

1. The seat of arbitration shall be The Hague, the Netherlands.
2. Meetings may take place at other locations if so decided by the Tribunal after consultation with the Parties. The Tribunal may meet without the Parties at any location convenient for its members.

Language

3. The arbitration shall be conducted in English.

Timetable

4. The procedural timetable shall be as follows:

Party	Action/Submission	Date
Parties	Memorials	30 June 2018
All	Hearing	24-27 August 2018

Written Submissions

5. The Parties agree that all written submissions shall be in compliance with the Official Rules of the ALSA International Moot Court Competition 2018.
6. The written submissions shall address the issues of jurisdiction and/or admissibility and liability. The issues of quantum and costs shall be dealt with later, if necessary.
7. Apart from those issues already addressed in the Notice of Arbitration and the Response to the Notice of Arbitration, the Parties may raise additional issues in their written memorials as may be deemed appropriate.
8. The Parties further propose that the Tribunal accept as uncontested the additional facts set out in Annex 1 to this Order.
9. The written submissions shall apply only the relevant provisions of the Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Namibia for the Promotion and Reciprocal Protection of Investments dated 14 February 2013 as exhaustively reproduced in Annex 2 to this Order.

Hearing

10. The Parties agree that hearing on jurisdiction, admissibility, and liability shall be held from 24 to 27 August 2018 at Yangon University.
11. The hearing shall be conducted in accordance with the Official Rules of the ALSA International Moot Court Competition 2018.

[signed]

Habibi A. Schumacher
Presiding Arbitrator
On behalf of the Tribunal

Place of Arbitration: The Hague, The Netherlands

ANNEX 1

STATEMENT OF UNCONTESTED FACTS

1. The Claimant in this matter is MenalCorp Tranma Limited (“**Claimant**” or “**MenalCorp Tranma**”), a limited liability company incorporated under the laws of Tranma, and fully owned by MenalCorp Limited (“**MenalCorp**”), a limited liability company incorporated under the laws of Melein, with its registered office in Saint Cow, Melein.
2. MenalCorp specialises in the construction and operation of wind and solar power plants. In line with its founding CEO’s (Mr. Elio Fox) passion for promoting the use of renewable energy sources, MenalCorp has built, for the past five years, three solar power plants in three countries, including Reorwell, Aiminiya, and Mboka.
3. The Respondent is the Millennial Republic of Nambia (“**Respondent**” or “**Nambia**”), a democratic sovereign state with a federal system of government. Nambia boasts 20 million inhabitants and comprises a total area of approximately 300,000 square kilometres.
4. For the past several decades, Nambia has relied on coal as its principal energy source. A recent survey found that Nambia has one of the largest proven coal reserves in the world, which, if mined, could satisfy the country’s energy needs for a century or more. Thirty-eight coal-fired power plants of small, medium, and large sizes have been operating in nearly all Nambian cities.
5. In 2007, a government-funded study found that the level of particulate pollution in some Nambian cities had slightly exceeded the standard recommended in the World Health Organization’s 2005 Air Quality Guidelines for Particulate Matter, Ozone, Nitrogen Dioxide, and Sulfur Dioxide (“**WHO Guidelines**”). While this finding led to some concern at the time of its publication, there was no strong public push for government action. The report did, however, spur a debate in popular and academic publications. Even now, it remains controversial, especially on social media.
6. In the 2013 general election, the Federal Green Party put forward a progressive campaign addressing various social issues, including universal healthcare, public school tuition, and environmental pollution. As regards its environmental policy, one of the propositions was to increase investment in renewable energy. The Federal Green Party won the election by a wide margin.
7. On 19 December 2013, the government of Nambia adopted a new initiative — supported by the governing Federal Green Party and lobbied for by several renewable energy operators, including MenalCorp — entitled “Great Expectations: Ensuring an Environmentally Sustainable Energy Supply for Heartland” (the “**Great Expectations Project**”). Notwithstanding a warm welcome of the public, the program was met with strong opposition from a substantial number of constituents and interest groups, including coal manufacturers, operators of coal-fired power plants, and unions representing coal workers. Opponents expressed their opposition throughout the project.
8. The goal of the Great Expectations Project was to attract investment in the renewable energy sector by offering premiums to qualified renewable energy companies to allow them to better compete with other energy suppliers on the Nambian energy market, which is dominated by coal-fired electricity plants. In part of a brochure distributed to green investors, the government stated:

“Nambia welcomes foreign investment. Therefore, in this new era of renewable energies and globalisation, Nambia intends to attract foreign investment in the renewable energy sector, through a legal system that facilitates the inflow of foreign

exchange. Nambia will make its best efforts to develop a legal and political system that will welcome foreign investment with open arms.”

9. The Great Expectations Project, duly enacted as Ministerial Order 314/2013, provided that electricity providers which met the Order’s definition of “renewable electricity generation technology company” were entitled to two forms of premium:
 - First, under Article 7(a), an “investment” premium, granted to offset investment costs which cannot be recovered by selling electricity in the Nambian market; and
 - Second, under Article 7(b), an “operations” premium, granted to facilities whose operating costs were higher than the market price to compensate for the difference between the operating costs and the revenue obtained in the market.
10. The funds for the premium payments were to be provided largely by the federal Nambian government.
11. The Great Expectations Project offered an exciting opportunity for entrepreneurs in the renewable energy sector to enter the Nambian electricity market — much in need of environmental upgrades — and minimise losses caused by the dominance of local coal companies.
12. As part of a lobbying group, MenalCorp participated in many meetings with the Ministry of Energy. The affinity between MenalCorp and high-ranking officials of the Ministry and members of the Federal Green Party was such that Mr. Antonio Caveden, the Minister of Energy, and his wife were invited to Mr. Elio Fox’s daughter’s wedding in May 2014. Furthermore, newspapers reported that part of the Federal Green Party’s National Congress, held in November 2014, was funded through a large donation by MenalCorp and other renewable energy operators.
13. On 3 March 2015, the Ministry of Energy for the province of Heartland (“**Ministry**”) published a call for tenders for the construction of a solar power plant in a vast field in the south of Heartland, in a region called Jenny’s Vineyard (the “**Tender**”).
14. On 21 March 2015, MenalCorp submitted its bid.
15. On 17 April 2015, the Ministry declared MenalCorp the winning bidder. On 18 June 2015, after two months of negotiations with various stakeholders including people living in Jenny’s Vineyard, MenalCorp and the Ministry reached tentative terms. As Nambian law required that only a company registered in Nambia can enter into a concession agreement, MenalCorp Nambia Limited (“**MenalCorp Nambia**”) was incorporated under Nambian Law, with MenalCorp as its sole shareholder.
16. On 21 June 2015, the Ministry and MenalCorp Nambia concluded a 15-year Agreement for Renewable Energy Supply (the “**Energy Supply Agreement**” or “**Agreement**”), granting MenalCorp Nambia the right to build and operate a solar power plant in Jenny’s Vineyard.
 - Section 2 of the Energy Supply Agreement stipulated that “Nambian law, and such general principles of law as may be applicable,” would govern its terms.
 - Section 5 of the Energy Supply Agreement provided that MenalCorp Nambia would benefit from “annual premiums to help it compete on an equal footing with other local energy providers,” and that the premiums would be granted “based on benchmarks established under the Great Expectations Project.”
 - Section 8 of the Agreement provided that MenalCorp must maintain its controlling share in and provide financial support to MenalCorp Nambia.

- Section 11 stipulated that “any contractual disputes concerning the interpretation and application of this Agreement shall be submitted to the exclusive jurisdiction of the competent administrative courts of Nambia.”¹
17. On 1 July 2015, MenalCorp began installing solar panels, manufactured in Aiminiya, in Jenny’s Vineyard. The solar power plant was planned to start operating as of 5 September 2015.
 18. Nevertheless, given the global shortage of polysilicon, a critical raw material used in the manufacturing of the photovoltaic cells, the installation was delayed. The solar power plant could not begin its operation until 1 July 2016.
 19. Notwithstanding the delay, the business had been remarkably successful since the beginning of its operation. The record showed that, in its first quarter (July to September 2016), the total amount of power generated exceeded the projected figure by 2.5 percent. The income stream had been stable. Together with premiums to be granted by the Nambian government, MenalCorp felt confident that its investment would prove profitable as planned.
 20. 2016 was an election year in Nambia. On 30 April 2016, the Nambian Prime Minister, Ms. Hanna Powell from the Federal Green Party, lost a vote of confidence and had to force a general federal election to be held in December 2016.
 21. Amid public backlash against many controversial decisions of the Federal Green Party, including the implementation of a hefty carbon tax, the populist Fed-Up Party and its charismatic leader, Mr. Owen Martin Grendall (better known as “OMG”), rose in the polls.
 22. After a lackluster career in business, OMG rose to fame through his daytime reality television show on NambyTV, “OMG!,” in which he quizzed tourists on the streets of Los Angeles about African geography, yelling his eponymous tagline at the most egregious answers. He gained notoriety through his controversial and at times outrageous claims on social media. He was particularly outspoken about climate change, calling it a “hoax” invented by neighbouring Aiminiya to bolster its green-tech industry and doubting the science after rainy days in Heartland. During the election season, OMG attacked the Great Expectations Project on Twitter as “very bad for Nambia” and pledged to “tear [it] up” if his party took power. These statements shocked the Nambian political establishment but did not generate widespread concern: according to polls conducted in early May, the Fed-Up Party still trailed the Federal Green Party by roughly 20 percent.
 23. On 10 May 2016, Mr. Niels Ramskells, the General Counsel of MenalCorp, sent an email to NDM LLP (“NDM”), its outside legal counsel, asking whether MenalCorp should adopt any preventive measures given the possibility that the Fed-Up Party might rise to power. Mr. Ramskells wrote that, “even if there is only one percent chance that the Fed-Up Party would win, we want to make sure that our investment in Nambia is duly protected.”
 24. On the same day, NDM partner Ms. Vil Mante, replied to MenalCorp: “Have you heard of this investor-State arbitration under the international investment treaty?” NDM subsequently explained in detail how investor-State arbitration functions, and noting that Nambia had entered into several bilateral investment treaties, including one with Tranma: the Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Nambia for the

¹ Nambia, which adopted a civil code after it won independence from France in 1954, has two court systems. According to the Federal Judicial Code, the administrative courts have exclusive jurisdiction over all cases in which the government is a party, while the civil courts have exclusive jurisdiction over cases involving two private parties. The Supreme Court hears final appeals in cases arising from both systems.

Promotion and Reciprocal Protection of Investments dated 14 February 2013 (“**Tranma-Nambia BIT**” or “**BIT**”).

25. On 15 May 2016, MenalCorp held a special board meeting. Two partners from NDM were also present. After long and intense discussions, the board adopted a resolution that it would restructure its investment in Nambia so that the investment would be covered by the Tranma-Nambia BIT. The plan was to set up a holding company in Tranma and transfer MenalCorp’s shares in MenalCorp Nambia to this new entity.
26. On 18 May 2016, MenalCorp Tranma Limited was incorporated in Tranma. Since then, MenalCorp has always been the sole shareholder of MenalCorp Tranma.
27. On 20 May 2016, MenalCorp formally transferred all of its shares in MenalCorp Nambia to MenalCorp Tranma. The transaction was registered legally under Nambian law. As a matter of courtesy, MenalCorp sent a letter to the Ministry of Energy for the Province of Heartland informing the latter of this transaction. The Ministry has never responded to this notification.
28. On 22 June 2016, OMG was quoted in the popular Rogue Magazine saying: “I’ll burn the Greens and all their stupid policies! They’ll choke on carbon released into the air thanks to their own mistakes!”
29. The next day, the Fed-Up Party posted the following statement on its official website:

Energy Security

[...] Coal-powered energy industry has always been a pride of this country. Approximately 65% of electricity generation in Nambia is produced from clean coal. Having a robust coal industry gives us complete confidence that our children and we will always have enough and lasting energy supply. We promise to bring the country back to its right track. Together, we will end the war on Nambian energy. We will end the war on beautiful coal and its beautiful workers.

Employment

[...] There has been a clear sign that competition from other energy sources, especially solar energy heavily and mistakenly subsidised by the past administration, has begun to cause the decline in the coal mining sector. Thousands of coal miners have been laid off since the Great Expectations Project was announced. Given extensive automation in the solar industry, the government is robbing our citizens of their livelihoods and not giving them back. This radical self-destruction adopted by the past incompetent administration is clearly one of this country’s most devastating mistakes in our modern history. To that we say, “GEP OUT!!!” We will fix this within the first one hundred days of our administration. JOBS JOBS JOBS!!!

30. At several rallies in June and July 2016, crowds of citizens worried about job cuts in local coal plants due to increased competition with renewable energy providers were heard chanting: “Burn our coal, not our jobs!”
31. On 11 December 2016, OMG and his Fed-Up Party won a shocking victory by gaining the most votes in the federal elections. Although Fed-Up had been gaining in the polls before election day, most observers assumed that the Federal Green Party’s hold on Nambia’s urban centres would fend off the challenge from rural areas like Heartland. Although the elections commissions certified the vote in accordance with the Nambian Constitution, a cloud still hangs over the election given

accusations by prominent Federal Green Party officials that OMG's allies had arranged significant cash bribes from abroad to members of the Elections Commission. On its last day in office, the Federal Green Party government appointed an independent prosecutor to investigate the allegations; the prosecutor's work continues, and to date he has made no public statements. Nevertheless, on 20 December 2016, the Fed-Up government took power, and OMG was installed as Prime Minister.

32. On 24 December 2016, OMG announced on NambyTV, that, as a "Christmas present for the people of Namibia," he would "thoroughly review what the Greens did to the country" and "set the stage for a new era."
33. On the same day, OMG set up a special committee ("**Committee**") comprising 15 members, 9 from the Fed-Up Party and 6 from the Federal Green Party, to re-evaluate the impact of Great Expectations Project. The Committee was tasked with studying the pros and cons of coal-fired energy compared to other forms of renewable energy, taking into account various policy considerations, including economic development, employment, and energy security. The Committee was ordered to submit a final report containing comprehensive recommendations by March 2017.
34. On 7 February 2017, by way of judicial reference, the Fed-Up government asked the Supreme Court of Namibia to issue an advisory opinion² on whether the Great Expectations Project, endorsed by the previous Federal Green government by way of a ministerial order, had been implemented in accordance with the Nambian Constitution. Specifically, it asked the Supreme Court to give its opinion as to: (i) whether the premiums constituted "state support" within the meaning of Article 17 of the Nambian Constitution, which defines it as "any advantage granted by federal or provincial government entity or through government resources to favour certain activities or the production of certain goods that distorts or risks distorting interprovincial competition," and (ii) if so, whether the premiums had been lawfully implemented.
35. On 2 March 2017, the ruling coalition in Parliament passed a law that granted the Prime Minister broad authority to remove and replace members of the Supreme Court who had been on the bench for more than 10 years. Although the government billed the law as a necessary step in judicial reform, critics called the move an attack on judicial independence. The representatives from the Fed-Up Party voted overwhelmingly for the bill, while the Federal Green Party minority boycotted the vote. On 15 March 2017, OMG named five new judges to the nine-member Supreme Court, effective immediately.
36. On 31 March 2017, the Committee published its final report. Having considered public opinions, inputs from a number of experts, and every competing state objective, the Committee voted along party lines to recommend that the Great Expectations Project be terminated. In part of the concluding section, the Committee wrote that:

While it may be true that renewable energy, especially the solar-powered one, has great potential to become a crucial source of Namibia's power for our future generations, the Committee believes that it is too early to shift its focus today from secured coal-fired energy, which has always been this country's critical source of energy supply and created millions of jobs over the years. Therefore, the Committee takes a view that the Great Expectations Project should, for the time being, be terminated. By so doing, the Government of Namibia would be

² Under Article 57 of the Nambian Constitution, the Supreme Court of Namibia may give an advisory opinion on legal questions regarding the constitutionality or interpretation of laws or regulations at the request of the government or the Parliament. Advisory opinions have no binding effect.

able to allocate its limited resource to support and improve Nambbia's clean coal-powered energy sector.

37. The 6 members from the Federal Green Party wrote a scathing dissent, excoriating the majority opinion for contributing to climate change, ignoring the shifting dynamics of the global energy market, violating Nambbia's international obligations, and damaging its global reputation.
38. On 10 April 2017, a draft law titled the "Promotion of Clean Coal Energy Act" ("PCCE") incorporating the Committee's recommendations was presented in Parliament.
39. On 30 June 2017, Parliament duly passed the PCCE, again along party lines. According to Article 2 of the Act, the Great Expectations Project was terminated.
40. On 3 July 2017, the Supreme Court, challenging its long-established precedent on state aid, issued an advisory opinion in which it determined that the premiums granted under the Great Expectations Project fell within the definition of "state support" in Article 17 of the Nambian Constitution and, as such, required parliamentary approval (rather than a mere Ministerial Order) to be lawfully implemented. On the same day, the PCCE was published in the Official Gazette and took immediate effect.
41. On 4 July 2017, OMG announced in an address on NambyTV that the Great Expectations Project was "finished."
42. By letter from counsel dated 7 July 2017, MenalCorp Nambbia invited the Ministry of Energy of Heartland to "negotiate a way forward" for MenalCorp Nambbia to continue to operate its solar power plant in Jenny's Vineyard in the "extremely hostile environment for renewable energy companies" that Nambbia had become. MenalCorp Nambbia requested confirmation that the "US\$4,200,000 premium for the first quarter of the year 2017 would nonetheless be paid by 31 August 2017, as originally agreed." MenalCorp Nambbia stressed that the premium was "crucial" to the pursuit of its operations, and that failure to pay them would constitute a breach of the Energy Supply Agreement. During this period, Mr. Evo Coalash was serving as Minister of Energy, having replaced Mr. Antonio Caveden on 20 December 2016.
43. Several negotiations among relevant stakeholders took place in July 2017. However, no mutually satisfactory settlement was reached to resolve the disagreements.
44. By letter dated 31 July 2017, counsel for the Ministry of Justice of Nambbia informed MenalCorp Nambbia that, absent a proposal, it would interrupt electricity transmission of the energy generated by its power plant at Jenny's Vineyard. That same day, OMG said in an interview on NambyTV: "We are going to get back the people's money that the Greens wasted and leave on the market only those firms that can lawfully compete."
45. On 4 August 2017, Nambank, a local Nambian banking institution filed a lawsuit against MenalCorp Nambbia on the basis of its failure to make several instalment payments to reimburse a US\$33,000,000 loan it used to finance the installation of the solar power station at Jenny's Vineyard.
46. On 10 August 2017, MenalCorp sought from NDM LLP a legal assessment of the present situation in Nambbia. NDM LLP, which had since been retained as personal legal counsel by OMG in the pending investigation into bribery during the elections, declined the representation. Given the time pressure, the General Counsel of MenalCorp supervised the assessment himself. Taking into account the Energy Supply Agreement and the Tranma-Nambbia BIT, Mr. Niels Ramskells concluded that MenalCorp's best course of action was to pursue arbitration under the BIT. The MenalCorp board agreed with the recommendation, and MenalCorp informed the Ministry of

Justice of Namibia and the Ministry of Energy of Namibia of the arbitration under the BIT by letter dated 14 August 2017.

47. By letter dated 30 August 2017, the Ministry of Justice informed MenalCorp that the dispute did not fall within the jurisdiction of the Tranma-Namibia BIT.³ Furthermore, the Ministry of Justice directed MenalCorp to Article 11 of the Energy Supply Agreement, which provided that the administrative courts of Namibia have exclusive jurisdiction over any contractual disputes concerning the interpretation and application of the Energy Supply Agreement.
48. On 4 December 2017, MenalCorp Tranma served Namibia with a Notice of Arbitration in which it informed Namibia that it had appointed Mr. Rony B. Chavez as arbitrator.
49. On the same day, MenalCorp Tranma sent a letter to the Permanent Court of Arbitration (“PCA”) with a copy of the Notice of Arbitration enclosed, along with further documentation.
50. On 5 December 2017, the PCA acknowledged receipt of the letter sent by MenalCorp Tranma. It also invited Namibia to submit its Response to the Notice of Arbitration within 30 days of receipt of the Notice of Arbitration.
51. On 2 January 2018, the Millennium Republic of Namibia served on MenalCorp Tranma its Response to the Notice of Arbitration. In it, it expressed its objection to the jurisdiction of the Tribunal. However, it also appointed Professor Duncan Luxenberg, which it said should not be seen as acceptance of the Tribunal’s jurisdiction.
52. By letter dated 20 January 2018, the PCA informed the Parties that the co-arbitrators had appointed Ms. Habibi A. Schumacher as Presiding Arbitrator, thereby duly constituting the Tribunal.

³ The Ministry of Justice cited a 1999 decision by the Namibian Supreme Court, which upheld a lower court’s dismissal of an investment arbitration organised under Namibian law. The Court held: “When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. [The BIT] by itself cannot constitute an agreement to arbitrate with an investor: no investor is a party to that Treaty. Something else must happen to create an agreement where there was none before. [The BIT] makes clear what that something is: an investor must submit his dispute to the courts of the host country.”

ANNEX 2

THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF TRANMA AND THE GOVERNMENT OF THE MILLENNIAL REPUBLIC OF NAMBIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS DATED 14 FEBRUARY 2013

Preamble

The Government of the Tranma and the Government of Namibia (hereinafter the “Parties”);

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximise effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour rights;

Recognising that the provisions of this agreement and provisions of international agreements relating to the environment shall be interpreted in a mutually supportive manner;

Recognising that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments;

Reaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights;

Determined to prevent and combat corruption, including bribery, in international trade and investment;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

Article 1: Definitions

For purposes of this Treaty:

“claimant” means an investor of a Party that is a party to an investment dispute with the other Party.

“covered investment” means, with respect to a Party, an investment made in its territory by an investor of the other Party on or after the date of entry into force of this Treaty.

“disputing parties” means the claimant and the respondent.

“disputing party” means either the claimant or the respondent.

“enterprise” means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

“enterprise of a Party” means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

“existing” means in effect on the date of entry into force of this Treaty.

“freely convertible currency” means “freely usable currency” as determined by the International Monetary Fund under its Articles of Agreement.

“investment” means any kind of assets, invested in accordance with the laws and regulations of the Party in whose territory the investment is made, including, but not limited to:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

“investment dispute” means a dispute between an investor of one Party and the other Party arising out of or in connection with a covered investment.

“investor” means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;

For the purposes of this definition, an enterprise of a Party is:

- (a) an enterprise that is constituted or organised under the laws of that Party; or
- (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);

“PCA Arbitration Rules” means the Permanent Court of Arbitration Arbitration Rules 2012.

Article 8: Investment and Regulatory Measures

1. For the purpose of this Treaty, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Treaty.

Article 9: Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment in accordance with the following paragraphs.
2. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
3. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
4. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

Article 10: Expropriation

1. Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:
 - (a) for a purpose which is in the public interest;
 - (b) not discriminatory;
 - (c) carried out under due process of law; and
 - (d) accompanied by the payment of prompt, adequate and effective compensation.

2. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”). Such fair market value shall at the request of the Investor be expressed in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

Article 16: Anti-Corruption Measures

1. Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.
2. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over offences committed in its territory.
3. Each Party shall make the commission of an offence covered by this Agreement liable to sanctions that take into account the gravity of that offence.
4. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of enterprises for participation in the offences covered by this Agreement. In particular, each Party shall ensure that enterprises held liable in accordance with this Article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 24: Submission of a Claim to Arbitration

1. If an investment dispute cannot be resolved amicably, the disputing investor may submit to arbitration a claim that the disputing Member State has breached an obligation under Articles 9 through 15, and that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach; and
2. The disputing investor may submit a claim referred to in paragraph 1:
 - (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings;
 - (b) under the PCA Arbitration Rules; or
 - (c) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

Annex B: Expropriation

The Parties confirm their shared understanding that:

1. Article 10 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 10 addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 10 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

ANNEX 3

NAMBIAN CRIMINAL CODE

Article 112

A person is guilty of an offence if the person makes:

- (a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties; or
- (b) the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

Article 113

A public official is guilty of an offence if the official engages in the solicitation or acceptance, directly or indirectly, of an undue advantage for the official himself or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties.