INTERNATIONAL CENTRE FOR SETTLEMENT

OF INVESTMENT DISPUTES

ADAMANTIUM STEEL LLC.

"Claimant"

v.

DASTAN LOGAM LTD

"Respondent"

ICSID Case No.

RESPONDENT'S MEMORIAL ON THE MERITS

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LIST OF ABBREVIATION

ICSID – International Centre for the Settlement of Investments Disputes

AS – Adamantanium Steel

DL – Dastan Logam

RMC – Ruberia Metals Coporation

BIT – Bilateral Investment Treaty

JVA – Joint Venture Agreement

FET – Fair and Equitable Treatment

NAFTA – North American Free Trade Agreement

UNCTAD – United Nations Conference on Trade and Developments

STATEMENT OF FACTS

The Federal Republic of Validatu has discovered its steel resources in 2009, however Validatu lacks financial resources to develop its steel mining industry, and thus it invited foreign investors.

In December 31,1998, the Federal Republic of Validatu and the Republic of Valiant entered into a Bilateral Investment Treaty with the intention to create and maintain favorable conditions for investments of investors of either contracting party in the territory of either contracting party. As agreed upon under Article 13, the treaty shall be in force for only a period of five years and until the expiration of a twelve month period, it shall remain in force from the date either party notifies the other in writing.

In 2009, Validatu with the aim of exploring its steel resource had invited Valiant to invest in its steel industry.

In pursuance of the further cooperation entered into between Validatu and Valiant, Dastan Logam and Adamantium Steel entered into a Joint Venture Agreement on August 4, 2010. The contracting parties established a joint venture company named Dastan Adamantium with the purpose of developing, funding, constructing, owning, and operating an integrated steel mill.

In Spetember 5, 2011, the President of Validatu announced the State's commitment to be the core country in Asia's Automotive Market. Thereafter, a presidential proclamation was made that any treaty made not in line with Validatu's goal would be terminated.

Consequently, Dastan Logam entered into a new joint venture project with Ruberia Metal Corporation and deemed it unnecessary to obtain the written consent of Adamantium Steel because the project under the new agreement is in different from their undertaking with Adamantium.

As a result, Adamantium seeks to enforce the non-compete clause of the contract and pursue remedies under BIT.

ARGUMENT

I. The ICSID Tribunal lacks jurisdiction over the claims; moreover, these claims are inadmissible

A. Adamantium Steel's claims are purely contractual. Accordingly the tribunal lacks jurisdiction over the case.

1. Article 25 of the International Centre for Settlement of Investment Dispute (ICSID) Convention requires four elements in order for the center to have jurisdiction over the case. The first element to the jurisdiction of the center is a **written consent** of the parties. The second is that the dispute must arise out of an **investment** and the dispute in question is a **legal dispute**.The third element requires that one contracting party must be a state, and the other party must be a national of the other state.

For the tribunal to have jurisdiction over the claims, all these elements must be satisfied.

i. The tribunal lacks Jurisdiction Ratione Materiae

a. The claims put forth by claimant are purely contractual and beyond the jurisdiction of the ICSID

2. A legal dispute refers to either disputes regarding the existence or scope of a legal right or obligation, or to disputes regarding the nature or extent of the reparation to be made for the breach of a legal obligation.[1] However, it is important to note that, for the tribunal to have jurisdiction over the claims, the existence of a legal dispute is not sufficient; it is a further requirement that such dispute must arise directly out of an investment.

3. To ascertain if a legal dispute arises out of an investment, the requirement of directness is the objective criteria for jurisdiction.[2] This criteria requires that a dispute to be

[1]Guide to ICSID Arbitration, Kluwer Law International, 2011 p. 25
[2]The ICSID Convention Commentary, Cambridge University Press 2013, p. 106

considered to arise from an investment must not only be connected to an investment; it must be *reasonably* closely connected to such an investment. More importantly, such investment dispute must involve legal claims arising from a treaty, and not from contracts.[3]

4. As the ICSID Tribunal in SGS v. Pakistan held, while contractual and BIT claims may both be deemed "dispute with respect to investment," still a distinction must be made between the descriptive qualification of "the factual subject matter of the dispute" and the "legal basis of the claim."[4] Thus, even if descriptively, a contractual claim may amount to an investment dispute, still, the ICSID does not have jurisdiction to entertain the same if its basis is the contract and not the BIT.

5. The violations alleged by the claimant, which are the alleged breach of the non-compete clause and the failure to provide written notice, are found under the Joint Venture Agreement,[5] a contract- and not based on the Bilateral Investment Treaty executed by Validatu and Valiant. These claims cannot therefore be regarded as disputes arising directly out of an investment within the meaning of Article 25 of the ICSID Convention.

b. The claims subject of this case are not transformed into BIT claims

6. The claims put forth by claimant cannot be said to amount to a violation of Articles 2 or 4 of the BIT.As the SGS v. Pakistan ICSID Tribunal stated, contractual breaches cannot automatically be elevated to the level of breaches of international treaty law.[6] To do so "clear and convincing evidence" of the intent of the parties to a treaty to embrace contractual violations as amounting to treaty is necessary.[7]

7. In this case, Claimant has not pointed to any textual or extratextual bases to prove that the parties intended the state obligations created under Article 2 on fair and equitable treatment, as well as under Article 4 on expropriation, to be expansive enough to cover undertakings that are purely contractual in character. Upon the other hand, the fact that the JVA – executed after the BIT– provided a dispute settlement mechanism different from that found in the BIT, suggest that

[3] *SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan* [2013] CASE No ARB/01/13 Par 161 (ICSID)
[4] SGS N. 3
[5] Article 16 JVA between Dastan Logam and Adamantium Steel
[6] SGS (N. 3) para. 166
[7] SGS (N. 3) para. 167

indeed the parties thereto intended disputes arising from that contract to be referred to another forum, and not to the forum identified in the treaty.

ii. The Tribunal has no Jurisdiction Ratione Personae

8. The International Law Commission points out that the responsibility of the state extends to breaches under international law if the wrongful act is attributed to the state.[8] To determine whether an act of DL is attributable to Validatu, claimant must prove that DL is either an organ of the state, or empowered to exercise elements of the governmental authority or is controlled by the state. DL is none of these.

a. DL is not a state organ.

9. Article 4 of the Responsibility of States for Internationally Wrongful Acts (or Articles on State Responsibility) qualifies, state organs as those which perform legislative, executive, or judicial acts of the government. In addition, it requires that acts attributable to the state must be those acts performed by such officers in their official capacity.[9]

10. DL never performed executive, legislative or judicial functions. Moreover, its acts do not express the will and constitute activities of the state of Validatu. DL cannot therefore be considered an organ of the state and its actions cannot be attributable to Validatu.

b. DL did not exercise elements of governmental authority.

11. Article 5 of the Articles on State Responsibility attributes the conduct of an entity authorized and empowered by the state to exercise specific governmental authority to the state itself. But for attribution to arise, the entity must be so authorized or empowered by the state.

[8] ILC Articles', Art. 1
[9] Salvador Commercial Company, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902)

12. There is nothing to show that DL was authorized and empowered to exercise any governmental authority or prerogatives of Validatu. In fact, its conduct in entering into JVA with both Claimant as well as with Ruberia is a purely private and commercial activity and it cannot be considered as an action that concerns governmental activity.

c. DL is not controlled by the state.

13. Article 8 of the Articles on State Responsibility attributes the acts of a person or entity to a state under two circumstances. The first is when private persons act on the instructions of the State in carrying out the wrongful act. The second deals with a more general situation where private persons act under the State's direction or control.[10] In the first case the acts will be attributable to the State only if it directed and controlled the specific operation. In the second, when the wrongful conduct, even if only incidentally and peripherally associated with an operation under the direction of the state, occurred due to some negligence or omission of the State.

14. The conduct of DL in entering into a contract with RMC did not amount to an internationally wrongful act given that the state did not act, or has exercised direction or control over DL. While DL is a limited liability corporation organized and existing under the state of Validatu, this fact alone does not prove that Validatu has directed or controlled its actions absent any showing that DL acted under the orders from the Government.[11]

B. The claims are inadmissible.

15. The JVA between DL and AS provides that whenever a dispute arises, an ad hoc tribunal shall hear the claims first before an International forum.[12]

16. It has been established by the respondent that the violations alleged by the claimant are purely contractual.

[10]Article 17 and commentary, and especially paraph (7) for the meaning of the words "direction" and "control".
[11] *Flexi-Van Leasing Inc v Iran* [1986] ILR 355 (Iran-U.S.C.T.R.)
[12]Joint Venture Agreement between Dastan Logam and Adamantium Steel, Article 27

17. But even supposing that the tribunal has jurisdiction, it cannot accept that a BIT would '*automatically override the binding of a selection forum…to determine their contractual claims,'and that as long as the essential basis of the claim is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.*[13]

18. In fact, in SGS v. Philippines, [14] the ICSID Tribunal has ruled that while a claim may both be based on a treaty and contract, arbitration to the ICSID may be premature if the claims are yet to be quantified by another body identified in the forum selection clause of a contract.

19. The foregoing ruling is applicable in this case. Indeed, the claims subject of this case, assuming *arguendo* they amount to treaty claims, have yet to be quantified. Accordingly, claimant's invocation of this Tribunal's jurisdiction is premature. Its claims are therefore dismissible on this account.

II. DL has not breached Validatu's obligations under the Bilateral Investment Treaty (BIT)

A. DL did not violate Validatu's obligations to accord investments in its territory Fair and Equitable Treatment

20. Clauses establishing the duty of Fair and Equitable Treatment (FET) with respect to investments emanate from the minimum standard of treatment of aliens which form part of customary international law.[15] This standard was enunciated in the Neer case[16] (United States v. Mexico) decided by the Mexico-United States General Claims Commission in which it stated:

[13]Vivendi (2002), 6 ICSID Reports 340 at 366 para. 98
[14] *SGS v Philippines* [2006] Case No ARB/02/6 355 (ICSID)
[15] M Orellana, *Law on Investment: the Minimum Standard of Treatment (MST)* (Vol 1(3) TDM edn, 2004)
[16] Neer Claim 9(1926) 4 UNRIAA 60

> "Without attempting to announce a precise formula, it is in the opinion of the Commission possible to […] hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."

i. DL did not violate the standard of treatment required by customary international law when it did not notify claimant of its transactions with RMC

21. It must be emphasized that the Neer standard requires the treatment of an alien to amount to "an outrage, to bad faith, or willful neglect of duty." None of these are present in this case.

22. Claimant cannot assert that DL's failure to notify it of its transactions with RMC transgresses the standard of conduct required by customary international law as declared in the Neer case. Indeed, DL has consistently held that its transactions with RMC – including its entry into another JVA with that entity – will not in any way impair or otherwise adversely affect the business of claimant in Validatu. Under these circumstances, such failure to give notice cannot give rise to international liability.

ii.The obligation to accord fair and equitable treatment does not include the duty of notice towards an investor

23. In the ADF Group Inc v. United States, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, the tribunal held that Article 1105(1) the Neer formulation does not extend to the contemporary context of treatment of foreign investors and their investments in another state. More importantly, it noted that an investor claiming violation of international law on account of a specific standard of treatment must show that an autonomous requirement to accord fair and equitable treatment "has been brought into the corpus of present day customary international law" before it may claim violation thereof.

24. Corollarilly, it is incumbent upon claimant to show that the FET requirement under the BIT includes the duty to give notice. This, claimant failed to do. In fact, nowhere in Article 2 of the BIT has it been mentioned or otherwise implied that Validatu, much less DL, must notify claimant of any developments that may have any effect on its investments.

iii. Neither may claimant suggest that the FET duty was violated because its legitimate expectations were not met

25. Customary international law does not include an obligation to abide by an investor's legitimate expectations. As stated by an eminent publicist:

> *The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable." [. . .] [N]o other State has made any statement to the effect of giving fair and equitable treatment a meaning different from the international minimum standard (let alone linking it to the*

"legitimate expectations" of investors and the stability of the legal environment for investment).[17]

26. To this end, the annulment committee considering the case of MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile ("MTD") warned tribunals that basing a decision upon an investor's expectations rather than express treaty obligations may result in an annullable error. It held that the obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which seeks to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly . . . [18]

27. Similarly, in Glamis Gold, a case in which the applicable standard of fair and equitable treatment was tied to the customary international law minimum standard of treatment—as is also the case here—the tribunal accorded no weight to the claimant's argument regarding legitimate expectations, finding that the standard enunciated in Tecmed was inapplicable under a customary international law analysis. The Glamis Gold tribunal concluded that "merely not living up to expectations cannot be sufficient to find a breach of Article 1105 [the fair and equitable treatment provision] of the NAFTA."[19]

28. But even if Claimant had met its burden of demonstrating that compliance with an investor's legitimate expectations is an element of the FET standard, claimant's argument still fails, because it has not shown that Validatu violated that standard by frustrating the Claimant's legitimate expectations.

29. In determining whether a set of expectations is "legitimate," or "reasonable," tribunals consider an investor's duty to investigate into the laws of the host State, its prior experience within the host State, or specific representations made by officials of the host State. In the absence of specific representations to the contrary, an investor is entitled to

[17] *Suez, Sociedad General de Aguas de Barcelona SS and Inter Aguas Servicios Integrales de Agua SA v Argentine Republic* [2010] Case No ARB/03/17/ 355 (ICSID)pp.3-7 (dissenting opinion)
[18] MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile,ICSID Case No. ARB/01/7 pp. 67-69
[19] Glamis Gold Award pp.608-610; 620

expect nothing more than the consistent, faithful application of the laws that exist at the time it makes its investment.

30. Furthermore, the MTD tribunal stated: "BITs are not an insurance against business risk and the Tribunal considers that Claimants should bear the consequences of their own actions as experienced businessmen."[20]

31. In addition, an "investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances."[21]

32. Accordingly, Claimant must demonstrate first that its expectations were legitimate, and, second, that Validatu has frustrated these expectations.

33. The requirement that expectations be 'reasonable' is an accepted standard under customary international law.[22] For example, the National Grid tribunal stated: "[T]he prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertakings or representations by the host State upon which the investor has reasonably relied."[23]

34. The tribunal in Parkerings-Compagniet A.S. v. Lithuania ("Parkerings")[24] agreed, explaining that it is not any subjective expectation that is entitled to protection, but rather only those that are legitimate and reasonable:

In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate

[20]MTD N. 18
[21]Parkerings Award p. 333
[22] Metalclad Corp v. Mexico, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1 (Award) 30 August 2000 (Lauterpacht, Civiletti, Siqueiros), p.103 ("Metalclad Award") ("Expropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to- be-expected economical benefit of property even if not necessarily to the obvious benefit of the host State." (emphasis added)).
[23] National Grid Award, p.152 (quoting JAN PAULSSON AND ZACHARY DOUGLAS, INDIRECT EXPROPRIATION IN INVESTMENT TREATY ARBITRATIONS (2004)).
[24] *Parkering-Compagniet AS v. Lithuania* [2007] Case No. ARB/05/8 355 (ICSID)

expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.[25]

35. In determining whether a particular expectation is "reasonable," tribunals consider an investor's duty to investigate into the laws of the host State, its prior experience within the host State, and the existence (or lack of existence) of specific representations by officials of the host State. Based on the facts that were known or which should have been known to Claimant at the time of its investment, none of its claimed expectations in this case were objectively reasonable.

36. In Duke v. Ecuador, the tribunal set out a holistic approach to the evaluation of expectations:

The assessment of reasonableness or legitimacy (of the investor's expectations) must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.[26]

37. In line with the facts presented, Validatu lacks financial resources which of course have an economic climate that is volatile. Yet, presumably a greater instability will be indeed part of the business risk, and an inquiry into the reasonableness of its expectations should not fail to assess this element.

38. In Parkerings v. Lituania, for example, the tribunal expressly noted that circumstances in a country in transition could not justify legitimate expectation as regards the stability of the investment environment. [27]

39. It should also be taken in consideration that an investor must realistically assess regulatory risk. Thus, investors in a developing country could not have expected that it would refrain from regulatory changes.[28]

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[25] Parkerings N. 21
[26]Duke Energy Electroquil Partners and Electroquil SA v. Ecuador, ICSID Case No. ARB/04/19, Award, 12 August 2008, para 340.
[27]*Parkering* N. 24
[28]*Methanex Corporation v. USA*, [2005] [NAFTA/UNICITRAL]

40. Thus, it may accord weight to an investor's expectations when they are reasonable in light of domestic law, or based upon specific representations made to the investor by representatives of the Government. Applying these factors does not, however, advance Claimant's position in this case. Considering Claimant's duty to investigate Validatu's law when making its investment, its prior experience, Claimant's expectations regarding the 40.
41. Contract were simply unreasonable. Specifically, Claimant could have no reasonable expectation that its investment would not be interfered with depending on the developmental needs of the state. From the very start, claimant knew that Validatu was a developing state. It was only fairly recently that it discovered its mineral resources.[29] Claimant therefore knew, or ought to have known, that Validatu relies on this resource to further its economic development and that therefore, in some future date, its policies as regards its mineral resources will change.

42. Needless to state, the Validatu government has to deal with the economic conditions of its country. Its creation of a new contract with RMC is a means to further enhance its economic status and further develop its resources. Therefore, the announcement of the president and its contract with RMC represented a logical sequel of the previously enacted measures of Validatu and should have come as no surprise to Claimant.

43. Moreover, Validatu acted in full conformity with the BIT that prescribes the duty of fair and equitable treatment. Validatu had to harmonize and balance the interests of the Claimant with the public interest and its sovereign power to regulate the issues vital for its citizens in their best interest. Thus, its actions towards Claimant were entirely legal and in the conformity with the relevant standards of protection.

B. DL did not violate Validatu's obligation under Article 5 of the BIT regarding expropriation

44. Article 5 of the BIT prohibits the expropriation of property, whether directly or indirectly, except for a public purpose. There is direct expropriation when property is taken or nationalized by the host state and ownership rights are transferred to the state or other

[29] Par. 1, Case Study

actors. On the other hand, even in the absence of physical takings of property, an indirect expropriation may arise, if there is total or near total deprivation of an investment.[30] In either case, it is worthy to note that the mere breach by a state of a contract does not in principle amount to an expropriation.[31]

a. No direct expropriation exists in this case

45. Claimant may not validly claim that Validatu, through DL, has directly expropriated its property. Indeed, the steel mill remains under the control and operation of claimant, and no transfer of rights with respect to such property has been effected.

46. In fact, Validatu has not even taken any measure that interfered with Claimant's rights over the steel mill. More importantly, it cannot validly allege that Validatu has interfered in its rights by its President's declaration of the shift in priority towards the Asian automotive market.[32]

47. Neither may it be claimed that respondent's JVA with claimant has been terminated. Indeed, there was no termination done by the government as the Presidential declaration categorically stated that treaties and agreements inconsistent with the shift in policy "would be" terminated. Such qualification simply means that some future action – independent of the declaration – will have to be made to effect termination of any treaty or agreement. Here, no such subsequent action has in fact been made, leading to the inevitable conclusion that the JVA with claimant still subsists.

[30] Expropriation: A Sequel. UNCTAD Series on International Investment Agreements II, United Nations, New York and Geneva, 2012 p.7

[31] See, *Waste Management v. Mexico*, [2004] Case No. ARB(AF)/00/3 [ICSID]; SGS v. Philippines, [2011] Case No. ARB03/11[ICSID]

[32]Case Study, Compromis

b. Neither may claimant assert that its property has been subject to indirect expropriation

48. As previously asserted, indirect expropriation envisions a situation where total or near total loss of rights results.

49. Claimant is an investor in the steel mill. In the JVA between the Dastan Logam and the claimant, the steel mill was to, among others, engage in the 'sale and export of by-products and processing of wastes generated by the Plant.'[33]

50. Upon the other hand, the JVA between DL and RMC, includes the use of 'cold-rolled full-hard substrate with the aim of maximizing use of DL cold-rolled full-hard substrate.'[34]

51. The cold-rolled full-hard substrate is a by-product of steel production. Such by product from the steel mill may presumably be purchased by DL and RMC from claimant. In other words, the JVA between DL and RMC – as DL rightfully claimed – does not adversely affect the business interest of claimant. In fact, by entering into such JVA, DL assures that claimant will have a ready market for its by-products.

52. Furthermore, even if it were assumed *ex gratia argumenti* that some adverse effect results from the execution by DL of a JVA with RMC, still claimant has not shown that the new JVA with RMC has resulted reduced its investments consisting in shares in the steel mill to total loss, or near total loss. As GAMI Investments v. Mexico,[35] the Tribunal noted that where a shareholder asserts expropriation of its investments, it must show that its shares have become valueless or near valueless for the accusation to be sustained. Here, claimant has not shown the total or near total loss in value of its shareholdings for its charge of expropriation to be given weight.

[33]JVA Dastam Logan and Adamantium Steel Art. 5 Purpose of Joint Venture
[34]JVA Dastan Logam and Ruberia Metal Coporation Art. 13 (a)
[35] Final Award, 15 November 2004, par. 123

c. In any event, claimant's assertion of expropriation cannot prosper considering its failure to abide by the requirement of Article 5(2) of the BIT

53. Under said provision, an investor whose property is expropriated is granted the right to seek redress before the tribunals or offices of Validatu, for the review of its claims and valuation of its investment. In both Waste Management v. Mexico and SGS v. Philippines, the ICSID Tribunals held that the failure to seek redress before the host state forecloses a claim for expropriation because in that instance, no definitive denial of the right against illegal expropriation can be asserted.

54. Claimant's failure to make use of the remedies under Article 5(2) of the BIT and insistence on direct resort to this Tribunal therefore renders its accusation of expropriation meritless.

III. Claimant is neither entitled to compensation nor the termination of DL's JVA with RMC

a. Claimant is not entitled to compensation

55. The actions taken by Validatu with respect to its economy are within the scope of any state's police and regulatory authority.

56. Where economic loss arises out of bona fide general regulation aimed at preventing nuisance, it should be considered an acceptable exercise of the police power and therefore would be non-compensable.[36] The tribunals in *Saluka v. Czech Republic*[37] and *Methanex v.USA*[38] found that states are not liable to pay compensation to a foreign investor when, in thenormal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

[36] Methanex(N. 28) para. 410
[37] *Saluka v. Czech Republic*, Partial Award, [2006], p. 276
[38] Methanex (N. 28)

57. Consequently, since Validatu's actions represent its exercise of power to intervene in the economy through regulation in a variety of ways: preventing and prosecuting monopolistic and anticompetitive practices, this Tribunal should find that Validatu is not liable to pay compensation to Validatu.

58. More importantly, there is nothing to show that Validatu has adopted the foregoing regulatory measures in a manner that is discriminatory, or directed against claimant. Such being the case, claimant may not seek compensation for patently valid regulatory acts by the state.

59. Neither may claimant validly assert any claim for lost profits arising from the supposed indirect expropriation of its assets. Specific to expropriation cases, it is established that lost profits are compensable only in cases of unlawful expropriation.[39]

60. However, seeing how in the case at hand no expropriation, let alone an unlawful one occurred, the Tribunal should reject Claimant's claim for lost of profits.

61. Not only did Claimant not suffer expropriation of its investment, but it was also treated in accordance with all the other relevant standards of protection. Consequently, Claimant suffered no damages at all, let alone moral damages. Therefore, Respondent asks the Tribunal to dismiss the claims relating to the moral damages, since no elements of said conduct could be found in the acts of Validatu.

b. Neither is claimant entitled to ask for the revocation of DL's JVA with RMC

62. It was previously presented that Validatu had accorded the Claimant a fair and equitable treatment tied with the minimum standards under the international law. Therefore, Validatu is not guilty of breach of duty and is not liable for injury for breach of non-compete agreement and prior written notice towards the Claimant.

[39] Amoco v. Iran, [1987] pp. 191-205

IV. Claimant cannot be given the right to Restitution

63. It was previously presented that Validatu had accorded the Claimant a fair and equitable treatment tied with the minimum standards under the international law. Therefore, Validatu is not guilty of breach of duty and is not liable for injury for breach of non-compete agreement and prior written notice towards the Claimant.

64. There is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.[40]In the Chorzow Factory case[41] the judgment of specific performance is not binding between Adamantium Steel and Dastan Logam.

V. Prayers for Relief

65. Find that the ICSID Tribunal has no jurisdiction and/or that the claims asserted by the Claimant are not admissible.

66. In the event that the Tribunal does not grant Dastan Logam first prayer for relief, find that Validatu has not violated the protections of the BIT.

67. In the event that the Tribunal does not grant Dastan Logam first or second prayer for relief, deny Claimant's request for specific performance.

68. Find that Validatu is entitled to restitution by Claimant of all costs related to these proceedings.

69.In any event the tribunal will not dismiss the case, the respondent appoint Prof. Lukman Lubis as the arbitrator following the agreement made from both parties.

[40]*SGS* (N. 14)
[41]*The Factory at Chorzow, Germany v. Poland* [1928] Series A, No. 9 [PCIJ]