AM10

ALSA International Moot Court Competition

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BETWEEN

JAN KONARSKI	**REPUBLIC OF REDENTIA**
(Claimant)	**(Respondent)**

MEMORIAL FOR CLAIMANT

TABLE OF CONTENTS

LIST OF AUTHORITIES

JOURNALS

BOOKS

ICSID CASES

OTHER CASES

CONVENTIONS & TREATIES

MISCELLANEOUS

STATEMENT OF FACTS

CLAIMANT

1. Claimant, Mr. Jan Konarski, is a businessman in the oil and gas industry who owns a 30% stake in Redentia Petroleum Corporation (RPC) after being compelled by Redentia to invest in its failing oil and gas industry following to 2009 Global Financial Crisis.
2. Claimant is of dual nationality, holding Artinan and Tronian citizenships.

RESPONDENT

3. Respondent, the Republic of Redentia, is a democratic republic located in one of the most liberal and prosperous regions in the world. In the last two decades, Redentia has actively pushed for foreign investment in order to boost its Gross Domestic Product (GDP), especially following the 2009 Global Financial Crisis where it persuaded high-net worth individuals – including Claimant – as well as investments banks and Fortune 500 companies to inject capital in order to save its economy.

THE GREEN PARTY

4. The Green Party – a pro-environment political party – the incumbent dominant political party came into power after winning Redentia's 2013 General Elections, attaining 60% of the popular vote and three-quarters of the seats in Redentia's parliament.

THE PRO-ENVIRONMENT MEASURES

5. Following an oil-spill off the Southern coast of Redentia's territory, they enacted Pro-Environment Measures ("PEM") a set of laws that included but is not limited to endorsing activities of pro-environment groups and removal of all taxes and tariffs on natural gas vehicles, which significantly harmed oil and gas industry. As a result of the PEM, ownership of petrol-engine vehicles dropped drastically. At the beginning of 2013, 80% of Redentian vehicles ran on petrol, while only 10% ran on natural gas. By the end of 2015, the figures were 60% and 34% respectively. This ultimately caused a gradual devaluation Claimant's 30% shares in RPC.

THE DISPUTE

6. Prior to settling the dispute before ICSID, Claimant sought to communicate with Redentia regarding his losses from the PEM, however since Redentia is bound on sticking to its electoral promises to steer Redentia to a "clean and green future", this was to no avail.
7. On 1 December 2015, Claimant's lawyers officially referred the dispute to ICSID arbitration. Claimant based its claims on the Redentia-Beginnia Bilateral Investment Treaty ("BIT"), since the Redentia-Artina BIT contains a Most-Favored Nation ("MFN") clause, which allows Claimant to rely on third-party treaties containing more favorable protection of investors.

ARGUMENTS ON JURISDICTION

SUBMISSION 1: THE TRIBUNAL HAS JURISDICTION RATIONALE CONSENSUS ALTHOUGH THERE IS NO ICSID ARBITRATION CLAUSE WITHIN THE REDENTIA-ARTINA BIT

1. Principally, an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates."[1] In this regard, Article 9(1) of the International Law Commission's 1978 Draft Articles on Most Favored Nation Clauses states that an MFN clause confers "only those rights which fall within the limits of the subject-matter of the clause".[2] Therefore, when determining the scope of the clause the Tribunal must have regard to the category of subjects found in the relevant treaty. In the present matter, the category of subjects is state in Article 4(2) of the Redentia-Artina BIT, which reads as follows:

> "Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favorable than that accorded to the investments and associated activities by its own investors or by the investors of any third State."

2. Article 4(2) of the Redentia-Artina BIT is broadly drafted, since the inclusion of the phrase "activities associated with such investments" in the article demonstrates the intention of the Treaty parties not to confine the application of the clause solely to the substantive economic protection of the investment.

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[1] *Ambatielos Claim (Greece, the United Kingdom and Northern Ireland)* (Award) [1956] 12 RIAA 107

[2] International Law Commission, 'Draft Articles on Most Favored Nation Clauses', *International Law Commission 30th Session* (Yearbook of the International Law Commission 1978), art 9(1).

3. In this context, the principle of MFN under Article 4 of the Redentia-Artina BIT is also capable of extending Redentia's consent to the jurisdiction of the Tribunal from Article 13 of Redentia-Beginnia BIT.

4. Claimant asserts that:

    A. MFN Provisions can apply to jurisdictional issues;

    B. There is nothing in the text of the Redentia-Artina BIT that limits the scope of the MFN provision of Article in this respect.

A. MFN provisions can apply to jurisdictional issues

5. There is no rule of international law that prevents an MFN provision from being applied to jurisdictional issues.[3] Although several ICSID tribunals have refused to apply MFN provisions to jurisdictional matters,[4] the Tribunal should take the position of the majority of ICSID tribunals, which have allowed for MFN provisions to apply to jurisdictional issues.[5]

6. The refusal of some tribunals to extend the effect of an MFN provision to jurisdictional issues originates from International Court of Justice ("ICJ") case law, which has a completely different set of facts from this Case. In the *Anglo-Iranian Oil Case,* the ICJ decided that United Kingdom could not establish the court's

[3] *Ambatielos Claim* (n 1); *Renta 4 S.V.SA v The Russian Federation* (Ad hoc Award on Jurisdiction) [2009] Arbitration Institute of the Stockholm Chamber of Commerce; *Siemens AG v. Argentina* [2004] ICSID Case No. ARB/02/08.

[4] *Plama Consortium Limited v Bulgaria* (Decision on Jurisdiction) [2005] ICSID Case No. ARB/03/24; *Wintershall Aktiengesellschaft v Argentina* (Award) [2009] ICSID Case No. ARB/04/14.

[5] *Maffezini v Spain* (Decision on Jurisdiction) [2000] ICSID Case No. ARB/97/7; *Siemens v. Argentina* (n 3); *RosInvest v Russia* (Decision on Jurisdiction) [2007] Arbitration Institute of the Stockholm Chamber of Commerce, Case No. Arbitration V 079/2005.

jurisdiction.[6] However, as elucidated in *Renta 4 v. Russia*, the reason of such refusal is not because MFN's inability to extend to jurisdictional issues, rather it was because United Kingdom tried to extend ICJ jurisdiction clause using a MFN provision from another treaty that has a different subject-matter.[7]

7. The question in the present Case is different from the one discussed by the ICJ in the *Anglo-Iranian Oil Case*. Here, Claimant contends that the purpose of the MFN provision is to link Article 10 of the Redentia-Artina BIT and Article 13 of the Redentia-Beginnia BIT, which are both dispute settlement clauses.

8. Therefore, the present question is closer to the one discussed by the ICJ in the *Rights of US Nationals in Morocco Case* (1952) regarding consular jurisdiction.[8] In that instance, the ICJ dealt with an MFN provision which contained the terms the "footing [of] commerce"[9] which entitled US nationals to "whatever indulgence, in trade or otherwise", which was granted to the nationals of certain other States.[10] In applying this provision, the ICJ found that by virtue of the access to consular jurisdiction granted to UK nationals, US nationals were entitled to such jurisdiction as well.[11] Claimant emphasizes that there is no reason for a distinction between the legal regimes of consular jurisdiction and international arbitration, with regards to MFN provisions.

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[6] *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, [1953] ICJ Rep 15, 109.

[7] *Renta 4 v Russia* (n 3) [84].

[8] *Rights of US Nationals in Morocco (France v United States)*, [1952] ICJ Rep 176.

[9] ibid, 190.

[10] ibid.

[11] ibid.

9. Another indication in the direction of applying MFN clauses to jurisdictional issues is provided also in the *Ambatielos Claim* (1956).[12] The Arbitral Commission concludes that Greek nationals could make claims before United Kingdom courts by interpreting the term "all matters relating to commerce and navigation" to include "administration of justice", since United Kingdom also provides access to its courts to other States' investors.[13]

10. Arbitral tribunals in investor-State disputes also adopted a similar position. The tribunal in *Maffezini v Spain* was the first to consider the issue of whether an MFN clause applies to jurisdictional issues.[14] The tribunal held that the clause in the *Argentina-Spain* BIT is applicable to jurisdictional issues in order to afford the claimant more favorable dispute resolution provisions contained in the *Chile-Spain* BIT. The tribunal stated:

> "The tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, ... if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause."[15]

11. Further, ICSID tribunals have confirmed the authority of *Maffezini* in subsequent cases such as in *Carmuzzi v Argentina*,[16] *Gas Natural v Argentina*,[17] *Renta 4 S.V.SA v*

[12] *Ambatielos Claim* (n 1).

[13] ibid, 107.

[14] *Maffezini v Spain* (n 5).

[15] ibid, [54-56].

[16] *Camuzzi International S.A. v Argentina*, (Decision on Jurisdiction) [2005] ICSID Case No. ARB/03/2, [57].

[17] *Gas Natural SDG S.A. v Argentina*, (Decision on Jurisdiction) [2005] ICSID Case No. ARB/03/10, [49].

Russia,[18] and *RosInvest v Russia*,[19] For example in *RosInvest v Russia* (2007), the tribunal came to the conclusion that: "an arbitration clause, at least in the context of expropriation [as in the case at hand], is of the same protective value as any substantive protection offered by applicable provisions".[20] The *RosInvest* tribunal then applied an MFN provision in order to give the investor access to international arbitration.[21]

12. Therefore, Claimant emphasizes that it should receive more favorable treatment by acquiring access to the dispute resolution mechanism contained in Article 13 of Redentia-Beginnia BIT, since MFN provisions are in general capable of being applied to jurisdictional issues according to international law.

B. Article 4(3) of the Redentia-Artina BIT contains no limitations in using MFN for jurisdictional issues

13. The Contracting States intended to extend the effect of Article 4 of the Redentia-Artina BIT to jurisdictional issues. Such conclusion is evident from the BIT itself, interpreted in a reasonable manner in accordance with the Vienna Convention on Law of Treaties ("VCLT") interpretation rules.[22] Article 31 of the VCLT reads as follows:

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

14. *Firstly*, the MFN provision of Article 4 of the Redentia-Artina BIT is drafted in

[18] *Renta 4 v Russia*, (n 3) [97].

[19] *RosInvest v Russia*, (n 5) [130-132].

[20] *RosInvest v Russia*, (n 5) [132].

[21] ibid, [133].

[22] United Nations, *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969), art 31.

general terms as to encompass jurisdictional issues. By interpreting it using the "ordinary meaning", jurisdictional issues are not listed under the exceptions for the MFN clause.[23] In this respect, *Renta 4 v Russia* tribunal declared that there is no textual basis or legal rule to say that "treatment" does not encompass the host State's acceptance of international arbitration.[24]

15. *Secondly*, an interpretation favoring the application of Article 4 of Redentia-Artina BIT to jurisdictional issues is in line with the way the Redentia-Artina BIT is drafted. Article 4(3) of Redentia-Artina BIT provides for exceptions to its application regarding certain matters, *i.e.* customs union, free trade area, economic union and any other international agreement resulting in such unions.[25] It can be thus deduced from the structure adopted in the treaty that the Contracting States considered which issues are to be left outside of the scope of the MFN provision.[26] Since jurisdictional issues are not included in the list of exceptions, it is reasonable to conclude that the Contracting States intended to extend the application of the MFN provision to the two dispute resolution clauses contained in Articles 9 and 10 of the Redentia-Artina BIT, despite Redentia's contrary suggestions.[27]

16. For all the above reasons, Claimant respectfully requests the Tribunal to apply the MFN provision of Article 4 of the Redentia-Artina BIT as intended by the Contracting States. Therefore, this Tribunal shall render Article 13 Redentia-Beginnia BIT applicable to Claimant and thus recognize that such provision constitutes

[23] Mark Villiger, *Commentary to the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 426.

[24] *Renta 4 v Russia*, (n 5) [101].

[25] Moot Problem, Annex I, art 4(3).

[26] Villiger, (n 23) 427-428.

[27] Villiger, (n 23) 426.

Redentia's agreement to treat Claimant as a foreign national for the purposes of Article 25(2)(b) of ICSID Convention.

SUBMISSION 2: THE TRIBUNAL HAS JURISDICTION *RATIONALE PERSONAE* BECAUSE HE IS A NATIONAL OF ARTINA

17. Claimant submits that:

    A. The Tribunal has jurisdiction *rationale personae* as Claimant is a national of Artina, in accordance with Article 25 of ICSID Convention; and

    B. The dual nationality of Claimant in Artina and Tronia does not bar this Tribunal's jurisdiction.

A. The Tribunal has jurisdiction *rationale personae* as Claimant is a national of Artina, in accordance with Article 25 of ICSID Convention

18. In deciding jurisdiction before this Tribunal, one of the requirements is based on whether an investor is of the nationality of an ICSID Contracting State, pursuant to Article 25(1) of ICSID Convention,[28] otherwise known as jurisdiction *rationale personae*.[29]

19. Further in Article 25(2)(a) of the ICSID Convention, the definition of national of the Contracting State is any individual who have the nationality of a Contracting State, but "does not include any person...had the nationality of the contracting state party to

[28] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 1975 ("ICSID Convention"), art 25(1).

[29] United Nations Conference on Trade and Development, *Dispute Settlement International Centre for Settlement of Investment Disputes: 2.4. Requirements Ratione Personae* (UNCTAD 2003) 1.

the dispute."[30] The latter is the only exception that the ICSID Convention recognized.[31]

20. In determining what nationality is, we can look into Article 1(2) of Redentia-Artina BIT, which stated that investor shall be any legal or natural person that invested in the territory of other Contracting Party.[32] Further in Article 1(2)(a) of Redentia-Artina BIT, the term "natural person" means any natural person that is "a national of that Contracting Party".[33] There is no further explanation about the term "a national of that Contracting Party." Consequently, we can conclude that the definition of "a national" here is really broad.
21. In such situation, we should define an individual's nationality based on the national law of each relevant State, as the ICJ in *Nottebohm* noted, "international law leaves it to each State to lay down the rules governing the grant of its own nationality."[34]
22. In the present Case, it is undisputed that the Claimant is a national of Artina based on Artina's law,[35] and at the same time, Artina is a Contracting State to the ICSID Convention.[36]
23. The only exception to the nationality rule under Article 25(2)(a) of the ICSID Convention is not applicable here because the Claimant does not hold the nationality of the Contracting State party to the present dispute, *i.e.* Redentia.[37] Thus, the

[30] ICSID Convention (n 28), art 25(2)(a).

[31] Timothy G. Nelson, 'Passport, S'il Vous Plait?: Investment Treaty Protection and the Individual Investor's Citizenship' [2007] 32 Suffolk Transnat'l L.Rev. 101, 110.

[32] ICSID Convention (n 28), art 1(2).

[33] ICSID Convention (n 28), art 1(2)(a).

[34] *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 2, 23.

[35] Moot Problem, Annex 3, [3].

[36] Moot Problem, Annex 3, [6].

[37] Moot Problem, Annex 3, [3].

Tribunal would have jurisdiction *rationale personae* because the Claimant fulfills the criteria under Article 25 of ICSID Convention.

B. The dual nationality of Claimant in Artina and Tronia does not bar this Tribunal's jurisdiction

I. The test of effective link in dual nationality claims would not bar this Tribunal's jurisdiction

24. Redentia may argue that the "effective link" test should be applicable and contend that the Claimant has effective link with Tronia, not Artina. However, this is an incorrect analysis based on two reasons, which are: (a) effective link test is not recognized in ICSID Tribunal; and (b) in any event, effective link test is only relevant when the investor holds a dual citizenship from both of the disputing States.

a. Effective link test is not recognized in ICSID Tribunal

25. When a tribunal or a court is faced with the issue of nationality, it is entitled to carry out its analysis,[38] and specifically for ICSID Tribunals, Article 41 of ICSID Convention empowers the tribunal to examine nationality issues when it is required.[39]
26. The "effective link" test adopts the view that a national must be the one that have a genuine link with the country of nationality, as coined in *Nottebohm*.[40] It is indicated

[38] *Government of the United States of America and the Government of His Majesty the King of Egypt concerning the Claim of George J. Salem (Egypt/The United States of America)* (Award) [1932] 2 RIAA 1180, 1184; *Flegenheimer (United States of America/Italy*) [1958] 25 ILR 140, 149.

[39] ICSID Convention (n 28), art 41.

[40] *Nottebohm Case* (n 34) 22.

by whether the individual is "closely attached by his tradition, his establishment, his interest, his activities, his family ties".[41] However, this doctrine is not recognized under ICSID.

27. To illustrate, in *Champion Trading* before an ICSID tribunal, the claimants that were US-Egyptian dual nationals tried to argue that they are not predominantly Egyptian, rather United States,[42] using the "effective link" test, as laid down in *Nottebohm and The Iran-United States Claims Tribunal in case No. A/18* decisions.[43] However, the tribunal stated that they are not applicable, as ICSID Tribunals already have a clear and specific rule under Article 25(2)(a) of ICSID Convention.[44]
28. In a more recent case, which is *Siag v. Egypt* before ICSID tribunal, the use of "effective link" test was declined.[45] The reason is that the majority of the tribunal agreed that the point of assessment only needs to go as far as whether Italian citizenship law has been complied with in relation to Italy-Egypt BIT; not to the extend of revisiting the conclusion by looking into the "effectiveness" of the nationality.[46]
29. In conclusion, the "effective link" test is not recognized before this Tribunal and as such, it will have jurisdiction *rationale personae* based on the Claimant's nationality as Artina.[47]

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[41] *Nottebohm Case* (n 34) 24.

[42] *Champion Trading Co. v. Egypt* (Decision on Jurisdiction) [2003] ICSID Case No. ARB/02/9, [3.4.1].

[43] *Decision Concerning Jurisdiction Over Persons with Dual Nationality* [1984] 5 Ira-U.S Cl. Trib. Rep. 251.

[44] *Champion Trading Co. v. Egypt* (n 42).

[45] *Siag v. Egypt* (Decision on Jurisdiction) [2007] ICSID Case No. ARB/05/15, [184].

[46] ibid, [198].

[47] See Submission 2(A).

b. In any event, effective link test is only relevant when the investor holds a dual citizenship in which one of the nationalities is of the host State

30. Even if the "effective link" test is recognized in an ICSID Tribunal, it has been a long standing rule of international law that "effective link" would only be relevant if the investor hold a dual citizenship from the claimant's State and the host State.[48]

31. For example in *Ethiopia-Eritrea Claims Commission*, the commission was faced with the issue of dual nationals of Eritrea and a third party.[49] When Ethiopia argued that the Eritrean nationality should be overruled because the claimant has an "effective nationality" of a third party State, the commission rejected the argument and stated that "effective nationality test must be restrictively applied, and limited to cases where a claimant holds the nationality of the two disputing States."[50]

32. This is also supported in *Olguin*, where an ICSID tribunal accepted the jurisdiction under the Peru-Paraguay BIT, when the claimant possessed a dual nationality between Peruvian and a third party, which is United States. In accepting that, the tribunal unanimously dismiss Paraguay's objection to ICSID's jurisdiction because the test of "effective link" should not be considered when the dual nationality is with a third party State.[51]

33. Similarly, even though the Claimant has dual nationality, it is the nationality of Artina and Tronia, which is a third party. The dual nationality does not involve Redentia, who is the disputing State in this Case, at all. Hence, even if effective link test is

[48] Valts Nerets, *Nationality of Investors in ICSID Arbitration* (Riga Graduate School of Law Research 2011), 19.

[49] *Loss of Property in Ethiopia Owned by Non Residents Eritrea's Claim (Eritrea v Ethiopia)* (Partial Award) [2005] 24 Eritrea-Ethiopia Claims Commission, [11].

[50] ibid.

[51] *Olguin v. Paraguay* (Decision on Jurisdiction) [2000] ICSID Case No. ARB/98/5, [31].

recognized and applicable before ICSID Tribunal, it does not affect this Tribunal's jurisdiction *rationale personae*.[52]

II. In addition, Tronia's non-participation in the ICSID Tribunal does not bar the Claimant to bring this Case through Artina

34. Redentia may argue that the Claimant holds a dual nationality, in which one of it does not recognized ICSID's jurisdiction. However, as noted above, the only exception is when the claimant is a national of the disputing State.[53] Further, Professor Schreuer hold the view that the:

> "possession of the nationality of a non-contracting state in addition to that of a contracting state would not as such be a bar to becoming a party to ICSID proceedings."[54]

35. In this Case, even though Claimant's dual nationality is Artina and Tronia, Tronia would not be a bar for the Claimant to be a party in today's proceedings before the Tribunal.[55]

36. In conclusion, the Tribunal has jurisdiction *rationale personae*, pursuant to Claimant's nationality as Artina.

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[52] See Submission 2(A).

[53] See Submission 2(A).

[54] Christoph H. Schreuer*, The ICSID Convention: A Commentary* (Cambridge University Press 2001), [485].

[55] Moot Problem, Annex 3, [3].

ARGUMENTS ON MERITS

SUBMISSION 3: THE PRO-ENVIRONMENT MEASURES ENACTED BY THE GOVERNMENT OF REDENTIA CONSTITUTE EXPROPRIATION AND UNFAIR DISCRIMINATION OF THE CLAIMANT'S INVESTMENT

37. The Claimant submits that:

A. The Fair and Equitable Treatment provides a higher standard of protection to the Claimant compared to the Minimum Standard of Treatment regulated under international law;

B. Redentia has failed to provide a Fair and Equitable Treatment to Claimant, violating Article 4(1) of Redentia-Artina BIT;

C. Redentia has conducted a discriminatory measure against Claimant's investment in violation of Article 3(3) of Redentia-Artina BIT; and

D. Redentia has conducted an illegitimate expropriation against the requirements provided under Article 5 of Redentia-Artina BIT.

A. Fair and Equitable Treatment ("FET") provided in Redentia-Artina BIT poses a higher standard than Minimum Standard of Treatment ("MST") given under international law

38. As a form of protection to foreign investors, the relevant host State has to provide a certain standard of treatment towards them.[56] In this regard, there are two main

[56] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' [2004] 1, 2

possible clauses, *i.e.* (1) qualified FET, which is FET clause with reference to MST under international law; and (2) unqualified FET, which is FET clause without any reference to any specific rule.[57]

39. According to *Saluka*, qualified FET will merely oblige a State to provide a "no-more than minimal" protection to the investors.[58] An example is readily available in Article 1105(1) of NAFTA Minimum Standard of Treatment, which clearly stipulate that the FET should be "in accordance with international law."[59] The implication of the use of classified FET is that it would be more difficult to find a breach of FET, or in other words, easing the host State obligation.[60]

40. On the other hand, unqualified FET will oblige a State to give the standard treatment to foreign investor on a case-per-case basis, dependent upon the relevant treaty's interpretation.[61] According to Article 31 of the VCLT, one of the main factors to be seen is the "object and purpose" of treaty,[62] often found in its Preamble.[63]

41. Reflecting from international practice, such as *2009 Belgium-Luxembourg Economic Union-Tajikistan BIT*[64] and *2009 China-Switzerland BIT*,[65] the wordings in Article 4(1) of Redentia-Artina BIT falls within the scope of unqualified FET.[66]

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[57] UNCTAD, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' [2012] 1, 17–18

[58] *Saluka Investments B.V. V. The Czech Republic, UNCITRAL, Partial Awards* [2004] 292-294

[59] North American Free Trade Agreement, "Minimum Standard of Treatment", art 1105(1).

[60] UNCTAD: FET (n 57) 29

[61] UNCTAD: FET (n 57) 21

[62] VCLT (n 22), art 31.

[63] *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (Merits) [1952] ICJ Rep 196; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Merits) [2002] ICJ Rep 625, [51].

[64] Belgium-Luxembourg Economic Union-Tajikistan Bilateral Investment Treaty (2009), art 3.

[65] China-Switzerland Bilateral Investment Treaty (2009), art 4.

42. In this Case, the Preamble of Redentia-Artina BIT, which reflects the object and purpose, stated that it desires to "maintain favorable conditions for greater investment by investors," showing how the BIT's objective is to protect investors.[67] Hence, Article 4(1) of Redentia-Artina BIT should be interpreted as to increase the threshold of protection, which must be accorded by Redentia, from the mere minimum provided under MST.[68]

B. Redentia violated Article 4(1) of Redentia-Artina BIT concerning the principle of FET

43. International practices show that the FET obligation can be violated if one of these possibilities occurred: (1) investor's legitimate expectations is defeated; (2) denial of due process; (3) arbitrariness in decision-making process; (4) discrimination; and (5) abusive treatment.[69] In this regard, Claimant submits that Redentia has violated Article 4(1) of Redentia-Artina BIT, concerning the principle of FET, as Redentia's Pro-Environment Measures ("PEM") vanquished Claimant's legitimate expectation.[70]

44. The obligation to protect legitimate exception is considered as one of the cornerstones of the principle of FET.[71] A State must not create governmental regulation that: (I)

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[66] Moot Problem, Annex I, art 4(1); UNCTAD: FET (n 57) 20-21.

[67] Moot Problem, Annex I, Preamble.

[68] UNCTAD: FET (n 57) 22; Prof. F.A. Mann, "British Treaties for the Promotion and Protection of Investments" [1990] BYBIL 234-238.

[69] *MCI Power Group LC and New Turbine, Inc. v. Republic of Equador* (Award) [2007] ICSID Case No. ARB/03/6, [302]; *Saluka* (n 58) [284]; *SD Myers v. Canada* (First Partial Award) [2000], UNCITRAL IIC 249, [261], UNCTAD: FET (n 57) 62.

[70] Moot Problem, Annex 3, [13].

[71] Andrea K. Bjorklund et al., "Investment Treaty Law: Current Issues III Remedies in International Investment Law The Emerging Jurisprudence of International Investment Law" [2008] British Institute

creates changes outside the investors' expectation; (II) which would bring adverse effects to foreign investments, *i.e.* reducing its economic value.[72]

I. Redentia's PEM is against Claimant's legitimate expectation when investing in Redentia Petroleum Company ("RPC")

45. As illustrated in cases such as *Genin v. Estonia*[73] and *Parkerings-Compagniet v. Lithuania*,[74] the investors' expectation is objectively assessed on whether there should be a presumption of awareness of the general regulatory situation in the host State.[75]

46. For example, in *Methanex v. United States*, the Government of United States made a regulation to ban manufacturing and selling gasoline containing methanol-based compound due to environmental reasons.[76] When addressing the issue on Methanex's legitimate expectation, the Tribunal before ICSID denies that there is a violation of this obligation because it had been notoriously known that the government "continuously monitored the use and impact…and commonly prohibit…those compounds for environmental reasons."[77]

47. In our Case, Claimant's legitimate expectation back in 2010 was that there would not exist such regulatory measure on environment that will directly affect Claimant's investment because, contrary to *Methanex*,[78] there was no continuous monitoring and

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of International and Comparative Law 207–238.

[72] UNCTAD: FET (n 57) 64.

[73] *Alex Genin v. Estonia* (Award) [2001] ICSID Case No. ARB/99/2, [348].

[74] *Parkerings-Compagniet AS v. Lithuania* (Award) [2007] ICSID Case No. ARB/05/8, [335–336].

[75] UNCTAD: FET (n 57) 71

[76] *Methanex Corporation v. United States of America* **(**Final Award) [2005] 44 ILM 1345.

[77] *Methanex,* (n 76) [10].

[78] ibid.

prohibition on the use petroleum-based products in Redentia.[79] Additionally, it was even Redentia itself that pushes the investors to inject their funds in these petroleum companies, including RPC.[80]

48. These facts show that it is legitimate for Claimant to expect that its investment would be protected against measures like PEM. Hence, Redentia has acted against the legitimate expectation of Claimant.

II. Redentia's PEM brought adverse affect to Claimant's investment in RPC as it reduced its economic value

49. As noted by the Tribunal in *CMS v. Argentina*[81] and *Enron v. Argentina*,[82] a State's regulatory action must not reduce investor's economic value, because reasonably, it is the factor that induces investors to invest in a State.[83]

50. The PEM has economically reduced the value of Claimant's investment in RPC, as it renders the profit in 2015 to be halved of the one in 2012.[84] Ultimately, Redentia's PEM fulfills all the elements to prove that there exists a violation of the FET principle, as stipulated in Article 4(1) of Redentia-Artina BIT.

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[79] Moot Problem, Annex 3, [8-10].

[80] ibid.

[81] *CMS Gas Transmission Company v. Argentina* (Award) [2005], ICSID Case No. ARB/01/8, [274].

[82] *Enron Corporation and Ponderosa v. Argentina* (Award) [2004], ICSID Case No. ARB/01/31, [259–260].

[83] UNCTAD: FET (n 57) 64.

[84] Moot Problem, Annex 3, [15-16].

C. Redentia violated Article 3(3) of Redentia-Artina BIT by taking discriminatory measures against Claimant's investment

51. According to Article 3(3) of Redentia-Artina BIT, the host State should not take any "unreasonable or discriminatory measures against the…use, enjoyment or disposal of investments by investor".[85] Arbitral tribunal has found that the requirement of non-discriminatory have been violated when a State has discriminated against foreign nationals on the basis of their nationality.[86]

52. Discriminatory measure is defined as whether there exist (I) other domestic investors that become the competitors, (II) which receives different treatments.[87]

I. Natural gas companies ("NGCs") in Redentia constitute domestic investors that serves as comparator

53. In *Methanex*, the Tribunal described that the comparison is made towards a domestic investor whose situation is similar to the foreign investor in relevant aspects.[88] However, similarity here does not need to be completely identical, rather it can be assessed on several relevant aspects**.**

54. As an illustration in *ADC v Hungary*, the tribunal in that case held that the discriminatory measure has occurred when Hungary' government issued a decree to take over all airport operation from ADC and gave it to a State-owned company.[89]

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[85] Moot Problem, Annex 3, art 3(3).

[86] UNCTAD, *Expropriation UNCTAD Series on Issues in International Investment Agreements* [2012] 1, 34.

[87] Moot Problem, Annex 1, art 3(3).

[88] *Methanex* (n 76) [14].

[89] *ADC Affiliate Limited v Hungary* (Award) [2006] ICSID Case No. ARB/03/16, [177].

The similarity here between ADC and the State-owned company is that both focuses on the business of managing and operating airport.[90]

55. Here, RPC focuses on producing energy from petroleum and the main revenue emanates from operating the fuel service stations for vehicles in Redentia.[91] At the same time, the NGCs in Redentia also produce energy from natural gas for vehicles.[92] These two companies have striking similarities as both focuses on energy production for vehicles in Redentia, rendering the NGCs to constitute as competitors.

II. Claimant's investment in RPC received different treatments compared to the NGCs

56. In order for a discrimination to exist, specifically in the context of expropriation, there must be a different treatment from one party to another based on their nationality.[93] In *ADC v Hungary*, even though the decree from Hungary was applied to all private investor in the airport management, the tribunal still held that discrimination occurred.[94] This is because the decree has impaired claimant's investment, while at the other end of the spectrum, benefited the respondent's airport operator.[95]

57. In this very Case, Redentia's PEM removed all taxes and tariffs only for the natural gas vehicles, and at the same time endorsed anti-petroleum activists.[96] In addition, Redentia replaced all of the buses and governmental vehicles from petroleum-based

[90] ibid, [131-160].

[91] Moot Problem, Annex 3, [8].

[92] Moot Problem, Annex 3, [13-16].

[93] UNCTAD: Expropriation (n 86) 34.

[94] *ADC v Hungary* (n 89) [411].

[95] ibid, [441-443].

[96] Moot Problem, Annex 3, [13].

vehicles to natural gas vehicles.[97] This has created different treatments between RPC and the NGCs on the field of energy resource. RPC's petroleum-based vehicle market dropped by 24% in 2 years, and a substantial number of them changed to natural gas vehicle, which is beneficial only for NGCs.[98] Eventually, RPC's profit is reduced by 50% compared to the number in 2012.[99] Accordingly, Redentia has conducted discriminatory measures against RPC, in violation of Article 3(3) of Redentia-Artina BIT.[100]

D. Redentia violated Article 5 of Redentia-Artina BIT by conducting an illegitimate expropriation against Claimant's investment

58. Under Article 5 of Redentia-Artina BIT, the Claimant's investment shall not be directly or indirectly expropriated, unless it cumulatively fulfills these elements, *i.e.* for the public interest, without discrimination, in accordance with domestic legal procedure, and accompanied with compensation.

59. In this very Case, Redentia has (I) indirectly expropriated Claimant's investment in RPC. However, it is (II) not in accordance with domestic legal procedure and (III) the Claimant has not received any payment for compensation purpose.

I. Redentia's PEM constitute an indirect expropriation

60. Indirect expropriation is defined as a State action that does not directly or formally take the foreign investor's right of ownership over their investment, but deprives the

[97] Moot Problem, Annex 3, [14].

[98] Moot Problem, Annex 3, [15].

[99] Moot Problem, Annex 3, [16].

[100] Moot Problem, Annex 1, art 3(3).

investor of the economic use and enjoyment of his/her investment, *e.g.* through governmental regulations.[101]

61. The degree of deprivation is decided on a case-per-case basis,[102] but the underlying rule is that: (a) there is a deprivation of economic benefit;[103] (b) it is not only temporary;[104] and (c) regardless of the State's intention in conducting the act in question.[105] In this Case, Redentia's PEM constitute as an indirect expropriation because it fulfills all of these attributes.

a. Redentia's PEM substantially deprive the economic benefit of Claimant's investment

62. According to *Tecmed,* indirect expropriation will occur when "the investor is deprived of the use and enjoyment of the rights related to investment, such as income or

[101] *Starrett Housing v. Iran* (Interlocutory Award) [1983], 4 Iran-United States Claims Tribunal Reports 122, 154; *Norwegian Shipowners' Claims (Norway v. the United States)* [1922], PCA RIAA 307; *German Interests in Polish Upper Silesia (Germany v. Poland*) (Merits) [1925], PCIJ No. 6.

[102] UNCTAD: Expropriation (n 86) 57.

[103] *Telenor Mobile Communications v. The Republic of Hungary* (Decision of Jurisdiction) [2006] ICSID Case No. ARB/04/15, [65]; *M.C.I. Power Group L.C. v. Republic of Ecuador* (Award) ICSID Case No. ARB/03/06, [300]; *LG&E v. Argentine Republic* (Award) [2007] ICSID Case No. ARB/02/1, [188-191].

[104] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* (Award) [1984] Iran-US Claims Tribunal Case No. 141-7-2, 219 [225].

[105] Rudolf Dolzer, "The Impact of International Investment Treaties on Domestic Administrative Law", (2006) 37 New York University Journal of International Law and Politics 1, 953; *Tokios Tokeles v. Ukraine* (Award) [2007] ICSID Case No. ARB 02/18 [120, 205]; *Telenor* (n 103) [70].

benefits."[106] However, this deprivation does not need to reduce the whole income or benefit, but it is sufficient if it deprives it in a "significant part."[107]

63. In *Tradex v Albania*, the tribunal held that Albania has expropriated Tradex's investment by not doing action towards the rogue villagers, who raided Tradex's land by 15%.[108] Consequently, this created a loss of profit amounting to $2.000.000 (two million), which was predicted to be even higher in the future,[109] and was considered to deprive the investor in a significant part.

64. In the same vein, Redentia's PEM has reduced RPC's income in a significant part. In 2 years after the PEM was created, RPC's annual benefit has been reduced by 50%, because PEM reduces RPC's marketing target scope (petroleum-based vehicle population is reduced by 20% in 2 years).[110] Further, it is even calculated that RPC will continue to obtain more significant losses in 2020.[111] So, Redentia's PEM substantially deprived the economic benefit of Claimant's investment.

b. Redentia's PEM is not merely temporary in nature

65. The tribunals in *Tippets v. Iran* pronounced that the State act in question must generate a deprivation to the investor, but it could not only be "for a short time".[112] In

[106] *Tecmed v. Mexico* (Award) [2003] ICSID Case No. ARB/00/2, [115]; *Telenor* (n 103) [67].

[107] *Metalclad Corporation v. Mexico* (Award) [2000] ICSID Case No. ARB/97/1, [103-107]; S Halabi, "International Trademark Protection and Global Public Health: A Just-Compensation Regime for Expropriation and Regulatory Takings" (2012) 61(1) Catholic University Law Review 325, 338-352.

[108] *Tradex Hellas v Albania* (Award) [1999] ICSID Case No. ARB/94/2, [57]

[109] Tradex v Albania (n 108)[60]

[110] Moot Problem, Annex 3, [15-16].

[111] Moot Problem, Annex 3, [16]

[112] T*ippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of the Islamic Republic of Iran and others* [1984] 6 IUSCTR 219, 225.

that case, the tribunal held that Iran has expropriated claimant's investment by arbitrarily appointing a new manager, which ceased all communications with the claimant.[113] The tribunal decided that this act was not merely for a short time because there was no indication of restoration of condition until the time of the proceedings.[114]

66. As a competing illustration, in *SD Myers v Canada*, the investor claimed that a ban on the export of chemical substance through a closure of the border from Canadian territory constituted an indirect expropriation.[115] However, the tribunal did not found an expropriation, since the ban, *i.e.* closure of the border, is temporary for only eighteen months.[116]

67. In our Case, the PEM has been implemented almost for 3 years, since the end of 2013 until this very time, with no indication of amendment.[117] RPC's profit has been declining from 2013 to 2015, and based on professional projections, these profits would become losses in 2020.[118] This showed how the PEM has affected Claimant's investment not temporarily, rather on a long-term basis.

c. Redentia's intention in passing PEM is irrelevant

68. Redentia may argue that the PEM was passed due to environmental reasons, without having the intention to expropriate Claimant's investment. However, this is irrelevant because as pronounced by many arbitral tribunals, such as *Tokios Tokeles*,[119]

[113] *Tippets v Iran* (n 112) 224-225.

[114] ibid, 229.

[115] *SD Myers v. Canada* (n 69) [141], [279].

[116] ibid [284-287].

[117] Moot Problem, Annex 3, [14].

[118] Moot Problem, Annex 3, [16].

[119] *Tokios Tokeles* (n 105) [120].

Vivendi,[120] and *Telenor,*[121] the intention behind taking any action is immaterial in defining whether expropriation occurs.[122]

69. Hence, expropriation should be analyzed based on the effect, and accordingly, Redentia's PEM constitute an indirect expropriation.

II. Redentia's PEM is not in accordance with domestic legal procedure

70. Due process, one of the elements for a lawful expropriation, demands a State to act in accordance with their domestic law, in a non-arbitrary manner, and with an opportunity for the investor to have the measures reviewed.[123] Arbitrariness may occur in various forms, *i.e.* lack of transparency, lack of candor in administrative process,[124] and lack of procedural fairness.[125] One of the examples of lacking in procedural fairness is State's reluctance to involve the investor in the policy making.[126]

71. In *Metalclad,* the dispute arises on whether the denial of the construction permit towards Metalclad by Mexico is in accordance with procedural fairness. The tribunal considered that the manner in which the decision was taken is unfair and undue,[127] since Metalclad received no invitation and was given no opportunity to appear in the

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[120] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine* (Award) [2007] ICSID Case No. ARB/97/3, [7.5.20].

[121] *Telenor* (n 103) [70].

[122] Dolzer (n 105) 953.

[123] UNCTAD: Expropriation (n31) 40.

[124] *Waste Management, Inc v. Mexico* (Award) [2000] ICSID Case No. ARB/03/11, [98].

[125] Ioana Tudor, "The Fair and Equitable Treatment Standard in the International Law of Foreign Investment" [2008] Oxford University Press 483.

[126] ibid, 469.

[127] *Metalclad* (n 107) [93].

meeting of the Municipal Town Council, which discussed about the denial of Metalclad's construction permit.[128]

72. Meanwhile in *Waste Management,* the tribunal did not found the Mexican government to be violating due process requirement against Waste Management Inc. because the government made some attempts,[129] such as allowing proceedings to be done to some of the State's employees and providing an Agrarian Court proceeding for the Claimant's previous land claims.[130]

73. In the present Case, the due process is absent because the PEM was arbitrarily implemented and not in accordance with procedural fairness. Redentia has never consulted or discussed anything with the Claimant regarding the PEM, even though that approach is very plausible.[131] Such lack of transparency in the administration process, as well as Redentia's reluctance to involve the investors, resulted in a arbitrary performance. Thus, the PEM did not follow due process norms.

III. Redentia's PEM is without the payment of compensation to Claimant

74. According to Article 5 of Redentia-Artina BIT, regardless of whether it is done for public purpose or not, a compensation must always be made whenever there is expropriation. The tribunal in *Metalclad* held that when an expropriation is not accompanied by any compensation, then it would constitute as unlawful.[132] It also can be seen in the *Santa Elena*, in which the tribunal stated that an expropriation or taking

[128] ibid, [91].

[129] *Waste Management* (n 124) [117].

[130] ibid, [110].

[131] Moot Problem, Annex 3, [13]

[132] *Metalclad* (n 107) [111-112].

for environmental reasons or public purpose "does not alter the legal character of the taking for which adequate compensation must be paid",[133] which may give the Claimant a claim for compensation and damages.[134]

75. Since Redentia's PEM constitute as an indirect expropriation,[135] and no exception to the compensation obligation is written in Redentia-Artina BIT, unlike other BITs[136] Consequently, Redentia must pay compensation and damages for the violation of Article 5 of Redentia-Artina BIT.

[133] *Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica* [2000] ICSID Case No. ARB/96/1, [71].

[134] *Vivendi* (n 120) [7.5.21]; *Siemens A.G. v. Argentine* (Award) [2007] ICSID Case No. ARB/02/8, [259], [273]; *ADC v. Hungary* (n 89) [398], [444].

[135] See Submission 3(D)(I).

[136] US-Rwanda Bilateral Investment Treaty, annex B(4)(b), Canada- Peru Bilateral Investment Treaty, annex B(13)(1)(c).

SUBMISSION 4: REDENTIA CANNOT RELY ON THE DEFENSE OF NECESSITY TO PRECLUDE ITS WRONGFULNESS

76. According to Article 25 of Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), a State may invoke the state of necessity as a ground to preclude wrongfulness of an act that violates international law.[137] However, there are several elements that have to be cumulatively fulfilled[138], *i.e.* (a) it is done to safeguard an essential interest;[139] (b) against a grave and imminent peril;[140] (c) it is the only way;[141] (d) it does not cause any serious impairment towards other State's interest,[142] (e) the defense of necessity is not excluded from the international obligation,[143] (f) there is no contribution by the invoking State towards the peril.[144] In this Case, Redentia has failed to fulfill 3 fundamental elements, which consequently bars Redentia from invoking the state of necessity.[145]

77. The Claimant submits that here, Redentia cannot rely on the defense of necessity to preclude its wrongfulness because:

    A. There is no grave and imminent peril;

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[137] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc. A/56/49, art 25(1); International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* ("ARSIWA Commentary") (2001) 80, [1].

[138] James Crawford, *The Sources of International Responsibility* (OSAIL 2010), 495.

[139] ARSIWA (n 137), art 25(1)(a).

[140] ibid.

[141] ibid.

[142] ARSIWA (n 137), art 25(1)(b).

[143] ARSIWA (n 137), art 25(2)(a).

[144] ARSIWA (n 137), art 25(2)(b).

[145] *CMS v. Argentine* (n 81), [121].

B. Alternatively, Redentia's PEM is not the only way to respond to the peril; and

C. In the further alternative, Redentia contributed to the peril.

A. There is no grave and imminent peril

78. According to the ICJ in *Gabcikovo-Nagymaros Case,* the peril must be both: (I) imminent; and (II) grave, for the invocation of the state of necessity.[146]

I. The situation in Redentia is not imminent

79. Imminence describes a situation where there is a threat to the specific interest of a State at the actual or proximate time,[147] and goes beyond the concept of mere possibility.[148] For example in *Russian Fur Seals,* Russian Government issued a decree prohibiting the hunting of seals in order to prevent the danger of seal extermination.[149] The situation was seen to be imminent because there was an "abusive increase" in the seal hunting near its territory that would lead to the inevitable extermination of the seal population.[150]

80. In this Case, there is no imminent peril against Redentia's interest of protecting environment. Redentia may use two facts, *i.e.* (i) global warming;[151] and (ii) oil spill

[146] *Case Concerning The Gabcikovo-Nagymaros (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, [54].

[147] ibid.

[148] International Law Commission, *Addendum-Eight Report on State Responsibility by Mr. Robert Ago, Special Rapporteur-The Internationally Wrongful Act of The State, Source of International Responsibility* (1980) 29 [36].

[149] ARSIWA Commentary (n 137) 39 [14].

[150] International Law Commission, *Yearbook of The International Law Commission* (1978) 105 [155].

[151] Moot Problem, Annex 3, [11].

in Redentia.[152] However, it would not fulfill the criterion of imminent under Article 25 of ARSIWA.

81. *First*, global warming could not be deemed as an imminent threat to Redentia's interest.[153] Global warming is a condition that is uncertain, whether in the context of what is the causation or what are the consequences.[154] At the same time, in *Gabcikovo-Nagymaros Case*, the ICJ stated that "uncertainty" of an environmental impact could not be deemed as imminent in the context of state of necessity.[155] Hence, Redentia could not use the pretext of global warming due to its uncertainty. This argument is also reasonable because otherwise, it would open a Pandora's box where every State can easily invoke necessity just based on the reason of global warming.[156]

82. *Second*, concerning the alleged peril that is caused by the oil spill, the PEM was actually established when the accident had caused the damage.[157] Meanwhile, according to the International Law Commission ("ILC") in reflecting the *Caroline* incident, the measure taken under necessity must be done to prevent the said damage.[158] Unless there is a fact stating that there will occur another spill in the near future, Redentia could not invoke the state of necessity, as it would not amount to an imminent peril.

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[152] Moot Problem, Annex 3, [12].

[153] Daniel Dobos, 'The Necessity of Precaution: The Future of Ecological Necessity and The Precautionary Principle' (2001) 375, 386.

[154] Stephen Schneider, *Climate Change Policy: A Survey* (Island Press 2002) 54; Attila Tanzi, *State of Necessity* (OPIL 2013) [16].

[155] *Gabcikovo-Nagymaros* (n 146) [54].

[156] Daniel Dobos (n 153) 375, 386.

[157] Moot Problem, Annex 3, [12].

[158] ARSIWA Commentary (n 137) [5].

II. The situation in Redentia does not reach the gravity required to invoke state of necessity

83. The ILC explained that the situation must also be "extremely grave" and entirely beyond the State's control.[159] The tribunal in *CMS v. Argentina* stated that the situation must be as severe as a "total collapse."[160] As an illustration, the tribunal rejected the situation in Argentina as grave, even when there were deadly riots and massive shrink in their economy[161] that leads to five Presidential successions within the mere period of three weeks,[162] because the state had not met a total collapse.

84. In the present Case, the situation does not even reach the gravity of what Argentina had in *CMS v. Argentina.*[163] The environmental situation in Redentia does not incapacitate them to the level of total collapse, noting that the State of Redentia is still running well, up to the present moment.[164] Hence, there is no grave peril against Redentia's essential interest.

B. <u>Alternatively, Redentia's PEM is not the only way to respond the peril</u>

85. Referring to *Gabcikovo-Nagymaros*[165] *and Fisheries Jurisdiction*,[166] the ICJ stipulated that in invoking the state of necessity, the peril could not be responded by

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[159] Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (Yale Human Rights and Development Journal 2014) 16.

[160] *CMS v. Argentina* (n 81) [106].

[161] Jim Saxton, 'Argentina's Economic Crisis: Causes and Cures' (Joint Economic Committee United States Congress 2003).

[162] International Monetary Fund, 'Lessons from the Crisis in Argentina' (Policy Development and Review Department 2003) 62 [63].

[163] Moot Problem, Annex 3, [11-16].

[164] Moot Problem, Annex 3, [11-12].

[165] *Gabcikovo-Nagymaros* (n 146) [55].

any other means, other than performing an unlawful conduct.[167] For example, in the *Torrey Canyon* incident, the British Government bombed the ship that caused a massive oil spill, with the purpose to burn the remaining oil and it was done only after all other means had failed,[168] *e.g.* towing the ship parts away and spraying detergents to mitigate the spill.[169]

86. Here, Redentia's PEM is not the only way because Redentia still had another alternative measure. In order to find what the other possible ways are, United Nations Conference on Trade and Development ("UNCTAD") stated that the development of environmental issue is one of the main factors for States to renegotiate and revise their BITs with the other contracting party.[170] For example, China and Canada had revised their BIT[171] by emphasizing the environmental protection clause with the purpose to harmonize the interest of each party.[172] This is a less disruptive way, as it will ensure a better balance between the rights of foreign investors and the concern to protect the environment.[173]

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[166] *Fisheries Jurisdiction Case (Spain v. Canada)* (Merits) [1998] ICJ Rep 432 [85].

[167] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1952) 16, 17

[168] ARSIWA Commentary (n 137) [9].

[169] BBC, 'Supertanker Torrey Canyon hits rocks' (18 March 2005) <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/18/newsid_4242000/4242709.stm.> accessed 2 June 2016.

[170] UNCTAD, *Recent Developments in International Investment Agreements* (2008) 5.

[171] ibid.

[172] Global Affairs Canada, 'Initial Environmental Assessment (EA) of the Canada-China Foreign Investment Promotion and Protection Agreement' (2013) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/canchina-canchine1.aspx?lang=en > accessed 8 June 2016.

[173] ibid.

87. Looking into the given facts, no fact indicated that Redentia had exercised any other possible measure in responding the peril, such as renegotiation with the Claimant's State. Thus, Redentia has failed to fulfill the element of 'the only way'.

C. <u>In the further alternative, Redentia has contributed towards the peril</u>

88. Necessity may not be invoked if the invoking State has contributed to the situation of necessity.[174] In *Gabcikovo-Nagymaros,* ICJ stated that this contribution can be either through action or omission.[175] In that case, Hungary was deemed to contribute to the environmental problems in the *Gabcikovo-Nagymaros* river because it had actually agreed and did not prevent to the construction of the dam, which eventually became the problem's causation.[176]

89. Similarly, Redentia has contributed to the environmental problems, which is their basis of necessity defense, by having exploratory meetings to approach investors to invest in Redentia's petroleum companies.[177] Eventually, these companies were the ones that created the oil spill[178] and also one of the contributors to the global warming issue in Redentia.[179]

90. Ultimately, Redentia has contributed to the situation of necessity, hence, could not preclude its wrongfulness using this defense.

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[174] ARSIWA (n 137), art 25(2)(b).

[175] ARSIWA Commentary (n 137) [20]*; Gabcikovo-Nagymaros* (n 146) [57].

[176] *Gabcikovo-Nagymaros* (n 146) [57].

[177] Moot Problem, Annex 3, [8].

[178] Moot Problem, Annex 3, [12].

[179] Moot Problem, Annex 3, [11].

RELIEF SOUGHT

The Claimant respectfully prays to the Tribunal for the following relief:

1. Declare that the Tribunal has jurisdiction over this dispute.
2. Declare that the Respondent has violated Article 4(1) of Redentia-Artina BIT and has the right to receive damages.
3. Declare that the Respondent has violated Article 3(3) of Redentia-Artina BIT and has the right to receive damages.
4. Declare that the Respondent has violated Article 5 of Redentia-Artina BIT and has the right to receive damages.
5. Declare that the Respondent cannot invoke the state of necessity to preclude its wrongfulness.
6. Moral damages for violating international obligations owed to the Claimant
7. Loss of sales for losses incurred by the RPC and Costs for Arbitration.
8. That the arbitration proceeds to the issue of determination of damages and relief.

Counsels for the Claimant

Team AM10

15 June 2016