TEAM No. T11

ALSA INTERNATIONAL MOOT COURT COMPETITION

CASE 2018

PERMANENT COURT OF ARBITRATION

MEMORIAL FOR CLAIMANT

BETWEEN

MenalCorp Tranma Limited	**The Millennial Republic of Nambia**
(CLAIMANT)	(RESPONDENT)

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LIST OF AUTHORITIES

INTERNATIONAL CONVENTIONS

ASEAN - Australian - New Zealand FTA	ASEAN - Australian - New Zealand Free Trade Agreement
BIT	The Agreement Between the Government of the Republic of Tranma and the Government of the Millennial Republic of Nambia for the Promotion and Reciprocal Protection of Investments dated 14 February 2013
OECD Anti-Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
VCLT	Vienna Convention on the Law of Treaties

INTERNATIONAL CASES AND ARBITRAL DECISIONS

ADC Affiliate	*ADC Affiliate v. Hungary* (Award) [2006] ICSID Case No. ARB/03/16
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Ambiente	*Ambiente Ufficio S.p.A. and others v. Argentine Republic* (Jurisdiction and Admissibility) [2013] ICSID Case No. ARB/08/9
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STATEMENT OF FACTS

1. The parties to this Arbitration are MenalCorp Tranma Limited (“MenalCorp Tranma” or the “Claimant”), a private limited liability company registered under the laws of Tranma fully owned by MenalCorp in Melein, and Millennial Republic of Nambia (hereinafter “Nambia” or the “Respondent”).

2. Federal Green Party who won 2013 governmental election offered premiums through "Great Expectation Project" enacted under Ministerial order 314/2013 to attract foreign investment.

3. In 2015, the Claimant won the bid arranged by Ministry of Energy of the province of Heartland (“Ministry”) for construction and operation of solar power in Jenny’s Vineyard. MenalCorp as a sole shareholder, registered MenalCorp Nambia Limited (“MenalCorp Nambia”) under the Nambian law to enter into a concession agreement and entered into the Energy Supply Agreement (“Agreement”) to build and operate the solar power plant with terms offering annual premiums.

4. In 2016, the Green Party lost the vote of confidence leading to a federal election in December. One of the candidates was the Fed-Up Party led by Owen Martin Grendall (“OMG”). Its campaign was hostile towards the Project. Despite the low possibility to win the election, ManalCorp, by its legal counsel’ advice, resorted to a preventive measure by setting up MenalCorp Tranma and legally transferring all its shares to MenalCorp Tranma.

5. The Fed-Up Party shockingly won despite the accusations of bribery to the Elections Committee. After gaining power, OMG set up a Fed-Up Party dominated special committee to evaluate the impact of the Project. Federal Green Party dissented the final report of the committee which concluded that Project should be terminated in order to support clean coal energy. The Government also requested for an advisory opinion on the constitutionality of the Project after replacing judges.

6. The Promotion of the Clean Coal Energy Act ("PCCE Act") was drafted and passed to terminate the Great Expectation Project, and the advisory opinions was issued.

7. MenalCorp negotiated with the new Minister of Energy about the previously agreed premiums but was unsuccessful. Counsel for the Ministry of Justice of Nambia informed MenalCorp Nambia that it would interrupt electricity transmission of the energy generated by its power plant at Jenny's Vineyard.

8. MenalCorp Nambia was unable to pay back its loan to the local Nambian banking institution and was sued.

9. The Claimant is now seeking redress from the Tribunal.

ARGUMENTS ON JURISDICTION

I. JURISDICTION HAS BEEN ESTABLISHED

A. The jurisdictional requirements have been fulfilled

10. The jurisdiction is established only when the express jurisdictional requirements [1] contained in the BIT are fulfilled.[2] In asserting the jurisdictional requirements, the Claimant submits that the Tribunal has jurisdiction *ratione materiae* (i); *ratione personae* (ii); and preconditions has been satisfied (iii).

i. The Tribunal has jurisdiction ratione materiae

11. The Tribunal has jurisdiction *ratione materiae* as Article 1 of the BIT's requirements of "investment", which are, first, any kind of assets and, second, invested in accordance with Party's laws and regulations, are satisfied.

12. Firstly, an asset includes shares, stocks and other forms of equity participation in an enterprise.[3] The Claimant owns 100% of the shares in ManalCorp Nambia,[4] thus the shares in MenalCorp Nambia extend the Claimant's investment to the concession contract made with the Respondent.[5] The Claimant made economic contribution to Nambia, reducing electricity cost more than US$40 million through its investment [6]

[1] Douglas, [151].
[2] Salacuse, [385]; Sornarajah, [306].
[3] BIT, Article 1 [9](b)
[4] Facts, [27].
[5] BIT, Article 1 [9](e); *MaliCorp*, [112].
[6] Notice of Arbitration, [4-5].

13. Secondly, the transfer of shares to the Claimant was legally registered which constitute as investment under Nambia's law,[7] accordingly, falls under the scope of the BIT.

14. By the Respondent enacting the 'PCCE' to terminate the Great Expectations Project and denying premiums, it breached the obligation to accord fair and equitable treatment and prohibition of expropriation under the BIT. Hence, the Claimant submits that Tribunal has jurisdiction *ratione materiae*.

ii. The Tribunal has jurisdiction ratione personae

15. The Claimant is an 'investor' pursuant to Article 1 of the BIT, which is defined as an enterprise of a party that is constituted or organised under the laws of that party.[8] According to the ordinary meaning[9] the test of the place of incorporation shall be used.

16. The Respondent may invoke that the 'control' is an appropriate test. However, this test does not apply in absence of the explicit language.[10] When the treaty implicitly stipulates the test of 'place' of incorporation, it is favourable to apply such test[11] as the contracting States, themselves, agreed to such definition.[12]

17. Here, the Claimant is a qualified 'investor' under the BIT. ManalCorp Tranma Limited was legally incorporated in Tranma[13] and has made investment in Nambia as previously

[7] Ibid, [27].
[8] BIT, Article 1 [11] (a)
[9] VCLT, Article 31(1).
[10] *Mobil*, [160]
[11] *Tokios*, [52]; *ADC Affiliate*, [357]; *Barcelona Traction*, [42].
[12] *Saluka*, [241].
[13] Facts [26].

established. Accordingly, the jurisdiction *ratione personae* requirement has been fulfilled, and investment is protected under the BIT.

iii. Procedural preconditions are fulfilled

18. The preconditions necessary under Article 24(1) to establish the jurisdiction are met, because the parties failed to resolve the dispute amicably. There have been several attempts by the Claimant to solve the dispute by way of negotiations but no mutually satisfactory settlement was reached.[14]

B. The Tribunal has jurisdiction to hear the dispute, despite of the contractual exclusive jurisdiction clause

19. The Claimant and the Respondent had entered into an Energy Supply Agreement, i.e. the Contract. This Agreement contained a dispute settlement clause ('Section 11') stating that:

"*any contractual disputes concerning... this Agreement shall submit to the exclusive jurisdiction of the administrative courts of Nambia*".

20. On the contrary, BIT likewise has a forum selection clause ('Article 24'), providing that "*If an investment dispute cannot be resolved,… investor may submit to arbitration …*"

21. The dispute arises to the overlap of different jurisdictions under Article 24 of the BIT, and Section 11 of the Agreement. In this line, Claimant submits that the Tribunal has

[14] Facts [43].

the jurisdiction to hear the dispute because: the alleged claim is a treaty breach, and not a contractual breach (i), and even if it is deemed to be contractual, the consent to arbitration under the BIT extends to contractual claims (ii). Moreover, Claimant did not waive its right to international arbitration (iii).

22. It should be noted that the issue of the contractual choice of forum concerns admissibility and not one of jurisdiction,[15] after *prima facie* establishing that there is dispute to treaty obligations to hold jurisdiction *ratione materiae*.[16]

i. The claims submitted before this tribunal is breach of BIT Obligations

23. The Tribunal has jurisdiction to hear the dispute because it concerns with treaty obligations, particularly on Article 9 and 10 of the BIT. The Respondent may argue that the Claimant is "*dressing up*" the contract claims as treaty claims. However, this is not true. The Claimant will demonstrate that the claims are concerning BIT breach, and thereby the claims are admissible.

24. First, several International Tribunals[17] and Professor Crawford[18] contends that if the "**essential basis**" or the "**fundamental basis**" of the claim is concerned with contractual breach, then the Tribunal should give effect to the jurisdiction clause in the contract.[19] Here, the Claimant has wide discretion in characterizing the claim.[20] In this case, the Claimant's claims are entirely rested on Article 9 and 10 of the BIT on fair

[15] *Abaclat*, [314]; Douglas, 148, 370; *SGS v. Philippines* [154].
[16] *SGS v. Pakistan*, [145].
[17] *Bayindir*, [148] - [151]; *SGS v. Philippines*, [157]; *Joy Mining*, [90] - [91]; *Woodruff*, 62*; Vivendi (Annulment)* [98-101].
[18] *Crawford*, 8.
[19] *Woodruff*, 62; *Vivendi (Annulment)*, [98]; *TSA v. Argentina* (Separate Opinion) [5] - [7]
[20] *SGS v. Pakistan* [145]; *Salini* [136]

and equitable treatment and expropriation. Indeed, as established in the *Vivendi (Annulment),*[21] because the fundamental basis of the claims of the dispute is treaty standard under international law, the exclusive jurisdiction clause in a contract shall not bar the Tribunal to hear the dispute.[22]

25. Second, the claim is treaty in nature because there is sufficient "Sovereign interference"[23] by the Respondent by acting "beyond the ordinary conduct of a commercial counterparty"[24]. In *Ambiente,* the Tribunal held that adoption of Law No. 26.017 amounted to a violation of the BIT, establishing the ground for claimant's treaty claims.[25] Comparably, the parliament had passed the law so-called 'PCCE', which terminated the Great Expectations Project.[26] Further, Supreme Court issued an advisory opinion that the Project was unlawful.[27] This is a legislative and judicial action that 'unilaterally altered'[28] the terms of the premiums under the contract, which is certainly an action that only sovereign can take. The action of denial of payments was not taken through exercise of contractual rights, but by legislative and judicial functions of the State.

26. Noting that the nature of the claim is treaty obligations, the Tribunal has jurisdiction to hear the claims.

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[21] *Vivendi (Annulment),* [101]
[22] *SGS v. Pakistan,* [145]; *Occidental,* [47]
[23] *Abaclat,* [318]
[24] *SGS v. Paraguay,* [134]
[25] *Ambiente,* [546].
[26] Facts, [39]
[27] Facts, [40]
[28] *Abaclat,* [311]; *Ambiente,* [544]

ii. In any event, scope of jurisdiction extends to contractual claims

27. Even if the Tribunal holds that the Claimant's claims are contractual in nature, the Tribunal still has the jurisdiction over the case because general language of BIT is broad enough to encompass any disputes that are related to investment.

28. The Respondent may rely on *SGS v. Pakistan*, which the Tribunal held that it had no jurisdiction over purely contractual claims by the phrase 'disputes with respect to investment'.[29] However, this decision is heavily criticized for attributing narrow meaning to the wording without unreasoned assumption,[30] and the Claimant will demonstrate that the Tribunal should not reach the same conclusion as this case.

29. First, this case can be refuted by state practices in conclusion of BIT explicit restricting the jurisdiction over contractual obligations in provisions.[31] In the present case, it was opened for the State parties to limit the jurisdiction of the Tribunal under BIT, yet they chose not to do so.

30. Secondly, it can be refuted by cases[32] including *SGS v. Philippines*, while having an identical provision from this case, held that its jurisdiction is "not limited by reference to legal classification of the claims that is made".[33] In *Vivendi*, the Tribunal noted that reading the BIT literally, the provision stating that "*dispute relating to investments made under the BIT*" does "*not necessitate that claimant must allege breach of BIT*

[29] *SGS v. Pakistan*, [161]
[30] *Douglas*, 237.
[31] Austria Model BIT, Article 11; NAFTA, Article 1116.
[32] *Salini*, [61].
[33] *SGS v. Philippines*, [131].

itself'.[34] In the present case, reading the BIT term literally, '*in connection to covered investments*'[35] also do not expressly exclude contractual claims from its purview.

31. The BIT is sufficiently broad enough to cover contractual dispute, and thereby it has jurisdiction over such claims.

iii. The Claimant did not waive its right to international arbitration

32. From numerous cases,[36] exclusive jurisdiction clause does not constitute as waiver of investor's right to bring their claims before other international forum under BIT. If the Respondent wanted to avoid the Claimant from exercising their rights, it should have incorporated an express waiver clause[37] in the Agreement, which they did not do so in this case.

C. The Claimant's corporate restructuring does not constitute as an abuse of process[38]

33. The corporate restructuring by the Claimant, as a preventive measure is common business practice[39], does not constitute as an abuse of process because: it was exercised in good faith (i); the dispute was not foreseeable at the time of restructuring (ii); and in any event, the Respondent is barred from asserting that the corporate restructuring constitutes as an abuse of process (iii).

[34] *Vivendi (Annulment),* [55].
[35] BIT, Article 1.
[36] *Aquas del Tunari v. Bolivia*; *SGS v. Paraguay (Jurisdiction),* [179]; *Aguas,* [119]
[37] *Azurix,* [26]
[38] *Mobil,* [204]; *Pac Rim,* [2.47]; *McLachlan,* [5.159].
[39] *Aguas,* [330]; Schreuer, [2].

i. The corporate restructuring is exercised in good faith

34. A restructuring of investment in order to receive protection from an investment is not permitted after the dispute has arisen.[40] In *Mobil Case*, an abuse of process was found if there was a pre-existing dispute.[41] Similarly, in *Phoenix Case* which applied *bona fides* investment test to establish an abuse in jurisdictional requirement, the Tribunal found that it lacked jurisdiction in relation to the pre-existing dispute. [42] Certainly, investor is allowed to structure their investments that would best fit their need for international protection.[43]

35. The Claimant's investment was not made in bad faith. Contrary to the finding in *Phoenix Cas*e, at the time of the Claimant's investment the dispute had not yet occurred. The dispute is set to occur when the PCCE Act was enacted.[44] The Claimant had legally invested since 2016, long before the dispute arose.[45] This reflects that the Claimant had made an investment in good faith prior to the outbreak of the dispute.

ii. The dispute was not foreseeable at the time of restructuring

36. In some Tribunals, an abuse of process if found when the dispute is foreseeable.[46] In the case of *Pac Rim Cayman*, the dividing-line of whether there is an abuse of process is the Claimant "can foresee future dispute as a very high probability and not merely a controversy". [47]

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[40] *Douglas*, [290].
[41] *Mobil*, [205]
[42] *Phoenix*, [113].
[43] *Phoenix*, [94].
[44] Facts, [40]; *PM v. Australia*, [533].
[45] Facts, [27].
[46] *PM v. Australia*, [554]; *Tidewater*, [193]; *Pac Rim*, [2.96].
[47] *Pac Rim*, [2.99].

37. Here, at the time of restructuring, the dispute was not foreseen by the Claimant. When the Claimant acquired the shares in ManalCorp Nambia, the probability that the Great Expectations Project would be terminated was a mere electoral campaign of a non-leading party.[48] It appeared that the Fed-Up Party whose campaigned against the Great Expectation project won a "shocking" victory.[49] Those events did not amount to very high probability that future dispute between the Claimant and Respondent will occur. Therefore, the Claimant could not reasonably foresee the dispute at the time of investment.

iii. In any event, the Respondent is barred from asserting an abuse of process against the Claimant's corporate restructuring

38. In considering abuse of process, the Tribunals in *Mobil Case*[50] and *Autopista Case*[51] held that corporate restructuring is not considered as an abuse of process when the host state was well aware of the transfer of shares but failed to raise any objection.[52] Indeed, this is consistent with international law on acquiescence.[53]

39. In this case, the Claimant did not conceal its corporate restructuring. The transfer of shares in ManalCorp Nambia to the Claimant was legally registered in Nambia. The Respondent was aware of the transaction as it was notified to the Ministry of Energy but did not respond.[54] The Respondent had never objected to this transaction despite

[48] Facts, [22].
[49] Facts, [31].
[50] *Mobil*, [192]
[51] *Autopista*, [129-130]
[52] *Mobil*, [205-206]; *Autopista*, [141]
[53] *Preah Vihear*, 23.
[54] Facts, [27]

many occasions to oppose, for example, during negotiations [55]. Therefore, the Respondent cannot object the jurisdiction on the basis of corporate restructuring because it failed to object the transaction prior to the dispute, i.e. the Respondent is estopped from alleging the abuse of process.[56]

D. The Protection of the Claimant's investment is not precluded, as investment was made in clean hands

40. The Respondent's allegation that the Claimant's investment made in 'unclean hands' shall be rejected by the Tribunal. The Claimant will demonstrate that the Tribunal has jurisdiction because: The Claimant complied with the legality requirement under the BIT (i), and in any event, the Respondent is estopped from raising corruption defence (ii).

41. The Claimant acknowledges that this is a question of jurisdiction, and not one of admissibility, as the dispute concerns with compliance of law at the *establishment* of investment and not at the time of *performance*.[57]

i. The Claimant made an investment "in accordance with the law"

42. For the Tribunal to have jurisdiction *ratione materiae*, the Claimant's investment must fulfil the legality requirement under Article 1 of the BIT, which requires investments to be made "*in accordance with the laws and regulations*" of the host state.[58] This is an express form of clean hands doctrine.[59] It is our contention that the Claimant's

[55] Facts, [42-43]
[56] *Preah Vihear*, 32.
[57] *Fraport*, [34]; *Hamester*, [127].
[58] BIT, Article 1.
[59] *Metal-Tech*, [153]; Dolzer and Schreuer, 246.

investment did not violate the Nambian Criminal law[60] on anti-corruption[61], and therefore the Tribunal has jurisdiction *ratione materiae*.[62]

43. Investment made through corruption "*cannot be considered to have made in accordance with the laws of the host state*'.[63] Nonetheless, the Respondent cannot prove the alleged corruption in the first place.

44. The Respondent who makes corruption defense shall bear the burden of proof under Article 27 of the PCA Arbitration Rules. Moreover, the burden is not shifted to Claimant because the Tribunal should only shift the burden if the proof becomes extreme burdensome of party to sustain corruption,[64] which is not the case here.

45. In any case, the Claimant will now prove there were no acts of corruption.

46. In this case, the Respondent should present a 'clear and convincing' standard of proof of corruption. This is because, corruption is a serious allegation that should not be taken lightly,[65] which is rightly noted in *Hamester* that the Tribunal should "*only decide on substituted facts and cannot base itself on inferences*"[66]. As there are no direct evidence available such as witness statement,[67] corruption cannot be proved.

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[60] Annex 3, Nambian Criminal Code.
[61] OECD anti-bribery Convention, Article 1.
[62] *Inceysa,* [335]; *Fraport,* [401]; *Anderson,* [57], [59]; *Metal-Tech,* [389]; Crawford, 13;
[63] *TSA Spectrum* [164].
[64] Zürich, [154].
[65] *Niko,* [424]; *EDF,* [221].
[66] *Hamester*, [134].
[67] *World Duty Free,* [110].

47. Even if the Tribunal were to adopt the lower 'balance of probabilities' standard, the Respondent still cannot prove the act of corruption. For instance, in *Methanex*, the Tribunal examined bribery under the use of circumstantial evidence to make adverse inferences, which was also noted as the 'connect the dots' methodology.[68] The Tribunal held that 'dots' of having the same political objective as the government,[69] making financial lobbying campaign contribution,[70] and having a private dinner meeting[71] was insufficient to infer that there were acts of bribery, as there was no true *quid pro quo* (i.e. contribution in exchange of favourable government action).[72]

48. Likewise, the facts are so similar that the Claimant and the former government of Nambia supported the Green Energy,[73] funded the National Congress,[74] and had attended many meetings and to the wedding party of one of the officials.[75] By connecting these dots, it is not sufficient for the Tribunal to adversely infer that there was act of corruption. Hence, the Claimant did not make illicit contributions to the former government in exchange of the concession contract.

49. With no corruption, the Claimant's investment is legal in light of Article 1 of the BIT, and therefore the Tribunal has jurisdiction *ratione materiae*.

[68] *Methanex*, PartIII, Chapter B [3].
[69] Ibid, [13].
[70] Ibid, [17].
[71] Ibid, [34].
[72] Ibid, [37].
[73] Facts, [8].
[74] Facts, [12].
[75] Facts, [12].

ii. The claims are admissible

50. Numerous Tribunals held that when general principles of law on good faith,[76] international public policy,[77] clean hands are violated, only if corruption is proven, it renders the claim to be inadmissible. Having corruption unproven in this case, Claimant's action has not violated general principles of international law, which makes claims admissible.

iii. Even if the Tribunal holds that there was act of corruption, the Tribunal should still uphold its jurisdiction by estoppel.

51. Estoppel is general principles of international law,[78] and Respondent is estopped[79] from invoking corruption to deny jurisdiction, as the Respondent itself was involved in the commission of such unlawful conduct.

52. Numerous Tribunals[80] noted that if State involved in commission of the unlawful conduct, the "*government is estopped from raising violation of law as jurisdictional defense*" to not escape from its liability.[81] In *Kardassopoulos*, the Tribunal applied the principle of attribution noting that even where an entity empowered to *"exercise governmental authority acts ultra vires, the conduct is nevertheless attributable to the State.*"[82]

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[76] *Inceysa*, [239].
[77] *Inceysa*, [243], [245]; *World Duty Free* [137].
[78] *Lauterpacht*, 245; *Macgibbon*, 468-513.
[79] *Temple of Preah Vihear*, [143-144].
[80] *Desert Line*, [117], [119]; *Fraport*, [346]; *Wena Hotels*, [111].
[81] *Wena Hotels*, [116].
[82] *Kardassopoulos v. Georgia*, [190];

53. In this case, the corruption allegation involved the granting of the Concession Agreement from the Ministry, which is an act of sovereign authority on behalf of the Respondent. Such governmental act, which involved corruption is attributable to the State.

ARGUMENTS ON MERITS

II. THE RESPONDENT HAS BREACHED THE OBLIGATION TO AFFORD FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 9 OF THE BIT.

54. The Respondent has an obligation to accord fair and equitable treatment ("FET") as provided in Article 9 of the BIT. The enactment of the PCCE Act terminating the Great Expectations and the denial of premiums payment by the Respondent constitute a breach of the FET obligation.

A. The standard of the FET obligation is an autonomous standard independent from the Minimum Standard of Treatment ("MST")

55. The FET obligation contained in Article 9 is an independent obligation from the MST standard under customary international law.[83] Article 9 of the BIT does not expressly specify that the FET obligation reflects customary international law or MST. Interpreting the text by its ordinary meaning, this evidences a self-contained standard.[84] If the parties intended to include customary international law or MST interpretation, the explicit link should be established to prevent misinterpretations of the FET standard by arbitral Tribunals.[85] Thus, in considering FET obligation, the Tribunal should not go

[83] *Fair and equitable treatment,* 25.
[84] *Dolzer and Stevens,* 162.
[85] *Fair and equitable treatment,* 28.

beyond Contracting States' intent and interpreting according to customary international law or MST.

56. With its established autonomous FET standard and the criteria given under Article 9, the issue is whether the actions by in question are fair and equitable.[86]

i. The Respondent has breached the FET obligation by violating the Claimant's legitimate expectations

57. Under Article 9(2) of the BIT, Respondent's act violated investor's legitimate expectation [87] because: there was a specific representation (1) [88], legitimate and reasonable expectation (2) [89] and Claimant's legitimate expectation outweighs Respondent's regulatory interest (3).[90]

1. There was a specific representation which promised stability

58. A Specific Representation is created through an obligation of an explicit promise to provide stable framework for the investors. Though not having to be completely rigid,[91] host state must act consistently with their agreement[92]. Thus, the criteria stability includes element of legitimate expectation.[93]

59. In this case, the Respondent made a specific representation by demonstrating its vocal support of the project through promoting "a legal system that facilitates the inflow of

[86] Ibid.
[87] *Duke Energy*, [340].
[88] *Methanex*, [7].
[89] *Ioana*,166-67
[90] *Saluka*, [306]
[91] ibid, [63].
[92] *CMS*, [267]
[93] *Ioana*, 164- 169.

foreign exchange".[94] This is ground for the Claimant to believe that Respondent would offset the costs through the premiums. The Project illustrates explicit assurance that the Respondent will provide premiums[95], affording the Claimant a stable framework to operate under with only a reasonable risk of the situation changing. These facts creates specific representation relied on by the Claimant which implies a promise of stability.[96]

2. The expectation is legitimate and reasonable

60. The breach of the FET obligation to the Claimant is not barred by lack of reasonableness or appropriateness. An expectation is illegitimate only if it imposes an obligation that is inappropriate and unrealistic without consideration to the state's interest[97]. Investors must plan their investment considering the change of circumstances for expectation to be legitimate and reasonable[98]. The Claimant acknowledges that it is unreasonable to expect circumstances to be completely unchanged,[99] however the investor is entitled to a degree of predictability by the state.

61. In this case, Claimant's expectation to receive the premiums is from Respondent's explicit promise[100] with declared intention to welcome foreign investment. Moreover, the change in government's policy could not have been reasonably expected as the victory of the Fed-Up party was a "shocking" one.[101] It was realistic for the Claimant to expect consistency from the Respondent.

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[94] Facts, [8].
[95] Facts, [10]
[96] Enron, [87]
[97] *Saluka*, [304]
[98] *Parkerings-Compagniet AS* [330]
[99] *Saluka*, [305]
[100] Facts, [10]
[101] Facts, [31].

3. The Claimant's legitimate expectation outweighs the Respondent's regulatory interest

62. The Tribunal must balance the "legitimate and reasonable expectations of the investor against the legitimate regulatory interests of the states."[102] This means that the regulatory interest has to be proportionate with the burden it causes to the investor.[103]

63. The Respondent's expressed decision to focus on coal energy could be accomplished through means that would allow Claimant to suffer less injury such as reducing the amount of premiums or paying the premiums for the first quarter as agreed[104]. Instead the Respondent terminated the project and demonstrated prejudice against it by calling it money wasted. [105] The Claimant is therefore left in a situation of being unable to pursue its investment due to the lack of premiums which demonstrates that the Respondent's actions was not proportionate as it is not the least restrictive means.

B. Alternatively, the FET obligation takes into account general international law

64. In addition to autonomous standard, general principle of international law also applies to help interpreting Article 9.

65. Although reference to fair and equitable is blurry, there is no doubt that fair and equitable is a general principle of international law and that the general principle exists independently of the conventional support expressing it.[106]

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[102] *Saluka*, [306].
[103] *Charanne*, [517]
[104] Facts [42]
[105] Facts [44]
[106] *P. Juillard*,132.

66. The tribunal should also take into account the general principle of law when interpreting Article 9.

i. The Respondent acted arbitrarily and against good faith

67. The Respondent's termination of the project is arbitrary. Although arbitrary can be expressed as a state action without legal basis [107], another interpretation can be inconsistent behaviour through revoking pre-existing decisions or permits [108] without sufficient justification of state.

68. Insufficient justifications include a violation of international law due to failure to satisfy requirements of national law [109] and where the state deems an act that it had previously considered as lawful to the investor be unlawful.[110] Both show arbitrariness due to the insufficient reasoning as the Respondent entering into the agreement means compliance to an international law obligation. This includes informing the Claimant of any possible misrepresentations of national law or else investor believing such act was lawful is justified.

69. Breach of the FET by the Respondent's inconsistency is under the principle of good faith, which is used as complementary standard alongside the FET [111] to create understanding and enhance interpretation [112]. It is, therefore, an umbrella term for

[107] *Ioana*, 179.
[108] Tecmed [154]
[109] *Gami Investments*, [91].
[110] *Ioana*, 166.
[111] *Mondev*, [116].
[112] *Sempra Energy*.

specific principles that can be applied due to the vagueness of treaties.[113] This principle of customary international law is for determining that a State cannot induce an investor to make an investment, generating legitimate expectations, to later ignore such commitments.[114]

70. The termination of the Project was made after an advisory opinion determined the project to be unlawful due to the necessity of parliamentary approval instead of a ministerial order. The Project's national law requirement does not result in an international law obligation. More importantly, the fact that the Respondent had not found issue with the means of implementation shows that the Respondent could not suddenly deem the act it supported as unlawful. The action of the Respondent is therefore arbitrary as it lacks sufficient justification.

III. THE RESPONDENT HAS BREACHED THE OBLIGATION NOT TO EXPROPRIATE UNDER ARTICLE 10 OF THE BIT

71. Article 10 of the BIT sets out the obligation for the Contracting States not to nationalise, expropriate or subject the investor to any measure having equivalent effect to the nationalisation or expropriation. The Contracting States additionally agreed that "*Article 10 is intended to reflect customary international law*".[115] As provided by the VCLT, the interpretation of the BIT shall comprise in addition to the text such agreement relating to the treaty.[116] The Claimant submits to the Tribunal that the

[113] *Gardiner*, 7
[114] *Charanne*, [438]
[115] Annex B
[116] VCLT, Article 31(2)(a).

Respondent violated its obligation not to expropriate the Claimant's investment under Article 10 as reflected in customary international law.

A. The Respondent's deprivation of the Claimant's investment amounts to an indirect expropriation

72. Under Annex B, factors to determine indirect expropriation include: impact (i) duration (ii) interference with legitimate investment backed expectation (iii) character of government's action (iv) and whether if police power doctrine applies (v).[117]

i. The Respondent's measure severely impact the Claimant's investment

73. The Respondent's refusal to pay the premiums under the Energy Supply Agreement deprived the Claimant of its investment. Severity of the deprivation dictates the occurrence of expropriation.[118] Expropriation arises when "events demonstrate that the owner was deprived of fundamental rights of ownership and deprivation is not merely ephemeral."[119] Even though the Claimant has control of its business, but if damaged investment could worth nothing and can no longer fulfil its economic purpose,[120] then it constitutes severe impact.

74. The Respondent jeopardized MenalCorp Nambia's financial situation and damaged the Claimant's investment with denial of premiums. The payment of premium is crucial to the operation of MenalCorp Nambia. [121] Without the premium, the Claimant's investment may not be able to compete with local coal energy suppliers and even lead

[117] *Salacuse*, 156-160
[118] *Starrett Housing.*
[119] *McCarthy, Stratton.*
[120] Dolzer & Schreuer, 118.
[121] Facts, [42].1

to bankruptcy. This is reflected by the fact that Claimant could not pay installation for solar power plant, and was sued by the Nambian bank.[122] Thus, the measures of Respondent indirectly expropriated the Claimant's investment.

i. The Respondent's action is not merely ephemeral

75. The Respondent's measure of removing the Claimant's "ability… to make use of its economic rights"[123] was not ephemeral.

76. The Respondent, through corrupted means, ordered the Project unlawful and refused to pay premiums pursuant to the Energy Supply Agreement. The project served as MenalCorp Nambia's right to receive premium and that the Respondent's rescission of such project constitutes "a lasting removal of the ability to make use of its economic rights"[124] since it deprives the Claimant of its expected profits.

ii. The Respondent has interfered with the Claimant's investment backed expectation

77. By denying the Premiums to MenalCorp Nambia, the Respondent interfered with the Claimant's expectation of operating its business with a certain amount of profit.

78. Under legitimate investment-backed expectation, the Respondent may only make reasonably predictable legal change.[125] Expectation is created through contract, assurances, and representation.[126] Changes which damage economic interests of

[122] Facts, [45].
[123] *S.D. Myers*, [238].
[124] Ibid.
[125] *Isakoff*, 202.
[126] *Azurix*, [318]

investor should not conflict with assurances given in good faith to such aliens as an inducement to their making the investments[127]. The Respondent did not live up to the reasonable expectation it had created.

79. In this case, the Respondent made specific assurances to the Claimant, and made unreasonable legal changes. The Claimant invested in Nambia based on Respondent's special representative on the Project. This specific commitment granted the Claimant the legitimate investment-backed expectation. The Respondent's enactment of the PCCE terminating MenalCorp Nambia's entitled premium is not a reasonably predictable legal change damaging the Claimant's investment. This action of the Respondent conflicts with previous assurances and interfered with the Claimant's legitimate investment-backed expectation.

iii. The character of the Respondent's action supports the occurrence of expropriation[128]

80. The Respondent's objective of terminating the Great Expectation Project was to allegedly provide jobs for its people by bringing back the prominence of coal energy suppliers. It has to be *"the only measure available to achieve the objective, or the least detrimental if a number of effective solutions exist"*.[129]

81. First, the Respondent did not undertake the least detrimental solution and target renewable energy investments, risking to wipe away the Claimant's investment without making compensation. Second, the Respondent enacted the PCCE through abuse of

[127] *Revere Copper*, Chapter-D, 4
[128] ASEAN Article 9; Australian-New Zealand FTA.
[129] *Tecmed.*

power. The Respondent has undertaken many questionable actions prior to the termination of the Project, including passing a Bill for Prime Minister to select judges, and establishing a committee to re-evaluate the Project with the majority of the members from the Respondent's party. Taking such context into consideration along with other factors, Respondent's action shall constitute as an expropriation.

iv. The police power doctrine does not apply

82. Under the conformed understanding of the parties and CIL, expropriation without compensation can only occur via police power doctrine when such measures serve a legitimate public welfare objective.[130] However, this right to regulate can be reduced if the state had given specific commitments to foreign investor.[131] The action taken to terminate the premium does not fall within the restricted standard of accepted police power due to prior commitment, its lack of a legitimate public welfare, and proportionality.

83. The Respondent had given prior commitment to the Claimant for it to invest in Nambia. This restricts the respondent's police power. The Respondent's choice to support coal energy sector is not a legitimate ground for public welfare. In general, the police power doctrine applies to more serious issues which the state has to directly interfere, such as public health, environment, and safety[132]. Therefore, the Respondent does not benefit from this doctrine.

B. Alternatively, the expropriation is unlawful under Article 10 of the BIT

[130] Annex B
[131] Article 31 (3) (b), VCLT
[132] *Tecmed*, [139]

84. Under Article 10 of the BIT, expropriation is accepted only if it was made for the purpose of public order (i) not discriminatory (ii)carried out under due process of law and (iii) accompanied with prompt, adequate, effective compensation (iv). However, the Respondent had not fulfilled these criteria thus the expropriation is unlawful.

i. Expropriation was not for the *bone fide* purpose for public interest.

85. Expropriation shall only be made for a legitimate purpose of public interest.[133] A change of policy by the new government is made to distance itself from the predecessor, lacks the genuine interest[134]of public interest in the manifestation of the expropriation.[135]

86. The conduct of OMG, as prior to the termination of the Great Expectation Project is a show of hostility to the predecessor government. With phrases such as, "I'll burn the greens and their stupid policies"[136] and "radical self-destruction adopted by the past incompetent administration."[137] These malicious statement shows that Fed-up is distancing itself from the predecessor administration. Thus, not a bone fide purpose of public interest.

ii. Expropriation against Claimant was discriminatory

87. Respondent must prove that the actions were not discriminatory.[138]Measure aim at excluding foreign investors is discriminatory.[139] Treatment of foreign investors must be

[133] UNCTAD Series, 29.
[134] *ADC*, [432].
[135] *Siemens*, [273].
[136] Facts, [28].
[137] Facts, [29].
[138] *LECTO*, 343, 367.
[139] *Eureko*, [242].

viewed as a whole, regardless of whether the Claimant was the only foreign investors that was affected in that certain State entity.[140]

88. The Promotion of Clean Coal Energy aimed at the terminating the Great Expectation Project as written under article 2 of this Act.[141] Promotion of Clean Coal is targeted for the nationals of Nambia[142], while the Great Expectation project was made to encourage the foreign investors and help compete with energy suppliers in the Nambia market.[143] Terminating the Great Expectation project in itself is excluding foreign investors. Further, the termination was due to the fact that Fed-Up were hostile to predecessor, which is discrimination of the Claimant by nature.[144]

iii. Expropriation was not under due process

89. The due process principle requires basic legal mechanism for expropriation to comply with domestic legislation.

90. The Great Expectation was terminated without advance notice to the Claimant. Negotiations proved futile as the Minister of Energy had been replaced.[145] Further, it is impossible for the impartial judicial review[146] as the Fed-Up party had replace 5 of the 9 Supreme Court judges. Basic legal mechanisms in this circumstance is irregular, thus it is the expropriation was not under due process.

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[140] *ADC*, [438].
[141] Facts, [39].
[142] Facts, [29] and [36].
[143] Facts, [8].
[144] *BP*, 329.
[145] *ADC*, [444].
[146] UNCTAD Series; UK Model BIT; Serbia and Montenegro-Switzerland BIT.

iv. Expropriation was not accompanied by payment of prompt, adequate, and effective compensation

91. Expropriation [147] should be accompanied by at least some payment.[148]The amount and time due depends on the BIT itself. Payment of compensation is prompt if it is paid without delay. It is adequate it paid in accordance with market value and effective if paid in controvertible or freely usable currency. [149]

92. The Respondent in this case had not offered, nor made it a possibility for the Claimant to get compensation for the non-payment of premiums. Thus, the requirement of compensation has not been fulfilled.

93. As the requirement of Article 10 of the BIT had not been fulfilled, the expropriation is unlawful.

IV. THE RESPONDENT MUST PAY COMPENSATION THE CLAIMANT

94. A State has an obligation to make reparation for the breaches international obligations.[150] The Respondent is obliged to make compensation to the Claimant for the breaches of Article 9 and 10 of the BIT for the loss of profits.[151]

[147] *M.Shaw*, 574.
[148] *LECTO*, 366.
[149] UNCTAD, 40.
[150] ARSIWA, Article 31.
[151] ARSIWA, Article 36.

PRAYER OF RELIEF

95. Wherefore, in the light of the arguments advanced, the Counsels for The Claimant respectfully request the Arbitral Tribunal to find:

a. that the Tribunal has jurisdiction to consider the dispute that has arisen between the Claimant and the Respondent;
b. that the Respondent had breached Article 9 and 10 of the BIT;
c. that compensation be paid for these violations.

[Counsels for the Claimant]

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