TEAM No. T11

ALSA INTERNATIONAL MOOT COURT COMPETITION

CASE 2018

PERMANENT COURT OF ARBITRATION

MEMORIAL FOR RESPONDENT

BETWEEN

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

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Barcelona Traction	*Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (Second Phase Judgment) [1970] 1970 ICJ Reports 3.
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STATEMENT OF FACTS

1. The matter was submitted to the arbitral Tribunal by MenalCorp Tranma ("Claimant"), a limited liability company incorporated in Tranma, though fully owned by MenalCorp Limited (MenalCorp"), against Millennial Republic of Nambia ("Nambia" or "Respondent") for the breach of Tranma-Nambia BIT ("BIT").

2. The government led by the Green Party introduced the Great Expectations Project ("the Project") enacted by Ministerial Order 314/2013 to attract investment in the renewable energy sector by offering premiums.

3. The MenalCorp, allegedly provided a large donation to the National Congress, and had a close relationship with the Green Party. It won a bid for the construction of the solar power plant in Jenny's Vineyard in the province of Heartland and registered MenalCorp Nambia for the purpose of entering into the Energy Supply Agreement ("Agreement").

4. Federal Green Party lost a vote of confidence leading general a federal election, and the Fed-Up Party rose in the polls.

5. MenalCorp's legal counsel (NDM) suggested the Claimant to establish MenalCorp Tranma and legally transfer MenalCorp's shares in MenalCorp Nambia to this new entity, with MenalCorp being the sole shareholder.

6. After the Fed-Up party won the 2016 governmental election, Mr. Owen Martin Grendall ("OMG") became Prime Minister and established a committee to evaluate the impact of the Great Expectation Project and requested for an advisory opinion from the Supreme Court concerning the lawfulness of the Project. A bill was legally passed to give OMG the power to replace judges in the Supreme Court.

7. The Committee published the final report proposing the termination of the Project with the majority opinion.

8. On April 2017, the "Promotion of Clean Coal Energy Act" ("PCCE") was drafted and later passed to terminate the Project.

9. The Supreme Court advisory opinion required Parliamentary approval instead of Ministerial Order to establish the Project.

10. MenalCorp Nambia invited the Ministry to "negotiate" for the continuance of the operation of the solar energy in Jenny's Vineyard, and requested the payment of the premium for the first quarter of the year. Ministry of Justice informed MenalCorp Nambia that it would interrupt MenalCorp Nambia's electricity transmission.

11. In August 2017, MenalCorp was sued by the Nambian banking institution for failure to repay its loans that are used for the operation of the solar power plant.

12. The MenalCorp then sent the notice of arbitration referring the dispute to the Permanent Court of Arbitration ("PCA").

ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIM SUBMITTED BY THE CLAIMANT, AND IN ANY EVENT, THE CLAIMS ARE INADMISSIBLE

A. The Tribunal has no jurisdiction over the Claimant's claims by the exclusive jurisdiction clause in the Energy Supply Agreement

13. The Claimant and the Respondent had entered into an Energy Supply Agreement or the Contract, which contained a jurisdiction clause ('Section 11') providing that any contractual disputes "*shall submit to the exclusive jurisdiction of the administrative courts of Nambia*".

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

15. Despite the overlapping jurisdiction, the Respondent submits that the Tribunal has no jurisdiction over the claims because: the dispute is merely a breach of contract, and not a breach of a treaty (i), and in any event, the Respondent's consent to arbitration under the BIT does not extend to breach of contract (ii).

i. The Claims are merely Contractual, and not a breach of a Treaty Claim

16. Only treaty claims fall under the Tribunal's jurisdiction.[1] Here, the Claimant' claims are purely contractual, attempting to disguise as a treaty claim.

[1] *SGS v. Pakistan* [186]; *Wendlandt*, [536]; *Abaclat*, [311].

17. Several International Tribunals[2] and Professor Crawford[3] contends that if the "**essence**" and the "**fundamental basis**" of the claim is contractual breach, then the Tribunal should give effect to the jurisdiction clause in the contract.[4] Here, the mere assertion of treaty obligation is insufficient.[5] In *SGS v. Philippines*, Tribunal held that dispute over the payment of debt was not sufficient to be a treaty claim.[6] Similarly, the Claimant's claim concerns with the payment of " *of premiums to which it was entitled pursuant to the Energy Supply Agreement…."*[7]. Here, the Claimant alleged no more than non-performance of contractual obligations, principally, the obligation to pay premiums. The basis of alleged breach of Article 9 and 10[8] solely relies on non-adherence to the contract, and thus the effect should be given to the contract's exclusive jurisdiction clause.

18. Moreover, the nature of the claim is contractual because there is no adequate "Sovereign interference"[9] by the Respondent. In *Ambiente*, the Tribunal held that adoption of Law No.26.017 does not necessarily mean that it is an exercise of sovereign authority.[10] In the present case, the fact that Parliament had passed the law[11] to terminate the Project does not necessarily constitute a sovereign act. Further, the Supreme Court's issuance of advisory opinion to terminate the Project made the

[2] *SGS v. Philippines*, [157]; *Bayindir*, [148]-[151]; *Joy Mining*, [90]-[91]; *Lanco, [94]; Woodruff*, 62*; Vivendi (Annulment)*, [98-101].
[3] *Crawford*, 8.
[4] *Vivendi (Annulment)*, [98].
[5] *Salini*, [163]; *UPS*, 33.
[6] *SGS v. Philippines* [162].
[7] Notice of Arbitration, [10].
[8] Notice of Arbitration, [19].
[9] *Abaclat*, [311]; *SGS v. Paraguay* [134].
[10] *Ambiente*, [316], [544], [546].
[11] Facts, [39].

contract void. Thus, the Respondent simply exercised its right as a contracting party to deny its performance of obligations i.e. denial of premiums.

19. Moreover, the Tribunal should not allow the Claimant to bring their claims under the forum that is appealing to their interest, because it encourages forum shopping,[12] and degrades from the idea of predictability.[13] Here, the Claimant brought its claims as 'treaty claims' because it concluded, *"that MenalCorp's best course of action was to pursue arbitration under the BIT*."[14] This shall not be encouraged.

20. Noting that exclusive jurisdiction clause is *prima facie* a binding obligation,[15] and that the nature of the claim is contractual, the Tribunal is barred from hearing the claims.

ii. The Respondent's consent to Arbitration under BIT does not extend to contractual claims

21. Alternatively, the Claimant cannot pursue such contractual claim before the international forum under the BIT because: the dispute settlement mechanism set out in the contract is a *lexis specialis* (1), and the broad language of the BIT shows that State parties did not intend to cover such contractual claims (2).

(1) The exclusive jurisdiction clause is lexis specialis

22. Under maxim of *generalia specialibus non derogant*,[16] the specific exclusive jurisdiction clause should override the general Article 24 of the BIT to resolve disputes

[12] Shany, 838.
[13] *NML Capital*, [27].
[14] Facts, [46].
[15] *SGS v. Philippines*, [137]; *Vivendi (Annulment)*, [99].
[16] *SGS v. Philippines*, [141].

concerning "*this Agreement*"[17]. This is espoused by Professor Schreuer, stating that "*dispute settlement clause which is more specific … should be given precedence over a document of general application."*[18].

23. Furthermore, this parties' explicit decision on the proceeding of the claims under the contract shall be respected by the Tribunal under party autonomy,[19] as to preclude Tribunal to hear its claims.[20]

(2) The State parties did not intend BIT to cover contractual claims

24. The BIT was not intended by the States Parties to cover contractual claims. The broad language of the forum selection clause in the BIT is not enough for the Tribunal to have jurisdiction over contractual claims.[21]

25. Numerous Tribunals rejected to exercise jurisdiction over contractual claims,[22] despite the clause phrased in broad terms "any investment dispute"[23]. Moreover, several BIT models make an express possibility of bringing contractual dispute under the definition of 'investment dispute'.[24] However, Article 1 of the BIT limits investment dispute as "*in connection with covered investment*", which impedes the possibility of bringing a contractual claim before the Tribunal.

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[17] Agreement, Section 11.
[18] *Schreuer*, 362.
[19] *ARSIWA*, Article 3; *Vivendi (Annulment)*; *SGS v. Pakistan*, [161]; *SGS v. Philippines* [138]; *BIVAC*, [146], [148].
[20] *SGS v. Philippines*, [162].
[21] *SGS v. pakistan*, [100]
[22] *LESI (Dispenta) v. Algeria*, [25]; *El Paso v. Argentina*, [65].
[23] *El Paso v. Argentina*, [36].
[24] USA Model BIT (1994), Article 9(1).

26. Moreover, State parties could have incorporated umbrella clause in the BIT to elevate the Claimant's contractual claim to the international forum.[25] By not doing so, it reflects the parties' intention to not cover contractual claims under the BIT.

iii. The Claimant waived their rights to international arbitration

27. Claimant waived its right to resort to international arbitration when it accepted the Agreement's exclusive jurisdiction clause.[26] As seen in *Atlantic Marine,* party shall not bring suit outside the specified forum previously agreed, as it attained "*'venue privilege' before a dispute arises*."[27]

28. Thus, Claimant who agreed to exclusive choice of forum under the Agreement is deemed to waived its right to *any other forum*.

B. The Tribunal lacks jurisdiction due to abuse of process

i. The Claimant failed to make good faith investment under the BIT.

(1) An investment is required to be made in good faith.

29. Good faith investment is an implicit requirement under the BIT. The principle of good faith is well-established general principle of international law.[28] Additionally, treaty interpretation must be in good faith.[29] This implicit shared meaning inherent in the term "investment" is found by tribunals[30] to include the requirement of good faith to prevent abusive manipulation of the arbitral proceeding.[31]

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[25] *Noble Ventures,* [53]; *SGS v. Pakistan,* [172]; *SGS v. Philippines,* [125]; OECD, 5.
[26] *Spiermann,* 209.
[27] *Atlantic Marine,* [582].
[28] *Nuclear Tests,* [46].
[29] VCLT, Article 31.
[30] *Pantechniki,* [46]; *Fakes,* [108].
[31] *Phoenix,* [79]; *Abaclat,* [646]; *Mobil,* [169].

30. Furthermore, in the light of its object and purpose[32], through the Preamble, the State Parties aimed to "*promote greater economic cooperation between them with respect to investment*", and "*reaffirms their commitment to…the rule of law*". This reflects desire to protect the actual investment made by an enterprise of one party in the other Party without mere intention to gain protection under the treaty. The Tribunal should honour the State Parties' intention by looking at the factual circumstances of claimed investment.

(2) The Claimant's investment was not made in good faith

(a) The dispute was foreseeable at timing of restructuring

31. The Claimant's restructuring will amount to an abuse of process if it is foreseeable with very high probability.[33]A corporate restructuring will become abusive if the transfer of right takes place after the fact giving rise to the claim.[34]

32. The Claimant's restructuring took place when there was a reasonably foreseeable dispute. Here, the sequence of events must be considered.[35] The Great Expectation Project had been opposed to since introduction.[36] The Green Party lost the vote of confidence and faced with public backlash, the Claimant was aware of the possibility that the Claimant investment will be affected.[37] Possibility increased when the Fed-Up Party rose up the poll. The share transfer took place right after these facts giving rise to the dispute.

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[32] VCLT, Article 31 (1)
[33] *Pac Rim*, [2.99].
[34] *Societe Generale*, [110]
[35] Maffezini, [96].
[36] Facts, [7].
[37] Facts, [20].

(b) The nature of the corporate restructuring indicates an abuse of process

33. The true nature of the operation of the claim was crucial.[38] In *Phoenix*, the Tribunal found that there was an abuse of process as no economic activity was performed or intended by the Claimant.[39] In this case, the transfer of shares was done solely to gain access to investor-state arbitration. As reflected through the legal advice from its legal counsel and the resolution of ManalCorp special board meeting,[40] it does not appear that there was a business plan, program refinancing or economic objectives attempted in this case.

ii. The Claimant is not an investor protected under the BIT

(1) The Claimant is not qualified as an investor

34. The Claimant is not qualified to be an investor because of the lack of active business activities. Contrary to the finding in *Aguas del Tundari* case, the Claimant was merely corporate shells to obtain jurisdiction.[41] The investor must have an active role, not simply holding the investment.[42] Such interpretation derives from both ordinary meaning and the object and purpose of the treaty.[43]

35. In this case, under ordinary meaning, an investor is required to have an active role in investing in Nambia. The phrase "made an investment" reflects that the investor must

[38] *Phoenix*, [140]; *Abaclat*, [647].
[39] Phoenix Case, [140].
[40] Facts, [24-15].
[41] *Aguas*, [315-323].
[42] *Standard Chartered*, [257].
[43] ibid, [230].

active role rather than passive ownership.[44] Even though the BIT permits an indirect ownership or control, it is only in the case of a natural person of that Party or another enterprise constituted under the laws of that party.[45]

36. Furthermore, the object and purpose states that the State Parties intended to conclude the treaty "*concerning the encouragement and reciprocal protection of investment*"[46]. With this reciprocal relationship between promotion and protection of investment, an investor without active role in deciding to make, fund or manage the investment would not fit the purpose of promoting investment by way of providing protection. [47]

37. Although the Claimant was constituted in Tranma, it is a holding company solely owned by MenalCorp, an enterprise of non-contracting state.[48] The Claimant has no role and intention to perform any economic activity role in Nambia[49] but merely holds fictional control to receive the protection from the BIT.[50] Such passive ownership shall not make the Claimant qualified as an investor under the BIT.

(2) Alternatively, the Tribunal should lift the Claimant's corporate veil

38. Although the test of incorporation is frequently used to establish nationality[51], effective seat and control test may be considered[52]. Under international law, to prevent "misuse

[44] Ibid, [225].
[45] BIT, Article 1.
[46] BIT, Preamble.
[47] *Standard Chartered*, [228].
[48] Facts, [26-27].
[49] Answer to Notice of Arbitration, [8].
[50] Facts, [25]; *Autopista*, [122].
[51] Dolzer and Schreuer, 47.
[52] *Autopista*, [107].

of the privilege of legal personality" or "evasion of legal requirement", the process of lifting of corporate veil is permitted.[53]

39. An abuse of legal personality is considered as a circumstance that will give rise to the process of lifting corporate veil.[54] The Tribunal should lift the corporate veil for the advantage of financial reality rather than mere façade of legal structure.[55] In event of corporate restructuring in anticipation of future dispute, veil lifting may be favoured.[56]

40. In this case, the Claimant was manifestly incorporated for the purpose of gaining access to the arbitral proceeding, contrary to the finding in *Tokios Case*.[57] Knowing of the existence of investor-state arbitration under the BIT, MenalCorp decided to restructure its investment.[58] Should the Tribunal allow the Claimant to gain benefit from this ill-intended restructuring, it would amount to a misuse of the privilege of being a legal personality of a State party to BIT. Therefore, the Tribunal should lift the corporate veil of the Claimant and dismiss its claim.[59]

iii. In any event, abuse of process constitute in admissibility of the claim

41. In *Philip Morris*, the Tribunal viewed the question of abuse of rights to relating to admissibility of the claim.[60] The corporate restructuring will amount to an abuse of

[53] *Barcelona Traction*, [56-58]
[54] *Tokios*,[56].
[55] *Banro*, [7].
[56] *TSA Spectrum*, [152].
[57] *Tokios*, [56]
[58] Facts, [25].
[59] Dissenting Opinion of Professor Weil in *Tokios*, [29].
[60] *PM v. Australia*, [588]

right when the dispute is foreseeable with reasonable prospect that the measure leading to treaty claim will materialise.[61]

42. Here, as previously established, the Claimant reasonably foresaw the dispute before its restructuring. The restructuring need not be done after the PCCE Act was enacted to constitute as an abuse of process.[62] It was certain that the Fed-Up party was a threat to its investment.[63] Such facts give rise to reasonable prospect that the claim under the investment treaty will materialise. The Claimant, in response of such prospect, abuse the process by restructuring its investment to gain access to investor-state arbitration.

C. The Claimant's misconduct makes the Tribunal lack jurisdiction *ratione materiae*, and in any event, the claim to be inadmissible.

43. The Claimant had engaged with acts of corruption to win the concession contract so-called the Energy Supply Agreement. The Tribunal lacks jurisdiction because: the Claimant's investment did not meet the legality requirement under the BIT (i). Alternatively, the Claimant's claims are inadmissible as the Claimant's acts are contrary to general principles of international law (ii), and in any event, the Respondent is not estopped from raising such corruption defence (iii).

44. As clarified in *Hamester*, this concerns with the jurisdiction rather than merits, as it concerns with illegality in **establishment** of investment, not during the **performance** of investment.[64]

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[61] ibid, [554].
[62] ibid, [563-564].
[63] *PM v. Australia*, [566].
[64] *Fraport*, [34]; *Hamester*, [127]; *World Duty Free*, [3]; *Yukos*; *Cyprus v. Russia; Inceysa*, [207].

i. The Tribunal lacks jurisdiction by the Claimant's act of corruption

45. The Claimant's investment did not meet the legality clause under the BIT as it was tainted with corruption. To be a protected 'investment' under Article 1 of the BIT, it requires investments to be made "*in accordance with the laws and regulations*" of the host state. This is an express form of clean hands doctrine.[65] Here, the Claimant's investment was made corruptly in violation of Nambian Criminal law[66] on anti-corruption[67], and thus the Tribunal lacks jurisdiction *ratione materiae*.[68] Indeed, protection of BIT does not extend to investment made illegally,[69] regardless of investor's intent.[70]

46. The Respondent will establish that corruption can be proven. Here, the standard and the burden of proof can be determined by the Tribunal's discretion.[71]

47. In general, the Respondent who makes the corruption defense shall bear the burden of proof under Article 27 of the PCA Rules. Nonetheless, the burden is shifted to the Claimant,[72] because once the circumstantial evidence is established, the Respondent is discharged from such burden,[73] which will be established in the following paragraphs.

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[65] Dolzer and Schreuer, 398.
[66] Nambian Criminal Code, Annex 3.
[67] *OECD Anti-Bribery Convention*, Article 1.
[68] *Metal-Tech*, [327], [389]; *Inceysa*, [335]; *Fraport*, [401]; *Anderson v Costa Rica* [57], [59]; *Crawford*, 1.
[69] *TSA Spectrum* [164]; *Teinver*, [317]; *Franz*, [275]; *Hamester*, [125]; *Fakes* [114]; *Metal-Tech*, [127]; *Inceysa*; *Niko*; *Salini; Tokios; Loannis; Bayindir; LESI; TSA Spectrum*, [164]; *Fraport*, [395].
[70] *Anderson v. Costa Rica*, [52].
[71] *Metal-Tech*, [238]; UNCITRAL Arbitration Rules, Article 27(4); IBA Rules, Article 9(1); ICC Rules, Article 25(1).
[72] *ICC Case No 6497*, [4].
[73] *Llamzon*, 9.11.

48. The Tribunal should apply the moderate 'balance of probabilities' standard to this case, which allows the Tribunal to assess circumstantial or indirect evidence to draw adverse inferences.[74] As argued by Professor Orrego,[75] the Tribunal shall adopt such standard because corrupted behaviours are non-documented and "*notoriously difficult*" to prove.[76] The tribunal in *Metal-Tech* acknowledged such difficulty,[77] and noted that 'reasonable certainty'[78] is sufficient to prove corruption.

49. In *Methanex*, the Tribunal examined bribery under the use of circumstantial evidence to make adverse inferences, which was also noted as 'connect the dots' methodology.[79] In that case, the tribunal held that several 'dots' of company and the government having making financial lobbying campaign contribution, and having a private dinner meeting was insufficient to infer that there were acts of bribery, as there was no true *quid pro quo* (i.e. campaign contribution in exchange of favourable government action). [80]

50. However, in the present case, there was *quid pro quo* because: the former government was also advocating for green energy and the Claimant had close relationship[81] with "high-ranking officials of the Ministry",[82] who was in charge of the Tender for the bidding contract. Their relationship was so close that the Claimant was invited to the official's daughter's wedding.[83] Moreover, the Claimant had "many" meetings with Ministry of Energy prior to the concession contract and made large donation for

[74] *Corfu Channel*, 4, 59; *ICC Case No 6497*; *Metal-Tech*, [293].
[75] *Siag*, Dissenting Opinion of Professor Orrego, 4.
[76] *EDF*, [221]; ICC Case No.4145; ICC Case No. 8891, 1021; *Fiortier*, 375.
[77] *Metal-Tech*, [243].
[78] Ibid.
[79] *Methanex, Part III*, [57].
[80] Ibid, [37].
[81] *Metal-Tech*, [293]; *ICC Case No 8891; ICC Case No 3916*; *ICC Case No 6497*.
[82] Facts, [12]
[83] Ibid.

government's National Congress.[84] This is different from *Methanex*, because in that case, Methanex failed to address the timeline of the ban of methanol,[85] which led the Tribunal to hold that there was no *quid pro quo*.[86] Whereas in our case, all these incidents were actively done between the enactment of Great Expectations project and prior to submission of the bidding contract. Connecting these dots together, the Tribunal can make an adverse inference that the Claimant made corrupted campaign contributions to the former government in exchange of the concession contract.

51. As Claimant obtained agreement via corruption, his investment violates Nambia criminal code, making the investment illegal under Article 1 of the BIT. The Tribunal lacks jurisdiction *ratione materiae*.

ii. In any event, the claims are inadmissible as the Claimant's act of corruption is contrary to General Principles of International Law

52. Alternatively, the Claimant's claims are inadmissible if there is corruption, as it contradicts with the general principle of law on good faith,[87] the principle of *nemo auditur propriam turpitudinem allegans* ('No man shall benefit from his wrongdoing'),[88] and international public policy.[89] Having established that Claimant conducted corruption, it amounts to these violations of general principles of international law, which makes the claims inadmissible.

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[84] Ibid.
[85] *Methanex*, (n82), [53].
[86] Ibid, [36-37].
[87] *Europe Cement Investment*, [175]; *Phoenix*, [113].
[88] *Plama*; *Inceysa*, [244].
[89] *Inceysa*, [225], [239], [246]; *World Duty Free*, [157]; *Plama; Niko*, [431-433]; *Metal-Tech*, [292]; *Cameron*, 329–369.

iii. The Respondent is not estopped from raising defence

53. The Respondent acknowledges that involvement of unlawful commission amounts to estoppel of objection to jurisdiction *ratione materiae*,[90] but only if it is attributed to the State, which is not the case.

54. It is insisted in *Kardassopoulos,* and corroborated by Judge Crawford that the State is not responsible for a public official's solicitation of a bribe or corrupt act if the officials acted in his private capacity rather than on behalf of the State.[91] In the present case, the fact that the officials of Ministry had granted the Concession Agreement via corruption, which was through receiving funds and having private meetings. This is rather *ultra vires* act, outside the scope of the State, and therefore it is not attributable.

[90] *Fraport*, [387].
[91] *Crawford*, 137-139.

ARGUMENTS ON MERITS

II. THE RESPONDENT HAS NOT BREACHED THE OBLIGATION OF FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 9 OF THE BIT.

A. Respondent has not breached duty to conform to Claimant's legitimate expectations

55. In determining the breach of obligation to accord fair and equitable treatment, Article 9(2) stipulates that the Tribunal may take into account the legitimate expectation of the investor.

56. The Respondent concedes that a specific representation was made but denies that a legitimate expectation was created due to the fact that the Claimant had not given consideration to various factors that prevented expectations from being legitimate. The scope of FET cannot be determined only by "foreign investor's subjective motivations and considerations"[92].

i. Claimant's expectations were unreasonable and illegitimate

57. A condition imposed upon the determination of the Claimant's legitimate expectation is whether such expectation is legitimate and reasonable.[93] The *Saluka* Tribunal defines what is unreasonable by giving an example where the investor expects that "the circumstances prevailing at the time the investment is made remain totally unchanged".[94]

[92] *Marshall.*
[93] *Saluka*, [304].
[94] *Saluka*, [305]; Parkerings-Compagniet, [333]

58. There is a risk in investment that the investor must be aware of and accepted from the start, which is borne by the latter; including the acceptance of potentially less stable socio-economic and political environments[95]. The obligation to live up to investor's expectations, therefore, is only legitimate so long as it is not used to "relieve investors of the business risks inherent in any investment"[96].

59. The Claimant neglected to take into account any reasonably foreseeable circumstances as they failed to consider that the introduction of the Great Expectations Project was not without opposition.[97] It will be unreasonable for the Claimant to expect that there will be no change in policy, as a normal course of business that will affect its investment in Nambia, as the State has relied on coal-fired power for decades.[98] Moreover, the Project is considered as unlawful.[99] The Claimant expecting that the Respondent's position would remain completely unchanged would be illegitimate and unreasonable

ii. The Claimant's legitimate expectation does not outweigh the Respondent's legitimate regulatory interest

60. A violation of legitimate expectations requires weighing between investor's legitimate expectation and the legitimate regulatory interests.[100] This is known as the test of proportionality.

61. The *Metalclad* Tribunal[101] confers a responsibility to the State to demonstrate to the investor their legitimate regulatory interest. Investors shall anticipate plausible changes

[95] *Ioana*, 164
[96] *Emilio Agustín Maffezini*, [64].
[97] Facts, [7].
[98] Facts, [4].
[99] Facts, [40]
[100] *Saluka*, [306]; *Eiser*, [370]

in circumstances and regulatory framework as States have sovereign legislative power to the extent that such law is unreasonable.[102]

62. The regulatory interest of the Respondent is reasonable in this case. The Respondent is entitled to take measures within their own territories for the sake of purposes such as social and consumer protection under Article 8 of the BIT. The Respondent's interest is for the protection of Nambia's critical energy source as well as the protection of millions of jobs[103]

63. Moreover, the Respondent did not deprive the right of the Claimant to operate in Nambia as they can still lawfully compete in the market. Therefore, the Claimant's interest in receiving a profitable return would not outweigh the interest of the Respondent to secure millions of Nambians' employment and allocate its economic resources for the public interest.

B. Respondent's actions were not arbitrary or discriminatory

64. The idea that the action of the Respondent is arbitrary and discriminatory arrives at a second stage as it is usually dealt with by tribunals after the specific wrongdoing of the state is discussed instead of when the question of whether there is wrongdoing in the first place is asked.[104] These two factors must also be present at the same time and not just be one or the other[105] in order to amount to a breach in the FET as to not have both implies that the level of severity was not sufficient.

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[101] *Metalclad*, [87].
[102] *Parkerings-Compagniet*, [332].
[103] Facts, [36].
[104] *Ioana*, 177.
[105] *Ronald S. Lauder*, [219].

i. Respondent's actions were not discriminatory.

65. For the part of discriminatory, the case of ELSI stated that in the context of the BIT it is discriminatory when there is intentional treatment in favour of a national against a foreign investor that would not happen under similar circumstances against another national[106]. The case of *LG&E* also iterates that the Investor must bring conclusive proof that the measure shows clear discrimination of the investor as a foreign entity.[107]

66. Within the present case, the actions of the Respondent in terminating the project demonstrates no evidence of being the result of purposefully targeting the Claimant discriminately. The Respondent's policy was only based on the legitimate regulatory interest in securing a vital energy source and preventing mass unemployment. In this regard, the Respondent has not therefore targeted Claimant's investment as foreign investments but for being an investment that is against Respondent's new domestic policy. It means that the Respondent would give the same treatment to any other nationals to serve its legitimate regulatory interest. The action taken is therefore not discriminatory.

ii. Respondent's actions were not arbitrary.

67. The state also has the obligation to not treat foreign investor with manifest arbitrariness falling below international standards.[108] Arbitrariness is established when an action is "founded on prejudice or preference rather than reason or fact".[109]

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[106] *Sean D. Murphy ICJ*, 1991.
[107] *LG&E.*
[108] *Ioana*, 177.
[109] *Lauder*, [221].

68. The acts of the Respondent are for the interest of a legitimate welfare objective. The termination of the Project was also the result of the Respondent's PCCE Act to achieve the regulating of the coal industry that would otherwise have led to a decline in Respondent's dominant economic sector.

69. The action of the Respondent can therefore be shown to be based on securing a public interest. This contains reason and fact derived from the review of a special committee with consideration of a variety of factors, such as economic and political factors[110] The action therefore cannot demonstrate manifest arbitrariness.

C. Respondent's alleged bad faith should not be grounds for breach of FET.

70. The use of good faith to establish a breach FET obligation is widely questioned as many deem FET standard as a more objective one where ideas of good faith does not result in a breach of other conditions in the FET obligation. The Mondev Tribunal[111] holds that "A state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."

71. As evidence of this fact, the ICJ court is explicit in not recognizing good faith by itself as a source of obligation.[112] Good faith is then a measure that is separate from the other preconditions of FET. The Tribunal in *ADF* case supports this view as "an assertion of breach of customary law duty of good faith adds only negligible assistance"[113] meaning there is no additional substantive content brought by the good faith principle.

[110] Facts, [33].
[111] *Mondev*, [116].
[112] *Nuclear Test Case*, [26].
[113] *ADF*, [191].

72. Even if bad faith were to be accessed, according to the *Loewen* case, there exists a high standard to determine that there must be malicious intent to the point where it cannot be defended by members of the international community.[114] Therefore, good faith should not be a standard in accessing the alleged breach in the FET. In any event, there exists no malicious intent by the Respondent against the Claimant. Mere desire to follow legitimate policy objectives accessed under the conditions of legitimate expectation, which makes the idea of bad faith redundant.

III. THE RESPONDENT HAS NOT BREACH THE OBLIGATION NOT TO EXPROPRIATE UNDER ARTICLE 10

A. The interpretation of Article 10

73. The parties included Article 10 in order to prevent an expropriation or a measure tantamount to expropriation to the Claimant's investment. Article 10 of the BIT must be interpreting in accordance with Article 31(2)(a) of the VCLT. Thus, Annex B must be taken into account in order to interpret the obligation under Article 10 the BIT. Annex B states that Article 10 is intended to reflect customary international law. Thus, customary international law can be used as an instrument to interpret and narrow down the scope of Article 10.

B. Each of the Respondent's action does not constitute as an expropriation

i. *The Respondent's cancellation of the Great Expectation Project does not amount to an expropriation*

[114] *Loewen*, [132].

1. The impact degree of interference and impact of the Respondent's action was low

74. Expropriation is often marked by substantial deprivation of an investment[115]. Such action should neutralize enjoyment of property[116]. This broad standard is assessed and narrowed down as the investor's ability to control, manage, and keep ownership[117], and in some cases, benefit and economic use of his property[118].

75. Applying the factors to this case, the Respondent's action is not severe enough to satisfy the standard of substantial deprivation. The premium only serves to support MenalCorp Nambia financially, to allow it to have an advantage at competing with other businesses. Premiums under ministerial order only exists as a privilege, not a substantial part of its investment. The Claimant still has the full power to own, make use, dispose, and manage its affairs in the form of shares.

76. Thus, the impact and interference marked by the government's action is far away from expropriation.

2. The Respondent did not severely interfere with the Claimant's legitimate investment-backed expectation

77. The legitimate investment-backed expectation differs between that of the Claimant and MenalCorp Nambia. As a shareholder, the Claimant cannot rely wholly on premium to claim a frustration of legitimate investment-backed expectation. The most the Claimant expects from investing via transferring share is profit, not premium. The legitimacy of

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[115] *CMS*, [159 and [163].
[116] *CMS*, [259]; *Pope & Talbot*.
[117] *Occidental*.
[118] *Santa Elena*, [76].

investment-backed expectation depends on the nature, risk, and detrimental reliance the invester takes[119]. The legitimacy of the Claimant's investment-backed expectation is lowered due to the Claimant's lack of reliance on the Respondent's representation, and the risk of its investment.

78. Nambia's energy is predominantly coal supplied. The Claimant knowingly invested on a renewable energy sector in a country with not only the biggest coal resource, but also entered into a highly competitive and disadvantageous market for its business. Thus, the nature of the Claimant's investment already contained significant risk, which should mark its expectation to be less legitimate for property protection purposes.

79. In order for legitimate investment-backed expectation to be compensable, the Claimant must detrimentally rely on assurances given to it. However, this condition is not satisfied. The Claimant transferred the shares to access BIT. It has no interest in active economic activity. In other words, investment of shares are not made due to representation of the Respondent nor reliance upon it, which means that the Claimant interest in this aspect is not protected[120].

80. Even if the Tribunal were to find that the Respondent frustrates the Claimant's expectation, it should also be noted that this does not necessarily lead to indirect expropriation, since the Claimant still has control over its business[121].

[119] VCLT, Article 31(3)(b); *Metalclad*.
[120] *Phoenix*
[121] *Azurix*, [322].

81. Therefore, the Respondent's interference of the Claimant's legitimate investment-backed expectation is not severe enough to amount to expropriation.

3. The character of the government's action does not constitute an expropriation

82. The cancellation of the Project is not an expropriation, since the initiation of the Project was not done according to the Nambian law. In this case, the Respondent does not have any object or intent to target the Claimant's investment.

83. Under Article 17 of the Nambian Constitution, all actions of state support require a parliamentary approval. The premium, which the Claimant alleged to be entitled to under the Energy Supply Agreement arises from the project that falls under the scope of state support according to Nambian Supreme Court. However, the Project was enacted under Ministerial Order instead of a parliamentary approval. As a result, the Project was unlawful from the start.

84. This advisory opinion was made binding in the Article 2 of the PCCE. Consequentially, MenalCorp Nambia was never entitled to receive any premiums, and expropriation did not occur since MenalCorp Nambia cannot be deprived of its non-existent contractual rights.

C. Actions of the state is not deemed indirect expropriation under Annex B paragraph 4 subsection B

85. Annex B paragraph 4 subsection B reflects the police power doctrine, a fundamental customary international law. Under this doctrine, in order or the state to exercise

regulatory power that does not constitute as expropriation, certain conditions must be met.[122]

86. Interpreting Annex B paragraph 4 (b), with the ordinary meaning, the conditions under the police power doctrine are (i) not made in a discriminatory manner, (ii) for the purpose of public welfare and (iii) proportional. As the Respondent fulfilled these criteria, the interference of the State is not deemed as expropriation.

i. The action of the Respondent is not discriminating against foreign nationals

87. The termination of the Great Expectation Project was not made in a discrimination manner towards the Claimant. An expropriation that targets foreign nationals is not in itself a discrimination. It must be unreasonable distinction[123] on the basis of the nationality[124] of the foreign investors. There must be different treatment to different parties.[125]

88. The termination of the Great Expectation Project was made with the purpose to allocate the government funds[126], the premiums[127], given to the Claimant to support the Nambia's clean coal energy. Thus, the termination of the project was not made because of participation of the foreign investors[128] but was made for the purpose that the

[122] *PM v. Uruguay*, [305].
[123] *Rubins*, [1,177].
[124] UNCTAD Series, 34.
[125] *ADC*, [429].
[126] Facts, [36].
[127] Facts, [8].
[128] *GAMI*, [114-115].

government wants to support the coal energy sector to secure jobs for millions of people as thousands have already been laid off.[129]

ii. The actions made was for a bone fide purpose of public welfare

89. The measure adopted must be made in good faith and for the purpose of public welfare objectives.[130] The interference with the Claimant property, or the premiums, was made to allocate the funds for the support and improve the clean coal powered energy. Doing so, the government is able to guarantee millions of jobs[131] for the citizens of Nambia. Thus, this measure was made in good faith for the public welfare purposes.

iii. The measure taken by the Respondent is proportional.

90. The tribunal shall consider the proportionality of the measure taken, weighing between the government aim and the measure taken.[132] In our case, the measure taken was proportional.

91. The Respondent terminating the Great Expectation project will secure millions of jobs for the Nambian citizens. The denial of premiums to the Claimant still enables the Claimant to invest and continue their business in Nambia. With addition to the fact that Claimant's business already has a stable income and has been remarkable successful.[133] Not granting premiums, though Respondent do recognize that it is crucial will only delay the investment as planned by the Claimant.[134] Moreover, this termination is not

[129] Fact, [29].
[130] *Techmed.*
[131] Facts, [38].
[132] *Techmed*; *Vivendi*.
[133] Facts, [19].
[134] ibid.

made permanently as Respondent had stated that the Great Expectation project will only be terminated "for now" [135]as Nambia is not ready to shift to renewable energy.[136]

92. In conclusion, the Respondent had fulfilled both the criteria under Annex B paragraph 4 subsection B. Thus, the Respondent has exercise valid police power[137] and actions of the state are not deemed to be indirect expropriation.

[135] Facts, [36].
[136] Ibid.
[137] *PM v. Uruguay*, [307].

PRAYER OF RELIEF

The Counsels for the Respondent respectfully request the Arbitral Tribunal to find:

1. that the Tribunal has no jurisdiction over this case;
2. that in any case, there are no violation of the BIT.

[Counsels for the Respondent]

WORD COUNT: 7994