INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

CASE NUMBER ARB/X/X

Between

JAN KONARSKI

…. Claimant

And

THE GOVERNMENT OF THE REPUBLIC OF REDENTIA

… Respondent

RESPONDENT'S CASE

The Arbitrators: AAA, President
BBB, Arbitrator
CCC, Arbitrator

Secretary of the tribunal: ABC

Solicitors for the Claimant
Frederick, Paxton & Marinov Ltd

Solicitors for the Respondent
Walter Exact LLP

15 June 2016

TABLE OF CONTENTS

I. LIST OF AUTHORITIES

A

Cases

A

Other Authorities

E

F

G

RESPONDENT'S CASE

II. STATEMENT OF FACTS

1. The Claimant, Mr. Jan Konarski was born in Artina to a Tronian father and an Artinan mother. Even though the Claimant was granted an Artinan citizenship from birth, he always had been living in Tronia ever since the young age of 8. From birth, he has been a dual citizen of both Artina and Tronia.

2. The Respondent is the state of Redentia. In recent times, the Respondent has been pushing for foreign investment so as to boost the country's Gross Domestic Product growth. Two of the several Bilateral Investment Treaties ("BITs") it signed are the Redentia-Artina and Redentia-Beginnia BITs.

3. In the 2009 Global Financial Crisis, many companies in Redentia including Redentia Petrolleum Corporation ("RPC") was badly affected. Thus, the Respondent contacted many high-net worth individuals to inject capital into the companies. One of the individuals contacted was the Claimant who invested a huge amount of USD 2 billion using his own funds to acquire a large 30% stake in RPC. This promoted steady growth for RPC in the next few years.

4. However, after a few years in mid-2013, The Green Party, a pro-environment political party in Redentia, won the popular vote in the General Elections. The party pledged to introduce policies to protect the environment from further harm and improve it as well.

5. Shortly after, there was a massive oil-spill off the Southern

coast of the Respondent, resulting in public outrage and protests in Redentia.

6. In order to pacify its citizens and fulfil its electoral promises, the Respondent implemented new laws and policies. They aim to protect the environment (the "Pro-Environment Measures").

7. The Respondent managed to regain public approval from such measures. However, the Pro-Environment Measures inevitably caused less petrol-engine vehicles on the road. Hence, the revenue of RPC, as a fuel company, plummeted and RPC is expected to incur losses by the year 2020.

8. The Claimant is concerned that the value of his 30% shareholding in RPC will continue to drop and has been negotiating with the Respondent to reach a settlement on the Pro-Environment Measures. However, as it is of greater importance to steer Redentia towards a "clean and green future", the Respondent does not wish to alter its policies.

III. ISSUES ARISING IN THIS CASE

9. Has *jurisdiction rationale consensus* been established in the present case?

10. Does the Claimant's Artinian nationality confer *jurisdiction rationale personae* on the tribunal?

11. Has there been expropriation or a breach of Article 3 of the BIT?

12. Is the Respondent entitled to rely on a defence of necessity?

A

IV. THE RESPONDENT'S SUBMISSIONS

A. This ICSID tribunal does not have *jurisdiction rationale consensus*.

B

13. The Respondent submit that this tribunal does not have *jurisdiction rationale consensus* over the current arbitration.

14. The Respondent submit that Article 12(2) is a clause pertaining to substantive treatment based on municipal law or other treaties that affect investors of Redentia and Artina, and is hence not a Most-Favoured-Nation (MFN) clause.

C

D

15. To ascertain the meaning of Article 12(2) via interpretation, this tribunal will need to rely primarily on Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT), considering that there is a lack of supplementary materials of interpretation for Article 32 to apply.

E

16. Even if this tribunal finds that Article 12(2) of the BIT is a MFN clause, an application of Article 31 of the VCLT does not fully support an interpretation that Article 12(2) of the Redentia – Artina BIT is a MFN clause that applies to dispute resolution clauses.

F

17. In any case, a MFN clause cannot establish the consent of a host state to arbitrate, in the absence of any consent to arbitrate in the basic Redentia – Artina BIT.

G

18. Therefore, in light of the above, the tribunal does not have *jurisdiction rationale consensus* over the current arbitration, and cannot proceed to discuss the merits of the case.

A

B

C

D

E

F

G

1. Article 12(2) is a clause that allows investors to invoke more favourable substantive provisions in other sources of law, subject to the proviso that the investor was "entitled" to such treatment.

19. The Respondent submits that Article 12(2), properly interpreted, is a clause which allows investors to invoke more favourable substantive provisions in other sources of law. It is not a MFN clause, and neither does it apply to dispute resolution mechanisms.

20. Firstly, Article 12(2) pertains to both "provisions of law of either Contracting Party" and "international obligations" which entitles investments of "the other Contracting Party" to more favourable treatment. The provisions of law and international obligations must be one which the "other Contracting Party" is "entitled to". Therefore, to invoke Article 12(2), the claimant must utilise a rule which he is entitled to, either by a provision of municipal law or a separate international obligation by which one Contracting Party has promised to "entitle" the claimant to a certain kind of treatment.

21. This interpretation is clearly supported by the words of the definitions within BIT itself. At the beginning of the Redentia – Artina BIT, the BIT defines the Governments of the Republic of Redentia and Artina as the "Contracting Parties. This reference is continually used consistently throughout the BIT. The claimant's attempt to give an alternative meaning to "other Contracting Party", identifying it as any other 3rd party state who has a BIT with either Redentia and Artina, is untenable as it would contradict the clear meaning of the term "Contracting Party" which the basic treaty has clearly defined, and

A

inconsistent with its continuous use throughout the treaty.

22. If the Redentia – Beginnia BIT had explicitly conferred rights or "entitled" an Artinan investor to its protection, then perhaps the Claimant might be able to rely on Article 12(2) for substantively more favourable treatment within the Redentia – Beginnia BIT. However, there is no such entitlement offered to the Claimant in the present case.

B

C

23. Furthermore, the diction of Article 12(2) shows that it is not a MFN clause. Most MFN clauses outright declare that they are MFN clauses, such as Articles 4(2), 6 and 7(3) of the Redentia – Artina BIT, which are clearly all MFN clauses. All of these clauses explicitly refer to a "third State". If Article 12(2) was meant to be a MFN clause, surely the term "third State" rather than "Contracting Party" should have been used. The fact that Article 12(2) is clearly different demonstrates that it is clearly not a MFN clause.

D

E

24. The Respondent also submit that Articles 12(1) and 12(2) focus on different types of agreements. Article 12(1) covers other agreements that both Contracting Parties, such as a separate BIT or a multilateral investment treaty. Article 12(2) further covers municipal law and other treaties that explicitly confer benefits on the investments of an investor. Municipal law, along with other international instruments such as a WTO resolution, can positively or negatively affect the rights of investors. Considering that Article 10 of the BIT provides for a dispute resolution system within the host state's courts, Article 12 will act as a substantive guide in assisting with the court's adjudication over the dispute by mandating the state courts to utilise rules that are objectively most favourable to the investor. In the case of a conflict of laws, where perhaps state municipal

F

G

law or a separate international obligation subjects an investor to better or worse treatment, Article 12(2) mandates the adjudicator to pick the substantively more favourable one. This will explain why Article 12 appears in the procedural portions of the treaty – it dictates the way a dispute is adjudicated, and what are the applicable rules to the dispute.

25. Therefore, Article 12(2) must only deal with substantive treatment offered to investments, and not dispute resolution procedures. Although the term "treatment" can potentially cover procedural rights, there is nothing within Article 12 that suggests it reaches this potential. The context of the Article that the Claimants so heavily rely on has been explained above. Hence, both clauses are effective and *effet utiles* has not been offended.

26. Furthermore, the fact that Article 12(2) explicitly makes the investment the subject of the clause, as opposed to the investors, is not insignificant as the Claimants would like to assert. The fact that investments and not investors are the subject of the clause lends support to the interpretation that "treatment" under Article 12(2) pertains to substantive rights accorded to investments, rather than procedural dispute settlement rights for an investor or investors. The fact that they are defined as two separate entities in Article 1 of the BIT means that we cannot use them interchangeably. The authority relied on by the Claimant, the case of *Pope & Talbot (Merits, Phase 2)*,[1] involved a case where the Respondent argued that the use of "investors" as opposed to "investor" required more than one aggrieved investor to invoke the provision. This was correctly rejected by that tribunal. However, the terms involved

[1] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, (10 April 2001).

in this case are not a mere matter of plurality, but a matter of substance which should lead this tribunal to find that Article 12(2) only applies to substantive, as opposed to procedural, treatment.

27. The Respondent agree with the Claimant that an application of Article 31 of the VCLT will call for an interpretation based on good faith, the ordinary meaning of the treaty terms, in the terms' contexts, in light of the treaty's object and purpose, whilst giving consideration to the preamble of the treaty.[2] This primarily relies on Article 31(1) and 31(2) of the VCLT. However, this is where our agreement ends.

28. The Respondent have substantially explained and provided a much more reasonable and tenable interpretation of Article 12(2) which is much more faithful to the ordinary meaning of the treaty terms, and with sufficient consideration of the context by which those terms have been inserted. Furthermore, Article 31(4) of the VCLT also requires this tribunal to respect the special meaning of terms accorded to by the parties. It is submitted that "special meaning" refers to "specific meaning" as is made clear from the definition of the terms "Contracting Parties", "investor" and "investment" in the Redentia – Artina BIT itself. The Claimant's interpretation runs afoul of these explicitly defined terms, and hence cannot be adopted by this tribunal. As the Tribunal in Plama has noted, an interpretation which "grossly manipulates" the definitions within the treaty is one contrary to good faith, a requirement under Article 31(1) of the VCLT. It is submitted that an interpretation which also manipulates the meaning clearly defined by the BIT is similarly contrary to good faith.

[2] J. Romesh Weeramantry, '*Treaty Interpretation in Investment Arbitration*' (1st edition, Oxford University Press 2012) 38.

A

29. The interpretation that the Respondent have submitted are also fully in line with the object and purpose of the BIT. In fact, the current interpretation puts investors in a fairly attractive position, requiring the state courts to accord the most favourable applicable substantive rules in resolving a dispute between an investor and the state. Article 12 procedurally aids the national courts making a decision on an investor-state dispute, suitably considering the context of the Article.

B

C

30. Therefore, Article 12(2) is not a MFN clause and cannot be invoked to apply Article 10 of the Redentia – Beginnia BIT, as the claimant is not entitled to do so. In any case, Article 12(2) does not apply to dispute resolution procedures. Hence, there cannot possibly be consent to ICSID arbitration.

D

E

2. There is no consent to arbitrate in the main treaty, and Article 12(2) cannot provide such consent.

31. The Respondent submit that even if this tribunal finds that Article 12(2) is a MFN clause that applies to dispute resolution mechanisms, the MFN clause nonetheless cannot establish consent to arbitration since it is lacking in the basic Redentia – Artina BIT.

F

G

32. Establishing the State's consent to arbitration is of utmost importance for a tribunal, and this consent is not to be presumed, but must be established by an express declaration or by actions that establish consent.[3] This is enshrined within Article 25 of the ICSID Convention. Such consent that is

[3] *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 Jul 2013).

A

required by the Convention is absent in the current proceedings.

33. While the Respondent accept that the standard required to establish a State's consent to arbitration is no longer "clear and unambiguous" as the Tribunal in *Plama* had asserted,[4] it is still to be interpreted neither restrictively nor liberally, favouring neither investor nor the state, as there is "no principle of extensive or restrictive interpretation of jurisdictional provisions in treaties".[5]

34. However, the tribunal should note that it is for the State's consent to be positively established.[6] This would mean, in practice, that it will always be for the Claimant to establish the State's consent to the tribunal whenever there is a jurisdictional challenge from the State pertaining to consent. This position was noted by Final Report of the Study Group on the Most Favoured Nation Clause by the International Law Commission, where the ILC stated that a "jurisdictional approach" starts from the "initial assumption that an MFN provision does not automatically apply to the dispute settlement provisions of a BIT".[7] As ascertaining the state's consent is indisputably related to the jurisdiction rather than admissibility of the arbitration, unlike an 18-month waiting period,[8] it should be for the claimant to satisfy the tribunal that consent to arbitration has been established.

35. The Respondent submit that the Claimant will fail to

B

C

D

E

F

G

[4] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (8 Feb 2005), para 198.
[5] *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct 2002), para 43.
[6] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 Jan 2015), paras 174-175.
[7] International Law Commission, '*Final Report of Study Group on the Most Favoured Nation Clause*' (2015), para 171.
[8] ibid.

A

demonstrate to this Tribunal that *jurisdiction rationale consensus* has been established. Firstly, there has been no case where consent to ICSID arbitration was established when there was no consent to arbitrate at all in the basic treaty. The case that the Claimant rely on for the authority that consent to ICSID arbitration can be established in the absence of such a clause, *Garanti LLP v Turkmenistan*, does not help the Claimant. In that case, there was at least an offer of a consent to international arbitration in the form of a UNCITRAL arbitration clause, which the majority in *Garanti* could heavily relied on to establish *jurisdiction rationale consensus*.[9] There is no such consent to international arbitration in the present case. This tribunal would be going even further than the *Garanti* tribunal if they find that Article 12(2) can establish consent in the absence of any consent to arbitrate.

B

C

D

36. The Respondent further submit that the majority of the tribunal in *Garanti* was wrong to substitute the UNCITRAL arbitration clause with the ICSID one. The powerful dissenting opinion in the case was correct to note that there was no mutual agreement nor consent between Turkmenistan and the UK to have recourse to ICSID arbitration.[10] Analysis of the case published by the International Institute for Sustainable Development agreed with the dissent, stating that the majority in *Garanti* had effectively 'imported' ICSID Arbitration through the MFN clause, even though it was not objectively clear that the MFN clause intended to import such consent.[11]

E

F

G

37. Therefore, this tribunal should find that *jurisdiction rationale*

[9] *Garanti* (n.3) para 29.
[10] *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013) para 69.
[11] Eric de Brabandere, 'Importing Consent to ICSID Arbitration? A Critical Appraisal of Garanti Koza v. Turkmenistan' (Investment Treaty News, 14 May 2014) <https://www.iisd.org/itn/2014/05/14/importing-consent-to-icsid-arbitration-a-critical-appraisal-of-garanti-koza-v-turkmenistan/> accessed 15 June 2016.

consensus has not been established because:

a. There is no consent to arbitrate in the basic Redentia – Artina BIT;

b. Article 12(2) does not import such consent, and nothing in the BIT shows that it was intended to 'import' such consent.

3. Article 13 of the Redentia – Beginnia BIT is not objectively more favourable than Article 10 of the Redentia – Artina BIT.

38. Lastly, even if this tribunal finds that Article 12(2) of the Redentia – Artina BIT is a MFN clause that applies to dispute resolution clauses, and that such a clause can import consent into the basic treaty, the Claimant cannot invoke Article 13 of the Redentia – Beginnia BIT as it is not objectively more favourable than Article 10 of the Redentia – Artina BIT, as this tribunal cannot find that ICSID Arbitration is "better" than litigation in Redentia's own courts.

39. The requirement that the invoked provision must be more favourable is clear from Article 12(2) which states that "the more favourable treatment shall be accorded". This requirement was applied by the tribunal in *Garanti*.[12] Therefore, for the Claimants to invoke Article 13 of the Redentia – Beginnia BIT, they need to show that ICSID Arbitration is "more favourable" than litigation in Redentia.

40. This tribunal cannot find that ICSID Arbitration is more favourable than litigation in Redentia. The advantages that ICSID Arbitration has over State litigation do not apply in the

[12] *Garanti* (n.3) para 80.

present case. The Respondent is a democratic republic located in one of the most liberal and prosperous regions in the world, with a Westminster system of government. The separation of powers and the independence of the Respondent's judicial system has not been called into question. The Claimant hence cannot show that ICSID Arbitration's insulation from political interference applies in the present case.

41. The Respondent also submits that the risk of non-compliance by the host state towards a decision from its own courts is a ridiculous insinuation that the Claimant makes if he is allowed to submit that ICSID Arbitration confers onto him the safety of an enforceable award, as compared to a decision from the Respondent's own courts. The Respondent is under the rule of law in Redentia, and will necessarily have to respect the decision of its own judicial system. There is hence no risk of non-compliance towards a judicial decision rendered in Redentia.

42. Furthermore, there are undeniable advantages that local litigation has over ICSID Arbitration that the Claimant has ignored. These include much shorter durations as well as lowered costs of proceedings. With advantages and disadvantages of the various forums of proceedings, this tribunal, like the one in *Garanti*, cannot conclude that ICSID Arbitration is clearly more favourable than litigation in Redentia. Therefore, the Claimant cannot rely on Article 13 of the Redentia – Beginnia BIT.

B. The Claimant's Artinian nationality does not give the tribunal jurisdiction rationale personae to hear the case

1. Mere possession of an Artinian passport is insufficient to prove that the Claimant is a citizen of Artina

43. The fact that the Claimant possesses an Artinian passport or any other documents is merely prima facie evidence in determining that he is a citizen of Artina. If there were a lack of genuine link between the Claimant and the country, his nationality would be considered to be ineffective.

44. Such an approach is adopted in leading cases involving nationality issues. In *Siag v Egypt*[13] [*Siag*], the tribunal held that an investor's certificate of nationality constitutes merely prima facie evidence and is not sufficient to deem him to be a national of Egypt.

45. A similar approach is adopted in *Soufraki v The United Arab Emirates*[14] [*Soufraki*] where the claimant was not entitled to bring a claim under the Italy-UAE BIT as an Italian national as the fact that he possessed certificates of nationality only provided prima facie evidence of his Italian nationality. Instead, the Tribunal stated that it required the Claimant in the case, Mr Soufraki, to have had a "habitual abode in Italy and that he manifested his 'intention' to fix in Italy the center of his own business and affairs". Two factors were required: one has to be actually living in the country for the required period of time and

[13] *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID No. ARB/05/15, Decision on Jurisdiction (11 Apr 2007).
[14] *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 Jun 2007).

A

one has to intend to remain as a resident.[15]

46. It may be argued that in the case of *Champion Trading Company v Egypt* [16] [*Champion Trading*], the individual claimants were still considered to be Egyptian nationals despite having lived in the United States throughout their lives; hence a birth certificate is sufficient to establish nationality. However, it is submitted that the case of *Champion Trading* can be distinguished from the present case. In that case, the claimants' Egyptian nationality had been used for the registration of their business. In contrast, the claimant in the present case, Mr Jan Konarski did not have a single asset located in Artina and had no ties at all to the country.

B

C

D

47. Applying the law to the facts in the present case, the only relationship the Claimant has with Artina is that he owns an Artina passport and has visited Artina a few times on holiday. Similar to the Claimant in *Soufraki*, the fact that he possessed an Artinian passport only serves a prima facie evidence that he is a citizen of Artina.

E

F

2. Applying the 'effective nationality' test, the Claimant cannot be considered as a national of Artina

G

48. The Respondent submits that the 'effective nationality' test should be applied in cases of ICSID arbitration and thus, in this present case as well. Applying such a test, the Claimant cannot be considered as a national of Artina.

[15] ibid, para 99.
[16] *Champion Trading Company, Ameritrade International, Inc v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction (21 Oct 2003).

A

49. The law regarding nationality is settled in international law. In the landmark decision of the International Court of Justice of April 1955 in the *Nottebohm case*[17] [*Nottebohm*], the ICJ favoured the search for 'real and effective' nationality over a more formalistic test. It held that in a case where there is conflict regarding nationality, the rule of dominant or effective nationality should be applied. The *Nottebohm Case* further stated that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties"[18]. Thus, an individual who has no genuine or effective link to a country cannot invoke the nationality of that state against another state.

B

C

D

50. Following the decision in the *Nottebohm* case, the tribunal in *Iran-United States*, *Case No. A/18* [19] also adopted a similar test of 'real and effective' nationality and applied the general rules of international law.

E

51. It is submitted that the test of 'effective and dominant' nationality should also be applicable in the ICSID context and there is no reason to depart from the stance in international law.

F

52. The claimant would like to highlight a case that discussed the applicability of the 'effective and dominant' nationality test in the ICSID context. In the case of *Champion Trading*, the tribunal considered the applicability of such a test in the ICSID context. Even though the test of 'effective and dominant' nationality was not applied in that case, the tribunal opined that a test of real or effective nationality should be used in the

G

[17] *Nottebohm case (Liechtenstein v Guatamala)* [1955] ICJ 1.
[18] ibid.
[19] *Iran-United States*, *Case No. A/18* (1984) 5 Iran-USCTR 251.

A

context of ICSID when an individual "has no ties whatsoever with the country of its forefathers". In such a case, it would be manifestly absurd or unreasonable for the person to be considered to be a national of the country. Hence, it is evident that in the ICSID context, tribunals will be inclined to apply the 'effective and dominant' test when the claimant has no ties to the country and merely possesses a birth certificate.

B

C

53. In the present case, the claimant clearly has no ties to Artina and does not even have a single asset located in Artina.

D

3. Even if a more formalistic approach regarding nationality is often adopted in cases involving single nationality, the 'effective and dominant nationality' test should still be used in cases of dual nationality, especially in extreme circumstances to prevent abuse of the system

E

54. The Respondent contends that even though many cases adopt a more formalistic approach regarding nationality in the context of ICSID arbitration, the 'effective and dominant nationality' test should be used when dealing with cases involving dual nationalities.

F

55. In the case of *Ioan Micula v Romania*[20] [*Ioan Micula*], the tribunal stated that there is "a clear reluctance in public international law to apply the genuine link test where only a single nationality is at issue"[21]. This may seem to suggest the 'effective and dominant' nationality test would not be used in the context of ICSID arbitration.

G

[20] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 Sep 2008).
[21] ibid, para 99.

A

56. However, it is submitted that when dealing with dual nationalities, the threshold for the Respondent state to show that the test is applicable is lower than in the cases of single nationality. This is established in the case of *Ioan Micula*. Even though tribunals may be reluctant to apply the 'effective and dominant' nationality test in cases involving a single nationality, they will most likely be willing to apply such a test in cases involving dual nationalities when there is a clear dominant nationality.

B

C

57. In the present case, the claimant is clearly a dual national of Artina and Tronia. It is also evident that he has much stronger ties to Tronia as compared to Artina. Applying the 'effective and dominant' nationality test, the claimant's dominant nationality is that of Tronia. He cannot be considered to be a national of Artina under the Artina-Redentia BIT.

D

E

C. There has been no expropriation of the Claimant's investments. The Pro-Environmental Measures were reasonable and non-discriminatory policies.

F

1. The Pro-Environmental Measures do not constitute unlawful expropriation as laid out in Article 5(1).

58. The Respondent submits that the Pro-Environment Measures do not have the "effect equivalent to" expropriation, which is the requirement stated in Article 5(1). The Respondent submits that these Measures, analyzed independently, cannot be considered to be acts of expropriation. Thus, even if the Tribunal were to look at the cumulative effect of the Measures, these Measures cannot be deemed as an indirect expropriation of the Claimant's investment.

G

59. An interpretation of the Artina-Redentia Treaty does not support the Claimant's submission that the Respondent's Measures constitute indirect expropriation. It is beyond debate that the Artina-Redentia Treaty clearly provides for indirect forms of expropriation. However, it is unconvincing to argue that, on a comprehensive reading of the Treaty, the Contracting States intended for instances such as the Respondent's Measures to constitute an indirect expropriation in violation of Article 5(1) of the Artina-Redentia Treaty.

60. An interpretation of Article 5(1) of the Artina-Redentia Treaty implies that for instances of indirect expropriation, the measures "having effect equivalent" to expropriation has to refer to having effect that is the same as a total deprivation of the Claimant's investment. This submission is based on the preliminary argument that relates to the reading of "expropriation" for the purposes of Article 5(1) of the Artina-Redentia Treaty itself.

61. A fair and comprehensive interpretation of "expropriation" and the relevant phrase "having effect equivalent to expropriation" will require reference to Article 31(1) of the Vienna Convention, where it is stated that

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

While Article 31(1) is meant to be a single rule, which is implied by the title of the Article itself ("General Rule of Interpretation"), there are four distinct elements to this:

1. The treaty has to be interpreted in "good faith",

2. In accordance with the "ordinary meaning" to be given to the terms of the treaty,
3. In the "context" of the terms of the treaty; and

62. In light of "its object and purpose".

63. The Respondent's overarching submission is that "expropriation" and the relevant phrase "having effect equivalent to expropriation" has to be construed narrowly for a fair and just interpretation of Article 5(1). A fair and just interpretation, the Respondent argues, necessarily means a strict adherence to in Article 31(1) of the Vienna Convention. Hence, a fair and just interpretation of Article 5 of the Artina-Redentia Treaty cannot deviate from the four principles, or elements, elucidated in Article 31(1) of the Vienna Convention.

64. The ordinary meaning of expropriate is "to take private property for the use of the public". (Black's Law Dictionary). While it is not stated explicitly, "to take" something connotes several meanings. First, "to take" connotes some form of directness when committing the action. This reading is consistent with the entirety of Article 5(1). While the Article indicates that that expropriation can occur either "directly" or "indirectly", there is a caveat as to what constitutes indirect expropriation. For a series of measures to constitute indirect expropriation, the measures are to have "effect equivalent" to expropriation. It is also noted that what qualifies as indirect expropriation has to be measures undertaken by the State, not just a single, once-off event or occurrence. This is implied from the use of "measures" instead of the same word in the singular.

65. This is consistent with the object and purpose of the Artina-Redentia Treaty. Allowing indirect expropriation to qualify as an expropriation in violation of the Artina-Redentia Treaty is

advantageous to the investors of either Contracting State. Expropriation can be present in many forms. This is evident from the fact that the Contracting States did not provide any definition of "expropriation", as well as any examples or explanations regarding expropriation. Thus, including indirect expropriation aids the investor to bring a claim to seek damages from the expropriating state for the injury to the investments. However, to balance the interest of the "expropriating" Contracting State and the "expropriated" investor, the Tribunal has to be careful not to hold the Contracting State liable for expropriation when the Contracting State is just exercising its regulatory powers in a legitimate manner. Thus, there has to be a strict application of what constitutes "indirect expropriation" to prevent bilateral investment agreements from being unfairly favorable to the investors. A strict interpretation of what constitutes "indirect expropriation", where the Measures have "effect equivalent to expropriation", will also comply with the requirement of interpreting the treaty in "good faith", as it balances the interests and burdens of the Contracting States and its stakeholders, namely the investors of either Contracting States.

66. It is noted that term "expropriation" in Article 5(1) itself refers to direct expropriation for the Article to be complete and non-repetitive. Given that the Article clearly indicates that the expropriation can be indirect, the reasoning will be circular and illogical for the Article to mean that indirect expropriation to occur "through measures having effect equivalent" to indirect expropriation. Hence, the part of Article 5(1) that applies to indirect expropriation means that: investments of investors of either Contracting Party shall not be expropriated indirectly through measures having effect equivalent to direct

A

expropriation.

67. Taking the interpretations of "expropriation" and "having effect equivalent to expropriation" into consideration, the Respondent submits that the Pro-Environment Measures cannot constitute indirect expropriation because the Measures do not have "effect equivalent" to a direct taking of the Claimant's investment.

B

C

68. In this factual context before the Tribunal that the Claimant alleges to constitute expropriation, the only remotely feasible characterization of an indirect expropriation is as follows: The Claimant alleges that the Respondent has indirectly expropriated the Claimant's shares in RPC by causing a devaluation of the Claimant's shares through the Pro-Environment Measures.

D

E

69. The Respondent refutes the allegation that Pro-Environment Measures amount to expropriation. Firstly, the Respondent's Measures did not exceed it's the legitimate use of it regulatory power. Second, a devaluation in shares does not amount to a total deprivation of the Claimant's investment. Third, the Claimant's loss is attributable to the independent exercise of the Claimant's investing sensibilities, instead of the Respondent's Measures.

F

G

70. The Respondent submits that the degree of interference with the Claimant's investment does not justify a violation of Article 5(1). As stated in Bayindir v Pakistan, a critical issue regarding the degree and nature of the interference with the Claimant's investment is the "intensity or the effect of such conduct" with respect to the investment. (para 443) There is no significant causative link between the Respondent's active endorsement of pro-environment groups, which includes anti-oil activists, and

A

the resulting drop in the value of the Claimant's shares in RPC. Furthermore, the support for such groups was not a discriminatory move aimed to injure the profits of RPC, and eventually the value of the shares of the Claimant. The Pro-Environment Measures were a legitimate and proportionate response against the backdrop of the growing unrest and the international sentiment regarding the effects of petrol usage on the environment. The Pro-Environment were important to contain the public unrest that were sparked by the oil-spill affecting the main industries of Redentia. The Respondent's measures did not exceed its regulatory powers.

B

C

D

71. The Claimant's devaluation of his shares does not amount to a total, or even substantial, loss of his investment. The term "expropriation", particularly direct expropriation, implies that the taking of the private investment is total. Hence, measures that do not have the "effect equivalent" to the complete taking of a private investment will not amount to an indirect expropriation. The Pro-Environment Measures has not deprived the Claimant of the substance of his investment. The title of the shares still remains under the Claimant's ownership and the Claimant is capable of selling his shares based on an independent assessment and investment foresight. These Measures have not affected his right to do so.

E

F

G

72. The Respondent also submit that there has been no breach of Article 3. The Pro-Environmental Measures were both reasonable and non-discriminatory policies, and were policy decisions made after careful consideration by the Respondent.

A

2. The Pro-Environmental Measures are reasonable.

B

73. The Redentia – Artina BIT does not define the terms "unreasonable". To assist this tribunal in determine the meaning of the term, the Respondent submit that the ordinary meaning rule in Article 31 of the VCLT and dictionaries are not extremely useful for this exercise,[22] as previous tribunals generally seek guidance from the ICJ case of *ELSI Elettronica Sicula SpA*[23] for the definition.[24] It should be noted that the terms "arbitrary" and "unreasonable" are generally used interchangeably in the BIT context.[25]

C

D

74. In *ELSI*, the ICJ defined arbitrariness as "something opposed to the rule of law… a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial proprietary". [26]

E

75. Previous tribunal decisions demonstrate that this generally means that the State's actions must not disregard its rule of law. For example, in the case of *LG&E*, no unreasonable treatment was found because: even though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration… result of reasoned judgement rather than simple disregard of the rule of law.[27] This is supported by the proviso "subject to its laws and

F

G

[22] U. Kriebaum, *Arbitrary/ Unreasonable or Discriminatory Measures*, in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), *International Investment Law* (Baden: Nomos, forthcoming 2013) 9.
[23] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* ICJ Report 1989 RLA 56.
[24] *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) para 392.
[25] Christoph H. Schreuer, *Protection against Arbitrary or Discriminatory Measures* in Catherine A. Rogers and Roger P. Alford, *The Future of Investment Arbitration* (Oxford University Press 2009) 183.
[26] *ELSI*, (n.15) 15.
[27] *LG&E v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para 162.

A

regulations" in that Article 3(3) begins with.

B

76. The Respondent would also like to highlight another useful case, *EDF v Romania*, that utilises a test proposed by Professor Schreurer. In that case, the tribunal gave content to the term "unreasonable" using the following objective criteria:

C

a. Whether the measure inflicts damage on the investor without serving any apparent legitimate purpose;

D

b. Whether the measure is based on legal standards, or on discretion, prejudice or personal preference;

c. Whether the measure was taken for reasons that are different from those put forward by the decision maker; and

E

d. Whether a measure was taken in wilful disregard of due process and proper procedure.[28]

77. This tribunal should note that Article 2(2) of the UK – Romania BIT in that case is extremely similar to Article 3 in the present case, and hence should heavily consider utilising the *EDF* tribunal's interpretation of "unreasonable".

F

78. The Respondent submits that applying these criteria to the present case, the Pro-Environmental Measures are clearly reasonable. This tribunal only needs to assess whether the Respondent had acted after due consideration, within the due process and procedure of its own laws. The merits or demerits of these measures are not one for the Tribunal to judge. If that was the case, then tribunals will be infringing upon the Respondent's powers to govern and make national decisions.

G

[28] *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) para 303.

A

79. In the present case, the Pro-Environmental Measures was implemented to protect Redentia's fishing industry and environment, which are clear legitimate public interests. The measures were also taken only after consultations of various experts from the United Nations, and received sound unanimous advice and support for its subsequent action. This demonstrates that the Measures were the result of due process and reasoned judgement. There is also no evidence that these measures were taken for any other hidden or ulterior purposes. Hence, this Tribunal should find that the Pro-Environmental Measures were reasonable.

B

C

D

3. The Pro-Environmental Measures are non-discriminatory.

80. The Redentia – Artina BIT does not define the terms "discriminatory". To assist this tribunal in determine the meaning of the term that is relevant for the current arbitration, the Respondent submit that the definition of "discriminatory" should be the one found in Black's Law Dictionary:

E

F

> Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.[29]

G

81. The Respondent submits that the applicable test for discrimination can be found in the case of *BG v Argentina*, where under this test, it is necessary to:

a. Identify the relevant entities of the national treatment comparison, to determine whether they are in like

[29] Bryan A. Gardner, *Black's Law Dictionary (10th ed. 2014)* (Thompson Reuters, Westlaw).

circumstances;

b. Consider the relative treatment received by each entity to ascertain the best level of treatment; and

c. Consider any factors which justify the differential treatment.[30]

This is a reasonable test that stays faithful to the clear legal definition of "discriminatory", which does not seem controversial.

82. The Respondent submits that the comparable entity should be that of an investor in other petroleum industries within Redentia. The basis of comparison is simply because they are all within the same industry. There is hence no discrimination towards foreign investors, especially since the Claimant only owns a 30% stake in the affected petroleum company. The rest of the shareholders, foreigner or Redentian, are all subjected to the same treatment. Any other investor with investments within the petroleum industry are subjected to the same problems.

83. It is also submitted that the basis of comparison should not be expanded to outside the petroleum industry. This is because the Claimant is only an individual investor who does not fully own the affected petroleum company. The most natural and fair entity that he should be compared to is a similar investor of the same company. As both of them, whether the "similar investor" is Redentian or foreign, is subjected to the same treatment, this tribunal should find that there is no discriminatory treatment.

84. Even if this Tribunal disagrees and decides that the appropriate comparable entity is that of another investor who has invested

[30] *BG Group Plc. v Republic of Argentina*, UNCTIRAL, Final Award (24 December 2007) para 356.

in a natural gas company, on the basis that both investors are involved in the energy industry, the Respondent is still confident that it is not guilty of discriminatory treatment. While the Respondent acknowledges that national policies have favoured the natural gas industry over the petroleum industry, there are ample justifications as to why the industries must be treated differently.

85. Although both industries are technically within the energy sector, there are clear differences between the two industries. Firstly, natural gas is clearly more environmentally friendly than petroleum. This alone is a large policy reason for a government to approach the two sectors differently. Secondly, the natural gas industry was a mere fledging industry (10% of vehicles in 2013), as opposed to the more established petroleum one (80%). The considerations for growing a small industry should naturally be different from handling a larger established one. Therefore, considering the marked differences between the two industries at the time the Pro-Environmental Measures were introduced, it is unfair to expect the Respondent to accord the two sectors equal treatment.

86. The Respondent would finally like to highlight to the Tribunal that it would be highly unfair and unreasonable to expect the Respondent accord equal treatment to both the petroleum and natural gas industries. Casting aside the extensiveness of the Pro-Environment Measures for now, this would mean that it is impossible for the Respondent to institute any policy that treats the two sectors even slightly differently at all. This ludicrous result surely cannot be what the BIT intended to do. Therefore, the Respondent submits that this Tribunal should find that there was no discriminatory treatment applied by the Respondent to

A

the Claimant.

D. In any case, the Respondent can successfully rely on a defence of necessity to protect the right of people in Redentia to a safe and clean environment.

B

87. The Respondent submits that it can rely on the customary international law (CIL) defence of necessity, as codified by Article 25(1) of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (*Draft Articles*). The existence of the defence at CIL and its applicability to investment arbitration has been confirmed by various tribunals, namely the Argentine Gas cases of *CMS*,[31] *Enron*,[32] *Sempra*,[33] and *LG&E*.[34]

C

D

88. The main legal materials that this tribunal will need to rely on to guide its decision in this issue are namely the *Draft Articles* themselves, alongside the accompanying ILC Commentary. This tribunal will also find the past decisions of the ICJ, as well as other ICSID tribunals, useful in making their final decision.

E

89. The Respondent will submit that the defence of necessity as codified by Article 25(1) can apply to an economic – environmental type of threat which is occurring in the present case.

F

G

90. The Respondent also submits that the defence has not been precluded by Article 25(2), as the Redentia – Artina BIT does not exclude the possibility of invoking necessity, and neither

[31] *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 315.
[32] *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 303.
[33] *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02.16, Award (28 Sep 2007).
[34] *LG&E* (n.27).

A

has Redentia contributed to the situation of necessity.

91. Lastly, Respondent submits that the elements of the defence as set out in Article 25(1), namely the protection of an essential interest, the lack of a viable alternative, a grave and imminent peril, and an objectively more essential interest, have all been satisfied. Therefore, the Respondent can successfully invoke the CIL necessity defence.

B

C

1. The defence of necessity clearly applies to economic and environmental threats.

D

92. The Respondent submits that the CIL defence of necessity, as codified by Article 25 of the *Draft Articles*[35], clearly applies to economic and environmental threats. This is based on the interpretation of what "essential interest" in Article 25(1) means. It is submitted that the term "essential interest" within Article 25 necessarily includes economic and environmental interests of the host state.

E

93. Firstly, the use of the term "interest" in Article 25 is a general term, which is contrary to a restrictive and narrow one that the Claimant is proposing. Taken broadly, it can easily mean various types of interests that a state can have, from political to socio-economic ones. The only qualification and limit that Article 25(1) places on this interest is that it must be "essential". Indeed, the accompanying commentary by the ILC notes that the scope of an interest "extends to particular interests of the State and its people".[36] This demonstrates that the scope of the term "interest" is meant to be wide, rather than

F

G

[35] International Law Commission, *Draft Articles on Responsibilities of States for Internationally Wrongful Acts* in *Report of the International Law Commission on the Work of its Fifty-third Session*, 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 25.
[36] ibid, Article 25, Comment [15].

narrow as the Claimants would like to assert.

94. The Respondent note that the interest under Article 25(1) must be an "essential interest". The *Draft Articles* state that the "extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged."[37] However, this demonstrates that the Claimants are plainly wrong to argue that "interest" in Article 25(1) should be interpreted narrowly, and cannot include environmental interests. In fact, the accompanying comments by the ILC note the invocation of the necessity defence towards a "wide variety of interests, including safeguarding the environment." [38] The ICJ has also utilised Article 25 to apply to environmental interests, "having no difficulty in acknowledging that the concerns [for Hungary's] natural environment … related to an "essential interest" of the State", within the meaning of Article 25 of the *Draft Articles*.[39] Therefore, the Respondent's environmental interests can qualify as an "essential interest" under Article 25.

2. The defence has not been precluded by Article 25(2) of the Draft Articles.

95. The Respondent also submit that Article 25(2) does not apply to preclude the necessity defence. The Respondent agree with the Claimant on their analysis of the *lex specialis* rule in Article 55 of the *Draft Article*[40], and their conclusion that Article 25(2)(a) is hence broader than Article 55. The Respondent also agrees that Article 6 of the Redentia – Artina BIT operates *lex specialis*. However, the Claimant is wrong in his submission that Article 6 operates *lex specialis* precluding Article 25(2)(a)

[37] ibid.
[38] ibid, Comment [14].
[39] *Gabčíkovo – Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ 92, para 53.
[40] *Draft Articles* (n.35) Article 55.

A

of the *Draft Article*.

B

96. The Respondent would like to clarify that Article 6 of the Redentia – Artina BIT operates *lex specialis* precluding Article 23 of the *Draft Articles*, which pertain to issues of *force majeure*. This should be clear from both Article 6 of the BIT and comments by the ILC that accompany Article 23[41] of the *Draft Articles*. Article 6 of the BIT promises to compensate investors for damage to investments "owing to war or other armed conflict, a state of national emergency, revolt, insurrection or other similar situation." Article 23 of the *Draft Article* is meant to preclude wrongfulness due to human intervention, such as "loss of control over a portion of the State's territory as a result of an insurrection or devastation by military operations."[42] The events in Article 23 in the *Draft Articles* are directly accounted for by Article 6 of the BIT. Hence, Article 6 operates *lex specialis* precluding Article 23, but not Article 25.

C

D

E

97. Applying the *ejusdem generis* maxim to Article 6, "other similar situations" must therefore only mean events related to *force majeure*, but not necessity. The *Draft Articles* intended to prevent the conflation of necessity with *force majeure*,[43] and this Tribunal must recognise that, and find that Article 6 does not preclude the necessity defence. Hence, Article 25(2)(a) of the *Draft Articles* do not apply.

F

G

98. There is nothing indicating that environmental crisis that Redentia was facing in mid-2013 was in any way caused nor contributed to by the Respondent. Hence, Article 25(2)(b) of the

[41] ibid, Article 23.
[42] ibid, Comment [3].
[43] ibid, Comment [1].

Draft Articles also do not apply. There is hence no bar to Respondent's invocation of the defence, and they only need to show that the elements of the defence as set out in Article 25(1) have been satisfied to rely on the defence.

3. The elements of the defence as set out in Article 25(1) have been satisfied.

99. There are 4 elements of the defence as set out in Article 25(1), namely:

a. The protection of an "essential interest" of the State;

b. The lack of a viable alternative;

c. A grave and imminent peril; and

d. A balancing of the "essential interest" protected against the international obligation infringed.

100. The Respondent submits that there is clearly an "essential interest" being protected in the present case. As the ICJ had unequivocally stated in Gabčíkovo – Nagymaros Project (Judgement), respect of the environment is of utmost importance and significance. It had also declared that there is a general international obligation of all States to respect the environment of other states.[44] Therefore, the Respondent's efforts to stem global warming via the Pro-Environmental Measures qualify as an essential interest of the State, and is in fact an "essential interest" of the international community.[45]

101. Furthermore, there is clearly a lack of a viable alternative to

[44] International Court of Justice, 1996, '*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*', para 29.
[45] United Nations Conference of the Parties, Twenty First Session, *Adoption of the Paris Agreement*.

tackle the threat to the environment that global warming poses to Redentia. A reduction of carbon emissions necessitated a reduction of reliance on fossil fuels such as petrol, to increased reliance on sources of energy that produce less carbon emissions such as natural gas. It is therefore inevitable that the Claimant's petroleum investment would be affected. Any solution that involves a reduction of carbon emissions can only be realistically dealt with by a reduction of reliance on petroleum, and natural gas "represents the most practical, realistic and easiest way to reduce pollution."[46]

102. The Respondent recognise that this element is failed if "there are other (otherwise lawful) means available, even if they may be more costly or less convenient".[47] Nevertheless, it is submitted that whatever "alternative solution" that the Claimant proposes that does not involve a reduction in petroleum reliance is simply a solution will not work in the long run. In the long run, as an integral part of protecting the environment, to effectively reduce greenhouse gas emissions, Redentia must see a lower reliance on greenhouse emissions-heavy fuels such as petroleum. The Pro-Environmental Measures to reduce reliance on petroleum were hence the "only way" the Respondent could tackle the global warming threat.

103. Global warming is also a "grave and imminent peril" to Redentia. The "gravity" of the peril relates to its severity, and this severity is always with respect to "whatever the [essential] interest" is.[48] In Gabčíkovo, the court was willing to accept that erosion of soil, which exposed drinking water resources to pollution, would have constituted a "sufficiently grave peril"

[46] International Gas Union Working Committee 5, *Natural Gas Vehicle (NGV) and United Nations Economic Commission for Europe Working Party on Gas Joint Report on Natural Gas for Vehicles*, 10.
[47] *Draft Articles* (n.35) Article 25, Comment [15].
[48] ibid.

had it been proved.[49] Therefore in the present case, global warming and melting icecaps that have caused irreversible environmental damage to Redentia's fishing industries and lush mountains, which pertain to consumable food and the natural environment, are analogous to what the ICJ found as grave in Gabčíkovo. Hence, global warming is a sufficiently grave peril which necessitated action from the Respondent.

104. The Pro-Environmental Measures were also necessitated by the "imminence" of the peril. The use of "imminent" over "immediate" shows that the peril that threatens an essential interest need not materialise in the near future. The ICJ in Gabčíkovo also noted that this also does not exclude a "long term peril", provided that the realisation of the peril is certain and inevitable.[50] It is submitted that the damage from global warming is clearly certain and inevitable. In any case, the damage that global warming threatened Redentia with had already materialised. Redentia has already suffered irreversible environmental damage, which necessitated the Pro-Environment Measures to prevent minimise further damage to the environment, which has also inevitably occurred.

105. Lastly, Article 25(1)(b) of the *Draft Articles* require a balancing of the interest protected with the interest infringed upon. The ILC Commentary states that this is to be assessed reasonably from the point of view of "the competing interests".[51] The Respondent submit that this is easily fulfilled. Tackling global warming is not merely in the interest of Redentia, but also the community of States. This clearly outweighs the prospective growth potential of any company within Redentia. Hence,

[49] *Gabčíkovo* (n.39) para 55.
[50] ibid, para 54.
[51] *Draft Articles* (n.35) Article 25.

A

Article 25(1)(b) of the *Draft Articles* has been fulfilled.

106. In light of the above, this tribunal should find that the Respondent is entitled to rely on a defence of necessity as is available to the Respondent, and its elements have been satisfied from the facts of the case.

B

V. CONCLUSION

C

107. In closing, this Tribunal does not have the jurisdiction to hear this case. The Respondent has not consented to ICSID arbitration, and the MFN clause does not offer such consent. There is also lack of *jurisdiction materiae personae* with respect to the Claimant's dual nationality.

D

108. Even if this case were to proceed to its merits stage, this Tribunal will find that the Respondent is not guilty of expropriation, unreasonable nor discriminatory treatment of the Claimant's investments. In any case, the Respondent is entitled to rely on a defence of necessity.

E

109. The Respondent humbly prays that this Tribunal grants judgement in favour of the Respondent, and fully dismiss the Claimant's action.

F

G

WALTER EXACT LLP
COUNSEL FOR THE
RESPONDENT

A

B

C

D

E

F

G