"SCA013"

UNCITRAL AD HOC TRIBUNAL

CLAIM 1

CLAIMANT 1 (C1): **AIRFRESH**

-AND-

RESPONDENT: **THE GOVERNMENT OF THE REPUBLIC OF BINDA**

&

CLAIM 2

CLAIMANT 2 (C2): **OXFORD**

-AND-

RESPONDENT: **THE GOVERNMENT OF THE REPUBLIC OF BINDA**

MEMORIAL ON BEHALF OF CLAIMANT

2018

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

¶¶/¶	Paragraph(s)
AAPL	Asian Agricultural Products Ltd.
ARB/Arb	Arbitration
Art/Art.	Article
Aug.	August
Austl.	Australia
BIT	Bilateral Investment Treaty
BNR	Binda National Rupee
BOO	Build Own Operate
C1	Airfresh
C2	Oxford
Cal. Ct. App	California Court of Appeal Cases
Can.	Canada
CIL	The Centre for International Law
CLOUT	Case Law on UNCITRAL Texts.
Comm.	Commercial
Corp.	Corporation
Ct.	Court
Dec.	December

Ed.	Edition
E.J.I.L.	European Journal of International Law
Eng.	England
EPC	Engineering Procurement and Construction Contracts
et al.	et alia
Eur. Ct. H.R.	European Court of Human Rights
Feb.	February
FET	Fair and Equitable Treatment
Fr.	France
Gen.	General
HARV. INT'L L.J	Harvard International Law Review
Hon'ble	Honorable
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Id.	Idem
I.I.L.J.	Institute for International Law and Justice
ILR	International law Report
Int'l Law Comm.	International Law Commission
J.	Journal

J. W. INV T.	Journal of World Investment and Trade
Jan.	January
L.R.	Law Reporter
Ltd.	Limited
Mar.	March
NGT	National Green Tribunal
No.	Number
Nov.	November
NZLR	New Zealand Law Reports
Oct.	October
Ont.	Ontario
p./pp.	Page(s)
PAE	Pollution Environment Ministry
PCA	Permanent Court of Arbitration
Perm.	Permanent
POTW	Privately Owned Treatment Works
Rep.	Report
SCC	Supreme Court Cases
Sep.	September
SEZs	Special Economic Zones
Supp	Supplement
Switz.	Switzerland
T.D.M	Transnational Dispute Management

T1	Tribunal 1
T2	Tribunal 2
TF	Tribunal fédérale
Trib.	Tribunal
U.K.	United Kingdom
U.S.	United States
UNCITRAL	United Nations Commission on International Trade Law Arbitration Rules
UNCTAD	The United Nations Conference on Trade and Development
USD	United States Dollar
v.	Verses
Venez.	Venezuela
ZR	Zurich Report

INDEX OF AUTHORITIES

I. STATUTES AND CONVENTIONS

1. UNCITRAL ARBITRATION RULES

2. IBA GUIDELINES ON CONFLICT OF INTEREST

II. BOOKS

III. CASES

1. UNCITRAL ARBITRATION CASES

3. ICC CASES

4. ICJ CASES/ PCIJ CASES/ PCA CASES

5. CLOUT CASES

6. OTHER CASES

IV. JOURNALS/ ARTICLES

V. OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Airfresh (C1) has the honor to submit the present dispute and its memorandum before this ad-hoc Tribunal at Finland under Art. 9 of the Agreement between C1 and the Respondent under the UNCITRAL Rules, governed by principles of *lex mercatoria* and good faith in contractual relations.

C1 has invoked the Jurisdiction of this honorable tribunal pursuant to **Art. *9***: ***Settlement of Disputes between an Investor and a Contracting*** Party of the Agreement between the Claimant and the Respondent.

Oxford(C2) has the honor to submit the present dispute and its memorandum before this ad-hoc Tribunal at Singapore under Art. 13 of the Agreement between C2 and the Respondent under the UNCITRAL Arbitration Rules.

C2 has invoked the Jurisdiction of this honorable tribunal pursuant to ***Chapter IV: Settlement of Disputes between an Investor and a Party,*** **Art. *13*** of the Agreement between the Claimant and the Respondent.

STATEMENT OF FACTS

BACKGROUND

Binda, a welfare state has two major problems i.e. shortage of drinking water and that concerning untreated wastewater discharges in Binda. Under the Written Constitution of the Government of Binda, the individual states of the union are vested with the sole authority to approve, finance and implement programs and implementing regulations for environmental control. Newly enacted national legislation requires point sources of discharge, both domestic and industrial, into a receiving water body such as a river or lake, to meet tertiary drinking water standards.

MECHANISM OF WATER CLEANSING

The treated wastewater, is pumped to receiving bodies of water or in the case of reclaiming drinking water from the wastewater, is piped and pumped to public entities and private industries for their use. The planning, design and construction of the wastewater collection and pumping network is financed by the PAE ministry's construction program, based on the experience and reputation of foreign engineering and construction firms under EPC contracts.

INCOME FOR INVESTORS

The income to be earned by the foreign investors is to be primarily generated by a unit charge in BNR per 1,000 kilolitres of wastewater treated. In cases where wastewater was converted to drinking water, a separate charge is fixed based on BNR per 1,000 kilolitres of drinking water produced. The foreign promoters of the environmental projects essentially operate on a build-own-operate (BOO) basis.

CURRENCY FLUCTUATIONS IN BINDA

Binda is the 4th largest consumer of crude oil in the world. Every 1 USD equivalent rise or drop in the crude oil price results in a significant increase or decrease in cost to Binda's economy.

However, the world economy began to feel the negative effects of the rise in international crude oil prices. The President of Petrollar issued an international diktat on the basis of its domination over the financial markets and international banks. The effect of the policy diktat was that Binda cannot purchase oil from that Middle East nation which is one of its largest suppliers.

CLAIM 1

The southern states of Smallnadu and Kukatuka in Binda, entered into a joint agreement for the clean-up and reuse of wastewater discharging into water bodies. Airfresh, which is a corporation established in the nation-state of Nuland qualified and invested in Kukatuka and was operating a hazardous waste landfill along with a treatment and disposal facility which was located close to the border of Smallnadu in compliance with Binda's Hazardous & Other Waste (Management & Transboundary Movement Rules) Rules 2016. But residents living adjacent to Airfresh's hazardous waste facilities in the neighboring state of Smallnadu launched a public agitation. the state administration and the state pollution control board to agitate a claim before the jurisdictional NGT for closure of the Airfresh facilities. The NGT found for the public on the grounds that it was not proven by Airfresh that it did not contribute to the elevated levels of contaminants in the drinking water wells and the activity of Airfresh was stopped through an interim stay.

CLAIM 2

Bingee contained the biggest river in Binda, Junjee which was polluted. Oxford invested its services to clean up Junjee, the supply rate for the supply for drinking water was 50 BNR per 1,000 Litres. An escalation clause of 10% per year on the agreed rate for 5 years, was fixed under the contract signed by Oxford but Bingee directed Oxford to revise the escalation clause to 5% per year and resort to austerity measures.

STATEMENT OF ISSUES

The following questions have been raised before the Hon'ble Tribunal to consider:

I.WHETHER MR. WHITE BE REMOVED FROM THE ARBITRAL TRIBUNAL?

II. WHETHER THE TRIBUNALS HAVE JURISDICTION TO DECIDE ON THE MATTER UNDER THE PRESENT BIT'S?

III. WHETHER THE REGULATORY ACTIONS OF THE RESPONDENTS AMOUNT TO A BREACH OF ITS OBLIGATIONS UNDER THE BINDA-NULAND BIT AND CONSEQUENTLY ENTITLE C1 TO A COMPENSATION OF 200 CRORES BNR?

IV. WHETHER THE REGULATORY ACTIONS OF THE RESPONDENTS AMOUNT TO A BREACH OF ITS OBLIGATIONS UNDER THE PETROLLAR BINDA BIT AND CONSEQUENTLY ENTITLE C 2 TO A COMPENSATION OF 1000 CRORES BNR?

SUMMARY OF ARGUMENTS

ISSUE 1: It is humbly submitted that Mr. White must not be removed from the arbitral tribunal pertaining to the reasons which are four-fold. *Firstly*, the Respondent has waived its right to sustain the challenge by failing to place objections. *Secondly*, T2 does not have the jurisdiction to hear the present procedural challenge. *Thirdly*, in arguendo Mr. White's connections and decisions do not tantamount to a breach of the "justifiable doubts" standards under the UNCITRAL Arbitration Rules. *Fourthly*, the frivolous challenge of the Respondent interferes with the C2's right to choose its own arbitrator.

ISSUE 2: T1 has the jurisdiction to hear C1 and T2 has jurisdiction to hear C2. The argument can be fivefold. *Firstly*, the Tribunals are competent to rule on their own jurisdictions. *Secondly*, negotiation clauses under the BITS are invalid and unenforceable due to inherent uncertainty. *Thirdly*, the jurisdictions are not barred by non-binding pre-arbitral procedures. *Fourthly*, in arguendo, the Tribunals should assume jurisdictions due to implied futility. *Fifthly*, the right to raise jurisdictional objections against the respective tribunals is waived due to unreasonable delay.

ISSUE 3: The regulatory actions of respondent amount to a breach of its obligations under Binda-Nuland BIT and consequently entitle *Firstly*, C1 failed to fulfill its substantive obligations under the Binda-Nuland BIT because C1's assets qualify as an investment under the Binda-Nuland BIT, the Respondents actions failed to promote and protect the investments of the C1, the Respondent expropriated C1's investment and failed to fulfill its legitimate expectations. *Secondly*, the Respondents actions are not precluded from liability under the Binda-Nuland. *Thirdly* and Consequently C1 is entitled to damages worth 200 Crores BNR.

ISSUE 4: The regulatory actions of the respondents amount to a breach of its obligations under the Binda-Petrollar BIT. This consists of three-fold arguments. *Firstly,* the Respondents actions are not precluded from liability under Chapter III of the Binda-Petrollar BIT. *Secondly,* the Respondent has failed to fulfill its obligations under Chapter II of the Binda-Petrollar BIT because the Respondent failed to provide adequate national treatment, expropriated the investment of the C2 and the Respondent failed to permit free transfer of funds. *Thirdly,* and Consequently C2 is entitled to damages worth 1000 crores BNR.

.

ARGUMENTS ADVANCED

ISSUE 1: WHETHER MR. WHITE'S APPOINTMENT IS VITIATED BY BIAS?

(¶1) It is humbly submitted that Mr. White must not be removed from the arbitral tribunal pertaining to the reasons which are four-fold. *Firstly,* the Respondent has waived its right to sustain the challenge by failing to place objections. [**A]** *Secondly,* T2 does not have the jurisdiction to hear the present procedural challenge. **[B]** *Thirdly,* in arguendo Mr. White's connections and decisions do not tantamount to a breach of the "justifiable doubts" standards under the UNCITRAL Arbitration Rules. [**C]** *Fourthly,* the frivolous challenge of the Respondent interferes with the C2's right to choose its own arbitrator. [**D]**

A. THE RESPONDENT HAS WAIVED ITS RIGHT TO SUSTAIN THE CHALLENGE BY FAILING TO PLACE OBJECTIONS

(¶2) Art. 13 of the UNCITRAL Arbitration Rules obligate settling every challenge on arbitrator within 30 days of the notice of challenge.[1] A party waives the right to object[2] to non-compliance with the UNCITRAL Model Law or the arbitration agreement if such an objection is made after the expiry of the prescribed time limit.[3] This period stands lapsed on 28th June 2018 as the notice of challenge was made on 28th May, 2018.[4] For the waiver to apply, it is presumed that the party must have either known, or ought to have known about the relevant non-compliance.[5] After the expiration of the 30-day time period, a challenging party's right to seek a decision on the

[1] United Nations Commission on International Trade Law Arbitration Rules art. 13 [hereinafter UNCITRAL Arbitration Rules].
[2] Oberlandesgericht [OLG] [Higher Regional Court] Jul. 16, 2002, EINSZU NULL FÜR DIE VERBANDSSCHIEDSGERICHTSBARKEIT DES [DFB] 88, 2002 (Ger.).
[3] UNCITRAL Arbitration Rules, *supra* note 1, art. 4.
[4] Moot Proposition, Annexure-IV.
[5] Model Law Secretariat Commentary art. 4, ¶ 1 [hereinafter Model Law Commentary].

challenge, unless agreed, is waived.[6] Since 30 days have passed a request by C2 for a decision has not been made, constitutes in itself a waiver of the right to ever obtain a decision on the challenge under the rules.[7]

(¶3) Assuming in arguendo, that the right does not stand waived due to the reasons stated above, the tribunal can only exercise its power flowing from Art. 17 (1) of the UNCITRAL Arbitration Rules to identify the implications of missing the deadline to resolve the dispute.[8] Art. 17 of the Rules prescribes that the Tribunal must mandatorily conduct arbitration in a manner[9] that [i] ensures equal treatment of parties; [ii] provides both parties a reasonable opportunity of presenting their case; [iii] provide a dispute resolution process which is efficient and avoids unnecessary delay and [iv] is fair.

(¶4) *Firstly*, the tribunal can ensure equal protection by means of procedural justice.[10] Procedural justice can be identified based on UNCITRAL Arbitration Rules and the BIT.[11] C2 and Respondent have been given an equal opportunity to choose the arbitrator and the procedure governing the arbitration in the agreement signed.[12] This has been identified as sufficient grounds for procedural justice through multiple case laws.[13] *Secondly,* the concept of reasonable opportunity to present a party's case is limited by deadlines.[14] It is an established position of law that due process is considered complicit in the event that the time given is considered sufficient

[6] DAVID CARON ET AL., THE UNCITRAL ARBITRATION RULES: A COMMENTARY 256 (2006).
[7] UNCITRAL Arbitration Rules, *supra* note 1, art. 32; s*ee also* Ground 2.2, Tribunal fédérale [TF], Oct. 17, 2017, 4A_53/2017.
[8] UNCITRAL Arbitration Rules, *supra* note 1, art. 17 (1).
[9] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2150–51 (2009).
[10] Soh Beng Tee & Co. Pte. Ltd. v. Fairmount Development Pte. Ltd. [2007] 3 SLR (4) 86 [hereinafter Beng Tee]; *see also* Noble China Inc. v. Lei Kat Cheong, (1998), 42 O.R. 3d 69 (Can. Ont. C.A.).
[11] THE UNCITRAL MODEL LAW AFTER TWENTY-FIVE YEARS: GLOBAL PERSPECTIVES ON INTERNATIONAL COMMERCIAL ARBITRATION 180 (Frédéric Bachand& Fabien Gélinas eds., 2013).
[12] Art. 18.1, Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates of Petrollar on The Promotion And Protection of Investments [hereinafter Binda-Petrollar BIT].
[13] Beng Tee, *supra* note 10, at 29.
[14] *Trustees of Rotoaira Forest Trust v Att'y Gen.* [1998] 2 NZLR 452 (SC), CLOUT Case No. 658.

to make submissions.[15] The timelines can be identified from party's consent.[16] The Respondents non-compliance and failure to exhaust remedies due to non-compliance limits the right of the Respondent.[17] *Thirdly,* the efficient resolution of disputes can be identified by procedural lapses.[18] Procedural lapses are identified in instances of uncertain or duplicitous litigation.[19] The Respondents failed to comply with the present deadline or provide reasons for non-compliance, thereby rendering the chance to conduct hearing inefficient.[20] *Fourthly,* a proceeding is said to be fair when the parties get a sense that the proceeding is unbiased,[21] they have control over the procedure and the parties arbitrate in good faith.[22] The non-compliance with deadlines and failure of Respondents to give reasons for non-compliance with deadlines is contrary to principles of good faith as said in a plethora of cases.[23]

B. THE PRESENT ARBITRAL TRIBUNAL DOES NOT HAVE THE AUTHORITY TO HEAR THE PRESENT CHALLENGE

(¶5) It is humbly submitted that the authority to decide a challenge on arbitrators flows from the UNCITRAL Arbitration Rules.[24] Here that authority is vested in the appointing authority who may be appointed either in the UNCITRAL Arbitration Rules[25] or the BIT.[26] However, in the

[15] *Id.*
[16] Binda-Petrollar BIT, *supra* note 12, art. 19.6.
[17] Binda-Petrollar BIT, *supra* note 12, art. 15.1.
[18] INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 70 (Giuditta Cordero-Moss ed., 2013).
[19] Simone Stebler, *The Problem of Conflicting Arbitration and Forum Selection Clauses*, 31 ASA BULLETIN 27, 43 (2013).
[20] Abaclat and Others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5, ¶ 137 (Aug. 4, 2011).
[21] Richard W. Naimark& Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT'L BUS. LAW 203, 205 (2002).
[22] David C. Sawyer, *Revising the UNCITRAL Arbitration Rules: Seeking Procedural Due Process Under the 2010 UNCITRAL Rules for Arbitration*, 1 INT'L COMM. ARB. BRIEF 24, 26 (2011).
[23] Science Applications International Corp. v. Greece (Final Decision), ICC Case No. 16394/GZ/MHM, ¶ 241-242 (Jul. 2, 2013).
[24] Binda-Petrollar BIT, *supra* note 12, art. 16.1.
[25] UNCITRAL Arbitration Rules, *supra* note 1, art. 6.
[26] Binda-Petrollar BIT, *supra* note 12, art. 18.4.

present case the appointing authority has not been appointed after the challenge, rather this tribunal has/ itself chosen to preside over the challenge in its capacity assuming the role of appointing authority.[27]

(¶6) The rules provide that the prior agreement between the parties will be used to determine the appointing authority.[28] In the present matter that is essentially the BIT which provides very specifically that the appointing authority will be the PCA Secretary General[29] who is Hugo Hans Siblesz.[30] Since the authority lies with the appointing authority, this tribunal will have no power to pass an award in connection with this challenge.[31] A number of decisions[32] have stressed on the importance of a third-party institution administering challenge placed on arbitrators to determine independence and impartiality and thus this tribunal has no authority in the instant case.[33] According to a commentary of UNCITRAL Arbitration Rules, the phrase "at any time" means a party can propose the Secretary General of the PCA to appoint an appointing authority whenever during the arbitral proceeding.[34] The same principle must thereby be applied in the instant case allowing the Appointing Authority to preside the challenge.

[27] Moot Proposition, Annexure-V.
[28] UNCITRAL Arbitration Rules, *supra* note 1, art. 6.
[29] Binda-Petrollar BIT, *supra* note 12, art. 18.3.
[30] *Secretary General*, PCA-CPA.COM, https://pca-cpa.org/en/about/introduction/secretary-general/ (last visited August 11, 2018).
[31] BORN, *supra* note 9, at 3296.
[32] DAVID STEWART & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE, THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 128 (1992); *see also* CARON ET AL., *supra* note 6, at 198.
[33] ISPRAMED, *Report on Independence and Impartiality of Arbitrators* 12, http://www.ispramed.it/root/wp-content/uploads/2012/09/Report-on-Independence-and-Impartiality-of-Arbitrators6.pdf.
[34] JAN PAULSSON & GEORGIOS PETROCHILOS, REVISION OF THE UNCITRAL ARBITRATION RULES: A REPORT 514-515 ¶ 14 (c) (2006).

C. IN ARGUENDO, MR. WHITE'S CONNECTIONS AND DECISIONS DO NOT AMOUNT TO A BREACH OF THE "JUSTIFIABLE DOUBTS" STANDARD UNDER THE UNCITRAL ARBITRATION RULES AND THE BINDA-PETROLLAR BIT

(¶7) It is humbly submitted that Respondent alleges that Mr. White should be removed from the arbitral tribunal due to his connection with his niece (which was not disclosed) creating doubts as to the arbitrator's independence and impartiality.[35] However, C2 submits that T2 shall not remove Mr. White on the ground that there is no justifiable doubt as to Mr. White's impartiality and independence.

(¶8) Pertaining to the aforesaid obligations that C2 seeks to contend, wherever there is a conflict in the obligations imposed by the two rules i.e. the UNCITRAL Arbitration Rules and the BIT, the UNCITRAL Rules will prevail as is envisaged by the treaty.[36] This has been substantially settled in a number of arbitrations conducted by UNCITRAL ad hoc arbitrations.

(¶9) Under the UNCITRAL Arbitration Rules,[37] an arbitrator may be challenged only if there are circumstances that give rise to justifiable doubt as to his impartiality and independence. One German Court held that an arbitrator could be challenged where the circumstances give rise to reasonable grounds for objectively suspecting its impartiality.[38] The invocation of the justifiable doubts doctrine in the present case in invalid because the circumstances in the present case do not qualify the objective test of independence and impartiality.[39]

---

[35] Moot Proposition, Annexure-IV.
[36] Binda-Petrollar BIT, *supra* note 12, art. 19.11.
[37] UNCITRAL Arbitration Rules, *supra* note 1, art. 12 (1).
[38] UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 65-66, ¶¶ 10-11 (2012), http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.; *see also* OLG, Dec. 19, 2001, docket number 10 SchH 3/01 (Ger.), *available* at JURIS [hereinafter OLG 10 SchH 3/01].
[39] Binda-Petrollar BIT, *supra* note 12, art. 19.11.

(¶10) The IBA Guidelines define circumstances for this objective test[40] and the IBA Guidelines (for determining justifiable doubts) have been sourced from UNCITRAL Model Law.[41] The Green List within the IBA Guidelines provides for those circumstances where the failure to disclosure cannot be considered so as to create justifiable doubts and entail disqualification.[42] In this present case the relations of the arbitrator are with his relative i.e. with his niece who works in a firm that holds minority shares in C2's company.[43] An entry similar to the present circumstances is entry 4.4.2 in the green list which provides that if arbitrator holds insignificant shares in a party or its affiliates then the same is not required to be disclosed.[44]

(¶11) In the present case, the arbitrator is not even personally holding any shares and it is merely his niece's financing company who is holding these shares which is automatically discharges the obligation to disclose in the present case.[45] In this regard the Indian Supreme Court had held that being an employee of a party to arbitration did not *ipso facto* raise a presumption that the arbitrator was biased, partial or lacked independence,[46] thus validating the decision to not disclose the circumstances.

(¶12) It is humbly submitted that to remove an arbitrator, the interest must be "direct" and "definite" not "remote" "uncertain" and "speculative".[47] Many decisions[48] have found that whether there is direct or indirect financial relationship with the party or counsel, this kind of

---

[40] International Bar Association Guidelines General Standard 2 (b) [hereinafter IBA GS]; *see also* Neomi Rao et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. INT'L L, 433, 442 (2004).
[41] UNCITRAL Arbitration Rules, *supra* note 1, art. 11.
[42] IBA Guidelines Part II, Green List [hereinafter IBA GL].
[43] Moot Proposition, Annexure IV.
[44] IBA GL, *supra* note 42, at Green List 4.4.2.
[45] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 344 (200-8).
[46] Department of Telecommunications v. Gujarat Co-operative Milk Marketing Federation Ltd. (2010) 10 S.C.C. 86 (India).
[47] Giddens v. Board of Education, 1947 Ill. 398, ¶ 167.
[48] S & T Oil Equipment and Machinery Ltd v. Romania, ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceedings (May 11, 2009); *see also* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

relationship does not certainly constitute that the arbitrator is not independent.[49] In the present matter the submission of claim and challenge UNCITRAL Arbitration will imply that the "objective test" (derived from UNCITRAL Model Law) will apply.[50] The UNCITRAL Arbitration rules only use IBA Guidelines in a number of decisions to apply the objective test.[51] The IBA guidelines on Conflict of Interest as stated above codify circumstances of such a nature that create justifiable doubts.[52] The present case is not a circumstance[53] that can create justifiable doubts within these guidelines.[54] The objective test analysis has been conducted in a number of decisions[55] and circumstances similar to the present case[56] have been regarded as not creating justifiable doubts.[57]

[49] YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 122 (2d ed. 2005); *see also* Mueller v. Allen, 463 U.S. 388 (1983).
[50] National Grid Plc v. The Argentine Republic, UNCITRAL Arbitration Award, ¶ 165 (Nov. 3, 2008); *see also* Helena Jung, The standard of independence and impartiality for arbitrators in international arbitration: A comparative study between the standards of the SCC, the ICC, the LCIA, and the AAA 21 (2008) (unpublished Master's Thesis, Uppsala University) (on file with author).
[51] OLG 10 SchH 3/01, *supra* text accompanying note 38.
[52] IBA GS, *supra* note 40, at General Standard 2 (b).
[53] OLG, July 5 2006, docket number 34 SchH 05/06 (Ger.), *available* athttp://www.dis-arb.de/de/47/ datenbanken/r-spr/olg-münchen-az-34-schh-05-06-datum-2006-07-05-id557; *see also* Jung Science Information Technology Co. Ltd. v. ZTE. Corporation, [2008] 1 H.K.C.F.I. 606 (C.F.I).
[54] IBA GS, *supra* note 40, at General Standard 4.
[55] GEA Group Aktiengesellschaftv. Ukraine, ICSID Case No. ARB/08/16, Award, ¶ 150-151 (Mar. 31, 2011); s*ee also* Malicorp Limited v. The Arabian Republic of Egypt, ICSID Case No. ARB/08/18, Award, ¶ 110 (Feb. 7, 2011).
[56] ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 35 (Feb. 27, 2012): *see also* Vladimir Berschader and MoïseBerschader v. The Russian Federation, SCC Case No. 080/2004, Award (Apr. 21, 2006).
[57] Aravali Power Company Private Limited v. M/s Era Infra Engineering Limited, Civil Appeal No. 12627-12628 of 2017 (India).

D. THE FRIVOLOUS CHALLENGE OF THE RESPONDENT INTERFERES WITH THE C2 RIGHT TO CHOOSE ITS OWN ARBITRATOR

(¶13) It is humbly submitted that C2 has a right to choose its own arbitrator and the right to challenge subsists as far as the limitation period to applying that challenge remains.[58] In the present matter the tribunal does not have jurisdiction and the party that requires a remedy has also chosen to waive its claim for the challenge.[59] If after all the institutional remedies have been waived by the Respondent yet a relief is granted then the same will be a very fundamental infringement of the right of C2 itself.[60] This same position was reiterated in an array of common[61] and civil law decisions.[62] This is based on the logic that allowing scope for remedy in spite of failure to exhaust remedies in the rules will frustrate the entire concept of providing any procedure for challenge.[63]

ISSUE 2 WHETHER THE TRIBUNALS HAVE JURISDICTION TO DECIDE ON THE MATTER UNDER THE PRESENT BITS?

(¶14) It is humbly submitted that the T1 has the jurisdiction to hear C1 and T2 has jurisdiction to hear C2. The argument can be fivefold. *Firstly*, the Tribunals are competent to rule on their own jurisdictions [**E**]. *Secondly*, negotiation clauses under the BIT'S are invalid and unenforceable due to inherent uncertainty [**F**]. *Thirdly*, the jurisdictions are not barred by non-binding pre-arbitral procedures [**G**]. *Fourthly*, in arguendo, the Tribunals should assume jurisdictions due to

[58] Mr. Hassan Awdi, Enterprise Business Consultants, Inc. & Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of C2's Claims, ¶ 70 (Jul. 26, 2013).
[59] Binda-Petrollar BIT, *supra* note 12, art. 21.
[60] Diane A. Desierto, *'Host State Controls over the Offer to Arbitrate: Waivers Against Parallel Actions in Investor-State Arbitration'*, KLUWER ARBITRATION BLOG (Aug. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016-/08/10/host-state-controls-over-the-offer-to-arbitratewaivers-against-parallel-actions-in-investor-state-arbitration/.
[61] W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L C. L. QUAT. 26, 41-42 (1989).
[62] K. D. Kerameus, *Waiver of Setting-Aside Procedures in International Arbitration*, 41 A.J.C.L. 73, 77 (1993).
[63] Ronald S. Lauder v. The Czech Republic, UNCITRAL Arbitration Award, ¶ 204 (Sep. 3, 2001).

implied futility [**H**]. *Fifthly*, the right to raise jurisdictional objections against the respective tribunals is waived due to unreasonable delay [**I**].

E.THE TRIBUNALS ARE COMPETENT TO RULE ON THEIR OWN JURISDICTIONS

(¶15) It is humbly submitted that the internationally accepted principle of *Kompetenz-kompetenz*[64] is expressly recognized in the UNCITRAL Model Law[65] as well as the UNCITRAL arbitration rules[66]. T1 and T2 are empowered to rule on their own jurisdiction.[67] Any objection raised in respect of the same does not limit this power.[68] This power is also substantiated by a "wide consensus" approving of the competence to decide all aspects of jurisdiction including the existence,[69] scope,[70] interpretation[71] and validity[72] of the arbitration agreement.

F. NEGOTIATION CLAUSES UNDER THE BIT'S ARE INVALID AND UNENFORCEABLE DUE TO INHERENT UNCERTAINTY

(¶16) It is humbly submitted that the validity of negotiation agreements can be upheld only if a "reasonably clear" set of substantive and procedural requirements is settled[73] so as to avoid

[64] Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd., [1991] 2 H.K.C. 526 (H.C.), CLOUT Case No. 20 [hereinafter Fung Sang Trading].
[65] UNCITRAL Arbitration Rules, *supra* note 1, art. 16 (1).
[66] UNCITRAL Arbitration Rules, *supra* note 1, art. 23 (1).
[67] Rio Algom Ltd. v. Sammi Steel Co., 562 N.Y.S.2d 486 (1990), CLOUT Case No. 18 [hereinafter Rio Algom]; *see also* Fung Sang Trading, *supra* note 64.
[68] Rep. of the G.A. on Its Fortieth Session, ¶ 150, U.N DOC. SUPP. NO. 17 A/40/17 (2006) [hereinafter G.A. Rep. 40th Sess.].
[69] Skandia International Insurance Co. v. Mercantile & General Reinsurance Co., [1994] MAL 16, 16 (Supreme Court of Berm.), CLOUT Case No. 127 [hereinafter Skandia]; *see also* Private Co. "Triple V" Inc. v. Star Universal Co. Ltd. & Sky Jade Enterprises Group Ltd., [1995] MAL 11 (C.F.I.), CLOUT Case No. 109.
[70] Rio Algom Ltd. v. Sammi Steel Co., 562 N.Y.S.2d 486 (1990); *see also* Mind Star Toys Inc. v. Samsung Co. Ltd., [1992] 9 O.R. 3d. 374 (Can. Ont. Gen. Div.), CLOUT Case No. 32.
[71] Continental Commercial Systems Corp. v. Davies Telecheck International Inc., [1995] MAL 5, 8 (1) (British Columbia Supreme Court), CLOUT Case No. 357.
[72] Skandia, *supra* note 69; *see also* Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd., [1992] MAL 2 (2) (Ontario Court), CLOUT Case No. 29.
[73] Fluor Enterprises, Inc. v. Solutia Inc., 147 F. Supp. 2d 648 (S.D. Tex. 2001); *see also* Jillcy Film Enterprises v. Home Box Office, 593 F. Supp. 515 (S.D.N.Y. 1984); *see also Elizabeth Chong Pty Ltd v Brown* [2011] FCR 56 (Austl.).

situation of legal and practical impossibility.[74] This has led courts from both civil as well as common law jurisdictions[75] to hold indefinite agreements invalid on grounds of inherent uncertainty.[76] A "clear set of guidelines" is essential for enforcement of such a clause.[77] The English High Court laid down the test to determine the enforceability of a negotiation clause.[78] Under T1 as well as T2 the negotiation clauses[79] specifies that negotiation must be conducted "as far as possible". The phrase as far as possible creates an element of subjectivity.[80] The presence of such an element creates ambiguity about the party's participation in the process.

G. THE JURISDICTIONS ARE NOT BARRED BY NON-BINDING PRE-ARBITRAL PROCEDURES

(¶17) It is humbly submitted that international arbitral jurisprudence establishes that the Tribunal's jurisdiction is sacrosanct in circumstances where the satisfaction of pre-arbitral procedures is under dispute.[81] Clauses requiring efforts to reach an amicable settlement prior to arbitration 'are primarily expressions of intention' and 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute.'[82]

---

[74] Halifax Fin Services Ltd. v. Intuitive Sys Ltd. [1999] 1 All ER 303 (Eng.); *see also* PTE Ltd. v. China Ocean Shipping Co., [1989] Lloyd's Rep. 522 (Eng.).
[75] L. Trakman & K. Sharma, *The Binding Force of Agreements to Negotiate in Good Faith*, 73 CAM. L.J. 598, 599 (2014).
[76] Schoffman v. Cent States Diversified Inc., 69 F.3d 215, 221 (8th Circ. 1995); *see also* Copeland v. Baskin Robbins, [2002] 96 Cal. App. 4th 1251, 1257 (Cal. Ct. App.).
[77] Mocca Lounge Inc. v. Misak, [1983] 94 A.D.2d, 761 (N.Y. App. Div.).
[78] Wah v. Grant Thornton Int'l Ltd., [2012] EWHC 3198 [57] (Eng.); *see also* WN Hillas & Co. Ltd. v. Arcos Ltd., [1932] UKHL 2, 147 LT (HL) 503, 566 (appeal taken from Eng.).
[79] Binda-Petrollar BIT, *supra* note 12; *see also* Agreement Between The Government of The Republic Of Binda And The Eswatinian Kingdom Of Nuland For The Promotion And Protection Of Investments [hereinafter Binda-Nuland BIT].
[80] Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara, UNCITRAL Arbitration Award, ¶ 307 (May 4, 1999); *see also* The Government of Sudan v. The Sudan People's Liberation Movement/Army, PCA Case No. 2008-07, Award, ¶ 649 (July 22, 2009).
[81] Alps Finance & Trade AG v. The Slovak Republic, UNCITRAL Arbitration Award, ¶ 215 (Mar. 5, 2011); *see also* Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova, UNCITRAL Arbitration Award, ¶ 53 (Apr. 18, 2002).
[82] Dyalá Jiménez. Figueres, *Multi-tiered Dispute Resolution Clauses in ICC Arbitration*, 14 INT'L COMM. A. BUL. 76, 84 (2003).

Efforts to reach an amicable settlement did not form a condition precedent to arbitration and served as a mere emphasis on the Parties' intention to avoid litigation.[83]

(¶18) It is humbly submitted that a clause calling for amicable negotiations should not have the effect of "delaying an orderly resolution to the dispute".[84] The respondent's indefinite silence with respect to all the communication that has been attempted by the C2 operates as an implied futility of the negotiations which will harbor excessive delay. Denial of jurisdiction on grounds of mere pre-arbitral ambiguity is a gross obstruction to the Party's right to access of justice.[85]

H. IN ARGUENDO, THE TRIBUNALS SHOULD ASSUME JURISDICTIONS DUE TO IMPLIED FUTILITY

(¶19) It is humbly submitted that a 'pre-arbitration' procedural requirement may be satisfied after the initiation of arbitration.[86] The dismissal of arbitration so as to wait for the obvious futility in the pre-arbitral procedure has been criticized and discouraged by Tribunals on various occasions.[87] The C2 submits that this Tribunal should, therefore, rule in favor of its jurisdiction.[88]

I. THE RIGHT TO RAISE JURISDICTIONAL OBJECTION IS WAIVED DUE TO UNREASONABLE DELAY

[83] Case No. 11490 of 2012, 37 Y.B. Comm. Arb. 32 (ICC Int'l Ct. Arb.).
[84] Case No. 8445 of 2001, 26 Y.B. Comm. Arb. 167 (ICC Int'l Ct. Arb.).
[85] Tokyo Koto Saibansho [Tokyo H. Ct.] June 22, 2011, Hei 20 (gyoke) no. 2116, HANREI JOHO [Hanta] 64 (Japan).
[86] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 148 (July 8, 2016); *see also* TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, ¶¶ 110–112 (Dec. 19, 2008).
[87] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, IC-SID Case No. ARB/09/1, ¶ 135 (Apr. 8, 2016); *see also* Greece v. United Kingdom, 1924 P.C.I.J. p. 34 (ser. A) No. 2; *see also* Application of The Convention on The Prevention And Punishment of The Crime of Genocide (Croatia V. Serbia), 2008 I.C.J. Rep. 412, ¶ 87 (Nov. 18).
[88] Christopher Boog, *How to Deal With Multi-Tiered Dispute Resolution* Clauses, 26 ASA BUL. 94, 103 (2009); *see also* Rachel Jacobs, S*hould Mediation Trigger Arbitration in A Multi-Step Alternative Dispute Resolution Clause?*, 15 A. REV. INT'L ARB. 161, 179 (2004); *see also* JEAN FRANCOIS POUDRET& SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 13 (Stephen Birti trans., Sweet & Maxwell 2d ed. 2007).

(¶20) It is humbly submitted that the UNCITRAL Model Law[89] as well as the Arbitration rules expressly provide that a failure to promptly object to any procedural non-compliance "shall be deemed to be a waiver of the right" to make such an objection unless such delay can be reasonably justified.[90] Failure to respond does not bar a tribunal from continuing with the proceedings. C1 and C2 submit that the respondent received the notice of arbitration on and never raised the objection on any non-compliance of pre-arbitral requirements. This delay operates as a waiver on the respondent's right to object to jurisdiction. The underlying objective is to avoid undue delay.[91] Knowledge of non-compliance is a pre-requisite for waiver to apply.[92] This "knowledge" has to be interpreted circumstantially so as to imply that "a party could not have been unaware of the defect".[93] These circumstances are sufficient to establish that reasonable opportunity was provided to the Respondent at every step[94] which was not adequately reacted to and thus their right to object stands forfeited per the provisions of UNCITRAL Rules.

ISSUE 3 WHETHER THE REGULATORY ACTIONS OF THE RESPONDENTS AMOUNT TO A BREACH OF ITS OBLIGATIONS UNDER THE BINDA-NULAND BIT AND CONSEQUENTLY ENTITLE THE C1 TO A COMPENSATION OF 200 CRORES BNR?

(¶21) This consists of three-fold arguments. *Firstly*, C1 failed to fulfill its substantive obligations under the Binda-Nuland BIT. **[J]** *Secondly,* the Respondents actions are not precluded from liability under the Binda-Nuland [**K]** *Thirdly,* and ConsequentlyC1 is entitled to damages worth 200 Crores BNR. **[L]**

[89] UNCITRAL Arbitration Rules, *supra* note 1, art. 4.
[90] UNCITRAL Arbitration Rules, *supra* note 1, art. 32.
[91] PETER BINDER, ANALYTICAL COMMENTARY TO THE UNCITRAL ARBITRATION RULES 208-209 (2013).
[92] G.A. Rep. 40th Sess., *supra* note 68.
[93] BINDER, *supra* note 91.
[94] UNCITRAL Arbitration Rules, *supra* note 1, art. 17 (1).

J. C1 FAILED TO FULFILL ITS SUBSTANTIVE OBLIGATIONS UNDER THE BINDA-NULAND BIT

(¶23) It is humbly submitted that the Respondent failed to fulfill its substantive obligations under the Binda-Nuland BIT. This is an argument that may be put forth in a four-fold manner. *Firstly*, C1's assets qualify as an investment under the Binda-Nuland BIT. **[1]** *Secondly*, the Respondents actions failed to promote and protect the investments of the C1. **[2]** *Thirdly*, the Respondent expropriated C1's investment. **[3]** *Fourthly,* C1 failed to fulfill its legitimate expectations **[4]**

1. C1'S ASSETSQUALIFY AS AN INVESTMENT UNDER THE BINDA-NULAND BIT

(¶24) C1's assets meet the requisite legal as well as investment requirements under the Binda-Nuland BIT because the assets of C1 contributed in the operation of the land and further met all the requisites of investments under Art. 1 of Binda-Nuland BIT.[95] The assets of C1 were also in compliance with all laws and regulations. The liability pertaining to the contamination of drinking water cannot be validly imposed against C1 unilaterally because C1 was merely treating the waste in a POTW capacity. However, the responsibility of transferring this waste lay with the Respondents. So, the proximity lay with the Respondent as much as it did with C1 for imposing liability. This follows to provide that C1's investment was made in accordance with law and the principles of strict liability are arbitrarily imposed against C1. This is thus an investment that deserves protection as is provided under Art.1 of the BIT. The same is with the intent of promotion and protection of investment.

[95] Binda-Nuland BIT, *supra* note 79, art. 1.

2. THE RESPONDENT IS IN BREACH OF ITS OBLIGATION TO PROMOTE AND PROTECT INVESTMENTS

(¶25) The Respondent failed to fulfill its obligations of promotion and protection of investment due to two-fold reasons. *Firstly*, the Respondent failed to encourage and create favorable conditions for C1 to make investments in its territory. **[1]** *Secondly,* the Respondent failed to accord FET to the investment of C1. **[2]**

2.1. THE RESPONDENT FAILED TO ENCOURAGE AND CREATE FAVOURABLE CONDITIONS FOR C1 TO MAKE INVESTMENTS IN ITS TERRITORY

(¶26) It is submitted that encouragement and creation of favorable conditions can be identified by a State's guarantee of stability in a secure environment which extends to appropriate physical, commercial and legal standards in the host state.[96] The 3 standards of protection have been breached by the Respondents in the instant case.

(¶27) *Firstly,* the physical standard that is identified by physical security of the investment has been breached.[97] The Respondents citizens have occupied the land of C1through public opposition in Smallnadu and threatened to turn violent with the local community sabotaging the facility despite security measures offered by the local police.[98] The settled law on this point is that not acting efficiently against disturbances at the site of the landfill under dispute violates treaty provision providing for 'full protection and security"[99] The obligation of physical security

[96] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 729-730 (July 24, 2008) [hereinafter BiwaterGauff]; *see also* Shabtai Rosenne, *International Law Commission, Draft Articles on State Responsibility, Commentary (2) to Article 25*, New York: Kluwer Academic Publishers, (1991) [hereinafter Rosenne].
[97] Moot Proposition, ¶ A (d).
[98] Moot Proposition, ¶ A (d).
[99] Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 175-181 (May 29, 2003) [hereinafter Tecmed].

is coupled with an obligation to not let an investment be withdrawn or devalued.[100] The Respondent's failure to stop the agitation[101] has also caused the breach of this obligation and resulted in the devaluation of the investment.

(¶28) *Secondly,* the commercial standard of protection has also not been met because C1's investment suffered losses as it did not even get the chance to operate and provide returns. It has been settled by a plethora of decisions that commercial standards of protection are breached if there is no return on any investment.[102]

(¶29) *Thirdly,* the Respondent failed to afford legal standard of protection as a decision was imposed on the Respondent without adequate proof. The same has been recognized as a violation of the principles of natural justice by a wide number of tribunals.[103]

2.2 THE RESPONDENT FAILED TO ACCORD FET TO THE INVESTMENT OF C1.

(¶29) It is submitted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations[104] and to refrain from arbitrary and discriminatory practices.[105] The concept of reasonable and legitimate practices is that the foreign investor expects the host State to act transparently in its relations with the foreign investor. However, the state of Smallnadu arbitrarily revoked its pre-existing permit that was

[100] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL Arbitration Partial Award, ¶¶ 173-174 (Sep. 13, 2001) [hereinafter CME Czech Republic].
[101] Moot Proposition, ¶ A (d).
[102] Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 I.I.L.J. 953, 971 (2005).
[103] Compañía de Aguas del Aconquija, S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB /97/3, Award, ¶ 7.4.17 (20 August 2007).
[104] Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Award, ¶ 7.75 (Nov. 30, 2012).
[105] THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 396 (Christoph Schreuer et al. eds., 2008).

relied upon by the investor and caused harm to the investor.[106] This has been reiterated in a number of decisions.[107]

(¶30) It is humbly submitted that *Secondly*, "any arbitrary or discriminatory measure, by definition, fails to be fair and equitable".[108] The decision of the lower courts in the Respondent's State is discriminatory and arbitrary because C1 has been deprived of its investment based on unproven allegations.[109] This position of law is contrary to the concepts envisaged by the UNCITRAL decisions and rules pertaining to burden of proof and therefore is liable to be struck down.[110]

3. THE RESPONDENT HAS UNLAWFULLY EXPROPRIATED C1'S INVESTMENT

(¶32) The actions of the Respondent constitute an indirect expropriation under Art. 5 of the BIT. This is due to two-fold reasons.

(¶33) *Firstly*, the measure taken by the Respondent 'substantially deprived' C1 from using and enjoying its investment, which further amounted to 'taking' of C1's property when there is an adverse effect on economic value of the property and investor's legitimate expectation from the investment have been breached.

(¶34) The economic value of an investment is determined by the commercial control.[111] The commercial control of C1 is by way of the ownership of the operations which has been nationalized by the Respondent. It is humbly submitted that the legitimate expectation has been inbuilt as a part of expropriation where a contracting party's conduct creates reasonable and

[106] Tecmed, *supra* note 99, at ¶ 115.
[107] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 348 (31 October 2011).
[108] Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 259 (Mar. 28, 2001).
[109] Moot Proposition, ¶ A (b).
[110] UNCITRAL Arbitration Rules, *supra* note 1, art. 27.
[111] JOHNATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS 361 (2014).

justifiable expectations on the part of the investor to act in reliance on said conduct such that a failure to honor those expectations could cause the investor to suffer damages.[112]

(¶36) *Secondly,* the measure does not serve the objective of public welfare. A tribunal noted that: a treaty requirement for 'public interest' requires some genuine interest of the public.[113]The reason behind the agitation launched by the people of Smallnadu needs to be examined. There is no clarification given by the Respondents on grounds of the interim stay.[114] The due-process requirement is fulfilled on non-arbitrary compliance with domestic law. C1 has followed the procedure prescribed by taking the necessary permits.[115] This position has been reiterated when the Iran-US claims tribunal held that if interference by the government denies the property owners its fundamental rights of ownership, use, enjoyment or management of business it may amount to expropriation.[116]

4. THE RESPONDENTS FAILED TO MEET THE LEGITIMATE EXPECTATIONS OF C1

(¶37) It is humbly submitted that the Respondent failed to meet legitimate expectations of C1 because the concept of legitimate expectations is identified using the legal rights approach, stability approach, the representations approach and the business plan approach.[117] All these approaches mandatorily create certain expectations for the investors. When it comes to the legal rights, C1 has been held in violation of the law in spite of complying with all the compliance requirements. C1 has further also not been able to operate the investment even before NGT's

[112] International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL Arbitral Award, ¶147 (Jan. 26, 2006) [hereinafter Thunderbird Gaming].
[113] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶ 432 (Jun. 1, 2009).
[114] Moot Proposition, ¶ A (d).
[115] Moot Proposition, ¶ A (b) (c).
[116] ITT Industries Inc. v. Iran, 2 Iran-U.S. Cl. Trib. Rep. 348 (1983) [hereinafter ITT Industries].
[117] BONNITCHA, *supra* note 111, at 363-364.

decision. A similar position has been reiterated by a number of tribunals in decisions.[118] The system created by Respondents caused harm to the investment as the investment was not allowed to operate at all in the host country. The harm is clearly a breach of the stability standard. The Respondents put forth the Representation of a business that would be given stability and growth, however the same was clearly not granted in any manner. The Business Plan of C1 was for the operation of a facility for cleaning the water and the same was breached by the Respondents action of being unable to control the public.

K. CONSEQUENTLY C1 IS ENTITLED TO DAMAGES WORTH 200 CRORES BNR

(¶39) C1 is entitled to compensation because the damages suffered were not reasonably foreseen; more particularly this is with reference to the presence of an arbitrary regime that existed in the Respondent State.[119] This was coupled with the fact that a liability was placed on C1 in spite of the possibility of role of Respondent in the contamination. Furthermore, the Respondent has not even been made responsible. While all this operated the Respondent failed to allow C1 to let his investment grow and take the shape of a returning investment after all promises that were provided for when C1 made the investment.

ISSUE 4 WHETHER THE REGULATORY ACTIONS OF THE RESPONDENTS AMOUNT TO A BREACH OF ITS OBLIGATIONS UNDER THE PETROLLAR BINDA BIT AND CONSEQUENTLY ENTITLE C2 TO A COMPENSATION OF 1000 CRORES BNR?

(¶40) It is humbly submitted that the regulatory actions of the respondents amount to a breach of its obligations under the Binda-Petrollar BIT. This consists of a three-fold argument. *Firstly*, the Respondents actions are not precluded from liability under Chapter III of the Binda-Petrollar BIT

[118] BONNITCHA, *supra* note 111, at 363-364.
[119] Hadley v. Baxendale, [1854] EWHC J70 [341] (Eng.).

[M] *Secondly,* the Respondent has failed to fulfill its obligations under Chapter II of the Binda-Petrollar BIT. **[N]** *Thirdly,* and consequently C2 is entitled to damages worth 1000 crores BNR. **[O]**

L. THE RESPONDENTS ACTIONS ARE NOT PRECLUDED FROM LIABILITY UNDER CHAPTER III OF THE BINDA-PETROLLAR BIT

(¶41) The obligations of the investors are merely to ensure that the investment be made by foreign investors as was the case with C2 and the same must be in compliance with law.[120] The same was hammered through an iron clad contract that was entered into by the BIT. The same would therefore not be liable to disqualification. C2 also met the obligations of CSR under Art. 12 of the BIT because it met the same by creating an eco-tourism facility for the entire country and created local facilities of clean drinking water in an environmentally unsound country.[121] The same has been recognized as a fundamental principle under International Investment Law.[122]

M. THE RESPONDENT FAILED TO FULFILL ITS OBLIGATIONS UNDER CHAPTER II OF THE BINDA-PETROLLAR BIT

(¶42) It is humbly submitted that this is an argument that may be made in a three-fold manner. *Firstly,* the Respondent failed to provide adequate national treatment **[1]** *Secondly,* the Respondent expropriated the investment of the C2. **[2]** *Thirdly,* the Respondent failed to permit free transfer of funds. **[3]**

---

[120] CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 140 (2d ed. 2009); *see also* Andrea Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 J. W. INT'L T. 35, 49 (2008); *see also* Christina Knahr, *Investments "in Accordance with Host State Law"*, 4 T.D.M. 5, 18 (2007).
[121] Binda-Petrollar BIT, *supra* note 12, art. 12.
[122] Christoph Schreuer et al., *supra* note 105, at 692.

1. THE RESPONDENT FAILED TO PROVIDE ADEQUATE NATIONAL TREATMENT

(¶43) Art. 4 of the Binda-Petrollar BIT. This is a two-fold argument. *Firstly*, the Respondent failed to provide full protection and security to the investment. **[1]** *Secondly*, the Respondent failed to afford FET under Binda-Petrollar BIT. **[2]**

1.1. THE RESPONDENT FAILED TO PROVIDE FULL PROTECTION AND SECURITY UNDER THE BINDA-PETROLLAR BIT

(¶43) The obligation to not abuse an investment is inbuilt within the provisions of full protection and promotion of investments.[123] The standard of full protection and security includes within its purview a State's guarantee of stability in a secure environment which extends to appropriate physical, commercial and legal standards in the host state, especially in the backdrop of a treaty aimed at promotion and protection of investments.[124] Here, Oxford's right has been taken away very blatantly by the Respondent through the imposition of austerity measures.[125]

(¶44) C2 contends that the host state is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. In the present case C2 has either been limited through an escalation clause or has been breached by restricting the transfer of any profit whatsoever under the Binda-Petrollar BIT.

1.2. THE RESPONDENT FAILED TO AFFORD FET UNDER THE BINDA-PETROLLAR BIT

(¶45) The Respondent's actions constitute a breach of FET under Art. 4.2 Of Petrollar- Binda BIT. This is an argument that may be made in a two-fold manner. *Firstly*, the Respondents

[123] Binda-Petrollar BIT, *supra* note 12, art. 3.2.
[124] Biwater Gauff, *supra* note 96; *see also* Rosenne, *supra* text accompanying note 96.
[125] Moot Proposition, ¶ B (f).

actions failed to meet the legitimate expectations of the C2. [1] *Secondly*, the Respondents actions breached the procedural standard of fairness. [2]

1.2.1 THE RESPONDENTS ACTIONS FAILED TO MEET THE LEGITIMATE EXPECTATIONS OF THE C2

(¶46) The legitimate expectations of C2 have been breached and they are interpreted in four-fold ways i.e. using the legal rights approach, the representations approach, the stability approach and the business plan approach.[126]

(¶47) The Legal Rights Approach[127] protects specific, enforceable legal rights that have been vested in the investor under domestic law.[128] The C2's legal right vested in the contract entered into with the host state and the same was unilaterally breached by changing the escalation rate to 5%.[129] The Respondent's actions (restricting funds and unilaterally modifying the escalation clause) breached the C2's basic expectations on which the investment was made.[130]

(¶48) The Representations Approach provides that representations made by the Host State are enforceable as long as they are specifically addressed to an investor.[131] Various decisions have acknowledged legitimate expectations can be availed if there is a specific condition offered by States concerned.[132] The Respondent by restricting the transfer of funds and modifying the escalation clause of the contract was making it difficult for the C2 to repatriate its earnings and to get a requisite return on its investment.[133]

---

[126] BONNITCHA, *supra* note 111, at 363-364.
[127] Thunderbird Gaming, *supra* note 112.
[128] BONNITCHA, *supra* note 111, at 363-364.
[129] Moot Proposition, ¶ B (e).
[130] LG & E Energy Corp., LG & E Capital Corp., and LG & E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 49 (Oct. 3, 2006) [hereinafter LG & E].
[131] Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 119 (Dec. 27, 2010).
[132] BONNITCHA, *supra* note 111, at 471.
[133] Thunderbird Gaming, *supra* note 112; *see also* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 275 (Christoph Schreuer et al. eds., 2008).

(¶49) The Stability Approach can be applied to changes in the general regulatory arrangements[134] which constitute a condition that the investor was accustomed to while making the investment.[135] The conditions that the C2 was accustomed to was a country providing a land with 50 years tax free lease, an authorization for the complete free transfer of funds including the profits.[136]

(¶50) The Business Plan approach applies when the Host State knew or should have known of the business plan while making the investment.[137] The contract that was entered into operated under the directions of the Central Ministry and its Officials.[138] The unilateral modification to the escalation clause from 10% to 5% was carried out by a modification of escalation clause by the Respondents[139] clearly proving that they were aware about the investment.[140] In the decision of Walter Bau it was held that the failure of authorities to increase toll under concessions contract that allowed collection of toll from bridge built for 25 years was a breach of legitimate expectations.[141]

1.2.2 THE RESPONDENTS ACTIONS BREACHED THE PROCEDURAL STANDARD OF FAIRNESS.

(¶51) The procedural standard of fairness can be characterized based upon 3 factors i.e. the procedures that were obliged by the contract,[142] the procedure that is envisaged by law of the

[134] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL Arbitration Award, ¶ 285 (Nov. 12, 2010).
[135] Occidental Exploration and Production Company v. Republic of Ecuador, UNCITRAL Arbitral Award, ¶ 181 (July 1, 2004).
[136] Moot Proposition, ¶ 6.
[137] Model Law Commentary, *supra* note 5.
[138] Moot Proposition, ¶ B (c).
[139] Moot Proposition, ¶ B (e).
[140] Yury Bogdanov v. Republic of Moldova, UNCITRAL Arbitral Award, ¶¶ 66 & 73 (Mar. 30, 2010).
[141] Walter Bau v. The Kingdom of Thailand, UNCITRAL Arbitration Award on Jurisdiction, ¶ 2.36 (Oct. 5, 2007).
[142] RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 154 (2d ed. 2013); *see also* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 162 (2008).

host State and the transparency in implementing the procedure.[143] The contract in the instant case was a standard concession contract. While amending such a contract, renegotiation is an imperative condition.[144] The Respondents however failed to conduct any such negotiations to amend the escalation clause. A number of decisions acknowledge that a change in procedure specified contract amounts to a breach of FET standard.[145]

2. THE RESPONDENT EXPROPRIATED THE INVESTMENT OF C2

(¶52) Art. 5 of the BIT prohibits a Contracting Party from directly or indirectly expropriating investment of investors of the other Contracting Party to the BIT.[146] Expropriation is the taking or deprivation of the property of foreign investors by a host state.[147] Expropriation may occur even when the legal title remains with the owners, namely in 'indirect' expropriation cases,[148] where the host state adopts certain measures that deprives the owners of the possibility of utilizing their investment.[149] A measure amounts to expropriation when it has a permanent character, or substantially deprives the investor's property rights, or conflict with the investor's investment-backed expectations.[150]

---

[143] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 76 (Aug. 30, 2000) [hereinafter Metaclad]; *see also* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 292 (2009).

[144] PSEG Global, Inc., The North American Coal Corporation, and Konya InginElectrikÜretimveTicaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 246 (Jan. 19, 2007).

[145] Rumeli Telekom A.S. and Telsim Mobil TelekomunikasyonHizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 617 (Jul. 29, 2008); *see also* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 673 (Aug. 27, 2009).

[146] Binda-Petrollar BIT, *supra* note 12, art. 5.

[147] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 290-298 (2008).

[148] Amoco Int'l Fin. Corp. v. Iran,15 Iran-U.S. Ct. Trib. Rep. 189, ¶ 220 (1987); *see also* Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 366-367 (Dec. 16, 2002); *see also* S.D. Myers, Inc. v. Government of Canada, UNCITRAL Arbitration Award, ¶ 281, 283; *see also* ITT Industries, *supra* note 116; *see also* Tippetts-Abbett et al. v. TAMS-AFFA, 6 Iran-U.S. Ct. Trib. Rep. 219, ¶ 225; *see also* DOLZER & SCHREUER, *supra* note 140, at 92; *see also* MCLACHLAN ET AL., *supra* note 145, at 290; *see also* NEWCOMBE & PARADELL, *supra* text accompanying note 141, at327.

[149] CME Czech Republic, *supra* note 100, at ¶ 608; *see also* Metalclad, *supra* note 141, at ¶ 103.

[150] LG & E, *supra* note 128, at ¶ 190; *see also* Metalclad, *supra* note 141, at ¶ 103; *see also* DOLZER & SCHREUER, *supra* note 140, at65-93.

3. THE RESPONDENT BREACHED THE OBLIGATION OF FREE TRANSFER OF FUNDS

(¶53) The obligation to ensure the free transfer of funds is applicable under Art. 6 of the Binda-Petrollar BIT[151]. The same was however not granted to C2 as it was deprived of an opportunity to freely move its money even at the standard exchange rate at that point. The objective of the same was merely to hold the money and not to ensure the free transfer. Further, the Respondents currency was heavily fluctuating and C2's investment was unilaterally modified making the free transfer of funds also a part of legitimate expectation under the contract that was breached by Respondent.

N. CONSEQUENTLY C2 IS ENTITLED TO COMPENSATION

(¶54) The Respondent did not fulfill their obligations owing to which C2 suffered damages. The right to damages accrues to any party aggrieved on the ground of non-performance.[152] The basic principle of calculation of damages includes "loss of profits" as a part of payable damages in addition to the loss suffered by the aggrieved party as a consequence of the breach.[153] Courts in common law jurisdictions have been instrumental in awarding damages for the loss of profits and loss of a chance.[154]

(¶55) Sufficient evidence exists to establish the high probability in respect of the loss incurred, the nexus between Respondent's lack of cooperation and the loss incurred as well as the net profit that could have been realized on the lost transaction.[155] The essential objective of taking part in a public tender so as to enter into a profitable contract has been held to be sufficient for an

[151] Binda-Petrollar BIT, *supra* note 12, art. 6.
[152] T. Sedgwick, *A Treatise on the Measure of Damages*, 46 HARV. L. REV. 855, 1770 (1912).
[153] United Nations Convention on Contracts for The International Sale of Goods art. 74.
[154] V. Vargas & D. Umana, *The UNIDROIT Principles of International Commercial Contracts in Costa Rican Arbitral Practice*, 35 U. L. REV. 180, 181 (2006).
[155] ICC Case No. 9078 of 2001, *available* at http://cisgw3.law.pace.edu/cases/019771i1.html.

award of damages in respect of lost profits.[156] The prime objective of compensation is restoration of the aggrieved party to such a position as it would have occupied in the event of proper discharge of the contract.[157]

[156] ICC Case No. 10346 of 2000, *available* at http://cisgw3.law.pace.edu/cases/0010114i.html.
[157] S. VOGENAUER& J. KLEINHEISTERKAMP, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 873-874 (2009).

PRAYER

In the light of the facts stated, issues raised, authorities cited and arguments advanced the Counsel(s) for the Claimants respectfully requests the Tribunal to adjudge and declare:

1. That Mr. White must not be removed from the arbitral tribunal T2;
2. That these Tribunals have the jurisdiction to hear the dispute;
3. That Claimants are entitled to protection of investment under their respective BIT's;
4. That Respondent is not immune from liability;
5. That Claimants are entitled to compensation claimed under their respective BIT's.

And pass such other order or orders as the Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed.

Date: Sd/-

Place: Counsel(s) on behalf of Claimants.