TEAM CODE- SCA014

1ST SURANA & SURANA- SCHOOL OF LAW, CHRIST INTERNATIONAL INVESTMENT &

ARBITRATION MOOT COURT COMPETITION 2018

BEFORE THE LD. ARBITRAL TRIBUNAL AT FINLAND

UNCITRAL ARBITRATION RULES, 2010

ARB. NO. _____/OF 2018.

In the Matter of:

AIRFRESH FACILITIES ……CLAIMANT

v

GOVERNMENT OF REPUBLIC OF BINDA……..…….RESPONDENT

&

BEFORE THE LD. ARBITRAL TRIBUNAL AT SINGAPORE

UNCITRAL ARBITRATION RULES 2010

ARB. NO. _____/OF 2018.

In The Matter of:

OXFORD……CLAIMANT

V

GOVERNMENT OF REPUBLIC OF BINDA…….RESPONDENT

MEMORIAL FOR CLAIMANT

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TABLE OF ABBREVIATIONS

&	And
¶	Paragraph
Annex.	Annexure
Arb	Arbitration
AIR	All India Reporter
All ER	All England Reports
Arb int.	Arbitration International
Art.	Article
BIT	Bilateral Investment Treaty
BNR	Binda National Rupees
CA	Court of Appeal
Civ	Civil
Co.	Company
Com. L J	Commercial Law Journal
Comm	Commercial
CME	Central European Media
CMS	Carbon Molecular Sieves
CUP	Cambridge University Process
Doc.	Document
edn./ed.	Edition
Eds.	Editor
FET	Fair and Equitable Treatment

Govt.	Government
ICJ	International Court of Justice
ICR	Industrial Cases Reports
ICSID	International Center for Settlement of Investment Disputes
ILM	International Legal Material
ILR	International Law Reports
Inc	Incorporation
LR	Law Reporters (England)
Ltd	Limited
Misc.	Misellaneous
NAFTA	North American Free Trade Agreement
No.	Number
NY	New York
NZLR	New Zealand Law Reporter
OCED	Organization for Economic Co-operation and Development
Ors.	Others
Para	Paragraph
PC	Privy Council
PCA	Permanent Court of Arbitartion
PCIJ	Permanent Court of International Justice
PICC	Principles of International Commercial Contracts
p/pp.	Page

Pvt.	Private
Pub.	Publisher/Published
QB	Queen's Bench
QBD	Queen Bench Division
Rep	Report
Rev	Review
RIAA	Reports of International Arbitral Awards
s	Section
S.A.	South America
SCC	Supreme Court Cases
SCC Arbitration	Stockholm Chamber of Commerce Arbitration
Trib	Tribunal
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Conference on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
USCTR	United States Claims Tribunal Reports
USD	United State Dollars
v	Versus
Vol	Volume
WLR	Weekly Law Reports
YBCA	Yearbook of Commercial Arbitration
ZTE	Zhongxing Telecommunication Equipment.

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STATEMENT OF JURISDICTION

CLAIM 1

The parties, has the honour to submit this dispute before the Arbitral Tribunal validly constituted in accordance with UNCITRAL Arbitration Rules under Article 10(2) of the Bilateral Investment Treaty concerning Dispute between the contracting Party i.e. Government of the Republic of Binda and the Eswatinian Kingdom of Nuland.

> *Article 10(2): If a dispute between the Contracting Parties concerning Parties cannot thus be settled within the period of six months from the time dispute arose, it shall upon the request of the either contracting party be submitted to an arbitral tribunal.*

CLAIM 2

The Parties in the instant case, has the honour to submit this dispute before the Arbitral Tribunal validly constituted in accordance with UNCITRAL Arbitration Rules under Article 16.1 of the Bilateral Treaty concerning the Consent to Arbitration between the Government of Republic of Binda and the Kingdom Emirates of Petrollar.

> *"(Article 16.1) A disputing investor who meets the conditions precedent provided for in Article 15 may submit the claim to arbitration under:*
>
> *i. the ICSID Convention, provided that both the Parties full members of the Convention;*
>
> *ii. the Additional Facility Rules of ICSID, provided that either Party, but not both, is a member of the ICSID Convention; or*
>
> *iii. the UNCITRAL Arbitration Rules 2010."*

STATEMENT OF FACTS

BACKGROUND

1. Binda is one of the world's most populous democracies. It has two main national problems: shortage of drinking water, and untreated wastewater industrial discharge. 65% of wastewater remains untreated, and hence every water body in Binda is polluted. As a result, national healthcare costs have escalated greatly, and Binda is facing a public health crisis. Under Binda's written Constitution, the individual states of the Union are free to set up Special Economic Zones (SEZs) for promoting economic growth through Foreign Direct Investment (FDI) and development of infrastructure.

2. Binda provided 100% FDI for proposed investments in environmental projects. Incentives offered to various foreign investors for concept planning and engineering and construction of treatment plants for environment industry included a 50-year-tax-free leasing of lands for constructing pollution control facilities. The income earned by foreign investors was to be determined based on a fixed charge in BNR of wastewater treated, and drinking water produced. An expensive wastewater collection pipe network extending to thousands of kilometers was established subsequently. Simultaneously, a nationwide pre-treatment program was established in Binda.

3. The legal protection for foreign investments for environment programmes were provided under the Bilateral Investment Treaties (BITs) and multilateral treaties of Binda with other countries. Binda's major supplier of crude oil was Milddle Eastern Nations, where the price was pegged to the USD. Inflation led to the crude oil prices rising from 50 USD to 80 USD per barrel. The President of Petrollar, world's largest economy, whose currency is dominated in USD, in an attempt to secure peace in the Middle East, isolated embargo, a Middle Eastern nation as it was developing weapons of mass destruction. As a result, Binda

could not purchase oil from one of its major suppliers, and it had a major impact on Binda's economy. Under the BITs that Binda entered into, the primary method to resolve foreign investment disputes was by investor-state arbitration conducted by international tribunals with jurisdictional powers surrounding international treaty law. Such investment treaty arbitration is conducted under procedural rules such as UNCITRAL Rules, which is an institutional mechanism that governs appointment of arbitrators and controls arbitral proceedings. The Binda Arbitration and Concilliation Act is also enacted along the guidelines of the UNCITRAL Model Law.

CLAIM 1

1. A foreign investor Airfresh, a corporation established in Nation State of Nuland, invested in the Southern state of Kukatuka in Binda, by constructing a regional environment project for the waste management, sludge disposal and for air pollution control.
2. Investment treaty protections under the Nuland- Binda BIT were given to the foreign investments. Airfresh commissioned the construction of facilities and they met all the environmental discharge parameters of waters, waste and air pollution.
3. The facilities were operating in accordance with the rules and regulations of state pollution control board. Subsequently, in March 2018 the residents who were residing adjacent to facilities launched a public agitation on the grounds that the facilities were contaminating the water bore wells close to their community.
4. When the series of samples of bore well water over a 6-month period were taken it was found that the alleged pollution of the public drinking water were unproved. Nevertheless, the state administration filed a claim before NGT who found in the favor of the public. Further the claim was filed in appellate NGT, who also gave the same decision.

5. Due to backlog of cases in SC, the case could not be heard for at least 6 months. Subsequently, Airfresh facilities initiated investor-state arbitration under UNCITRAL Arbitration Rules and sought a claim of BNR 200 crores.

CLAIM 2

1. The northern state of Bingee is the largest state in Binda and has the biggest river called Jungee. Jungee River is polluted with toxic material due to industrial discharges and human cadaver from religious rituals, and this is a major issue as it is the only safe drinking water source for around 500 million residents of Bingee and neighboring states.
2. Oxford is a company incorporated in Petrollar nation. It invested its services to provide clean drinking water to residents of Bingee at a rate of 50 BNR per 1000 liters.
3. There was an agreed escalation clause of 10% per year on the same rate for 5 years, under a contract between Oxford and Bingee State. Oxford was also in-charge of waterfront development along the Jungee River. State of Bingee directed Oxford to change the escalation clause from 10% to 5% for public policy reasons, as the economy worsened. Oxford attempted to settle the matter by conciliation, however, failed.
4. It attempted negotiation with the municipalities to maintain the original escalation clause as 10% according to the 5-year contract, but was still unsuccessful. Oxford raised investor-state arbitration claim against Binda under Petrollar- Binda BIT alleging expropriation, breach of treaty related to national treatment and denial of free transfer of funds, and sought damages of 1000 crore BNR.
5. Oxford appointed Prof. Mark White as its arbitrator, Respondent State, Binda, appointed Prof. Black, and the presiding arbitrator is Prof. Gray. Binda challenged the appointment of Prof White as arbitrator, alleging conflict of interest as Prof. White's niece, who was close to him, worked as a Senior Investment Manager in Young & Coopers, an international firm which is a 10% shareholder in the claimant company Oxford.

STATEMENT OF ISSUES

CLAIM 1

-I-

RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

-II-

THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULAND- BINDA BIT HAS NOT BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

FOR CLAIM 2

-I-

THE ARBITRATOR SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL.

-II-

THE RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PATROLLER-BINDA BILATERAL INVESTMENT TREATY.

-III-

THE RESPONDENT HAS COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

-IV-

THE CLAIMANT HAS BEEN DENIED THE FREE TRANSFER OF FUNDS BY THE RESPONDENT.

SUMMARY OF ARGUMENTS

CLAIM 1

Issue 1: RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

It is submitted that the Respondent country is liable for the Expropriation of investments under Nuland -Binda Bilateral Investment Treaty. Article 5 of the BIT provides that the Investments of the investors either Contracting Party shall not by expropriated by the other Contracting party, either directly or indirectly through measures equivalent to expropriation It has been submitted that the respondent would be held liable for the expropriation because the investments have been indirectly expropriated, the investors has been prevented from enjoying the property and due process has not been followed.

Issue II: THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULAND-BINDA BIT HAS NOT BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

It has been submitted that the investments which are being made by Nuland under Nuland-Binda BIT has not been accorded fair and equitable treatment. FET is a minimum standard of treatment which includes obligations and burden on the Contracting State to provide full protection and security and the prohibition of discriminatory measure. There has been the violation of the FET by not performing contract in Good Faith, there has violation of the legitimate expectations and there was no protection and security of investments.

CLAIM 2

Issue 1: THE ARBITRATOR SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL.

It is submitted that the challenge of Prof. Mark White as arbitrator is not valid, and he should not be removed from the arbitral tribunal. Nothing in the facts in the present case raise justifiable doubts as to his independence and impartiality as an arbitrator, and a mere appearance of bias by the arbitrator is not reason enough to prove his partiality or lack of

independence. There was no directness of relationship between the arbitration proceeding and the relationship between Prof. White and his niece, and hence there was no need for disclosure of such circumstances by him..

Issue II: **THE RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PATROLLER-BINDA BILATERAL INVESTMENT TREATY.**

It is submitted that the measures taken by the Respondent did not result in expropriation. The measures taken were in public interest as it was concerned with drinking water for the general public and were also taken in consonance with the due process of law as there was a general legislation passed for the same and the Claimant were given the fair chance to be heard before a impartial and independent body under Commercial Courts Act, 2015.

Issue III: THE RESPONDENT HAS COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

It is submitted that the Respondent had undertaken austerity and monetary measures. Both the domestic and foreign investors were equally affected by the austerity measures. The domestic investors weren't affected by the monetary measures because there was no transfer of money that was taking place from the territory of Binda to any other foreign nation. Thus, there was no breach of national treatment committed by the Respondent.

Issue IV: CLAIMANT HAS BEEN DENIED THE FREE TRANSFER OF FUNDS BY THE RESPONDENT.

It is submitted that the Claimant has not been denied the free transfer of funds. There were certain reasonable restrains that were imposed by the Ministry of Finance, Government of Binda on the outward remittances keeping in mind the dampening monetary situation in the country, thereby serving the public interest. Furthermore, the actions were taken by the central government as they fall within the purview of the Union List.

ARGUMENTS ADVANCED
CLAIM 1

[ISSUE I] RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

1. It is contended that Respondent is liable for the Expropriation of investments under Nuland -Binda Bilateral Investment Treaty. Under article 5[1] of the Bilateral treaty entered into by the Government of Republic of Binda and The Eswatinian Kingdom of Nuland that the Investments of the investors either Contracting Party shall not be expropriated by the other Contracting party, either directly or indirectly through measures equivalent to expropriation or nationalization. [2] It has been contended that the respondent would be held liable for the expropriation because **(A.)** the investments have been indirectly expropriated **(B.)** the investors has been prevented from enjoying the property **(C.)** due process of law has not been followed.

(A) THE INVESTMENTS HAVE BEEN INDIRECTLY EXPROPRIATED.

2. It is contended that Respondent has indirectly expropriated the investments which have been made by investors in accordance with the BIT entered in between Nuland and Binda. Indirect Expropriation occurs whenever the state takes effective control of, or otherwise interferes with the use, enjoyment or benefit of, an investment, strongly depreciating its economic value, even without direct taking of the property. [3]
3. In the case of *Metalclad Corporation v. UNITED Mexican State* [4] it was held that

> "*Expropriation" includes convert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.* [5]

[1] Article 5, Clause 1, Annexure 1, Moot Proposition.
[2] Ibid.
[3] *UN Environment, Environment and Trade Hub*, International Institute for Sustainable Development.
[4] Metalclad Corporation v. United Mexican States (Award) (30 August 2000) 5 ICSID Rep 209.
[5] Ibid.

4. In the following case the Nuland as an investor has been deprived the benefit of the property. Despite the alleged pollution of the Public drinking water wells by Airfresh were unproved, then also the public opposition in Smallnadu to the operations of the Airfresh facilities did not abate and further they were threatened to turn violent along with sabotaging the facilities.[6] Meantime when the appeal was pending before the Supreme Court on the behalf of the Airfresh Facilities, the public approached the Supreme Court and obtained the interim stay order preventing them operating the hazardous waste landfill and related operations.[7] Therefore it is submitted that the investments has been expropriated by the Respondents.

(B) THE INVESTORS HAVE BEEN PREVENTED FROM ENJOYING OF THE PROPERTY.

5. It is contended that the investors have been prevented from enjoying the property because of **(i)** that the investors cannot reap benefits from the property anymore and **(ii)** the investors have been fully deprived of the property.

(i) The investors cannot reap the benefit from the property anymore.

6. It is contended before the Hon'ble court that the investors from foreign country of Nuland cannot benefit from the property anymore. It is contended that a state is considered responsible for expropriation even when the property or the investments are being subjected any type of regulations or taxations or other action that is said to be confiscatory or that prevents, unreasonably interferes with, or unduly delays or effective enjoyment of an alien's property or its removal from the state's territory.[8] If taking of the property effectively neutralizes the benefit of the property to the foreign owner, then it can be subjected to expropriation claims. [9] It is contended that the foreign investors has not reaped in any benefit when the interim stay order issued by the Supreme Court and therefore it

[6] ⁋ d, Claim 1, Moot Proposition.
[7] ⁋ d, Claim 1, Moot Proposition.
[8] *American Law Institute, 'Restatement third) Foreign Relations of the US'* (1987, Vol 1) s 712, comment g.
[9] CME Czech Republic BV v Czech Republic (Partial Award) (13 September 2001) 9 ICSID Rep 121, 239.

does not neutralizes the benefits which the foreign investors were enjoying out of the property.[10]

7. In essence, for there to be expropriation under International Law it is necessary to establish that a government has interfered unreasonably with the use of private Property.[11] It is therefore contended that the Airfresh has been denied the use and enjoyment of the property because the state has interfered with the same. Initially the state pollution control authorities took a series of samples of the bore well water over a period of 6 months that the alleged pollution of the public drinking water wells by Airfresh were unproved. [12] But solely due to compulsion by the MLAs on the state administration and the state pollution control board, they filed a claim against Airfresh Facilities in NGT and thus depriving them with the enjoyment and benefit of the property. [13]

(ii) <u>There Has Been Full Deprivation Of Property.</u>

8. It is contended that the foreign investors from Nuland has been *deprived* from their property. The test to establish expropriation is whether that interference is sufficiently restrictive to support the conclusion that the property has been taken from the owner. [14] An investor has to be deprived in whole or in significant part of the use of its property or if the state authorities interfere to a significant degree with the enjoyment of its use or its benefits [15] to constitute indirect expropriation,[16] even if the title to the property is not affected.[17] In the following case in hand the investors has been deprived from using their facilities because of the state administration and state pollution control board were compelled by the

[10] ¶ d, Claim 1, Moot Proposition.
[11] Harza Engineering Co. v. Iran, (1982) 1 Iran- US C.T.R. 499 AT 504.
[12] ¶ c, Claim 1, Moot Proposition.
[13] ¶ d, Claim 1, Moot Proposition.
[14] Pope & Tablot Inc v. Government of Canada (Interim Award) (26 June 2000)7 ICSID Rep 69, 87.
[15] Supa 4.
[16] Ibid, See Also Iurii Bogdanov Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova (Award) (22 September 2005) SCC Arbitration.
[17] Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, The Government of Islamic Republic of Iran (Award) (29 June 1984) 6 Iran-USCTR 219, 225.

MLAs to agitate a claim for the closure of the Airfresh Facilities in the NGT and appellate NGT, who ultimately found in favour of the public which indicates that Airfresh Facilities should be closed down, even when the samples of the bore well water which was alleged to be contaminated were itself jointly taken by Kukatuka and Smallnadu pollution control authorities for a period of 6 months and the alleged pollution was unproved.[18]

9. In the case of *SPP v Egypt*[19] the arbitral tribunal focused that the guarantees which has given to the foreign investors in attracting him to the country and violation of these guarantees must engage the liability of the state.

10. The arbitral tribunal in one of the case of *Santa Elena v Costa Richa* [20] held that

> *"Expropriatory measures of the State no matter how laudable and beneficial to the society as a whole- the state's obligation to pay the compensation remains."*

11. Therefore it is contended that the although the state must have taken the steps in the name of public interest and regulation but still there lies a duty on the behalf of the state to pay the compensation to the Claimant party for the reason of Expropriation of the property.

(C) TEMPORARY SEIZURE OR A REGULATORY MEASURE AMOUNTS TO EXPROPRIATION.

12. It is contended that the temporary seizure of the property and the regulatory measure will amount to expropriation. Usually if there is expropriation it will amount to a lasting removal of the ability of an owner to make use of the economic rights but even the partial deprivation[21] is sufficient to support an expropriation.[22] Regulatory measures which deprive the investors of their property may also constitute expropriation. [23]In the following case the public approached the Supreme Court through a Public Interest

[18] ¶ c, Claim 1, Moot Proposition.
[19] SPP v Egypt (1983) 22 ILM 752.
[20] Compafida del Dessarollo de Santa Elena S.A v Republic of Costa Rica, ¶ 72.
[21] SD Myers Inc v Government of Canada (Partial Award) (13 November 2000) 40 ILM 1408.
[22] Wena Hotels Ltd. v Arab Republic of Egypt (Award) (8 December 2000) 41 ILM 896.
[23] Pope & Tablot Inc v Government of Canada (Interim Award) (26 June 2000) 7 ICSID Rep 69, 87.

Litigation (PIL) obtained an interim stay order which prevented the Airfresh Facilities from operating their facilities. [24] According to Black Law's Dictionary the interim order means-

"a term that applies to a temporary edict from a court such as a temporary injunction".[25]

13. Therefore it is contended that although the interim stay order has been issued for the temporary period of time but it will be recognized as the expropriation.

(D) THE ACTION OF RESPONDENT WERE IN VIOLATION OF DUE PROCESS OF LAW.

14. It is contended the Claimants have been deprived of due process of law. There is the Principle of Minimum Standard of Justice to be reserved to the foreign investor and their economic interests under customary international law.[26] An integral part of this standard is the Principle of *access to justice* This principle presupposes that the individual who has suffered an injury in a foreign country at the hands of public authorities or of private entities must be afforded the opportunity to obtain redress before a court of law or appropriate administrative agency. [27]
15. When the 'justice' is not delivered, either because judicial remedies are not available[28] or the administration of justice is so inadequate, deficient, or deceptively manipulated as to deprive the injured alien of effective remedial process,[29] the foreign investor invoke 'denial of justice': a wrongful act for which international responsibility may arise. [30]

[24] ‖ d, Claim 1, Moot Proposition.
[25] Black's Law Definition, 2nd Edition,
[26] Oxford Academic, European Journal of International Law; Access to Justice, Denial of Justice and International *Investment Law, European Journal of International Law*, Volume 20, Issue 3, 1 August 2009, Pages 729–747.
[27] Loewen Group Inc. and Raymond Loewen v. United States of America, ICSID Case No. ARB (AF)/98/3, 26, 26 June 2003, 42 ILM (2003) 811.
[28] Mondev International Ltd v. United States of America, ICSID (Additional Facility) Case No. ARB (AF)/99/2, Award, 11 Oct. 2002, 42 ILM (2003) 85.
[29] Ibid.
[30] Supra note no. 23.

16. The customary rule requires that there should be prior exhaustion of the local remedies as a precondition of diplomatic protection.[31] In the following case in hand that there was exhaustion of the local remedies by the foreign investors. First they approached to NGT for obtaining the initial orders and when it was found in the favour of the public then they appealed the appellate NGT and further approached to the Supreme Court.[32] SC due to heavy backlog of cases in the court of about 70,000 cases at least the case would not be heard for 6 months.[33] Therefore the Denial of Justice claim can also be made when the courts delays inordinately in giving the judgement. [34]
17. Further Article 9 of the BIT[35] provides that if there is any dispute between the investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. In the following case in hand the State Administration proceeded to file in NGT against the Claimants without initiating the negotiation as envisaged under article 9 and as a result BIT has been violated.[36]

[ISSUE II] THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULAND-BINDA BIT HAS NOT BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

18. It is contended that the investments which are being made by Nuland under Nuland- Binda BIT has not been accorded fair and equitable treatment. Fair and Equitable treatment is a minimum standard of treatment[37] which includes obligations and burden on the Contracting

[31] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1.
[32] ‖ d, Claim 1, Moot Proposition.
[33] Ibid.
[34] Antoine Fabiani (No. 1) (France v. Venezuela), Moore, Arbitrations.
[35] Article 9, Settlement of Disputes between an Investor and a Contracting Party, Annexure 1, Moot Proposition.
[36] Ibid.
[37] Occidental Exploration and Production Company v. The Republic of Ecuador (Final Award) (1 July 2004) 17(1) WTAM 165 [190];

State[38] to provide full protection and security, the prohibition of arbitrary and discriminatory measure and the obligation to observe contractual obligations towards the investor[39] & providing a reasonably stable environment, consistent with investor's expectations to invest.[40]

19. Fair and equitable treatment should be understood to be treatment in an even-handed and just manner[41], conducive to fostering the promotion of foreign investment.[42] Minimum standards of treatment provide a treaty defined baseline[43], 'a floor below which treatment to foreign investors must not fall, even if a Government were not acting in a discriminatory manner.'[44] There has been the violation of the Fair and Equitable Standard of Treatment because **(A.)** there has been breach of FET by not performing contract in Good Faith **(B.)** there has been violation of the legitimate expectations **(C.)** there has been no protection and security of investments.

(A) <u>THERE WAS BREACH OF THE FET BY NOT PERFORMING CONTRACT IN GOOD FAITH.</u>

20. The standard of Fair and Equitable treatment is used as a measure to ensure the protection to the Investors,[45] it includes the requirement of stability, predictability and consistency of the legal framework, procedural due process protection against discrimination, arbitrariness and transparency. [46]

[38] Suez, Sociedad General de Aguas de Barcelona S.A., & InterAgua Servicios Integrales del Agua S.A. v. Argentina (Jurisdiction) (16 May 2006) ICSID Case No ARB/03/17 [55].
[39] Noble Venture Inc v. Romania (Award) (12 October 2005) ICSID Case No. ARB/01/11.
[40] Vivendi v. Argentine (Award) (20 August 2007) 41 ILM 1135.
[41] MTD Equity Sdn Bhd v Republic of Chile (Award) (25 May 2004) 44 ILM 91 [109].
[42] Azurix Corp. v. Argentine Republic (Award) (14 July 2006) ICSID Case No ARB/01/12 [130]; Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (1st ed. OUP 2008)110.
[43] Ronald S. Lauder v. The Czech Republic (Final Award) (3 September 2001) 4 WTAM 35 [209].
[44] SD Myers Inc v. Government of Canada (Partial Award) (13 November 2000) 40 ILM 1408 [259]; See also Gus Van Harten, Investment Treaty Arbitration and Public Law (1st ed. OUP 2007) 78.
[45] PSEG Global, Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5 Award (2007).
[46] *Marc Jacob & Stephen Schill , Fair and Equitable Treatment: Content, Practice and Method, INTERNATIONAL. INVESTMENT LAW: A HANDBOOK* (Bungenberg , 2015).

21. The standard of Fair and Equitable Treatment provides with the duty to act in good faith is the Fundamental norm underpinning international legal responsibility. [47] The International court of Justice acknowledged that the good faith principle is one of the basic principles governing the creation and performance of legal obligations.[48] The overreaching duty of good faith is the touchstone for much of the content of the international law standard.[49]
22. Also in art. 26 of the Vienna Convention[50] the maxim *Pacta sunt Servanda* provides that every treaty in force is binding upon the parties to it and must be performed by them in the good faith. It is hereby contended that Respondent has not provided with the fair and equitable treatment to the foreign investors as they have no performed the contract in good faith. The principle of fair and equitable treatment provides with the notion on the legitimate expectations of the foreign investor of the time of entry of the investment.[51]
23. The principle of good faith requires States to use the legal instruments that govern the actions of the investor in conformity to the function usually assigned to such instruments. Thus, it will be an act of bad faith if Government agencies deliberately and without justification acted to defeat the purpose of an investment agreement.[52] Under the pressure of the MLAs the state administration agitated a claim before the jurisdictional NGT. All the proceedings were initiated were in bad faith as they were done on the compulsion of MLAs and to suppress the increasing public opposition. [53]
24. Further, in the case of *Saluka v The Czech Republic,* [54]it was held that the foreign investor is entitled that the state implements bona fide policies by conduct i.e. as far as it is affecting

[47] *Franck, T. Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), extract ("Franck, (1995)") at 42-43 (Investor's Schedule of Legal Authorities at CL-075).
[48] Australia v. France, Judgment, I.C.J. Reports 1974, 253 para. 46.
[49] O'Connor, J. F. Good Faith in International Law (Brookfield: Dartmouth, 1991), extract ("O'Connor (1991)"), at p. 107 (Investor's Schedule of Legal Authorities at CL-077).
[50] Vienna Convention on the Law of Treaties (1969) (Investor's Schedule of Legal Authorities at CL-011).
[51] Supra 4.
[52] Tecnicas Medioambientales Tecmed SA v. United Mexican States (Award) (29 May 2003) 43 ILM 133.
[53] ¶ d, Claim 1, Moot Proposition.
[54] Saluka Investments; B.V. v. Czech Republic , Partial Award, 2006 WL 1342817 (March 17, 2006) ("Saluka - Award"), at ¶ 307 (Investor's Schedule of Legal Authorities at CL-081).

the investor's investment and that such conduct does not manifestly violate the requirements of the consistency, transparency, even handedness and the non-discrimination. It is contended that the respondents have violated the principle of fair and equitable treatment by not acting in the good faith. There was the element of non-discrimination which was involved in the proceedings which have been initiated by the respondent as it did not involve the element of good faith. As mentioned in the facts the local Members of Legislative Assembly raised questions in the Smallnadu State Assembly and *compelled* the state administration and state pollution control board to *agitate* a claim before the jurisdictional NGT for closure of the Airfresh facilities. [55]

25. It is contended that the legal definition of Compulsion which refers to the "forcible inducement to an act."[56] It also means "the act of compelling; the state of bring compelled; an uncontrollable inclination to do something; duress". [57]
26. After taking into consideration the above mentioned definition, the MLAs forcibly induced the state administration and the board to agitate a claim before the jurisdictional NGT for the closure of Facilities. Further to describe the meaning of agitate "is to excite and often trouble the mind or feelings" or "to move with an irregular, rapid, or violent action". [58]
27. It is contended that the meaning of the word *agitate* clearly indicates in the following case the MLAs has excited and they have troubled the mind of the state administration and the pollution board to finally take an irregular action against the foreign investors which concludes that there was discrimination present on the part of the respondents while rendering the decision. Thus, the good faith doctrine has not been followed in the following case and as a result the doctrine of fair and equitable treatment is not being followed.

[55] ¶ 4, Claim 1, Moot Proposition.
[56] US Legal, Compulsion law and legal definition.
[57] Ibid.
[58] Merriam Webster Dictionary; definition of agitate, upd. 2nd September 2018.

(B) THERE WAS VIOLATION OF LEGITIMATE EXPECTATIONS AND PRESENCE OF ARBITRARINESS.

28. FET standards do not affect the foreign investor's basic expectations used in making the investment and allow the investor can expect the regulations for their industry to be consistent, [59] transparent, fair, reasonable, [60]and enforced without arbitrary or discriminatory decisions.[61]There would be breach of the standard of the FET in circumstances where the assurances made to the foreign investor both in the contract as well as in non-contractual documents, in the law of the host state and even possibly verbal communication of high officials of the state[62] that give rise to the legitimate expectations in the foreign investors. In this case all the legal protection which has been promised to the foreign investors is quid pro quo for the financial risks undertaken by the investors.

29. In the case of the *National Grid v Argentina,* the tribunal said

> *"This standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned. Thus, treatment by the State should 'not affect the basic expectations that were taken into account by the foreign investor to make the investment."*[63]

30. It is further contended that the respondent acted in an arbitrary and grossly unfair manner. The host state terminated the contract without any valid reasons. There was just compulsion on the part of the MLAs on the State administration and the State pollution control board to agitate a claim against the foreign investors. The Claimants were never consulted and there was no attempt which was made by the respondents to engage in any of the reasonable negotiations as is required under the Bilateral Investment Treaty. Section 9[64] of the BIT which states about the settlement of disputes between an investor and a Contracting Party.

[59] M. Sornarajah, *The International Law of Foreign Investment,* CUP 2010.
[60] Ibid.
[61] Ibid.
[62] LG&E Energy Corporation v. Argentina (2007) 46 ILM 36, para. 130.
[63] National Grid plc v The Argentine Republic, UNCITRAL, Award, 30 November 2008.
[64] Article 9, Annexure 1, Moot Proposition.

It states that any such dispute in relation to any investment of the former under this agreement shall as far as possible, be settled amicably through negotiations between the parties to the dispute. [65]

(C) RESPONDENT HAS NOT PROVIDED FULL PROTECTION AND SECURITY OF INVESTMENTS TO CLAIMANTS.

31. It is contended that Republic of Binda have undertaken to provide full protection and security to the Claimant. [66]This principle is concerned with the let-down of the State to protect the investor's property from actual damage by not exercising proper due diligence[67] and has been held to imply a duty which requires contracting parties to take precautionary measures to protect the investment.[68] The host state must show that it has taken all measures of protection to protect the investment.[69] Additionally since the term 'protection' and 'security' are qualified by 'full', it implies a State's guarantee to protect the investment physically, commercially and legally.[70]

32. The claimant first of all contend that the obligation to provide Full Protection and Security is much more wider term than the physical protection and security The Tribunal's point of view in *CME v Czech*[71] , *Siemens v Argentina*[72] and *Parkerings v Lithunia*[73] show that the full protection and security was understood to go beyond the protection and security which has been ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of

[65] Ibid.
[66] Agreement between the Govt. of United Kingdom of Great Britain and Northern Ireland and the government of Malaysia, Art. 2(2), Oct. 21, 1988, UKTS No. 16 (1989).
[67] CAMPBELL MCLACHLAN QC ET AL., INTERNATIONAL INVESTMENT ARBITRATION, 247, (Loukas Mistelis ed., 2006).
[68] Pope & Talbot v. Canada, UNCITRAL Arbitration, Award on Merits of Phase 2, 50, ¶ 111 (May. 31, 2002).
[69] American Manufacturing & Trading, Inc. (AMT) (US) v Republic of Zaire, ICSID case No. ARB/93/1, 21 February, 1997, ¶ 6.05.
[70] Biwater Gauff Ltd. v. Tanzania, ICSID Case No ARB/05/22, ¶ 729, (July. 24, 2008).
[71] CME Czech Republic BV v Czech Republic (Partial Award) (13 September 2001) 9 ICSID Rep 121, 239.
[72] Siemens A.G v The Argentine Republic, Award, ICSID Case No. ARB/02/8, 62, 215, (Feb. 6, 2007);
[73] Parkerings v Lithunia ICSID Case No ARB/05/08.

view. It is contended that the rights which has been created by the treaty exist on the plane of the international law and therefore no provision of a national law shall be taken as the defence to any such claim.[74] Whenever the state admits it into its territory any of the foreign investments whether they are the juristic person or the natural persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them.[75] In the case of *Eastern Sugar v Czech Republic* [76] the tribunal suggested that the standard protected investors against violence stemming from third parties. It said:

> *"As the tribunals understands it, the criterion in Article 3(2) of the Czech-Netherlands BIT concerns the obligation of the host state to protect the investor from third parties, in the cases cited by the parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus it is the duty of the host state to provide full protection and security to the foreign investors investing in the country. [77]"*

33. It is contended that the Respondents have not provided with the full protection and security of investments to the Claimants. As mentioned in the proposition the public opposition in Smallnadu to the operations of the Airfresh Facilities became so violent, that they have threatened to turn violent and further sabotaging the facility of the foreign investor.[78] The *literal* meaning of the word *Sabotage* is-

> *"The wilful destruction or impairment of, or defective production of, war material or national defence material, or harm to war premises or war utilities. During a labour dispute, the wilful and malicious destruction of an employer's property or interference with his normal operations."*

Therefore it is submitted that the facilities of the Airfresh were sabotaged by the local community who even after the police protection offered, has sabotaged the facilities and therefore the standard of full protection and security has been violated by the respondents.

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[74] Campbell McLachlan QC, et. al, International Investment Arbitration: Substantive Principles (1st ed. , OUP Inc. 2007) 99.
[75] Barcelona Traction Light and Power Co (Belgium v. Spain) [1970] ICJ Rep 3 [33]; See also Rudolf Dolzer and Christopher Schreuer, Principles of International Investment Law (1st ed. OUP 2008) 335.
[76] Eastern Sugar v Czech Republic, Partial Award, 27 March 2007, ¶ 203.
[77] Ibid.
[78] ¶ d., Facts Pertaining to Claim 1, Annexure 1, Moot Proposition.

ARGUMENTS ADVANCED

CLAIM 2

[ISSUE I] THE ARBITRATOR SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL.

34. It is contended that the appointment of Prof. Mark White as an arbitrator is valid in nature, and his appointment should not be challenged. It is the Claimant's submission that nothing in the present case raises justifiable doubts to the impartiality and independence of Prof. Mark White, and hence he should not be removed from the arbitral tribunal. The tribunal should therefore dismiss the Respondent's challenge of Prof. White and he should remain as the arbitrator for Oxford.

35. It is contended that UNCITRAL[79] rule has given autonomy to the parties to appoint an arbitrator of their own choice[80]. A challenge of an arbitrator may take place when the facts create reasonable doubt about the independence and impartiality of the arbitrator. Independence can be understood as a non-existence of actual or prior relationship between the parties that may affect the arbitrator's freedom of judgment; impartiality relates to a state of mind when the arbitrator has no preference for one of the parties. In this case, contrary to the allegations, it has become clear that Mr. White has no lack of impartiality or independence.

36. Article 11 of the UNCITRAL Rules,[81] which provides for a duty to disclose, for the party and for the arbitral tribunal, any fact that raises doubts on the independence or impartiality of the tribunal. Only doubts that are substantiated and justifiable in the eyes of a fair-minded

[79] Appendix 7, UNCITRAL Model Law on International & Commercial Arbitration, 1985, Law and Practise of Arbitration and Conciliation, The Arbitration & Conciliation Act 1996, 2nd edn, Lexis Nexis.
[80] Article 9, UNCITRAL Arbitration Rules, 2010
[81] Article 11, United Nations Commission on International Trade Law, 1985.

and reasonable observer can meet the standards of Article 11[82]. This objective test has been reiterated in multiple case laws such as *Laker Airways Inc. v FLS Aerospace Ltd*[83].

37. Mr. White's niece was a Senior Investment Manager in Young & Coopers, a financial institution which was a 10% shareholder in the claimant company, Oxford. However, this remote kinship could not be stated to affect his role as an arbitrator as his niece was a very professional employee, and has had a flawless professional career since the past 20 years. Mr. White has a dozen nieces and nephews, and his remote relationship with them should not affect his impartiality and independence as an arbitrator.

(A) THERE EXISTS NO JUSTIFIABLE DOUBTS AS TO THE ARBITRATOR'S INDEPENDENCE AND IMPARTIALITY.

38. It is contended that the principle that arbitrators must be independent and impartial is now universally acceptable in International Arbitration. Most national laws, international conventions and arbitration rules provide that arbitrators must be independent and impartial[84]. Several German Courts have considered what constitute justifiable doubts as to arbitrator's impartiality and independence. In one case, the court dismissed a challenge to an arbitrator based on the fact that the impugned arbitrator's goddaughter was employed by the law firm represented the other party. A key consideration in the Court's reasoning was that the person had so significant involvement in the case[85]. It has been held by multiple courts that he "justifiable doubts as to his impartiality and independence" test is identical to the common law test applicable to judges, and it amounts to considering whether, on the basis of the circumstances invoked by the party bringing the challenge, there exists a real possibility that the arbitral tribunal was biased.

[82] Gauthier v ITM, Cours de casssation, FR, 1 July 2011.
[83] Laker Airways Inc. v FLS Aerospace Ltd, (1999) EWHC B3 (Comm), 20 April, 1999
[84] *The Arbitral Process and the Independence of Arbitrators* (ICC Publication No.472, 1991). Aldo Berlinguer, *Impartiality and Independence of Arbitrators in International Practice*, vol. 6 AM. REV. INT'L ARB. 339 ARIA 1995.
[85] Oberlandesericht München, Germany, 34 SchH 05/06, 5 July 2006.

39. The test is not whether the particular litigant thinks or feels that the arbitrator has been or may be biased. What matters is the viewpoint of the hypothetical fair-minded and informed observer, who would consider whether the challenged arbitrator might not bring an impartial and unprejudiced mind to the resolution of the dispute[86].

(B) THERE WAS DISCLOSURE OF THE CIRCUMSTANCES BY THE ARBITRATOR.

40. The arbitral tribunal must decide whether a party must submit documents to disclose circumstances regarding an arbitrator's independence and impartiality at an early stage of proceedings, and if so, then the scope of such disclosure, and to set out the time limits, the form of disclosure requests and the procedure for contesting requests[87]. There was no such request by either party for submission of documents or any other form of disclosure of circumstances, and hence it cannot be stated that there was a lack of disclosure on behalf of Prof. Mark White.

41. When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to 'justifiable doubts' as to his impartiality or independence[88]. The meaning of the term 'justifiable doubts' raises two questions: firstly, whose doubts are relevant, and secondly, what degree of apprehension of partiality or lack of independence satisfy the test of 'justifiable doubts'[89]. Since the qualities of independence and impartiality cannot be assessed objectively, the French courts have sensibly decided that the relevant test is that of a party's reasonable doubt as to the arbitrator's independence or impartiality[90]. One should therefore consider

[86] Jung Science Information Technology Co. Ltd. v ZTE Corporation, High Court-Court of First Instance, Hong Kong Special Administrative Region of China, 22 July 2008 [2008] HKCFI 606.
[87] UNCITRAL *Notes on Organizing Arbitral Proceedings*, 2016.
[88] Article 11, UNCITRAL Arbitration Rules, 2013.
[89] Croft Clyde, Christopher Kee, Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules,* CUP May 2013) ed. 1st pp.133.
[90] Annahold v Loreal, CA Paris, April 9, 1992

the viewpoint of a "reasonable man" in the different circumstances encountered in each case[91].

42. It is contended that in the year of 1987, the International Bar Association adopted the "Rules of Ethics for International Arbitrators."[92] These Rules state from the outset that "international arbitrators should be impartial, independent"[93], and that they shall remain "free from bias."[94] Whether an arbitral tribunal is impartial is a questions of fact and depends on whether the arbitral tribunal can resolve the dispute objectively[95]. General partiality requires personal interest on the part of the arbitrator which might cause him to be biased.[96] In the present case, Prof. Mark White's niece was just employed as a Senior Manager in a firm that has 10% shares in Oxford, and hence this cannot be stated to be a personal interest in his behalf.

43. It is further contended that in the *Morelite Construction Corp*[97] case, it was held that to challenge an arbitrator and to prove his partiality, it must be proven that there is more than just an appearance of bias. Strong circumstances that powerfully suggest bias should also be shown by way of proof.[98] To check whether impartiality exists in the relationship between the arbitrator and the party, the following facts need to be considered,

    (a) Extent of interest present, irrespective of whether it is personal, pecuniary or otherwise
    (b) Directness of the relationship between the arbitrator and the party
    (c) The connection of that relationship to the arbitrator
    (d) The proximity in time between the relationship and the arbitration proceeding.[99]

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[91] Ibid.
[92] David J. Branson, *Ethics for International Arbitrators,* 3 ARB. INT'L 72 (1987)
[93] Introductory Note, IBA Rules of Ethics for International Arbitrators, 1987
[94] Article 1: Fundamental Rule, IBA Rules of Ethics for International Arbitrators, 1987
[95] Societe Philip Brothers v. Societe Drexel Burrham Labert et autres (1990) Rev Arb 497; Societe Anonyme setec bâtiment v Societe Anonyme Sicca (1987) Rev Arb 63
[96] Siderma Societa Italiana Di Armamento Spa v Holt Marine Industries Inc. 515 F Supp 1302 (SDNY, 1981)
[97] Morelite Construction Corp. v New York City District Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (2d Cir. 1984)
[98] Kaplan v First Options of Chicago, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994)
[99]Scandinavian Reins. Co. Ltd. v ST. Paul Fire and Marine Ind. Co, 668 F. 3d 60, 72 (2d Cir. 2012)

44. Since there is no interest present, there is no directness of relationship between the arbitration proceeding and the personal relationship between Prof. White and his niece. Even if his niece is an employee of Young & Coopers, that is not a necessary reason for Prof. White's decision during the arbitration process to be biased.

45. Disclosure by and challenge of arbitrators is dealt with in Articles 11 to 13 of SIAC Rules. A person who is approached to serve as an arbitrator is obliged to disclose "any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[100] The primary aim of the UNCITRAL Rules with respect to the challenge and replacement of arbitrators is to provide a degree of transparency and under Article 9, an arbitrator approached in connection with a possible appointment must disclose *"any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.*"

46. It is contended that many institutional rules follow the example of the ICC in requiring prospective arbitrators to disclose any circumstances which would be liable to cast doubt on their impartiality or independence.[101] Shifting of all appointing powers to the appointing authority safeguarded the principle of equality of all parties.[102] Since in the present case, the arbitrator was appointed in accordance with the SIAC arbitration rules, it can be safely assumed that SIAC, the Appointing authority, would have mandated Prof. White to disclose circumstance which would have given rise to doubts towards his impartiality or independence and after checking and safeguarding the equality of all parties and after ensuring that Mr. White would act independently and impartially would have appointed Mr. White only after that.

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[100] Article 11, CEAC Rules; based on Article 11, revised UNCITRAL Arbitration Rules.
[101] E. Gaillard & J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999.
[102] *Report of the United Nations Commission on International Trade Law*. Forty-third Session 21 June-9 July 2010 (A/65/17) at [60]-[61].

[ISSUE II] THE RESPONDENT IS LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PETROLLAR-BINDA BILATERAL INVESTMENT TREATY.

47. As per the International Law, there is no definite definition of the term "Expropriation". Therefore, various tribunals have defined the term expropriation on a case-by-case basis, referring to applicable rules of international law.[103]
48. Expropriation is the governmental taking of property with the effect of substantially depriving investor of value of the investment through regulatory interference such as erosion of the investor's rights over time through a series of actions. It is illegal when it is discriminatory against the investor and not in accordance with due process of law and not accompanied by full compensation that is prompt, adequate and effective.
49. It is contended that the act of the municipality of Bingee to direct Oxford to revise the escalation clause and reduce it from 10% p.a. to 5% p.a. does not constitute expropriation.
50. So as to constitute expropriation, two element need to be proved **(A.)** that the actions of the government were as per any due process of law and **(B.)** the actions undertaken were for the welfare of public health or for a public purpose.

(A) THE ACTIONS TAKEN BY RESPONDENT VIOLATED THE DUE PROCESS OF LAW.

51. The due process of law principle clearly states that **(i)** the actions taken must be in accordance with the domestic legislation of that country (in our case Binda) and, in turn, **(ii)** such actions which have been taken, the investor (in our case Oxford) must have an opportunity to challenge the same before an independent and impartial body.

[103]Metalclad Corporation v. The United Mexico States. ICSID Case No. ARB(AF)/97/1.

(i) Due Process Of Law Was Not Followed.

52. In *ADC v. Hungary*[104] where there was a clear violation of 'due process of law' and the tribunal held as follows:

> *"…'due process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.* ***Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute****, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow."*

53. The actions taken by the Bingee municipality lacked legal basis and can be construed as a classic example of the misuse of power by the State. Oxford did not have a fair chance to defend itself before any necessary tribunal in Bingee.

54. A State denies justice when its judicial system acts are egregious and violate international law[105]. Stability cannot exist in a situation where the law keeps changing continuously and endlessly.[106]

(ii) The Claimants Did Not Get A Fair Chance Of Hearing.

55. Furthermore, in the present case the lack of speedy justice made the claimants believe that suits in the local courts will take a huge amount of time to be resolved as there are already a backlog of about 27 million cases pending in the courts of Binda[107] and a mere single legislation enacting the Commercial Courts Act 2015 cannot guarantee justice to the claimants. Claimant's various attempts to solve the matter amicably through conciliation did not bear any results.

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[104]ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary ("ADC v. Hungary"). ICSID Case No. ARB/03/16.
[105] Patrick Dumberry, *The Fair And Equitable Treatment Standard*, A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, 2013*;* Chevron Corporation (Usa) And Texaco Petroleum Company (Usa) v. Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award On Merits (2010).
[106]BG Group Plc. v. Argentina, UNCITRAL, Final Award, 101, 326 (Dec. 24, 2007);National Grid Plc. v. Argentina, UNCITRAL, Award, 62, 157 (Nov. 3, 2008).
[107]¶ 10, Background, Moot Proposition.

56. Hence, the actions that were taken up by the govt. to expropriate the investments of Oxford were neither as per the due process of law nor were they given any assurance of speedy justice.

(B) THE ACTIONS TAKEN BY RESPONDENT WERE NOT IN PURSUANCE OF A PUBLIC PURPOSE.

57. The actions undertaken by Binda were not in the pursuance of a public purpose, but were discriminatory against the foreign investor, i.e. Oxford and biased in favour of their domestic service providers.

58. In *ADC v. Hungary*[108], the tribunal noted that:

> *"… **a treaty requirement for 'public interest' requires some genuine interest of the public.** If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."*

59. The host state is under an obligation to provide for a "*secure investment environment*"[109], which was clearly not in the present case, as the measures taken by the government of Binda in no ways tried to secure the Claimant's investment.

60. Furthermore, it has been previously held that the intent of the government is less important than the effects of measures on the owner and the reality of their impact.[110]

61. Expropriation is unlawful when there is no compensation provided for the same.[111] Since in the present case, as there was no compensation granted to the Claimant's for the expropriation undertaken by the State, therefore, it renders the expropriation to be deemed as unlawful. Thus, the investment of the claimant has been unjustly expropriated.

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[108] Ibid 2.
[109] Azurix Corp v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 146, 408 (July 14, 2006).
[110] Phelps Dodge Corp. and Overseas Private Investment Corp. v. Iran, 10 Iran U.S. C.T.R. 121, 130, (Mar. 19, 1986).
[111] Siemens A.G v. The Argentine Republic, Award, ICSID Case No. ARB/02/8, 62, 215, (Feb. 6, 2007); Compañía De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Award, ICSID Case No. ARB/97/3, 223, 7.5.5 (Aug. 20, 2007).

[ISSUE III] THE RESPONDENT HAS COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

62. The principle of National Treatment, as defined under the International Law, states that if a state provides certain rights and privileges to the domestic investors, it must provide exactly the same rights and privileges to other international investors operating in the country, given that both of them are competing in the same business.

63. It is hereby contended that so as to determine the breach of national treatment standard, the first step would be to compare the treatment accorded to a foreign investor and a domestic one[112] operating in the same economic sector[113] and the second would be to assess a reasonable nexus to rational Government policies[114] and the elements of discrimination against the foreign owned producers.[115]

64. It is contended that, so as to test whether there was a violation of the national treatment principle, it needs to be established that the business performed by the domestic and foreign investor were **(A.)** functioning in comparatively "like circumstances" and **(B.)** the foreign investor was accorded with less favorable treatment compared to their domestic counterparts, with respect to the management, conduct, operation, sale or other disposition of investments in its territory.[116]

[112]Pope & Talbot Inc v Govt of Canada (Award on Damages) (31 May 2002), 7 ICSID Rep 43 (107-125) (UNCITRAL).
[113] Ibid;See also SD Myers Inc v Government of Canada (Partial Award) (13 November 2000) 40 ILM 1408.
[114]United Parcel Service of America Inc v Government of Canada (Jurisdiction) (22 November 2002) 7 ICSID Rep 285.
[115] Andrew Newcombe and LluisParadell, *Law and Practice of Investment Treaties- Standards of Treatmen (1st edn, Wolters Kluwer* 2009) 159.
[116] Article 4, Bilateral Investment Treaty between The Government of Republic of Binda and The Kingdom Emirates of Petrollar on The Promotion and Protection of Investments, Annexure II, Moot Proposition.

(A) DOMESTIC SERVICE PROVIDERS AND THE CLAIMANT CONDUCTED THEIR BUSINESSES IN "LIKE CIRCUMSTANCES".

65. The very first step to determine the violation of national treatment principle is to assess whether both the domestic and foreign investors were functioning in comparable circumstances or "like circumstances".

66. As held in *S D Myers v. Canada*[117], the term "like circumstances" includes both the concept of "economic sector" as well as "business sector". The term "business sector" can be interpreted as dealing in the same product or service.

67. In assessing whether investments are in 'like circumstances', an analysis of the competitive relationship is often critical. The Tribunals have also compared investments in very different economic sectors that were not in a competitive relationship.[118] Also, refusal to deal in a constructive manner with the foreign investor and instead according a preferential treatment to the local one is held to be a breach of the standard.[119]

68. The other domestic providers were also providing similar service as Oxford, i.e. of processing the wastewater into potable water and supplying the same to the general public at a particular pre-decided price. Thus, it is prima facie visible that both the domestic as well as foreign service provider, i.e. Oxford were operating in "like circumstances".

(B) CLAIMANT HAS FACED A DISCRIMINATORY TREATMENT IN THE REPUBLIC OF BINDA.

69. It is contended that discrimination against a foreign investor exists when the rights & privileges provided to a foreign service provider is less favorable as compared to the one provided to the domestic service provider. If the treatment received is less than favorable, it implies that the foreign investor is discriminated against. It however doesn't imply that

[117]Supra 40
[118]Occidental Exploration and Production Company v Ecuador (Award) (1 July 2004) 17(1) WTAM 165.
[119]Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award) (17 March 2006) 18(3) World Trade and ARB MAT 166 (UNCITRAL) (408-416).

all the treatment that must be accorded should be identical, but it should be justifiable on reasonable ground as to why a particular treatment was not accorded to the foreign investor.

70. In the present case, certain monetary measures were undertaken by the municipality of Bingee, which majorly restricted the transfer of funds from the territory of Binda. The finance ministry of the govt. of Binda restricted the outward remittance of money by the major investors in Binda and only allowed a minimal funds transfer outside the territory of Binda in a carefully monitored monetary program by the Reserve Bank of Binda.[120]
71. Further, the state of Bingee even directed Oxford to revise their escalation clause of 10% per year on sale/purchase of water to 5% per year, even though the contract signed clearly cited that the escalation clause shall remain at 10% for the agreed 5 year period. Oxford even requested the respondents to hold the escalation clause at least in accord with the contract signed for 5 year period and in turn honour the contract, after which Oxford was ready to re-negotiate the same. However, Oxford was unsuccessful in convincing the respondents to honour the agreement.[121]
72. It is finally contended that the action taken by govt. of Binda weren't in good faith & were irrational and improper. The principle of good faith requires every right to be exercised honestly & loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will constitute an abuse of right, prohibited by law.[122]

[ISSUE IV] THE CLAIMANT HAS BEEN DENIED FREE TRANSFER OF FUNDS.

[120] ¶ b, Claim 2, Moot Proposition.
[121] ¶ e, Claim 2, Moot Proposition.
[122] Anglo-Norwegian Fisheries (United Kingdom v Norway) 1951 I.C.J. Rep 116, 142.

73. The principle of free transfer of funds refers to the freedom that has been rendered on the foreign investor investing in a particular country to repatriate their earnings or any other amounts that have been invested by them in the host country back to their own country.
74. It is hereby contended that the finance ministry of the government of Binda had imposed monetary restrictions through restricting the outward remittances, on Oxford, and denied them their right to a free a transfer of funds from the territory of Binda to that of Petrollar. There was only a minimal transfer of funds allowed that too carefully monitored by the Reserve Bank of India. Further it has been held in *Enron Corporation and Ponderosa Assets LP v. Argentina*[123] that a host country cannot impose arbitrary regulatory measures and jeopardize the investor's investment, giving necessity as justification for the same.
75. As that per the "Article 6[124] one party has to permit the other party related to its investment in its territory to be freely transferred and on a non-discriminatory basis. It includes all the types of profits, dividends, capital, interest, etc. that have been generated in the business. The funds being transferred by Oxford fall well within the purview of this list.
76. Furthermore, even though the said acts of the government of Binda were in good faith, they are not acceptable as the treaty between the two nations clearly prevents any party from conditioning the transfer through a good faith application of law.
77. Even though in the current case the restrictions were imposed by the Reserve Bank of Binda, It has been clearly mentioned that the above good faith application of law includes any action relating to requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party.[125]

[123]Enron Corporation and Ponderosa Assets LP v. Argentina, ICSID Case No. ARB/01/3, Decision on Application for Annulment (2010).
[124] Article 6, Transfers, Annex.2, Moot Proposition.
[125] Article 6.3(x), Bilateral Investment Treaty Between The Government of Republic of Binda and The Kingdom Emirates of Petrollar on The Promotion and Protection of Investments, Annexure II, Moot Proposition.

78. Further, it is contended that there was a new national legislation that had been passed by The Kingdom Emirates of Petrollar allowing zero taxation of profits earned by its nationals and its companies doing business overseas and it even provided incentives for repatriating earnings overseas.[126] The claimant in the given case is Oxford, a Petrollar based company.

79. Lastly, it is also contended that there was no national legislation that was passed by the Parliament of Binda under Article 253 of the Constitution of Binda and thus, in the absence of national legislation on the particular aspect of free transfer of funds, the treaty law shall prevail.[127] It was clearly held in the landmark decision of *Christie Goodwin v. United Kingdom*, which was later reiterated by the Hon'ble Supreme Court of Binda[128] that:

> *"If Parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian law, rather than the international law. In the absence of a contrary legislation, municipal courts in India would respect the rules of international law."*[129]

80. It is the parliament only which has the power to make laws in relation to the same. In *Maganbhai Ishwarbhai Patel v. Union of India & Anr.* it was held:

> *"The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament which it may not otherwise possess."*[130]

81. Therefore it is prima facie evident that the actions of the government of Binda are ultra vires, contravened with the provisions of the Bilateral Investment Treaty signed between the Republic of Binda and The Kingdom Emirates of Petrollar and also violate the new national legislation implementation.

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[126] ¶ 14, Background, Moot Proposition.
[127] ¶ 16, Background, Moot Proposition.
[128] National Legal Services Authority v. Union of India &Ors., AIR 2014 SC 1863.
[129] Christie Goodwin v. United Kingdom, (2002) 35 EHRR 18.
[130] Maganbhai Ishwarbhai Patel v. Union of India & Anr., 1969 SCR (3) 254.

PRAYER

CLAIM 1

In light of the facts presented, issues raised and arguments advanced, Counsel for Claimant respectfully submits to the Tribunal to:

1. **HOLD** that the Respondent is liable for expropriation.
2. **DECLARE & ADJUDGE** that Respondents have failed to comply with the standard of Fair and Equitable Treatment.

CLAIM 2

1. **QUASH** the Challenge to the appointment of the Arbitrator.
2. **HOLD** that the Respondent is liable for expropriation.
3. **DECLARE & ADJUDGE** that the doctrine of National Treatment has been violated and the actions of the Respondents must be reversed.
4. **DECLARE & ADJUDGE** that the claimants have not been granted the right to free transfer of funds.

All of which is respectfully affirmed and submitted.

Place: Arbitral Tribunal, Finland (Claim 1) Sd/- ***Counsel for Claimants***

Arbitral Tribunal, Singapore (Claim 2)