"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 RESPONDENT

2018

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¶¶/¶	Paragraph(s)
AAPL	Asian Agricultural Products Ltd.
ARB/Arb.	Arbitration
Art/Art.	Article
Aug.	August
BIT	Bilateral Investment Treaty
BNR	Binda National Rupee
BOO	Build Own Operate
C1	Airfresh
C2	Oxford
Can.	Canada
CIArb	Charted Institute of Arbitrators
CIL	The Centre for International Law
CLOUT	Case Law on UNCITRAL Texts.
Comm.	Commercial
Ct.	Court
Dec.	December
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
F. INV. L.J.	Foreign Investment Law Journal
Feb.	February
FET	Fair and Equitable Treatment
Fr.	France
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
ILR	International law Report
Int'l Law Comm.	International Law Commission
J.	Journal
L.R.	Law Reporter
Ltd.	Limited
Mar.	March
NGT	National Green Tribunal
No.	Number

Nov.	November
Oct.	October
p./pp.	Page(s)
PAE	Pollution Environment Ministry
PCA	Permanent Court of Arbitration
Perm.	Permanent
POTW	Privately Owned Treatment Works
Rep.	Report
Sep.	September
SEZs	Special Economic Zones
Supp	Supplement
Switz.	Switzerland
T1	Tribunal 1
T2	Tribunal 2
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

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2. G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 60 (1976) 25

3. GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 100-101 (4th ed. 2013) 9

4. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (James Crawford ed., Oxford 8th ed. 2013) (1966) 17

5. PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II 434 (O. Landom & H. Beale eds., 2000) 25

6. R. DOLZER AND M. STEVENS, BILATERAL INVESTMENT TREATIES 83 (1995) 13

7. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1010 (1990) 25

8. SAM LUTTREL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 195 (2009) 5

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10. THE INTERNATIONAL ARBITRATION REVIEW 458 (James H. Carter ed., 2012) 4, 7

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52. Nathalie Voser, SanktionenbeiNichterf¨ullungeinerSchlichtungsklausel, No. 29, 1999, ZR 99, 376 (2000) (Zurich Court of Cassation, Switz.)..... 10

53. Positive Software Sols. Inc. v. New Century Mortg. Corp, 259 F. Supp. 2d 531 (N.D. Tex. 2003)..... 6

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IV. JOURNALS/ARTICLES

1. Barbara Helene Steindl, *Procedural Tactics of a Guerrilla Nature and Suggestions for Counsel How to Counter and Employ (From the Perspective of Counsel Before Commercial Tribunals),* 7 T.D.M.J. (2010)..... 21

2. Aïssatou Diop, *Objection under Rule 41(5) of the ICSID Arbitration Rules*, FI L.J. 312, 315-316 (2012) 2

3. Amr A. Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism, 41 HARV. INT'L L.J. 419, 424 (2000) 8

4. Bruno Zeller, *Good Faith - Is it a Contractual Obligation?*, 15 (2) BOND L. REV. 215, 218 (2013) 24

5. Chartered Institute of Arbitrators, *Jurisdictional Challenges*, 1 INT'L ARB. PRAC. GUID. 3 (2015), http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015jurisdictionchallenges.pdf?sfvrsn=26 9,10,16,17,18

6. Dyalá Jiménez Figueres, *Partial Award in ICC Case No. 6276*, 14 INT'L C.A. BUL. 76,84 (2003) 8,9

7. Jürgen Kurtz, *Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni*, 20 E.J.I.L. 1077, 1081 (2009) 12

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11. Rainer Geiger et al., *UNCTAD Series on International Investment Agreements*, 18 IIA P. S. 108 (2002) 16, 19

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2. International Maritime Organization Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, Dec. 29, 1972, 11 LL.M. 1291 13

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5. U.N. G.A. Rep. of the Secretary-General on its 18th Sess., June 3–21, 1985, p. 44, ¶ 3, U.N. DOC. A/CN.9/264 (Mar. 25, 1985)..... 11

STATEMENT OF JURISDICTION

CLAIM 1

1. The Respondent has the honor to submit this claim, while expressing reservations to the jurisdiction of this Tribunal. The Respondent submits the present dispute and its memorandum before this ad-hoc arbitral Tribunal at Finland under Art. 9 of the Agreement between C1 and the Respondent under the UNCITRAL Arbitration 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 C1 and the Respondent.

CLAIM 2

2. Respondent 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 UNITRAL 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 C2 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 is funded by PAE with expertise through EPC.

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 requirement. 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

I.WHETHER THE APPOINTMENT OF MR. WHITE IS VITIATED BY BIAS?

II. WHETHER THE TRIBUNALS HAVE JURISDICTION TO DECIDE ON THE MATTER UNDER THE PRESENT BITS?

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: Mr. White must be removed from the arbitral tribunal pertaining to reasons which are four-fold. *Firstly,* the principle of "waiver of right to object" does not render the Respondents challenge waived. *Secondly,* T2 with Mr. White must not decide on the challenge. *Thirdly,* the connections of Mr. White, creates justifiable doubts as to his independence and impartiality. *Fourthly,* the presence of Mr. White in deciding the substantial issues will prejudice the Respondent.

JURISDICTION

ISSUE 2: The Respondent humbly submits that T1 and T2 do not have jurisdictions to adjudicate upon Claim 1 and Claim 2 respectively because mandatory pre-arbitral negotiation procedures have not been exhausted. This argument is four-fold. *Firstly,* Non-compliance with mandatory pre-arbitral procedures under the BITs bars jurisdiction. *Secondly,* in arguendo, the Tribunals should stay the proceedings pending compliance. *Thirdly,* waiver of right to object to the jurisdictions does not apply in case of mandatory provisions. *Fourthly,* there has not been valid exhaustion of local remedies under the claims in order to justify recourse to arbitration.

MERITS

CLAIM 1

ISSUE 3: This is a three-fold argument. *Firstly,* Respondents actions are precluded from liability under the Binda-Nuland BIT. *Secondly,* the Respondent fulfilled all its obligations under the Binda-Nuland BIT because the Respondents actions promoted and protected the investments of the C1, the Respondent did not expropriate C1's investment and Respondent met the legitimate expectation of C1. *Thirdly* and consequently C1 is not entitled to compensation of 200 crores BNR.

ISSUE 4: The regulatory actions of the Respondents do not amount to a breach of its obligations under the Binda-Petrollar BIT. This is mainly because of three- fold reasons. *Firstly,* the Respondent is precluded from liability under Chapter II of this treaty. *Secondly,* the Respondent in arguendo**,** fulfilled its obligations underlined under Chapter II of this treaty because the Respondent provided adequate national treatment of investments, the Respondent did not expropriate the investment of C2. and the Respondent did not breach the obligation of free transfer of funds. Consequent to the arguments put forth C2 must not to be entitled to compensation under the Binda-Petrollar BIT.

ARGUMENTS ADVANCED

ISSUE 1 WHETHER THE APPOINTMENT OF MR. WHITE IS VITIATED BY BIAS?

(¶1) It is humbly submitted that Mr. White must be removed from the arbitral tribunal pertaining to reasons which are four-fold. *Firstly*, the principle of "waiver of right to object" does not render the Respondents challenge waived. **[A]** *Secondly*, T2 with Mr. White must not decide on the challenge. **[B]** *Thirdly*, the connections of Mr. White, creates justifiable doubts as to his independence and impartiality. **[C]** *Fourthly*, the presence of Mr. White in deciding the substantial issues will prejudice the Respondent. **[D]**

A. THE PRINCIPLE OF "WAIVER OF RIGHT TO OBJECT" DOES NOT RENDER THE RESPONDENTS CHALLENGE WAIVED

(¶2) Art. 13 of the UNCITRAL Arbitration Rules obligate settling every challenge on an arbitrator within 30 days from the notice of a challenge.[1] The same rules are however silent with respect to the sanction in case there is a failure to settle the challenge within 30 days. Therefore, the decision to allow or disallow the challenge automatically falls upon the arbitral tribunal in lieu of Art. 17 of the UNCITRAL Arbitration Rules.[2] While exercising the power of Art. 17, T2is bound by two obligations, namely: the obligation to treat parties equally and the obligation to allow every party to present its case at an appropriate stage of the proceedings.[3]

(¶3) T2, in the instant case has to ensure that both the parties get an equal opportunity to present its case and not allowing the Respondent to put forth his arguments on the challenge merely

[1] United Nations Commission on International Trade Law Arbitration Rules art. 13 [hereinafter UNCITRAL Arbitration Rules].
[2] *Id*. art. 17.
[3] *Id*.

because of a failure to place an objection or request under the rules will not fulfill the said objective because of two reasons.

(¶4) *Firstly,* the Respondent has chosen not to place an objection because of the fact that T2 had already passed on order to that effect determining that T2 was in total authority to decide the challenge on the arbitrator.[4] C2 waived its right to object for non-compliance thereby losing the Right to challenge the authority of this tribunal on the expiry of 30 days.[5] This is mainly because the challenge was made on 5th June 2018 and approximately more than a month has passed and yet a formal objection has not been placed.[6] A number of common law and civil law jurisdictions including several institutional rules recognize that a months' time is more than sufficient to place a preliminary objection.[7]

(¶5) C2 has also failed to provide a reason for the delay to make an objection with regards to the members who will chair the challenge or any objection with regards to the 30 days rule in making a decision on the challenge of Mr. White.[8] The Respondent can be justified because in light of all the arguments stated above the Respondent was of the opinion that the tribunal has chosen to forego the requirement that has been placed under Art. 13 of the UNCITRAL Arbitration Rules in lieu of party autonomy. Thereby, the Respondent went ahead with the idea of not objecting when there was no decision in 30 days with regards to the challenge.[9] In this regard a number of decisions of various institutions have held that the waiver of right to object by one party entails the scope of the challenge for that particular party in reference to that

[4] Moot Proposition, Annexure-V.
[5] Art. 19.6, 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].
[6] Moot Proposition, Annexure-V.
[7] ICSID Arbitration Rules art. 41 (5); *see also* Aïssatou Diop, *Objection under Rule 41(5) of the ICSID Arbitration Rules*, F. INV. L.J. 312, 315-316 (2012).
[8] Moot Proposition, ¶ 2.
[9] UNCITRAL Arbitration Rules, *supra* note 1, art. 13.

particular objection i.e. in this case the challenge on the authority of T2 and the power to hear the challenge after 30 days.[10]

(¶6) *Secondly,* in arguendo, if the Respondent did waive any right to object, this was the Right to get a decision on the challenge within 30 days from the date of the notice of the challenge. The institution provides for completing a challenge on an arbitrator within 30 days. This merely entails an expeditious resolution of dispute and it does not eliminate the scope of a challenge itself.[11]

B. T2 WITH MR. WHITE MUST NOT DECIDE ON THE CHALLENGE ON ACCOUNT OF NON-COMPLIANCE

(¶7) The jurisdiction as per the UNCITRAL Arbitration Rules[12] and the BIT[13] of deciding a challenge lies with the appointing authority. In the present case the appointing authority is Secretary General of PCA.[14] The jurisdiction of the appointing authority in the present case is limited by the fact that the power of the appointing authority to decide the challenge, remains only if the period of 30 days after the notice of the challenge by a party has not expired.[15] After the expiry of the 30 days the power should ideally descend to the arbitral tribunal itself as envisaged by Art. 17.[16] This arbitral tribunal has made decisions on challenge to arbitrator in the past and this power did descend to the arbitral tribunal when the appointing authority did not pass a decision within a period of 30 days.[17]

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[10] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Award, ¶ 58 (Apr. 30, 2004) [hereinafter Waste Management].
[11] ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL Arbitration Award, ¶ 68 (Feb. 10, 2012).
[12] UNCITRAL Arbitration Rules, *supra* note 1, art. 12.
[13] Binda-Petrollar BIT, *supra* note 5, art. 18.3.
[14] *Id.*
[15] UNCITRAL Arbitration Rules, *supra* note 1,art. 6, ¶ 4;*see also* Food Services of America, Inc. (Amerifresh) v. P-an Pacific Specialties Ltd., [1997] 32 B.C.L.R. 3d 225, pp. 581-589 (Can. S.C.C.).
[16] UNCITRAL Arbitration Rules, *supra* note 1,art. 17.
[17] UNCITRAL Arbitration Rules, *supra* note 1,art. 16 (2).

(¶8) *Secondly,* this tribunal must invoke the principle of *kompetenz-kompetenz* which has been in built within the rules in itself to invoke its authority and jurisdiction to decide on a challenge to the arbitrator in addition to Art. 17.[18] The rules have not within their scope envisaged or indicated what is to happen when the challenge is not decided within 30 days. The absence of such a rule essentially implies that the authority to decide on the challenge descends on the arbitral tribunal as is its power to rule on its own jurisdiction. This power therefore can definitely be exercised in order to decide if the challenge still stands or not. Thus, in order to maintain the fairness, the chairing of T2 in the present case stands. The principle of natural justice should also be supplied should disqualify T2 with Mr. White.

C. THE CONNECTIONS OF MR. WHITE CREATES JUSTIFIABLE DOUBTS AS TO HIS INDEPENDENCE AND IMPARTIALTY

(¶9) It is submitted that there are two facts that create justifiable doubts as to the arbitrator's independence and impartiality and these are *firstly*, the failure to disclose his relations with his niece who worked in an investment firm that held 10% shares in C2's company and *secondly*, the existence of a conflict of interest owing to the business relationship with his niece. Both these facts give rise to two duties and these are the duty to disclose and the duty to act independently and impartially.[19]

(¶10) The duty of disclosure imposes an obligation that any fact/ circumstances that creates justifiable doubts or speculate the possibility of creating justifiable doubts be disclosed in a timely manner.[20] In the present case this duty was not fulfilled by the arbitrator and this can be proven by two-fold arguments.

[18] THE INTERNATIONAL ARBITRATION REVIEW 458 (James H. Carter ed., 2012).
[19] Binda-Petrollar BIT, *supra* note 5, art. 19.1.
[20] Binda-Petrollar BIT, *supra* note 5, art. 19.3.

(¶11) *Firstly*, the duty to disclose is inbuilt in Art.11, 12(1), 13of UNCITRAL Arbitration Rules.[21] The IBA Guidelines can be used to determine circumstances of conflict of interest owing to non-disclosure under UNCITRAL Arbitration Rules. This is mainly because the IBA Guidelines have sourced its obligations from the UNCITRAL Arbitration Rules.[22] A significant number of decisions recognize the use of IBA Guidelines in interpretation of disclosure norms under UNCITRAL Arbitration.[23]

(¶12) Art. 7 (d) of the IBA Guidelines imposes a duty on the arbitrator to make reasonable enquiries to identify any conflict of interest, and explicitly states that "failure to disclose a conflict is not excused by a lack of knowledge, if the arbitrator does not perform such reasonable enquiries".[24] Here the fact is that the niece works in a firm that holds 10% shares of the C2 Company.[25] A victory in this arbitration can provide sufficient financial motive in itself as the reward received in the arbitration will release a large amount of money in the hands of the C2 and its shareholders.[26] A very specific possibility that can also be entertained is disclosure of undisclosed public information to the niece. The same will cause significant prejudice to the Respondent as C1's investments are operational in Respondent's State. This supports the conclusion that there might have been possibility of financial motive thereby making the disclosure standard stated above applicable.[27]

(¶13) *Secondly,* the obligation to disclose within the Binda-Petrollar BIT mandates the arbitrator to disclose two circumstances. *Firstly*, if the arbitrator or his/her associates or relatives have an

[21] UNCITRAL Arbitration Rules, *supra* note 1,art. 11, 12 (1), 13.
[22] *Id*. art. 7,12.
[23] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB /97/3, Award, ¶ 20-22 (Aug. 20, 2007); *see also* SAM LUTTREL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 195 (2009).
[24] IBA Guidelines, General Standard 7 (d).
[25] Moot Proposition, Annexure-IV.
[26] IBA Guidelines, Part II, Non-Waivable Red List 1.3, 1.4.
[27] IBA Guidelines, Part II, Waivable Red List 2.3.9.

interest in the outcome of the particular arbitration and *secondly,* if the arbitrator has a controlling influence by virtue of shareholding or otherwise in one of the parties.[28] Both these facts were present here due to the arbitrator's relationship with his niece. The niece of the arbitrator was a very close relative and she was dear to him and she worked at an investment firm (that being a minority shareholder) that had some sort of interest in the outcome of the process of arbitration owing to holding shares.[29] Furthermore being the Senior Investment manager she definitely had a control over the regulation of the purchase and sale of shares and the same must also be considered as being a significant reason to believe that there is a potential control of this shareholding in the hands of the arbitrator.[30]

(¶14) The duty to act independently and impartially is an obligation that flows from the UNCITRAL Rules as well as the Binda-Petrollar BIT in supplementary fashion.[31] Under both these rules the obligation is to ensure that there is no appearance of bias to an objective evaluation of evidence by a third party.[32] The objective evaluation of evidence does not have to prove actual bias but it is merely sufficient to prove the appearance of bias.[33] The appearance of bias has been interpreted to mean proving the speculative appearance as more likely than other appearances.[34] In the instant case the arbitrator has a relationship with his niece who works in a firm that has direct links to C2's company and an outcome of the same can definitely favor the shareholder of the company and the niece. Here the relationship between the arbitrator and niece

[28] Binda-Petrollar BIT, *supra* note 5, art. 19.10 (7).
[29] Moot Proposition, Annexure-IV.
[30] Tidewater Inc. and Others v. The Bolivarian Republic of Venezuela, ICSID Case No ARB/10/5, Decision to Disqualify Arbitrator, ¶ 16 (Dec. 23, 2010).
[31] Binda-Petrollar BIT, *supra* note 5, art. 19; *see also* UNCITRAL Arbitration Rules, *supra* note 1, art. 11.
[32] UNCITRAL Arbitration Rules, *supra* note 1,art. 10 (1); *see also* Longreef Investments A. V. V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/5, Notice of Arbitration, ¶ 60 (Feb. 23, 2011).
[33] Positive Software Sols. Inc. v. New Century Mortg. Corp, 259 F. Supp. 2d 531 (N.D. Tex. 2003).
[34] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award, ¶ 132 (Nov. 20, 1984); *see also* Crow Construction. Co. v. Jeffrey M. Brown Assocs., 264 F. Supp. 2d 217, 224 (E.D. Pa. 2003).

is a very close one. Avery prominent possibility is disclosure of undisclosed public information to the niece who being a Senior Investment Manager can govern investments. The justifiable standards are meant to eliminate the slightest of the doubt that may render the arbitrator incapable of rendering his duties de facto/ de jure.[35] Such a relationship has been recognized as meeting the requisites of conflict of interest in past decisions as well.[36] Essentially this implies that there is a slight speculative possibility of bias and to add to this possibility and make the outcome more apparent there is a clear financial link between the arbitrator and C2 through the trail of the niece who works in a firm holding stakes in C2 in itself.[37] Such a strong financial motive has been recognized by a number of arbitral decisions as proving justifiable doubts.[38]

D. THE PRESENCE OF MR. WHITE IN DECIDING THE SUBSTANTIAL ISSUES WILL PREJUDICE THE RESPONDENT

(¶15) The concept of prejudice has been in built in the UNCITRAL Rules and the Binda-Petrollar. Both these rules very specifically obligate assurance that every arbitrator be free of any possible conflict of interest.[39] The interpretation of both these rule point to the presence of one fact that can create significant prejudice and that is the possible financial and personal motive that exists in the present case.[40] In the present case the arbitrator has the power to make a decision on the outcome by chairing T2 and the same arbitrator has relations with a niece who

[35] Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland, Permanent Court of Arbitration, ¶ 43 (Nov. 30, 2011).
[36] Perenco Ecuador Ltd. v. The Republic of Ecuador et al., PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator, Dec. 8, 2009, ¶ 44.
[37] Moot Proposition, Annexure-IV.
[38] Carter, *supra* note 18, at 223.
[39] UNCITRAL Arbitration Rules, *supra* note 1,art. 17, ¶ 5; *see also* Binda-Petrollar BIT, *supra* note 5, art. 1.1.
[40] IBA Rules of Ethics 3.2; *see also* IBA Guidelines, *Conflicts of Interest in International Arbitration (2004)* General Standard 6 cmt (a).

directly benefits on an outcome of this case.[41] Such a direct possibility of financial gain to the relative of the arbitrator has been recognized as a direct proof of prejudice by tribunals and decisions alike.[42]

ISSUE 2 WHETHER THE TRIBUNALS HAVE JURISDICTION TO DECIDE ON THE MATTER UNDER THE PRESENT BIT'S?

(¶16) The Respondent humbly submits that T1 and T2 do not have jurisdictions to adjudicate upon Claim 1 and Claim 2 respectively because mandatory pre-arbitral negotiation procedures have not been exhausted. This argument is threefold. *Firstly*, Non-compliance with mandatory pre-arbitral procedures laid down under the BITs bars jurisdiction. **[E]** *Secondly,* in arguendo, the Tribunals should stay the proceedings pending compliance**. [F]** *Thirdly*, Waiver of right to object against the jurisdictions does not apply in case of mandatory provisions. **[G]** *Fourthly*, there has not been valid exhaustion of local remedies under the claims in order to justify recourse to arbitration. **[H]**

E. NON-COMPLIANCE WITH MANDATORY PRE-ARBITRAL PROCEDURES BARS JURISDICTION

(¶17) Arbitral jurisprudence has upheld the sanctity of compliance with mandatory pre-arbitration procedures.[43] The failure to satisfy pre-arbitral procedures which are strictly binding[44]

[41] Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 48 (Nov. 12, 2013); *see also* Locabail (UK) Ltd. v. Bayfield Properties Ltd., [2000] Q.B. 451, at 472 (Eng.).

[42] Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 29 (Oct. 22, 2007); *see also* Amr A. Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism, 41 HARV. INT'L L.J. 419, 424 (2000).

[43] MacKinnon v. National Money Mart Co., 2009 B.C.L.R. 4th 89, para 129 (Can.); *see also* Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara, UNCITRAL Arbitration Award, ¶ 307 (May 4, 1999).

[44] Dyalá Jiménez Figueres, *Partial Award in ICC Case No. 6276*, 14 INT'L C.A. BUL. 76,84 (2003) [hereinafter Jiménez]; *see* Case No. 9812 of 2009, 20 Y.B. Comm. Arb. 69 (ICC Int'l Ct. Arb.) [hereinafter Case 9812]; *see also* Burlington Res Inc v. Republic of Ecuador & Petro Ecuador, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of The Award, ¶ 50 (Aug. 31, 2017).

has often been the reason for dismissal of arbitration.[45] The arbitrator should reject the request for arbitration as "procedurally inadmissible" if there is a clear, precise and binding condition with respect to a mandatory pre-arbitral procedure[46], and if such a precondition has not been fulfilled.[47] It has been observed while ruling against jurisdiction that "manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met."[48]

(¶18) The obligation to negotiate and consult flows from Art.15.4 of the Binda-Petrollar BIT.[49]. The objective of every negotiation is to ensure that the interest of both parties remain protected, however C2 while offering any form of settlement has chosen to ignore this obligation in totality.[50] The same is the case with C1. When the negotiations were in the nature of a mandatory settlement clause, an action brought before the courts prior to completion of the same has been held to be inadmissible.[51] Non-compliance with mandatory pre-arbitral procedural requirements[52] bars a party from initiating arbitral proceedings.[53]

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[45] ICC Case No. 12739 of 2004 (unreported) [hereinafter Case 12739]; *see also* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 100-101 (4th ed. 2013); *see also* Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, 18 J. INT'L ARB. 159, 165 (2001).

[46] Chartered Institute of Arbitrators, *Jurisdictional Challenges*, 1 INT'L ARB. PRAC. GUID. 3 (2015), http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015jurisdictionchallenges.pdf?sfvrsn=26 [hereinafter CIArb]; *see also* Laurent Gouiffès and Melissa Ordonez, *Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?* 31 (1) ARB. INT'L 109, 110 (2015); *see also*Jiménez, *supra* note 44.

[47] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, ICSID Case No. ARB/11/28, Award, ¶ 71 (Mar. 10, 2014).

[48] Application of The International Convention on The Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Judgement, 2011 I.C.J. Rep. 70, ¶ 159 (Apr. 1).

[49] Binda-Petrollar BIT, *supra* note 5, art. 15.4.

[50] Moot Proposition, ¶ B (f).

[51] BGH Mar. 24, 1999, VIII ZR 121/98, http://cisgw3.law.pace.edu/cases/990324g1.html.

[52] Case 12739, *supra* note 45.

[53] Case 9812, *supra* text accompanying note 44.

F. IN ARGUENDO, THE TRIBUNALS SHOULD STAY THE PROCEEDINGS PENDING COMPLIANCE

(¶19) The Respondent submits that even if this Tribunal intends to rule in favour of its power to hear the matter, it should stay the arbitration pending compliance.[54] When arbitrators are confronted with such a question as to the jurisdiction vis-à-vis pending non-compliance with a mandatory pre-arbitral procedure, they should decide (1) whether an obligation is imposed by such a clause? And (2) if yes, whether or not it should have been satisfied as a pre-arbitration requirement?[55] In the light of the present agreement[56], both these questions are answered in the affirmative and the Tribunal should therefore rule against its jurisdiction or to stay the matter pending compliance.[57] There is no doubt that the Agreement mandates negotiations as a precondition to arbitration and the failure of both the Claimants to satisfy the same in glaringly evident.

G. WAIVER OF RIGHT TO OBJECT AGAINST THE JURISDICTIONS DOES NOT APPLY IN CASE OF MANDATORY PROVISIONS

(¶20) The concept of waiver applies only in case of non-compliance with arbitration agreement or a non-mandatory provision of Model Law.[58] Such an objection regarding waiver, if in terms of arbitration agreement, must not be a violation of any mandatory procedure as per the Model Law.[59] The right to be heard remains of absolute sanctity as it is a mandatory provision

[54] CIArb, *supra* note 46.
[55] Nathalie Voser, SanktionenbeiNichterf¨ullungeinerSchlichtungsklausel, No. 29, 1999, ZR 99, 376 (2000) (Zurich Court of Cassation, Switz.).
[56] Moot Proposition, ¶ 19.
[57] 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 (July 8, 2016); *see also*TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5 (Dec. 19, 2008).
[58] Rep. of the G.A. on Its Fourth Working Group Report, ¶ 178, U.N DOC. A/CN.9/245 (2017).
[59] Settlement of Commercial Disputes, Rep. of the G.A. on Its Fourth Working Group Report, ¶¶ 12-13, U.N DOC. A/CN.9/WG.II/WP.50 (2016).

envisaged by the rules of arbitration[60] as well as the Model Law.[61] Mandatory provisions do not attract the applicability of waiver.[62]

H.THE CLAIMANTS FAILURE TO EXHAUST AVAILABLE LOCAL REMEDIES IN THE PRESENT MATTER BARS JURISDICTION

(¶21) The Claimants invocation of arbitral jurisdiction under Binda-Petrollar and Binda-Nuland BIT is not justified in the light of the instant facts due to non-compliance with their local remedies' provisions. Art. 9 of the Binda-Nuland BIT and Art. 15 of the Binda-Petrollar define the conditions precedent to the submission of any claim to arbitration.[63]Art. 9 of the Binda-Nuland BIT and Art. 15.1 of Binda-Petrollar BIT clearly establish that the recourse to arbitration shall always be subject to exhaustion of all local remedies available to the investor in the host state.[64] It is submitted that C2 had not even once approached the domestic legal system in its personal capacity with respect to its claim but had directly initiated the proceedings as laid down in the BIT. Similarly, C1 has also not approached the resolution forum which was the Commercial Court under Commercial Courts Act 2015 and thereby breached the obligation under Art. 9(2).

(¶22) It is the whole system of legal protection, as provided by municipal law, which must have been put to the test.[65] C1 & C2 have failed to approach the Commercial Courts that have been made with the sole purpose of adjudicating disputes of investors[66] and providing them speedy justice. The outright rejection of all such remedies by investors is evident from the fact that they

[60] UNCITRAL Arbitration Rules, *supra* note 1,art. 17 (1).
[61] *Id*. art. 18.
[62] U.N. G.A. Rep. of the Secretary-General on its 18th Sess., June 3–21, 1985, p. 44, ¶ 3, U.N. DOC. A/CN.9/264 (Mar. 25, 1985).
[63] Binda-Petrollar BIT, *supra* note 5, art. 15
[64] *Id*.
[65] Ambatielos Claim (Greece v. U.K.), 12 R.I.A.A. 83, 120 (Perm. Ct. Arb. 1956).
[66] Moot Proposition, ¶ 10.

did not even file an appeal in such a forum which very clearly shows their failure to exhaust local remedies.[67] A number of decisions[68] by both ad hocs and institutional tribunals have stressed in the importance of local remedies.[69] The only condition under which the requirement can be over ridden is if the decision of the tribunal is going to be hit by unreasonable delay and that is not the case in the present dispute as the entire purpose of Commercial Courts Act for the expeditious disposal of any claim.[70]

ISSUE 3 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?

(¶23) This is a three-fold argument. *Firstly,* Respondents actions are precluded from liability under the Binda-Nuland BIT. **[I]** *Secondly,* the Respondent fulfilled all its obligations under the Binda-Nuland BIT. **[J]** *Thirdly,* and consequently C1 is not entitled to compensation of 200 crores BNR. **[K]**

I. THE RESPONDENTS ACTIONS ARE PRECLUDED FROM LIABILITY UNDER THE BINDA-NULAND BIT

(¶24) The investment does not constitute an investment for the purpose of Binda-Nuland BIT under Art. 1 due to two-fold reasons. *Firstly,* there is a question of law that exists which is

[67] Moot Proposition, Claim 2.
[68] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶¶ 114 & 134 (Dec. 16, 2002); *see also* Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, ¶ 168 (June 16, 2003) [hereinafter Loewen Group]; *see also* Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 121 (June 16, 2006); *see also* Saipem S.P.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, ¶ 150-153 (Mar. 21, 2007); *see also* Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 316-320, 344, 360, 361, 449, 453, 454 (Sep. 11, 2007); *see also* Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic, ICSID Case No. ARB/05/07, Award, ¶¶ 144-146, 181, 214-217 (June 6, 2008).
[69] Jürgen Kurtz, *Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni*, 20 E.J.I.L. 1077, 1081 (2009); *see also* Mondev v. U.S. ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002).
[70] Moot Proposition, ¶ 10.

pending determination by the Supreme Court where law is to be laid down.[71] The same is beyond the purview of this tribunal because the same is an issue of constitutional law. The tribunal's decision on this matter will lose all merit in the event the decision of the Supreme Court is contrary to what this tribunal decides. The abuse of such a process must therefore be prevented in the instant case particularly because C1 has invoked the jurisdiction of the Supreme Court as well as this tribunal.

(¶25) *Secondly,* Art. 1 obligates the investment to be made in accordance with law. C1 has chosen to make an investment which is contrary to law in its operations.[72] Though C1 has obtained all its permits, but while investing, it has failed to maintain the character of its investment when its operation of hazardous wastes has allegedly leaked.[73] Post the leak C1 has failed to establish how it was not having a nexus with the contamination of drinking water. The failure of C1 to establish the same makes it liable under the principles of strict liability.[74] It has been held that the principles of absolute liability apply on investors and if they are unable to establish why they are not liable for the same they shall be in breach of this principle considering the health of the citizens that was involved.[75] The logic that is being applied here is that since C1 chose to invest in a business with hazardous substances it is responsible for ensuring that its investment does not harm the general public living near the area.[76] To the extent of the operation of C1 the investment now stands nullified and should be beyond protection under Art. 2.[77]

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[71] Moot Proposition, ¶ A (d).
[72] Binda-Petrollar BIT, *supra* note 5, art. 14.1.
[73] Moot Proposition, ¶ A (d).
[74] R. DOLZER AND M. STEVENS, BILATERAL INVESTMENT TREATIES 83 (1995); *see also* Boffolo Case, 10 Trib. Arb. Mixtes 528 (Fr.-Venez. 1903).
[75] Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/, Award, ¶ 27 (June 27, 1990).
[76] International Maritime Organization Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, Dec. 29, 1972, 11 LL.M. 1291.
[77] Moot Proposition, art. 2, 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].

J. THE RESPONDENT FULFILLED ALL ITS OBLIGATIONS UNDER THE BINDA-NULAND BIT

(¶26) This is a three-fold argument. *Firstly*, the Respondents actions promoted and protected the investments of the C1. **[1]** *Secondly*, the Respondent did not expropriate C1's investment. **[2]** *Thirdly*, the Respondent met the legitimate expectation of C1. **[3]**

1. THE RESPONDENT PROMOTED AND PROTECTED THE INVESTMENTS OF C1.

(¶27) This is a two-fold argument. *Firstly*, the Respondent encouraged and created favorable conditions for C1 to make investments in its territory. **[1]** *Secondly*, the Respondent accorded FET to the investment of C1. **[2]**

1. 1 THE RESPONDENT ENCOURAGED AND CREATED FAVORABLE CONDITIONS FOR C1 TO MAKE INVESTMENTS IN ITS TERRITORY

(¶28) The encouragement and creation of favorable conditions can be identified by stability in a secure environment which extends to appropriate physical, commercial and legal standards.[78] The Respondent has ensured all three to C1. *Firstly*, physical security has been granted to C1 because Police protection was provided.[79] *Secondly*, the legal standard was also met because the recourse to courts was not barred by the Respondent in any manner. Further the Respondent also ensured that there was availability of remedy under Commercial Courts Act 2015 and Inter-State dispute resolution forum.[80] The same has been recognized as sufficient under the legal standards

[78] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 729-730 (July 24, 2008) [hereinafter Biwater Gauff]; *see also* Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm. on the work of Its Fifty-Third Session UN DOC A/56/10, at 134 (2001).
[79] Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/03/19, Award ¶ 38 (Aug. 3, 2006).
[80] Moot Proposition, ¶ 10.

approach by a number of tribunals.[81] *Thirdly,* the commercial standard was also met because the regime provided by the Respondent was a regime where tax benefits were given to invest and investment was encouraged through such incentives.

1.2 THE RESPONDENT ACCORDED FET TO THE INVESTMENT OF C1

(¶29) It is humbly submitted the Respondent accorded FET due to two-fold reasons. *Firstly*, the Respondent met the standard of legitimate expectation. A stable and predictable legal framework and environment to foreign investments are essentials of legitimate expectation.[82] The right to expect is clearly[83] attached to an obligation to predict and identify the prevalent situation[84] which C1 did not satisfactorily exercise in the instant matter. C1 was well aware of the situation that existed when they conducted their due diligence and furthermore were open to make investments in the territory of Binda.[85] They chose to conduct due diligence of only the NGT to identify the legal framework and made no effort to find out the functioning of Commercial Courts Act 2015 which was explicitly made for investors.

(¶30) *Secondly,* the principle of good faith is an intrinsic element of the FET standard which related to the policies of goodwill which needs to be maintained.[86] The concept of goodwill is identified by the legal framework in the Respondent's country.[87] The Respondent built a framework to ensure that C1 always had a remedy in law using the Commercial Courts Act 2015.The Respondent also created a separate river basin authority for the purpose of solving

[81] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL Arbitration Award, ¶ 268 (Mar. 10, 2010); *see also* White Industries Australia Limited v. The Republic of India, UNCITRAL Arbitration Award, ¶ 10.4.13 (Nov. 30, 2011).
[82] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009).
[83] Saluka Investments B.V. v. The Czech Republic, UNCITRAL Arbitration Award, ¶¶ 304-308 (Mar. 17, 2006) [hereinafter Saluka]; *see also* STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW – AN INTRODUCTION 324-332 (2010).
[84] Methanex Corporation v. United States of America, UNCITRAL Award, ¶ 10 (Aug. 3, 2005).
[85] Moot Proposition, ¶ A (b).
[86] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006) [hereinafter Inceysa]; *see also* Phoenix Action Ltd v. Czech Republic, ICSID Case No ARB/06/5, Award (Apr. 15, 2009).
[87] Saluka, *supra* note 83, at ¶¶ 304-308.

disputes and making the state an agitation free state.[88] A number of tribunals recognize the use of the legal framework as indicators of good faith.[89]

2. THE RESPONDENT HAS NOT EXPROPRIATED C1'S INVESTMENT

(¶31) This is a three-fold argument. *Firstly*, the State's right to regulate is an essential constituent of the police power doctrine. The Respondent has the right to regulate the domestic policies and legislations in pursuance of public interest and such regulatory measures neither fall within the purview of expropriation, nor create a liability for compensation.[90] The doctrine of police powers enunciates that certain acts of States are not subject to compensation under the international law of expropriation[91] which includes State acts such as implementation of control mechanism through licensing, permits and authorizations, forfeiture or a fine to punish or suppress crime, legislation restricting use of property in certain cases, etc.[92]

(¶32) *Secondly*, the State has a right to decide for itself the constituents of public good.[93] The decision with respect to what is and what is not a public matter lies with the State which is to be afforded due deference in all such matters.[94] So, the agitation launched was not contrary to the rules as it was done for the purpose of public good as stated in Art.5 of the BIT.[95]

(¶33) *Thirdly,* the State measures may affect foreign interests without amounting to expropriation, because the hazardous waste landfill running in the State was in violation of

[88] Moot Proposition, ¶ A (d).
[89] Inceysa, *supra* note 86.
[90] CIArb, *supra* note 46.
[91] Saluka, *supra* note 83, at ¶ 255.
[92] Rainer Geiger et al., *UNCTAD Series on International Investment Agreements*, 18 IIA P. S. 108 (2002) [hereinafter Geiger et al.].
[93] James and Others v. United Kingdom, 2 Eur. Ct. H.R. at 46 (1986); *see also* Pressos Compania Naviera S.A. and Others v. Belgium, 471 Eur. Ct. H.R. at 37 (1995).
[94] Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003).
[95] Binda-Nuland BIT, *supra* note 77, art. 5.

principles of strict liability[96] and subsequently subject to confiscation by the State and initiation of a fresh grant. This action of the government amounts to mere confiscation and cannot, by any stretch of imagination, be believed to have the effect of expropriation.[97]

3. THE RESPONDENTS MET THE LEGITIMATE EXPECTATIONS OF C1

(¶34) Legitimate expectations are factors based on which the investment was made.[98] A number of decisions acknowledge the same as sufficient requisites of legitimate expectations under the legal stability principle[99] C1 was also aware of the liability under polluter-pays principle.[100] C1 when making the investment was well aware of the legal system in NGT due to their due - diligence.[101] Despite knowing all this C1 chose to make an investment and therefore C1 cannot now claim violation of legitimate protection.

K.C1 IS ENTITLED TO COMPENSATION OF 200 CRORE BNR UNDER THE BINDA-NULAND BIT

(¶35) The Respondent submits that C1 should not be compensated because the losses were reasonably foreseeable and did not deserve compensation.[102] The reasons for damages suffered by C1 can only be public agitation and order of NGT against C1. Both these damages however were reasonably foreseeable because of two reasons. *Firstly,* C1 could foresee the possibility of agitation in an area because of the inter-state peace keeping authority that was recently made. *Secondly,* C1 conducted due diligence in the Respondent's NGT only and nowhere else therefore

[96] CIArb, *supra* note 46.
[97] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (James Crawford ed., Oxford 8th ed. 2013) (1966).
[98] Electronica Sicula SPA (ELSI) (United States of America v. Italy), Judgement, 1989 I.C.J. Rep. 15, (July 20) [hereinafter ELSI].
[99] Ronald S. Lauder v. The Czech Republic, UNCITRAL Arbitration Award, ¶ 232 (Sep. 3 2001) [hereinafter Lauder].
[100] Moot Proposition, ¶ 10.
[101] Moot Proposition, ¶ 10.
[102] Binda-Nuland BIT, *supra* note 77, art. 9.

C1 knew the environmental mechanism adopted by NGT making it foreseeable. To indicate something is foreseeable a number of decisions have held that mere knowledge of the possibility of occurrence of such an act is sufficient.[103]

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

(¶36) It is humbly submitted that the regulatory actions of the Respondents do not amount to a breach of its obligations under the Binda-Petrollar BIT. This is mainly because of three- fold reasons. *Firstly,* the Respondent is precluded from liability under Chapter II of this treaty. **[L**] *Secondly,* the Respondent in arguendo**,** fulfilled its obligations underlined under Chapter II of this treaty. **[M]** *Thirdly,* and consequent to the arguments put forth C2 must not to be entitled to compensation under the Binda-Petrollar BIT. **[N]**

L. THE RESPONDENT IS PRECLUDED FROM ITS LIABILITY UNDER THE BINDA-PETROLLAR BIT

(¶37) The Respondent is not bound to fulfill its obligations under Chapter II of the treaty due to four-fold reasons. *Firstly,* Chapter III discharges the Respondent from its obligations under the BIT as C2 failed to meet criteria of good faith and risk. C2 carried out its investment in contravention of the obligations of good faith under the Binda-Petrollar as it failed to exhaust local remedies.[104] *Secondly,* the concept of risk was absent in the present case as C2 failed to

[103] CIArb, *supra* note 46.
[104] Binda-Nuland BIT, *supra* note 77, art. 1.4.

conduct any form of analysis and that is one of the primary reasons why this claim has been brought.[105]

(¶38) *Thirdly,* Art.33 of the Binda-Petrollar BIT requires all possible actions to protect essential interests.[106] Binda had only two options either to negotiate a deal with the Middle Eastern countries by offering them large value of its currency for the purchase of oil (which was a breach of the international diktat) or to conduct austerity measures in its country and restrict outward remittance by declaring national financial emergency.[107] Binda chose to do the latter to ensure that its relations with Petrollar are not ruined and thereby its economy is maintained.[108] The actions of the Respondent also clearly need not have been to protect the interest of the investors when it was invoking such a state of necessity.[109]

(¶39) *Fourthly,* the BIT also provides for protection in the interest of general exceptions under Art. 32 exemptions in case the Respondent chooses to conduct the measure was taken because there was a lack of availability of Foreign exchange funds in the economy due to the pressure from the international diktat.[110]

M. THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDERLINED IN CHAPTER II OF THIS TREATY

(¶40) It is humbly submitted that in the present matter the Respondent fulfilled its obligations under Chapter II of this treaty due to three-fold reasons**.** *Firstly,* the Respondent provided adequate national treatment of investments. **[1]** *Secondly,* the Respondent did not expropriate the

[105] Geiger et al., *supra* note 92.
[106] Binda-Petrollar BIT, *supra* note 5, art. 33.
[107] Moot Proposition, ¶ 14.
[108] Moot Proposition, ¶ B (d).
[109] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 338 & 342 (May 22, 2007).
[110] Moot Proposition, ¶ 14.

investment of C2. **[2]** *Thirdly,* the Respondent did not breach the obligation of free transfer of funds. **[3]**

1. THE RESPONDENT PROVIDED ADEQUATE NATIONAL TREATMENT OF INVESTMENTS

(¶41) Art. 3 and Art. 4 of the Binda-Petrollar BIT obligate adequate national treatment of investments. This is a three-fold argument. *Firstly,* the Respondent has not subjected the investment to measures in violation of CIL. **[1]** *Secondly,* the Respondent has provided full protection and security to the investment. **[2]** *Thirdly,* the Respondent's measures do not amount to less favorable treatment in "like circumstances". **[3]**

1.1 THE RESPONDENT HAS NOT SUBJECTED THE INVESTMENT TO MEASURES IN VIOLATION OF CIL.

(¶42) Art. 3.1 of the Binda-Petrollar BIT impose the obligation aforesaid. This is a three-fold argument. ***Firstly,*** the Respondent did not at any point of time conduct an action in violation of principles of denial of justice in any administrative tribunal or judicial body.[111] C2 has not approached any judicial or administrative bodies with a concern rendering the violation of these principles impossible. *Secondly,* the requirement of due process is that no action should be of such nature that is arbitrary,[112] in the present matter Respondent had a valid reason[113] to carry out a classification and in consonance with the same the Respondent had chosen to make the decision to impose economic restrictions[114] due to reasons of emergency and economic distress.[115] *Thirdly,* the manifestly coercive treatment is one which places an investor under

[111] Loewen Group, *supra* note 68, at ¶ 169; *see also* Waste Management, *supra* note 10, at ¶¶ 97 & 116.
[112] ELSI, *supra* note 98.
[113] Lauder, *supra* note 99, at ¶¶ 221, 232 & 270.
[114] Moot Proposition, ¶ B (e).
[115] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL Arbitration Partial Award, ¶ 162 (Sep.13, 2001).

unreasonable pressure by forcing the investor to adopt certain policies.[116] In the present case no such duress can be identified. Be it the escalation clause of the contract between the two parties or the restrictions that were placed on the transfer as both the were done in the interest of the public.[117]

1.2 THE RESPONDENT HAS PROVIDED FULL PROTECTION AND SECURITY TO THE INVESTMENT.

(¶43) While deciding whether this obligation is fulfilled or not due regards needs to be placed upon the actions pursued in domestic courts or local administrative tribunals.[118] Here C2 has not gone before a single court in the Respondents country in spite of the availability of a very specific remedy as Commercial Courts Act 2015.[119] A number of decisions of arbitral institutions recognize the failure to exhaust local remedies as sole grounds to deny a claim for the protection and promotion of investments.[120]

1.3 THE RESPONDENT'S MEASURES DO NOT AMOUNT TO LESS FAVORABLE TREATMENT IN "LIKE CIRCUMSTANCES"

(¶44) Art. 4 obligates that each party shall accord investors of other party no less favorable treatment than it accords in like circumstances to its own investors or its own investment by such investors with respect to the management, conduct, operation, sale or other disposition of the

[116] Barbara Helene Steindl, *Procedural Tactics of a Guerrilla Nature and Suggestions for Counsel How to Counter and Employ (From the Perspective of Counsel Before Commercial Tribunals)*, 7 T.D.M.J. (2010).
[117] Binda-Petrollar BIT, *supra* note 5, art. 5.5.
[118] *Id*. art. 5.6.
[119] Moot Proposition, ¶ 10.
[120] ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 6 (2009); *see also* Loewen Group, *supra* note 111.

investment in this treaty.[121] The same is to be applied even to a sub national government as well.[122]

(¶45) Like circumstances depend on a variety of factors in the Binda-Petrollar BIT and these have to be seen in totality.[123] When such an analysis of the present circumstances of companies that were present in the Respondents country is made it is clear that foreign currency played a huge role in Respondents actions. Hence it was not voluntarily done and rather a risk in the investment. To the extent of the escalation clause and its amendment in the 5 year contract that is a contractual claim and therefore within like circumstances this claim does not hold good.[124] To evaluate the circumstances in which such a drastic decision was taken by the Respondents we need to take into account the economic condition of the country and the increasing pressure from the international diktat.[125] In many decisions it was held that when extreme emergency arises the State will tend to protect itself rather than prioritizing the interest of the investors.[126]

2. THE RESPONDENT DID NOT EXPROPRIATE THE INVESTMENT OF THE C2

(¶46) This is a three-fold argument. *Firstly,* the process of indirect expropriation only occurs if a measure or a series of measures has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investment of the fundamental attributes of property in its investment, including the use, enjoy and dispose of its investment without formal transfer of title or outright seizure.[127] There are two effects that can be observed on C2 and these are the restriction on the outward remittance and the variation in the escalation clause of the

[121] Binda-Petrollar BIT, *supra* note 5, art. 4.1.
[122] *Id*. art. 4.2.
[123] Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 265, 268-269 (Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Newcombe eds., 2011).
[124] Moot Proposition, ¶ B (e).
[125] Moot Proposition, ¶ 14.
[126] Moot Proposition, ¶ 14.
[127] Binda-Petrollar BIT, *supra* note 5, art. 5.1.

investment.[128] Such an outward remittance restriction cannot be considered as an expropriation because in order for there to have been actual expropriation there needs to have been a substantial deprivation and not merely restriction.[129] The presence of mere restriction cannot be deprivation because a deprivation requires that there be a substantial impossibility of the usage of the property.[130]

(¶47) *Secondly,* the effect on the economic value stands to be the sole reason for claiming indirect expropriation. C2 says that there is a reduction in the economic value because the escalation clause that changed from 10% to 5% which makes this a completely economic oriented claim.[131] A number of common law and civil law decisions[132] recognize the elimination of protection for expropriation if the claim is based merely on economic value and nothing else.[133] Further the instant case is one of public interest and that is a factor which also needs to be considered while conducting expropriation and this by implication dismisses the possibility of a claim in the first place.[134]

(¶48) *Thirdly,* there is a very specific requirement to ensure that there is proper pursuance of local and administrative remedies.[135] In the present case at no instance have C2 gone to the extent of even taking up the smallest of judicial remedies under the law particularly when they had such a remedy available under the Commercial Courts Act 2015 especially for the speedy justice of investors.[136]

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[128] Moot Proposition, ¶ B (d) (e).
[129] Binda-Petrollar BIT, *supra* note 5, art. 5.3 (a) (ii).
[130] Moot Proposition, ¶ B (e).
[131] Moot Proposition, ¶ B (e).
[132] French Company of Venezuela Railroads (Fr. v. Venez.), 10 R.I.A.A. 285, 353 (Perm. Ct. Arb. 1902); *see also* Int'l Law Comm'n, Rep. of Its Thirty-Fifth Session, U.N. Doc. A/35/10, at 79(1980).
[133] Binda-Petrollar BIT, *supra* note 5, art. 5.3 (b) (i).
[134] *Id*. art. 5.5, Binda-Petrollar BIT; *see also* Biwater Gauff, *supra* note 78, at¶ 436.
[135] Binda-Petrollar BIT, *supra* note 5, art. 5.6.
[136] Moot Proposition, ¶ 10.

3. THE RESPONDENT DID NOT BREACH ITS OBLIGATION OF FREE TRANSFER OF FUNDS

(¶49) The Respondent did not breach its obligations of allowing the free transfer of funds because the action restricting outward remittance of money has been protected under Art. 6.4 of the Binda-Petrollar BIT.[137] The measure has been passed by the Government to protect its monetary and exchange rate policies as a part of macroeconomic management[138] and the same is evident from the facts in terms of the threat in case of exceptional circumstances.[139]

(¶50) The power to restrict transfers is a part of good faith and the same is protected under the Binda-Petrollar BIT.[140] The good faith principle can be determined through the intention of the Respondent. To add to this the intention of the respondent can be determined through its actions.[141] The respondent provided a tax-free investment, which generated profits. Rather the limitation was one of tax savings and that can be limited under Art. 6.3.[142] Even more such a limitation can be placed under Art. 6.3(x).[143] This requires compliance with the requirements set forth by RBI as well and therefore the same will also be applicable in the instant case.[144]

(¶51) Art. 7 obligates that the Party will pay non-discriminatory restitution for all transactions when there is a loss created owing to the instances of national emergencies.[145] At present there is no remedy that is available due to non-existence of loss and it can be determined by the fact[146] that not a year has passed from the time C2 made the investment, making the escalation rates

[137] Binda-Petrollar BIT, *supra* note 5, art. 6.4.
[138] *Id*.
[139] Moot Proposition, ¶ B (d).
[140] Binda-Petrollar BIT, *supra* note 5, art. 6.2.
[141] Bruno Zeller, *Good Faith - Is it a Contractual Obligation?*, 15 (2)BOND L. REV. 215, 218 (2013).
[142] Binda-Petrollar BIT, *supra* note 5, art. 6.3.
[143] *Id*.
[144] Moot Proposition, ¶ B (d).
[145] Binda-Petrollar BIT, *supra* note 5, art. 7.1.
[146] Moot Proposition, ¶ B (c) (e).

inapplicable at the moment under national emergency.[147] The issue that can create losses is only the escalation clause and austerity as a process.[148] This entails the fact that losses are essentially contractual and that makes the losses to be available in the contract as a remedy.

N. C2 IS NOT ENTITLED TO A COMPENSATION OF 1000 CRORES BNR

(¶52) This is a two-fold argument. *Firstly,* C2 is a substantial contributor to the breach and the principle of contributory negligence[149] makes C2 to exacerbate its losses by its own behavior.[150] *Secondly,* the compensation claimed failed the test of certainty[151] and foresee ability as C2 damages remain unclear.[152] Art. 26 of the Binda-Petrollar BIT[153] mandates the tribunal to award damages not greater than the loss suffered and in the present situation there is no nexus with the loss suffered and the investment done, the damages are speculative, remote and of imaginary character.[154]

[147] Zeinab Asqari, *Investor's Legitimate Expectations and The Interests Of The Host State In Foreign Investment*, 4 Asian Economic and Financial Review, 1906, 1911 (2014).
[148] Moot Proposition, ¶ B (e).
[149] Art. 7.1.2, International Institute for the Unification of Private Law Principles of International Commercial Contracts; *see also* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1010 (1990).
[150] PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II 434 (O. Lando & H. Beale eds., 2000).
[151] G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT 60 (1976).
[152] Hadley v. Baxendale [1854] EWHC J70 [145] (Eng.).
[153] *Id.*
[154] Banque Arabe et Internationaled' Investissements et al v. Inter-Arab Investment Guarantee Corporation of 1994, 22 YB. Comm. Arb. 643, 37(ICC Int'l Ct. Arb.).

PRAYER

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

1. That Mr. White must be removed from the arbitral tribunal;
2. That this Tribunal does not have the jurisdiction to hear the dispute;
3. That Claimants are not entitled to protection of investment under their respective BIT's;
4. That Respondent is immune from liability;
5. That Claimants are not 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/-