Team Code: **SCA008**

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

MOOT COURT COMPETITION 2018

CLAIM I

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW IN FINLAND.

AIRFRESH

(Claimant 1)

and

THE REPUBLIC OF BINDA

(Respondent)

CLAIM II

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW IN SINGAPORE.

OXFORD

(Claimant 2)

and

THE REPUBLIC OF BINDA

(Respondent)

Memorial for the Respondent

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STATEMENT OF JURISDICTION

CLAIM I

Article 9(3)(b) of the agreement between the Government of the Republic of Binda and the Eswatinian Kingdom of Nuland for the Promotion and Protection of Investments:

> 3) Should the Parties fail to agree, within a period of three months, on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:
>
> (b) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976.

CLAIM II

Article 16.1 of the agreement between the Government of the Republic of Binda and the Kingdom Emirates of Petrollar for the Promotion and Protection of Investments:

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

STATEMENT OF FACTS

1. **Binda** faces two major national problems i.e. shortage of drinking water and untreated wastewater discharges, cost of which has spiralled out of control. An international report issued in 2018, claims that shortage of water supplies would result in wars over water rights, which would be fought over water rather than for oil.
2. Binda developed guidelines for the establishment of special economic zones. A new grants programme was undertaken by the Pollution & Environment Ministry that is to be funded 80% by the central government, 15% by the state government and 5% by local government in each state of the union. Binda through its Foreign Investment Promotion Board, provided 100% foreign direct investment for investments in environmental projects and announced "Treat in Binda" for creation of new jobs for protection of the environment.
3. In early 2018, the world economy began to feel the negative effects of the rise in international crude oil prices of 80 USD per barrel. The worldwide slump in oil prices in 2014, provided a windfall "savings" in the oil import bill.
4. **Petrollar** is the world's largest economy which implemented new national legislation allowing for zero taxation of profits earned business overseas and provided incentives for repatriating earnings overseas. An international diktat was issued by President of Petrollar on the basis of its domination over the financial markets and international bank to isolate by embargo, a Middle East nation to avoid entry of weapons of mass destruction in developing nations.
5. **Smallnadu** and **Kukatuka** are the Southern states in Binda and have entered into a joint agreement to establish a river basin authority to resolve inter-state disputes that may arise out of the environmental projects under under the Rivers Cleanup Act 2005.

6. **Airfresh** is a foreign investor established in the nation-state of Nuland and has undertaken investment activities in the state of Kukatuka under the Nuland-Binda BIT. The former conducted due diligence on the functioning of the pollution regulatory authority in Kukatuka and the National Green Tribunal in Binda. It determined that not a lot of major infrastructure project clearances were sanctioned by the government of Binda were quashed out of about 300 cases at hand
7. Airfresh was operating a hazardous waste landfill along with a treatment and disposal facility located close to the border of Smallnadu for which it claims to be in compliance with Binda's and Kukatuka's regulations.
8. The residents living in adjacent areas of Smallnadu, initiated a public agitation for contamination in the neighbouring water bore wells. The samples tested by the Kukatuka and Smallnadu pollution control authorities declined prevalence of pollution. Despite reports of authorities, public opposition threatened to turn violent. The local Members of the Legislative Assembly compelled the state administration and pollution control board to agitate a claim before the jurisdictional NGT for closure of the Airfresh facilities.
9. The NGT upheld public claims and Airfresh appealed to the appellate NGT but did not succeed. On an appeal to Supreme Court of Binda, it was expected that hearing be delayed to at least six months due to heavy backlog of cases. In the meantime, public through a Public Interest Litigation and obtained an interim stay order from the court preventing Airfresh from operating the hazardous waste landfill and related operations.
10. **Bingee** which is the largest state in Binda contained the biggest river in Binda called the Junjee which is the only river source available to produce safe drinking is polluted with organic material dumped into it.

STATEMENT OF ISSUES

CLAIM I

1. EXPROPRIATION OF INVESTMENT.
2. FULL PROTECTION AND SECURITY.
3. FAIR AND EQUITABLE TREATMENT.
4. LEGITIMATE EXPECTATION.

CLAIM II

1. CHALLENGE TO PROF. WHITE'S APPOINTMENT.
2. JURISDICTION OF THE AD HOC TRIBUNAL.
3. EXPROPRIATION OF INVESTMENT.
4. BREACH OF TREATY IN RELATION TO NATIONAL TREATMENT.
5. DENIAL OF FREE TRANSFER OF FUNDS.

SUMMARY OF ARGUMENTS

CLAIM I

1. EXPROPRIATION OF THE INVESTMENT.

The measures taken by Binda were within the scope of its' police powers and hence the same cannot be termed as an expropriation. In any case, judicial acts cannot be termed as expropriations and the same are exempt under the BIT.

2. FULL PROTECTION AND SECURITY.

Binda has no obligation under the BIT to provide full protection and security to Airfresh's investment. In any case, even if such an obligation exists, it will be limited to physical protection and security only. Since Binda provided local police forces and took adequate measures to control the social unrest against Airfresh's investment, it cannot be deemed to have violated the standard.

3. FAIR AND EQUITABLE TREATMENT.

A mere delay in judicial proceedings will not violate this standard. Moreover, Binda cannot be held liable if Airfresh does not comply with the laws and regulations of Binda and it leads to a detrimental effect on the former's investment. In any case, Airfresh did not exhaust its local remedies and the claim should be dismissed.

4. LEGITIMATE EXPECTATION.

Airfresh cannot expect Binda to be free from political and social disturbances and if some of them materialize against it, a violation of its' legitimate expectations cannot be alleged. Legitimate expectations need to be based on due diligence of the host nation's economy and not any other irrelevant criteria.

CLAIM II

1. CHALLENGE TO PROF. WHITE'S APPOINTMENT.

Prof. White's appointment should not be set aside because *firstly,* failure to disclose constitutes as a ground for disqualification, *secondly,* any fair minded person would conclude on the basis of this fact that Prof. White is not independent and impartial.

2. JURISDICTION OF THE AD HOC TRIBUNAL.

The ad hoc tribunal does not have jurisdiction to hear this case because *firstly,* the requirement of exhausting local remedies is not merely procedural and is jurisdictional, *secondly,* Binda's consent to arbitrate is based on such exhaustion of domestic remedies, *thirdly,* the domestic remedies available in Binda are not futile because Binda has enacted a special legislation for commercial disputes.

3. EXPROPRIATION OF INVESTMENT.

Binda has not expropriated the investment because *firstly,* there is no significant depreciation, *secondly,* these measure will not be in the nature of expropriation because it was done on legitimate public interest. *Lastly,* in absence of expropriation, there is no need for Binda to compensate.

4. BREACH OF TREATY IN RELATION TO NATIONAL TREATMENT.

National treatment requires no discrimination between foreign and domestic investors and when the downward revision did not apply to domestic investors but differentiation based on legitimate public interest will not result in breach of the treaty.

5. DENIAL OF FREE TRANSFER OF FUNDS.

Free transfer of funds is the prerogative of the host state and when there is a fiscal emergency, such a right given to the investor can be curtailed in the economic interest of the host state.

ARGUMENTS ADVANCED

Claim I

I. EXPROPRIATION OF THE INVESTMENT

A. THE STATE APPROPRIATION CRITERION IS NOT SATISFIED.

1. There can be no indirect expropriation when the State does not derive economic benefit from the measure on the investor. The injurious effect on the investment must have resulted in economic benefit to the State[1].
2. An interim stay order, preventing Airfresh's facilities to operate, by the Supreme Court of Binda[2], did not provide any economic benefit to the Republic of Binda ["**Binda"**]. It is thus submitted that the interim stay order does not satisfy the State appropriation criterion and is hence not expropriation.

B. AN EXERCISE OF POLICE POWER IS NOT EXPROPRIATION.

3. Every man whose property rights are diminished thinks that there has been an expropriation[3]. It is not the function of the international law of expropriation to eliminate the normal commercial risks of a foreign investor[4].
4. Not all State measures that are harmful to investment activities constitute an indirect expropriation and as such give the injured party the right to pursue compensation[5].

[1] R. S. Lauder v. Czech Republic IIC 205 (2001); Eudoro A. Olguín v. The Republic of Paraguay ICSID Rev.-FILJ; A. Newcombe, I, in P. Kahn, T. W. Wälde (Eds.), *New Aspects of International Investment Law*, 441-445 (Leiden/Boston ed., Martinus Nijhoff Publishers, 2007); Canadian Pacific Railway Co. v. Vancouver (City), (2006) 1 S.C.R. 227.
[2] Moot Proposition, ¶A(d).
[3] B. Weston, *Constructive Takings under International Law: A Modest Foray into the problem of "Creeping Expropriation*, Va.J.Int'l L., Vol.16, p111 (1975-1976).
[4] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3.
[5] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.

Governments must be free to act in the broader public interest through protection of the environment and similar measures without entitling the deprived investor to compensation[6].

5. There is no need to compensate an investor for any ensuing damage to its property interests when a State exercises its legitimate police powers[7]. A police power measure is every measure essential to the effective functioning of the State[8].
6. The continued operation of Airfresh's facilities would result in contamination in the neighbouring bore wells[9]. It is submitted that the Binda'S interim stay order to prevent the Airfresh's facilities from operating, was an essential measure and for the broader public interest of environmental protection. It is hence submitted that the interim stay order was an exercise of the Binda's police powers and therefore will not give rise to any liability for compensation towards the Airfresh.

C. JUDICIAL ACTS ARE NOT EXPROPRIATION AND ARE EXEMPT UNDER THE TREATY.

1. Judicial Acts cannot be deemed to be Expropriations under the Bit.

7. The Agreement between the Government of the Republic of Binda and the Eswatinian Kingdom of Nuland for the Promotion and Protection of Investments ["**Binda-Nuland**

[6] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina (ARB/03/17); §712 of Restatement of the Law, (Third), The Foreign Relations Law of the United States, American Law Institute Publishers, St. Paul, Minnesota, 1987, vol. 2; L. B. Sohn et R. R. Baxter, Responsibility of State to injuries to Economics Interests of Aliens, AJIL, 1961, vol. 55(3), 545-584 (1960); Suzy H. Nikiema, Best Practices Indirect Expropriation, Pp.3; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1; M. Sornarajah, *The International Law on Foreign Investment*, CAMBRIDGE UNIVERSITY PRESS 200- 283 (1994); B. Weston *'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'*, VIRGINIA JOURNAL OF INTERNATIONAL LAW, *vol. 16, 116 (1975);* G. Christie, *What Constitutes a Taking of Property under International Law*?, BRITISH YEARBOOK OF INTERNATIONAL LAW, 307-338 (1962).

[7] Methanex Corporation v United States, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345; Emmanuel Too v. Greater Modesto Insurance Associates and the United States of America, award of December 29, 1989, Iran-US CTR, vol. 23, 1989-II, p. 378; Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens Art. 10 (5); *Restatement of the Law Third, the Foreign Relations of the United States*, AMERICAN LAW INSTITUTE, vol I, 1987, Section 712, comm. (g).

[8] M. Sornarajah (2010), *The International Law on Foreign Investment*, Cambridge: Cambridge University Press, 374 (3rd ed, 2010).

[9] Moot Proposition, ¶ A(d).

BIT"] provides that actions by judicial bodies of a party designed, applied or issued in public interest including those designed to address environmental concerns will not constitute expropriation[10].

8. It is hence submitted that the interim stay order, being a judicial act of the Binda, is exempt under the Binda-Nuland BIT and cannot be deemed to be an expropriation.

2. <u>The Judicial act cannot be deemed to be an Expropriation.</u>

9. Every court decision depriving an investor of property rights could technically be considered to have the effect of an expropriation. For a judicial act to bring about a violation of expropriation standards, serious flaws within the procedure or the substance of the ruling have to have occurred. Unless a denial of justice has occurred, a judicial expropriation cannot be said to have taken place[11].
10. An arbitral tribunal considering an expropriation claim arising out of a purported environmental measure should limit its inquiry to determining whether the science underlying the risk determination has the minimal attributes of scientific inquiry, even if the evidence is controversial or inconclusive[12].
11. It is submitted that the Airfresh was neither able to prove itself innocent in the National Green Tribunal ["**NGT**"] nor was it able to successfully appeal to the NGT to overturn the order[13]. It is hence submitted that due process of law was followed and there was no denial of justice that took place. It is further submitted that the interim stay order was based on

[10] Moot Proposition, p. 15, ¶ 4.
[11] Saipem v. Bangladesh, ICSID Case No. ARB/05/7; Eli Lilly and Company v. Canada, Case No. UNCT/14/2; Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico, ICSID Case No. ARB(AF)/97/2; Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 731 (2009).
[12] North American Free Trade Agreement (January 1, 1994) 32 ILM 289, 605 (1993), Art. 1133.
[13] Moot Proposition, ¶ A(d).

the failure of the Airfresh to prove that its' facilities did not contaminate the groundwater in nearby regions. It is thus submitted that no judicial expropriation took place.

D. CONCLUSIVE EVIDENCE OF ENVIRONMENTAL DAMAGE CAUSED BY AIRFRESH'S FACILITIES IS NOT NEEDED.

12. States have a very wide margin of appreciation concerning the establishment of measures for the public interest. It is for States to make the assessment of the existence of a public concern warranting measures that result in a "deprivation" of property rights. The state's judgement should be accepted unless exercised in a manifestly unreasonable way[14].
13. Any regime that truly allows for protection against the risk of environmental harm must recognize the precautionary principle, which is based on the premise that science does not always provide the information or insights necessary to take protective action effectively or in a timely manner[15].
14. It is submitted that the interim stay order is merely a measure in conformity with the precautionary principle, in order to prevent further damage to the environment in the Binda's territory. It is further submitted that the Binda is entitled to exercise its discretion in order to determine whether an interim stay order was appropriate or not and the same cannot be questioned by an arbitral tribunal. It is therefore submitted that whether conclusive evidence proving that the Airfresh's facilities caused pollution, is available or not, is irrevelant.

[14] James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986).
[15] Philippe Sands, The Greening of International Law: Emerging Principles and Rules, 1 Global Legal Studies J. 293, 301 (1994); Philippe Sands, Principles of International Environmental Law 208-12 (1995); Interpreting the Precautionary Principle 262 (Tim O'Riordan & James Cameron eds., 1994); Nuclear Tests (New Zealand v. France), 1995 ICJ Reports 288, 342; The Framework Convention on Climate Change, U.N. Doc. AJAC.237/18 (Part II)/Add.l (1992), 31 I.L.M. 849; the Ministerial Declaration of the Second World Climate Conference (Nov. 7, 1990), 1 Y.B. INT'L ENVTL. L. 473 (1990); the Second International Conference on the Protection of the North Sea, Ministerial Declaration 1 (1987); the World Charter for Nature, G.A. Res. 37n, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. AJRes/37n (1982), 22 I.L.M. 455 (1983).

E. THE STAY ORDER IS IN CONFORMITY WITH THE "POLLUTER PAYS" PRINCIPLE.

15. Shifting the cost of environmental harm from society at large to the person causing the harm is a fundamental element of environmental protection[16] and is known as the "polluter pays" principle.
16. It is submitted that since the Airfresh failed to prove that its' facilities did not result in groundwater contamination, it can be assumed to have caused pollution. It is thus submitted that the interim stay order depriving the Airfresh of some of its property rights cannot be deemed to be an expropriation and the same is in conformity with the "Polluter Pays" principle.

F. DAMAGE CAUSED TO THE INVESTMENT BY THE MOB IS NOT EXPROPRIATION.

17. If there is active participation or instigation of the persons causing the damage by the state or its agents, then responsibility for the damage will arise. There must be a definite link between the perpetrators of the damage and the state[17].
18. Investors have to assume a risk that the country might experience disturbances, changes of political system and even revolution. That any of these risks materialised does not mean that property rights affected by such events can be deemed to have been expropriated[18].
19. It is submitted that there was no link between the persons damaging the Airfresh's investment and the Binda and hence the latter cannot be liable for the same.

G. STAY ORDERS ARE TEMPORARY IN NATURE AND DO NOT AMOUNT TO EXPROPRIATION.

[16] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. AlCONF.151/5/Rev. 1 (1992), princ. 16, *reprinted in* 31 I.L.M. 876, 879.
[17] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Y.B. OF INT'L. L. COMM., 62 (vol. 2, 2001).
[18] Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

20. The duration of the measure is another criterion of whether the measure has had a severe enough impact on property to constitute an expropriation[19]. The determinative factor for establishing an expropriation is the duration of the economic deprivation suffered by the investor[20].

21. There is no expropriation when an order is to be valid only for a temporary period[21]. The expropriation must be permanent and it cannot have a temporary nature[22]. Interim orders are valid only for a limited period of time and cannot be said to be an expropriatory measure[23].

22. It is submitted that since the stay order is interim in nature and therefore temporary, the Airfresh is not entitled to bring a claim for expropriation against the Binda since temporary measures cannot be deemed to be expropriations.

II. BINDA PROVIDED PROTECTION AND SECURITY TO AIRFRESH'S INVESTMENT.

A. BINDA HAD NO OBLIGATION UNDER THE BINDA-NULAND BIT TO PROVIDE PROTECTION & SECURITY TO AIRFRESH'S INVESTMENT.

23. The Binda-Nuland BIT between Binda and Nuland does not contain any clause concerning "protection and security"[24]. It is submitted that since the Binda-Nuland BIT does not

[19] J.M. Wagner, "International Investment, Expropriation and Environmental Protection", Golden Gate University Law Review (1999), Vol.29, No 3; pp. 465-538.
[20] *Vivendi v. Argentina II*, Award, 20 August 2007, para. 7.5.11.
[21] Liselotte Hauer v Land Rheinland-Pfalz, European Court Reports 1979 -03727.
[22] LG&E Energy Corp. and LG&E International Inc.v Argentina (ARB/02/1), Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser.A) at 29 (1976); Poiss v. Austria, 117 Eur. Ct.H.R. (ser. A) 84, 108 (1987); Matos e Silva, Lda v. Portugal Eur. Ct. H.R. rep. 573; H. Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation, Regulatory Expropriations of the Property of Foreign Investors*, N.Y.U. ENVIRONMENTAL LAW JOURNAL, Vol. 11 No. 1, 148-173 (2002).
[23] S.D. Myers, Inc. v. Government of Canada 40 ILM (2001) 1408.
[24] Moot Proposition, Annexure I.

contain any such obligation, whether express or implied, the Binda cannot be held to be under an obligation to provide protection and security to the Airfresh's investment.

B. PROTECTION AND SECURITY IS LIMITED TO PHYSICAL PROTECTION AND SECURITY.

24. The full protection and security standard is limited to protecting the foreign investment from a certain degree of physical damage[25]. It is restricted to protection from physical violence and damage[26].

25. It is submitted that even if the Binda is under an obligation to provide protection and security to the Airfresh's investment, the obligation is limited is only protection from physical violence and damage.

C. BINDA PROVIDED PROTECTION AND SECURITY TO AIRFRESH'S INVESTMENT.

26. When there is insufficient evidence to prove that the State had encouraged, fostered or contributed to the acts of the mob and that there is no evidence to suggest that the authorities had not reacted reasonably, violation of the full protection and security clause cannot be alleged[27].

27. The extent of a state's duty under this provision depends to some extent on the resources available to the host State. If the authorities are unable to control the magnitude of the social unrest they had been confronted with, a violation of the provision does not take place[28]. The provision cannot be construed as the giving of a warranty that property shall never in any circumstances be disturbed[29].

[25] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16; Saluka Investments BV v Czech Republic, Partial Award, IIC 210 (2006).
[26] BG Group PLC. V. Republic of Argentina, Case No. U.S. 12-138 (2014).
[27] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11.
[28] Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21.
[29] Elettronica Sicula SpA (ELSI) (United States of America v Italy) [1989] ICJ Rep 15.

28. The Binda deployed local police forces to protect the Airfresh's investment[30]. It is submitted that the failure of the authorities to control the unrest, despite taking adequate measures, cannot be taken to be a violation of the provision.

III. BINDA PROVIDED FAIR AND EQUITABLE TREATMENT TO AIRFRESH'S INVESTMENT.

A. FAIR AND EQUITABLE TREATMENT REFERS TO THE MINIMUM STANDARD REQUIRED BY INTERNATIONAL LAW.

29. The Fair and Equitable Treatment ["**FET**"] standard is linked to the minimum standard required by international law[31] and general principles of international law[32]. A provision containing the FET standard is not an authorization to go outside the law and to apply equitable principles[33].
30. Acts that would violate this minimum standard would mean acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards[34].
31. It is submitted that since the Binda took adequate measures to protect the Airfresh's investment from being sabotaged by the local community, a violation of the FET standard cannot be deemed to have taken place.

B. BINDA PROVIDED FAIR AND EQUITABLE TREATMENT TO AIRFRESH'S INVESTMENT.

1. <u>A delay in judicial proceedings will not violate the FET standard.</u>

[30] Moot Proposition, ¶ A(d).
[31] OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention,* 13-15 (Oct. 12 , 1967); United Nations, *Reports of International Arbitral Awards,* IV 1926.
[32] OECD, *Intergovernmental Agreements Relating to Investment in Developing Countries,* (May 27, 1984).
[33] Ade Group, Inc. v. United States of America, 6 ICSID Reports 470; Mondev International Ltd. v. United States of America, 6 ICSID Reports 192.
[34] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia, ICSID Case No. ARB/99/2.

32. A mere delay in judicial proceeding will not violate the FET standard[35]. It is thus submitted that the AIRFRESH not getting a hearing within six months at the Supreme Court of Binda, cannot be taken to be a violation of the FET standard.

2. <u>The Airfresh is responsible for being aware of the host nation's laws and regulations.</u>

33. Bilateral investment treaties are not insurance policies against bad business judgments[36]. An investor is responsible for meeting the requirements of the host State's law and ignorance of the law is no excuse[37]. Where the investor's conduct has been found to have contributed to its loss, the FET standard cannot be said to have been breached[38].
34. It is submitted that the Airfresh was under an obligation to be aware of the Binda's laws and regulations concerning environmental protection and violation of the same by the former, will not lead to a violation of the FET standard, if a measure taken by the latter affects the investment of the former.

3. <u>If the measure is non-discriminatory and legally justified, no violation of the FET standard can be deemed to have taken place.</u>

35. Even if State actions are not the model of clarity or fairness but are legally justified and non-discriminatory, no violation of the FET standard can be found[39].
36. It is submitted that the Airfresh has failed to provide any evidence to show that the Binda's acts were discriminatory in nature. It is further submitted that since the interim stay order was passed by the Supreme Court of Binda after the Airfresh failed to prove that its'

[35] Elettronica Sicula S.p.A. (ELSI) (United States v. Italy). 1989 ICJ Rep. 15, 28 ILM 1109 (1989).
[36] Emilio Augustin Maffezini v. Kingdom of Spain ICSID Case No. ARB/97/7 McLachlan, Shore, Weiniger, para 7.140 p246.
[37] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7; C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 234 (Oxford University Press, 2007).
[38] International Thunderbird Gaming Corporation v Mexico, Award, IIC 136 (2006)*;* MTD Equity Sdn Bhd and MTD Chile SA v Chile, Award IIC 174 (2004); GAMI Investments Incorporated v Mexico IIC 112 (2003).
[39] S.G. Gross, Inordinate Chill: Bit's, Non–Nafta MITs, and Host State Regulatory Freedom – An Indonesian Case Study, 24 MICH. J. INT'L L. 894 (2003).

facilities did not contribute to groundwater contamination in both the NGT and the appellate NGT, it was legally justified and hence there was no violation of the FET standard.

C. NO DENIAL OF JUSTICE TOOK PLACE AND AIRFRESH DID NOT EXHAUST ITS' LOCAL REMEDIES.

1. Airfresh did not exhaust its' local remedies.

37. A claim for violation of the FET standard can be rejected on the ground of non-exhaustion of local remedies[40] and the same has been held by the International Court of Justice.[41] Where the conduct of the court system is at issue, the notion of exhaustion of local remedies becomes a substantive requirement and not only a procedural prerequisite to an international claim[42].

38. It is submitted that the Airfresh did not exhaust its' remedy before the Supreme Court of Binda, the highest judicial body within the territory of the Binda, and therefore it's claim should be dismissed on the ground of non-exhaustion of local remedies.

2. No denial of justice occurred.

39. A denial of justice is limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgement. It may also be employed in connection with the improper administration of justice, including denial of access to courts, inadequate procedures, and unjust decisions[43].

[40] Ambatielos (Greece v. United Kingdom) 23 ILR 306 (1956).
[41] Interhandel, Switzerland v United States, Preliminary Objections, Judgment, ICJ GL No 34.
[42] Waste Management Incorporated v Mexico, Award and dissent (2000) 15 ICSID Rev—FILJ 214.
[43] Azinian v. the United Mexican States, ICSID case No ARB(AF)/97/2.

40. An investor cannot bring arbitration proceedings for denial of justice in order to seek international review of national court decisions as though the arbitral tribunal were an appellate body[44].

41. It is submitted that since the Airfresh was neither denied access to the courts of the Binda nor was any unjust decision passed against it, no denial of justice can be said to have taken place.

3. No arbitratiness occurred.

42. Arbitrariness is something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks a sense of judicial property[45]. It is submitted that there was no disregard of the due process of law by the Binda and thus there can be no arbitrariness and no violation of the FET standard.

IV. BINDA MET AIRFRESH'S LEGITIMATE EXPECTATIONS.

43. Investors have to assume a risk that the country might experience disturbances, changes of economic and political system and even revolution[46]. No investor can reasonably expect that the circumstances prevailing at the time the investment is made to remain totally unchanged[47].

44. Specific commitments given by the State to the investor that the government would refrain from certain measures, is a pre-requisite to give rise to legitimate expectations for the

[44] Azinian, Davitian & Baca v. Mexico ICSID Case No. ARB(AF)/97/2; Mondev International Limited v United States, Award (2003) 42 ILM 85.
[45] Asylum Case, Colombia v Peru [1950] ICJ Rep 266.
[46] Alapli Elektrik Besloten Vennootschap v Turkey, Decision on Annulment, IIC 653 (2014) Iran-US Claims Tribunal; Starrett Housing Corp. v. Iran, 16 IRAN-U.S. C.T.R., at 112 et seq.
[47] Saluka Investments BV v Czech Republic, Partial Award, IIC 210 (2006); PSEG Global Incorporated and Ors v Turkey, Decision on jurisdiction IIC 197 (2004).

investor[48]. A lack of such representations by the host State will indicate that the expectations of the investor are not legitimate[49].

45. It is submitted that the Binda's economy is rated in one of the lowest possible categories with regards to return on investments by international rating agencies[50] and the Airfresh should have been aware of the same before investing. It is further submitted that the Airfresh's expectations were neither based on an assessment of the Binda's economy, nor were they based on any representations made by the Binda. It is thus submitted that there has been no violation of the legitimate expectations of the Airfresh.

Claim II

I. CHALLENGE TO PROF. WHITE'S APPOINTMENT.

1. Oxford appointed Prof. Mark White ["**Prof. White**"] as its Arbitrator. Binda raised a challenge against Prof. White, alleging a conflict of interest. The challenge was that one of Mr. White's many nieces, who is also dear to him, is a Senior Investment Manager in Young & Coopers, which is a 10% shareholder in Oxford.[51] Mr. White's appointment is valid because [A] Non-Disclosure is not a Disqualification by its self and [B] Mr. White is not disqualified to be an arbitrator.

A. NON-DISCLOSURE IS NOT A DISQUALIFICATION.

2. Article 11 of the United Nations Commission on International Trade Law Arbitration Rules ["**UNCITRAL Rules**"] states that an arbitrator "shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."[52] Article 19.2

[48] Methanex Corporation v United States, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345.
[49] International Thunderbird Gaming Corporation v Mexico, Award, IIC 136 (2006).
[50] Moot Proposition, ¶ 6.
[51] Moot Proposition, Annexure IV.
[52] United Nations Commission on International Trade Law Arbitration Rules, (December 15, 1976) UN Doc. A/RES/31/98.

of the Bilateral Investment Treaty between Binda and the Kingdom Emirates of Petrollar ["**Petrollar**"] for the Promotion and Protection of Investments ["**Binda-Petrollar BIT**"] also imposes this obligation. Failure to disclose constitutes as a ground for disqualification.[53] Failure to disclose relevant material is, in and of itself, evidence of partiality, even if the facts would not have led to a challenge or refusal to appoint.[54]

3. Explanation to General Standard 3(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"], there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.[55] Oxford is owned by shareholders across the globe, and who were nationals of various developed and developing countries including Binda[56] and Young & Coopers, an internationally established financial powerhouse having offices in 58 countries.[57] Mr. White's niece, who is dear to him, is a Senior Investment Manager in Young & Cooper.[58]
4. The Red Waivable list of the IBA Guidelines requires disclosure if close family member of the arbitrator has a significant financial interest in the outcome of the dispute or if a close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties. The definition of an arbitrator's "close family member" widened to include not only a spouse, sibling, child, parent or life partner but also "any other family member with whom a close relationship exists."[59] Therefore, Mr. White had an obligation to disclose and failure of which, Mr. White should be disqualified.

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[53] Common Wealth Coatings Corp v. Continental Casualty Co. 393 US 145 (1968).
[54] *Suez, Sociedad General de Aquas de Barcelona S.A., &Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second proposal for the disqualification of a Member of the Arbitral Tribunal (12 May 2008), para. 44.
[55] IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014).
[56] Moot Proposition, ¶ B(c).
[57] Moot Proposition, Annexure IV.
[58] Moot Proposition, Annexure IV.
[59] Khaled Moyeed, Clare Montgomery and Neal Pal (Clyde & Co. LLP), *A Guide to the IBA's Revised Guidelines on Conflicts of Interest*, KLUWER ARBITRATION BLOG (Jan. 29, 2015).

B. MR. WHITE IS NOT DISQUALIFIED.

5. Under Article 12 of the UNCITRAL Arbitration Rules,[60] "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence." General Standard 2(c) of the IBA Guidelines creates a very similar rule expanding on the test for 'justifiable doubts', explaining that doubts are justifiable when a reasonable and informed party would conclude that there was a likelihood that the arbitrator, in reaching his or her decision, may be influenced by factors other than the merits of the case as presented by the parties.[61] The doubts existing must be justifiable on some objective basis.[62] The real test is if a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[63] Mr. White's is disqualified because there are justifiable doubts as to [1] Mr. White's Independence and [2] Mr. White's Impartiality.

1. Mr. White is not Independent.

6. Independence has been described as the *modus operandi* of the arbitrator.[64] Independence issues usually arise when the arbitrator has a relationship with a party; when the arbitrator has a relationship with an entity linked to a party.[65] 'Independence' connotes an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties which might lead the arbitrator to favour the party concerned.[66]

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[60] *Supra* n. 52, Art. 12.
[61] *Supra* n. 55.
[62] Challenge Decision of 11 January 1995, XXII YBCA 227 (1997).
[63] Porter v Magill AC 357,102 (2002).
[64] El-Kosheri, M. & Youssef, K., *The Independence of International Arbitrators: An Arbitrator's Perspective*, ICC BULLETIN, SPECIAL SUPPLEMENT 45 (2007).
[65] Whitesell, A.M., *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC BULLETIN, SPECIAL SUPPLEMENT 8 (2007).
[66] AT&T Corporation v. Saudi Cable Company (2000) APP.L.R. 05/15, p. 67.

7. Out of all the worldwide shareholders in Oxford, Young & Coopers has 10% shareholding and its Senior Investment Manager is Mr. White's niece with whom he has a close relation. This is the objective basis on which any reasonable person would come to conclusion that when Oxford's investment is in trouble, the shareholder will have some interest. Independence is 'the absence of inappropriate personal or financial links with a party.[67] Therefore, Mr. White is not independent.
8. Mr. White is not impartial.
9. 'Impartiality' certainly does not mean utter indifference,[68] and also has a different meaning from the word 'neutrality'.[69] Rather, 'impartiality' means 'complete receptivity to the parties' arguments.'[70] As impartiality only requires a state of mind it can be particularly difficult to measure,[71] or indeed prove.[72] In practice, impartiality is assessed against objective factors such as those used to determine independence.[73] Therefore, neither is Mr. White independent nor is he impartial.

II. JURISDICTION OF THE AD HOC TRIBUNAL.

10. Oxford attempts to settle the matter amicably through conciliation and did not bear any results. It further attempted to negotiate a settlement with the municipalities requesting them to hold the escalation clause in accord with the contract signed for the 5-year period, after which the escalation clause could be renegotiated. Oxford was unsuccessful. Oxford raised an investor-state arbitration claim against Binda under the Binda-Petrollar BIT. An

[67] Park, W., ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 380 OXFORD (2006).
[68] Flick, J.A., NATURAL JUSTICE: PRINCIPLES AND PRACTICAL APPLICATION, 158 BUTTERWORTHS (2nd ed. 1984).
[69] Binder, P., *Italian Arbitration Law*, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, 83 KLUWER SUPPLEMENT 17 (1994).
[70] HASCHER, D., *A COMPARISON BETWEEN THE INDEPENDENCE OF STATE JUSTICE AND THE INDEPENDENCE OF ARBITRATION*, ICC BULLETIN, SPECIAL SUPPLEMENT 83 (2007).
[71] J. D. M. LEW, L. A. MISTELIS AND S. M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, THE HAGUE: KLUWER LAW INTERNATIONAL, p. 11-11 (2003).
[72] BLACKABY AND PARTASIDES, REDFERN AND HUNTER, p. 4.78 (6th ed., 2015).
[73]CHRISTOPHER KEE AND JEFF WAINCYMER, CLYDE CROFT, A GUIDE TO UNCITRAL ARBITRATION RULES, CAMBRIDGE UNIVERSITY PRESS 131 p.11.4 (2013).

ad hoc tribunal governed by UNCITRAL Arbitration Rules is set up in Singapore. The ad hoc tribunal does not have jurisdiction to hear the matter because [A] Exhaustion of Domestic Remedy is Jurisdictional, [B] it is part of the offer to arbitrate and [C] The available Domestic Remedies are not Futile.

A. EXHAUSTION OF DOMESTIC REMEDY IS JURISDICTIONAL.

11. Article 15.1 of the Binda-Petrollar BIT requires the exhaustion of local remedies for five years before submitting a claim of arbitration. According to Article 36(2) of the Vienna Convention on Law of Treaties,[74] a State exercising a right shall comply with the conditions for its exercise provided for in the treaty. Exhaustion of domestic remedy is a jurisdictional requirement and a failure to comply would result in a determination of lack of jurisdiction.[75] The tribunal in *Murphy v. Ecuador*[76] reaffirmed that procedural requirements may not be ignored without giving rise to procedural consequences and if the procedural conditions to a State's consent to international arbitral jurisdiction are overlooked, there is no consent to international jurisdiction. Therefore, this is not merely a waiting period but rather a condition precedent to institute arbitration.

B. IT IS PART OF THE OFFER TO ARBITRATE.

12. Article 17.1 of the Binda-Petrollar BIT reads "each Party consents to the submission of a claim to arbitration in accordance with the terms of this Agreement." On such term is to exhaust the domestic legal remedy before instituting arbitral proceeding. The host State's

[74] Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331, Art. 36(2).
[75] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 ; Maffezini v. Kingdom of Spain,ICSID Case No. ARB/97/7, ¶¶34-37; Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶¶133-153; Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda), Judgment of 3 February 2006, 2006 ICJ Reports 6,¶¶87-88; Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Decision on Preliminary Objections, Judgment of 1 April 2011, ICJ, ¶¶133-134;
[76] Murphy Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/08/4, 142 (5 Dec. 2010).

consent to arbitration is therefore premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts.[77] Therefore, the exhaustion of local remedy is a condition precedent to the consent to arbitrate in the Binda-Petrollar BIT.

C. THE AVAILABLE DOMESTIC REMEDIES ARE NOT FUTILE.

13. Futility has also been recognised as an exception to jurisdictional prerequisites in international law in other contexts.[78] The tribunal has to weigh the interests of the parties to the dispute, i.e., for the host State to have "a fair opportunity to address the issue through its domestic legal system", and for the Claimants to be provided with "an efficient dispute resolution mechanism."[79]
14. In an effort to streamline the judicial process, Binda recently enacted a Commercial Courts Act 2015 requiring only disputes relating to commerce including investments be filed before the newly established commercial courts in all the states in Binda.[80] The treaty has also provided sufficient time of five years to first approach domestic courts before instituting arbitration. If a time limit is provided it must reflect the average duration of investor-state proceedings.[81] Therefore, there is a fair opportunity to address the disputes domestically.
15. Therefore, in the absence of even a cursory attempt by the Claimant, it simply cannot conclude that recourse to the courts would have been completely ineffective at resolving

[77] Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 22::4-23::4.
[78] Ambiente Officio S.P.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶620 (Feb. 8, 2013); C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 204-209 (2nd ed. 2004); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 101- 102 (2005).
[79] Abaclat and Others (formerly Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, 582 (4 Aug. 2011).
[80] Moot Proposition, ¶ 10.
[81] Joongki Kim, *Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions*, 11 TRANSNATIONAL DISPUTE MANAGEMENT 2 (2014).

the dispute.[82] Thus, this ad hoc tribunal should not have jurisdiction because Oxford failed to meet the jurisdictional requirement envisaged in the Binda-Petrollar BIT.

III. EXPROPRIATION OF THE INVESTMENT.

16. Binda provided 100% foreign direct investment for proposed investments in environmental projects and offered incentives including a 50-year tax-free leasing of lands and the income to be earned by the foreign investors is to be primarily generated by a unit charge of wastewater treated and in cases where wastewater was converted to drinking water, a separate charge is fixed.[83] An escalation clause of 10% per year on the agreed rate for 5 years.[84] The state of Bingee, on behalf of its municipalities, cited public policy reasons and directed Oxford to revise downward, the escalation clause of 10% per year on the sale/purchase of water to 5% per year.[85] This is not an act of expropriation and does not entitle Oxford to compensation because [A] Binda has not Indirectly Expropriated and [B] Oxford need not be compensated.

A. BINDA HAS NOT INDIRECTLY EXPROPRIATED.

17. Article 5.1 of the Binda-Petrollar BIT reads that Neither Party may nationalize or expropriate an investment of an investor of the other Party either directly or through measures having an effect equivalent to expropriation. Measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or of significant depreciation of value, of assets of a foreign investor.[86]

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[82] ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9.
[83] Moot Proposition, ¶ 6.
[84] Moot Proposition, ¶ B(c).
[85] Moot Proposition, ¶ B(e).
[86] Middle East Cement Shipping v. Egypt 7 ICSID Reports (2005) 178; Norwegian Shipowners' Claims, 1 RIAA (1922) 307; The Case concerning some German Interests in Polish Upper Silesia, Germany v Poland PCIJ Series A. No. 7 (1926) 3; UNCTAD, *Series on Issues in International Investment Agreements: 'Taking of Property'* (2000) 4; L B Sohn and RR Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens* 5 AJIL 545-553 (1962).

18. Article 5.3(a)(ii) of the Binda Petrollar BIT further elaborates that indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation and requires a case by case fact based inquiry,[87] taking into consideration *firstly* economic impact of the measure, *secondly* duration of the measure, *thirdly* character of the measure or series of measures, notably their object, context and intent and *lastly* whether a measure by a Party breaches the Party's prior binding written commitment to the investor.

19. The economic impact of the measure is that the escalation clause of 10% per year on the sale/purchase of water is revised downward to 5% per year.[88] Duration has not been mentioned. The character of the measure is an emergency fiscal measure.[89] The escalation clause was agreed at the time of making the investment when there was a worldwide slump in the oil prices.[90] However, in early 2018, the world economy began to feel the negative effects of the rise in international crude oil prices and the prime minister faced economic decisions that would slow infrastructure development because inflation began to gallop forward in Binda.[91]

20. An escalation clause of 10% per year on the agreed rate for 5 years, was fixed under the contract signed by Oxford and the municipalities of Bingee state.[92] But Article 2.4(ii) of the Binda-Petrollar BIT states that this treaty shall not apply to measures by a local Government.

21. To qualify as indirect expropriation there must be major adverse impact on the economic value of the investment[93] but in the present case there is only a downward revision of the

[87] Article 5.3(b) of the Binda-Petrollar BIT.
[88] Moot Proposition, ¶ B(e).
[89] Moot Proposition, ¶ B(e).
[90] Moot Proposition, ¶ 12.
[91] Moot Proposition, ¶ 13.
[92] Moot Proposition, ¶ B(c).
[93] Telenor Mobile Communications A.S. v. Republic of Hungary (ICSID Case No. ARB/04/15; Gotez v. Brundi 15 ICSID Review-FILJ (2000) 457; Sporrong And Lonnroth v Sweden: ECHR 23 SEP 1982.; RFCC v. Morocco 20 ICSID Review-FILJ (2005) 391.

escalation clause. Oxford will still get paid for its services. Therefore, there is no major impact on the economic value and it does not qualify as indirect expropriation. Article 5.6 of the Binda-Petrollar BIT requires domestic remedies to be sought first which Oxford has not fulfilled. Therefore, the acts of Binda do not constitute indirect expropriation.

B. OXFORD IS NOT ENTITLED TO COMPENSATION.

22. Article 5.1 of the Binda-Petrollar BIT expressly recognises that Binda must pay adequate compensation for any expropriation measures taken. This obligation is also recognised under Article 36 of ARSIWA.[94] But Article 5.4 of the Binda-Petrollar BIT carves out 'legitimate public interest as an exception to expropriation. Financial crisis is a legitimate public interest.[95]

23. The purpose behind the measure must be considered[96] because expropriation not only refers to the economic impact of the government action but also to the design to protect legitimate public welfare objectives.[97] The purpose behind the fiscal measures was to protect Binda's economy and therefore will not amount to expropriation. In absence of expropriation, there can be no provision for compensation. Therefore, Oxford is not entitled to compensation.

IV. BREACH OF TREATY IN RELATION TO NATIONAL TREATMENT.

24. Emergency fiscal measures were implemented by passing general legislation requiring all municipalities and state government departments to resort to austerity measures.[98] Other domestic providers of services similar to that provided by Oxford, who were also permitted to operate environmental facilities under an exemption in Binda's national legislation, were

[94] *Supra* n. 17.
[95] CMS v. Argentina 44 ILM (2005) 1205.
[96] S.D. Myers, Inc. v. Government of Canada 40 ILM (2001) 1408; Oscar Chinn, United Kingdom v Belgium, Judgment, PCIJ Series A/B No 63.; Iran-US Claims Tribunal, Sea-Land Services, Inc. v. Iran, 6 IRAN-U.S. C.T.R., at 149 et seq.
[97] Norwegian Shipowners' Claims (Norway v USA), 1 RIAA (1922) 307.
[98] Moot Proposition, ¶B(e).

not affected by the monetary restrictions imposed by Binda.[99] Article 4.1 of the Binda-Petrollar BIT requires parties not to apply measures that accord less favourable treatment to the foreign investor than that it accords, in like circumstances, to its own investors.

25. The non-discrimination standard does not require all treatment to be identical, but any difference in treatment must be justified on reasonable grounds.[100] It has to be determined *first,* if foreign investor and domestic investor are placed in the same setting. *Second,* if treatment accorded to foreign investor is at least as less favourable than treatment accorded to the domestic investors. *Third,* if there is a justification for such differentiation. The first condition is met because the domestic investors provide services similar to Oxford.

26. But the second and third conditions are not met because a state has the right to enforce legislation for the purpose of protecting and preserving its sovereignty and ensuring the public welfare of its citizens, even if that negatively impacts on the foreign investor and his investment.[101]

27. Assessment of 'like circumstances' must also take into account circumstances that would justify government regulations that treat them differently in order to protect public interest.[102] Like circumstances includes amongst other things includes, whether the investment is public, private, or state-owned or controlled, and the practical challenges of regulating the investment. In early 2018, the world economy began to feel the negative effects of the rise in international crude oil prices.[103] Every 1 USD equivalent rise or drop in the crude oil price results in a significant increase or decrease in cost to Binda's

[99] Moot Proposition, ¶B(f).
[100] The Restatement (Third) – The Foreign Relations Law of the United States, The American Law Institute (1986), 1-488, vol. I, Section 712; Barcelona Traction, Light and Power Company Ltd, (Belgium v. Spain) I.C.J. Reports 1970, p. 3.; Beveridge et al., 2000.
[101] Exon-Florio amendment, Omnibus Trade and Competitiveness Bill of 1988, section 5021 (Pub. L. No. 100–418, 102 Stat. 1107; 50 U.S.C. App. § 2170); Court of Justice of the European Communities, Association Église de Scientologie de Paris & Scientology International Reserves Trust v. the Prime Minister of the Republic of France, C-54/99, ECR [2000] I-01335.
[102] SD Myers Incorporated v. Canada, (2004) 244 FTR 161.
[103] Moot Proposition, ¶ 13.

economy.[104] Binda requires sufficient liquidity to meet its financial obligations, given that payment to Oxford would reduce its financial reserves, it is justified to treat Oxford differently in order to maintain financial stability. Therefore, this will not be considered as a breach of the National Treatment obligation.

V. DENIAL OF FREE TRANSFER OF FUNDS.

28. Oxford invested its engineering and construction services under a Build Own Operate Scheme.[105] However, due to the recent economic pressures faced by Binda, the finance ministry of the government of Binda restricted the outward remittance of money by Binda.[106] Binda has breached not breached its obligation because [A] Free transfer of funds is not an absolute right and [B] The Restriction is justified.

A. FREE TRANSFER OF FUNDS IS NOT AN ABSOLUTE RIGHT.

29. Article 6.1 reads "Subject to its law." The right to free transfer is not always absolute, and is subject to certain restriction taking into consideration the finite foreign exchange reserves of the host country, that the investor shall have to rely on while transferring funds.[107] Provision of Free Transfer is not a guarantee that investors will have funds to transfer, it rather guarantees that if investors have funds, they will be able to transfer them, subject to the conditions.[108]
30. Due to the recent economic pressures faced by Binda concerning the substantial increase in crude oil import bill (liability), and due to the negative externality and dampening effect on the monetary situation in Binda resulting from the international diktat, the finance ministry of the government of Binda restricted the outward remittance of money by Binda

[104] Moot Proposition, ¶ 12.
[105] Moot Proposition, ¶ B(c).
[106] Moot Proposition, ¶ B(d).
[107] KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION, 316 (2010).
[108] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July, 2008).

and other major investors in Binda, citing required fiscal prudence due to the deteriorating domestic economic situation.[109]

31. Article 6.3 reads "nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its law" and one such condition is "requirement to satisfy other formalities imposed by the Central Bank." This is clearly aimed at restrictions on the movement of capital and exchange of currency imposed by a Contracting Party, rather than the assertion of a contractual right to funds provided for in a bank guarantee.[110] Therefore, this right to free transfer is not an absolute right rather it is subject to certain conditions that are identified in the Binda-Petrollar BIT.

B. THE RESTRICTION IS JUSTIFIABLE.

32. Article 6.4 reads that "the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies." Customary international law and treaty norms[111] that recognise the right of countries to impose capital controls in situations of balance of payment crisis.[112]

33. The rise in crude oil prices threatens to turn into an economic crisis and one option to mitigate the monetary crisis in Binda was to directly trade with the Middle East suppliers.[113] The diktat issued by the President of Petrollar will have an impact on the foreign currency

[109] Moot Proposition, ¶ B(d).
[110] White Industries Australia Limited v. Coal India Limited (2004) 2 Cal LJ 197.
[111] Articles of Agreement of the International Monetary Fund, art. VI(3), Dec. 27, 1945.
[112] WOLTERS KLUWER LAW & BUSINESS, THE BACKLASH AGAINST INVESTMENT ARBITRATION, 51 (2010); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION, 316 (2010).
[113] Moot Proposition, ¶ 13.

reserves which needed to be maintained at a sufficiently high level in Binda to secure the stability of its economy.[114]

34. The free transfer principle is aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host State which effectively imprison the investors' funds, typically in the host State of the investment.[115] No such measures have been taken in the present case because the ministry allowed minimal funds transfer out of Binda in a carefully monitored monetary program by the Reserve Bank of Binda.[116]

[114] Moot Proposition, ¶ 14.
[115] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July, 2008).
[116] Moot Proposition, ¶ B(d).

PRAYER

IN LIGHT OF THE ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE RESPONDENT RESPECTFULLY REQUESTS THIS TRIBUNAL TO ADJUDGE AND DECLARE THAT:

Claim I

1. BINDA HAS NOT EXPROPRIATED AIRFRESH'S INVESTMENT.
2. BINDA HAS NOT FAILED TO PROVIDE FULL PROTECTION AND SECURITY.
3. BINDA HAS NOT VIOLATED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT.
4. BINDA HAS MET AIRFRESH'S LEGITIMATE EXPECTATIONS.
5. BINDA DOES NOT HAVE TO COMPENSATE AIRFRESH.

Claim II

1. PROF. WHITE'S APPOINTMENT IS INVALID AND SHOULD BE SET ASIDE.
2. THE AD HOC TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS MATTER.
3. BINDA HAS NOT EXPROPRIATED OXFORD'S INVESTMENT.
4. BINDA HAS NOT BREACHED ITS OBLIGATION RELATING TO NATIONAL TREATMENT.
5. BINDA HAS NOT BREACHED ITS OBLIGATION RELATING TO FREE TRANSFER OF FUNDS.
6. BINDA DOES NOT HAVE TO COMPENSATE OXFORD.

On behalf of the Respondent

COUNSELS FOR THE RESPONDENT