TEAM CODE – SCA004

ARBITRATION UNDER

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BINDA AND THE ESWATINIAN KINGDOM OF NULAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

&

BILATERAL INVESTMENT TREATY BETWEEN THE GOVERNMENT OF REPUBLIC OF BINDA AND THE KINGDOM EMIRATES OF PETROLLAR ON THE PROMOTION AND PROTECTION OF INVESTMENTS

BEFORE

AN AD HOC TRIBUNAL GOVERNED BY THE UNCITRAL RULES

BETWEEN

AIRFRESH (CLAIMANT) AND **GOVERNMENT OF REPUBLIC OF BINDA(RESPONDENT)**

&

OXFORD (CLAIMANT) AND **GOVERNMENT OF REPUBLIC OF BINDA(RESPONDENT)**

MEMORIAL FOR THE RESPONDENT

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LIST OF ABBREVIATION

%	Percentage
&	and
AAA	American Arbitration Association
AAA-IDR	American Arbitration Association International Dispute Resolution
AJIL	American Journal of International Law
Apr.	April
ARB.	Arbitration
art. / arts./Art	Article / Articles
BIT	Bilateral Investment Treaty
BNR	Binda Rupee
Chap	Chapter
Cl.	Claimant
Co.	Company
Corp.	Corporation
Dec/Dec.	December
Doc	Document
Dr.	Doctor
Eg.	Example
Feb	February

FET	Fair and Equitable treatment
FILJ	Foreign Investment Law Journal
FIN. ECON	Financial Economy
FPS	Full protection and security
GATT	General Agreement on Tariffs and Trade
Govt.	Government
I	First
i.e.	id est (that is)
IBA	The International Bar Association
ICGJ	International Court of General Jurisdiction
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
II	Second
III	Third
ILM	International Legal Materials
Inc./Inc	Incorporated
IV	Fourth
Jan	January
Jul	July
Jun	June
JWIT	Journal of World Investment and Trade
Kl	Kiloliter

L. Rev	Law Review
Ltd.	Limited
Mar	March
Mr.	Mister
NGT	National Green Tribunal
No./No	Number
Oct	October
p./pp./pg	Page
Para	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Journal
Petro	Petrollar
PIL	Public International Law
SEZ	Special Economic Zone
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICTRAL	United Nations Commission on International Trade Law
US	United States
USCTR	US Claim Tribunal
USD	United States Dollar

V	Fifth
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VIII	Eighth
vs.	Versus

STATEMENT OF JURISDICTION

CLAIM 1:

The respondents humbly challenge the jurisdiction of this Ad Hoc Arbitral Tribunal under Article 9 of the Binda – Nuland BIT, but submit to the UNCITRAL Arbitration Rules under Article 1 of the UNCITRAL Arbitration Rules.

CLAIM 2:

The respondents humbly challenge the jurisdiction of this Ad Hoc Arbitral Tribunal under Article 16 of the Petrollar – Binda BIT, but submit to the UNCITRAL Arbitration Rules under Article 1 of the UNCITRAL Arbitration Rules.

STATEMENT OF FACTS

CLAIM 1

- The southern states of Smallnadu and Kukatuka in Binda agreed to resolve inter-state disputes.
- A foreign investor, Airfresh, from the kingdom of Nuland, entered into a contract for operating a regional environmental project. Investment treaty protections for foreign investments were offered under the Nuland-Binda BIT.
- Airfresh determined that it was in compliance of Binda's laws regarding hazardous substances and was operating its facilities after obtaining the necessary permits.
- In March 2018, residents of Smallnadu launched a public agitation against Airfresh on the grounds that it was contaminating the neighbouring water bore wells. This agitation led to sabotaging of the facilities of Airfresh by the angry citizens. The MLAs compelled the state pollution control board to agitate a claim before the jurisdictional NGT for closure of the Airfresh facilities. The NGT ruled against Airfresh, so they appealed to the Appellate NGT, but failed. Airfresh then appealled to the Supreme Court of Binda.
- In the meantime, before the claim could be heard, the affected public approached the Supreme Court through a PIL and obtained an interim stay order from the apex court, preventing Airfresh from operating the hazardous waste landfill and related operations.
- Subsequently, under the Nuland-Binda BIT, Airfresh initiated investor-state Arbitration against the Republic of Binda under the UNCITRAL Arbitration Rules.

CLAIM 2

- The northern state of Bingee, in Binda, contains the biggest & holiest river of Binda i.e. Junjee, which is the only river source of safe drinking water. Junjee is being highly polluted due to the toxic waste discharges and observance of holy rituals.
- The Prime Minister, vowed to save the national river along with the mantra "Save Junjee, Save Binda".
- Oxford, a company from Petrollar, invested its engineering and other services, in 2016, to clean Junjee & supply safe drinking water to the state of Bingee. An escalation clause was fixed to the contract signed between Oxford & Bingee. Oxford's investments were protected under the Petrollar-Binda BIT. Oxford was further instructed to incorporate the concept of waterfront development for recreation, & to provide a boost to the local economy.
- Due to recent economic pressures, the Govt. of Binda restricted the outward remittance of money by major investors in Binda, due to fiscal prudence. Only monitored minimal funds transfer out of Binda was permitted.
- Citing public policy reasons, Bingee, revised downward the escalation clause from 10% per year on the sale/purchase to 5% per year.
- Other domestic providers of similar services like those of Oxford weren't affected by these monetary restrictions, but were affected by the austerity measures.
- After failed attempts at conciliation & negotiation, Oxford initiated investor state arbitration against Binda, alleging expropriation, breach of treaty in relation to national treatment & denial of free transfer of funds & sought compensation.

STATEMENT OF ISSUES

CLAIM 1

1. WHETHER BINDA EXPROPRIATED AIRFRESH'S INVESTMENT.
2. WHETHER BINDA MET AIRFRESH'S LEGITIMATE EXPECTATIONS IN RELATION TO PROTECTION OF ITS INVESTMENT.
3. WHETHER BINDA DENIED FAIR AND EQUITABLE TREATMENT TO AIRFRESH.
4. WHETHER BINDA FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO AIRFRESH'S INVESTMENT.

CLAIM 2

1. WHETHER MR. WHITE'S APPOINTMENT AS ARBITRATOR IS JUSTIFIED AND FREE OF CONFLICT OF INTEREST.
2. WHETHER BINDA EXPROPRIATED OXFORD'S INVESTMENT.
3. WHETHER BINDA BREACHED THE TREATY IN RELATION TO NATIONAL TREATMENT.
4. WHETHER BINDA DENIED OXFORD FREE TRANSFER OF FUNDS.

SUMMARY OF ARGUMENTS

ISSUE 1.

A. THAT THIS TRIBUNAL LACKS JURISDICTION:

1. That Article 9.1 is not Satisfied
2. That Article 9.2 is not satisfied

B. THAT BINDA HAS NOT EXPROPRIATED AIRFRESH'S PROPERTY:

1. There was no taking of the property by The Republic of Binda.
2. That the expropriation of the property was justified.

C. THAT BINDA HAS ACCORDED FAIR AND EQUITABLE TREATMENT TO AIRFRESH:

1. That Binda has acted in Good Faith
2. That Binda has not breached Airfresh's legitimate expectations
3. That Binda has the right to regulate

D. THAT BINDA HAS NOT BREACHED THE FULL PROTECTION AND SECURITY REQUIREMENT

ISSUE 2.

A. CHALLENGE TO MR. WHITE'S APPOINTMENT AS ARBITRATOR

1. That Mr. White's connection to Oxford through his niece breaches the IBA Guidelines
2. That Mr. White's appointment breaches Article 19 of the BIT

B. THAT THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE

1. That Article 15 has not been satisfied.
2. That the tribunal does not have *Rationae Personae* jurisdiction
3. That this tribunal does not have *Rationae Materiae* jurisdiction
4. That the Treaty does not apply to this dispute

C. That Binda has not breached its duty in relation to National Treatment

1. That there were no 'like circumstances'.
2. That there was no differential treatment of investors.
3. That the breach of duty is justified.
4. That Binda did not have discriminatory intent.

D. THAT BINDA HAS NOT BREACHED THE DUTY TO PROVIDE FREE TRANSFER OF FUNDS

1. That Article 6 is not applicable
2. That Binda has Monetary Sovereignty over its monetary policies

E. THAT BINDA HAS NOT EXPROPRIATED OXFORD'S PROPERTY

1. That the Doctrine of Police Powers is applicable
2. That there is no abuse of power

ARGUMENTS ADVANCED

ISSUE 1

A. THAT THIS TRIBUNAL LACKS JURISDICTION:

1. ARTICLE 9 IS NOT SATISFIED:

1.1 That Article 9(1) has not been satisfied:

1.1.1 Article 9 (1) requires the parties to, as far as possible, settle the dispute amicably. It is thus a mandatory provision to attempt amicable settlement wherever possible. The period is allotted to provide for bona fide dispute settlement between the parties[1]. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.[2]

1.1.2 However, the investor did not attempt any such amicable dispute resolution before approaching this tribunal. Thus, article 9(1) of the BIT has not been satisfied.

1.2 That Article 9(2) has been satisfied:

1.2.1 Article 9(2) states that any dispute which has not been amicably settled for 6 months may be submitted to either the domestic body or for conciliation under the UNCITRAL Rules.

1.2.2 The parties have initiated proceedings before the domestic judicial body. If the investor has resorted to the host State's domestic courts to have its dispute settled, it has lost its right to resort to arbitration.[3]

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[1] *Ronald S Lauder v The Czech Republic,* Final Award, 3 September 2001, 9 ICSID Reports 66
[2] *Enron Corp and Ponderosa Assets, LP v Argentina*, Decision on Jurisdiction, 14 January 2004, 11ICSID Reports 273.
[3] C Schreuer, 'Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road', 5 JWIT 231 (2004) at 249

1.2.3 The Claimant has already appealed from the NGT's decision to the Supreme Court, with the intention of settling its disputes, and has thus agreed to the dispute resolution mechanism, under Article 9(2)(a), as required under Article 9(3).

1.3 Therefore, Article 9 of the BIT has not been satisfied and thus, this tribunal does not have jurisdiction.

B. THAT BINDA HAS NOT EXPROPRIATED AIRFRESH'S PROPERTY:

1. THERE WAS NO TAKING OF THE PROPERTY BY THE REPUBLIC OF BINDA:

1.1 The definition of Expropriation under Article 5[4] says that Party shall not be nationalized, expropriated of the Contracting Party except for the public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Clearly there was no taking of the property of the investor as whatever steps was taken was done for the sake of the public purpose and thus it falls under the exception of Article 5.

1.2 The Claimant cannot seek compensation for effects of *bonafide* regulatory measures aimed at securing public interests.[5] In this case, the regulatory measure that was taken by the Government of Binda comes under the bonafide regulatory measure which was done for the public purpose.

1.3 The nature and characteristics of a particular measure has emerged as a key factor in drawing a line between indirect expropriation and non-compensable regulation. A bona fide regulatory act (or its application to an individual investor) that genuinely pursues a legitimate public-policy objective (such as the protection of the environment and public health and safety) and complies with the requirements of non-discrimination, due process and proportionality may

[4] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Nuland, Article 5.
[5] UNCTAD Series on International Investment Agreements II

not be designated as expropriatory, despite an adverse impact. This follows from the doctrine of police powers of States which, in its contemporary meaning, goes well beyond the fundamental functions of custody, security and protection and encompasses the full regulatory dimension of States. It effectively places the risks arising from bona fide regulation on economic actors.

2. **IN ARGUENDO, THE EXPROPRIATION OF THE PROPERTY WAS JUSTIFIED**:

2.1 Police Power- According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war[6]. In this case the Claimant is claiming damages for taking of the property but this expropriation clearly comes under the picture of Police power.

2.2 The 'public purpose' requirement for legal expropriation is based on utilitarian view of governance: the individual's right to property can only be violated by an overriding interest of the greater public in the transfer.[7]

2.3 The same would be the case if an establishment is shut down for violations of environmental or health regulations. Airfresh also in the year 2018 was operating a hazardous waste landfill along with a treatment and disposal facility which was located close to the border of the Smallnadu. The people of the neighboring state of Smallnadu claimed that there was

[6] UNCTAD Series on International Investment Agreements II.
[7] Muthucumaramaswamy Sornarajah, The International Law on Foreign Investement. (Third edition, 2011)

contamination in the water bore wells close to their communities which were caused by the operation of the hazardous waste facilities.

2.4 In present, the police powers must be understood as encompassing a State's full regulatory dimension. States go well beyond the fundamental functions of custody, security and protection. They intervene in the economy through regulation in a variety of ways […] protecting the environment and public health; regulating the conduct of corporations; and others. An exercise of police powers by a State may manifest itself in adopting new regulations or enforcing existing regulations in relation to a particular investor.

2.5 Sedco v. NIOC[8] "Iran-US Claims Tribunal noted that it was an "accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide legislation within the accepted police power of States." – General Acceptance of the police powers doctrine (Not in investment cases).

2.6 In *Feldman v. Mexico*, the tribunal noted that "*governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like*", adding that "*reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this*".[9]

2.7 Therefore, even if there was expropriation of the property of the investor, it was justified as the expropriation was done for the sake of the public purpose as there was contamination in the neighboring water bore wells due to the operation of the hazardous waste facilities by Airfresh, and to protect the health of the people the taking off the property was justified.

[8] Sedco Inc *v.* National Iranian Oil Company and the Islamic Republic of Iran (Case No 129) Iran-United States Claims Tribunal 10 Iran-U.S. Cl. Rep. 180 (1986)

[9] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec 16, 2002)

2.8 In *Suez v. Argentina*, the tribunal also acknowledged that: *"...States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers … has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate."*[10]

2.9 There was no expropriation of the property of the investor as property was taken for the purpose of public policy. The Government of Binda had no personal interest in taking this measure as Airfresh's hazardous waste facilities in the neighboring state of Smallnadu contaminated the neighboring water bore wells which is a concern of public health policy as due to the contamination in water bore wells which give rise health issues and which is against the public health policy.

C. THAT BINDA HAS ACCORDED FAIR AND EQUITABLE TREATMENT:

According to Article 3(2) of the Agreement, Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

1. THAT BINDA HAS ACTED IN GOOD FAITH

1.1 The Arbitral Tribunal in the Tecmed[11] case found that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the bona fide principle recognized in international law[12], although bad faith from the State is not required for its violation:

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[10] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award (Apr 9, 2015)
[11] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003)
[12] Brownlie, Principles of Public International Law, Oxford, 5th. Edition (1989), p. 19.

1.2 To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[13] It is understood that the fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses "...the international law requirements of due process, economic rights, obligations of good faith and natural justice"[14]

1.3 In the present circumstances too, the measures taken by the Court by granting of the interim stay order to prevent Airfresh from operating the facilities was done in good faith as the citizens had alleged that the hazardous facilities were contaminating the neighboring drinking water bore wells.

1.4 In an opinion regarding the Metalclad[15] judgment, it was said that the arbitrators had failed to elaborate why the investor's expectations should be the measure of the legality of a state's actions. Indeed, given Mexico's arguments that the company's plans threatened the environment, and that its denial of the permit was required to protect the local community as well as endangered species in the area of the planned disposal site, many observers were of the opinion that whatever the investor's expectations were, the government was right in taking the action it did.

1.5 In the same case, the Claims Commission while giving the award said that although Mexico had made decisions that the tribunal found unreasonable or inefficient and failed to take actions that might have solved the crime, the tribunal found no violation of the international legal

[13] Mondev International Ltd v United States of America, ICSID Arbitration no. ARB(AF)/99/2, p.40, 116, (Oct 11, 2002)
[14] S.D. Myers, Inc.v. Government of Canada, UNCITRAL, Final Award (Dec 30, 2002)
[15] Metalclad Corporation v. The United Mexican States, ICSID Case No.ARB(AF)/97/1, Award (Aug.30,2000).

standard of required behavior because Mexico did not act 'in an outrageous way' or purposefully against the interests of the alien.

1.6 Similarly, Binda didn't act purposefully against the interests of Airfresh. In fact, it did provide it with Police protection and the sole reason for the closure of Airfresh facilities was the allegation that it was against public health due to the contamination of bore wells which was causing health and environmental issues.

1.7 In Alex Genin v. Estonia, where the claim was based on the host's revocation of the investor's banking license, the tribunal found procedural failings on the part of the government. Despite this, the claimant's behavior led to a determination that the skepticism displayed by the host was justified, and thus, the US-Estonia BIT wasn't violated.[16]

1.8 The tribunal in the case of Minnotte and Lewis v. Poland wrote that "While precise FET standards differ, the common notion is that the state must be shown to have acted delinquently in some way or other if it is to be held to have violated that standard. The claimant's unfortunate position as a result of dealing with the Respondent is not enough. The respondent in that case didn't act in an improper manner or for an improper purpose."[17] Similarly, Binda didn't act for an improper purpose, but for public good as here the public health was affected because of the act of the investors.

2. THAT BINDA HAS NOT BREACHED AIRFRESH'S LEGITIMATE EXPECTATIONS:

2.1 The strong language used in the Tecmed case, defending the legitimate expectations of the investors has been modified somewhat by the tribunals who look not just to what the particular investor expected, but what the investor could legitimately have expected. Under

[16] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No.ARB/99/2, Award (June 25, 2001).

[17] David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1 Award, paras.198-199 (May 16, 2014).

current views of FET, the legitimacy of expectations is determined by balancing the host's explicit or implicit promises made to the particular investor with its right to regulate.[18]

2.2 In Ioan Micula et al. v. Romania,[19] Co-Arbitrator Abi-Saab denied that the claimant's expectations were legitimate, by saying that, to qualify as 'legitimate', the expectations must be based on some kind of legal commitments. Responsibility, under general international law, upon the host state cannot ensue without a prior breach of a legal obligation.[20]

3. THAT BINDA HAS THE RIGHT TO REGULATE:

3.1 Raising the requirements for the host state's behavior towards foreign property holders has serious implications for the regulatory state. The FTC (Free Trade Commission's) interpretation of FET with respect to NAFTA provisions has limited it to the international minimum standard by saying that "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[21]

3.2 Recently, a number of tribunals have shifted to viewing FET from a more state centered perspective, emphasizing the host's 'right to regulate'. An interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host states from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.

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[18] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003)

[19] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Final Award (Dec 11, 2013)

[20] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 (Dec 11, 2013)

[21] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, para 184, ICSID Case No. ARB/03/19, Award (Apr 9, 2015)

3.3 The tribunal further observed that while it subscribes to the general thrust of FET & legitimate expectations, but if the terms are taken too literally, they would impose upon host states' obligations which would be inappropriate and unrealistic. For the protection of their expectations, they must rise to the level of legitimacy and reasonableness in the light of the circumstances.

3.4 Further, it was observed that No investor may reasonably expect that the circumstances prevailing at the time the investment is made, will remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.[22] 26

3.5 In S.D.Myers, the tribunal had stated that the determination of a breach of the obligation of FET by the host state must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[23]

3.6 In the present circumstances as well, Binda is merely exercising the right to regulate matters within its own territory that too for a public purpose as public health policy was disturbed because of the Airfresh's hazardous waste facilities which leads to contamination in the water bore wells. Thus, the act of the state is not against Article 3(2) and whatever measures were taken by the state was done for the public purpose.

D. THAT BINDA HAS NOT BREACHED THE FULL PROTECTION AND SECURITY REQUIREMENT:

[22] Saluka Investments BV v Czech Republic, Partial Award, IIC 210 (2006), (March 17 2006), Permanent Court of Arbitration [PCA]
[23] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Final Award (Dec 30, 2002).

1.1 Full Protection and Security (FPS) is a standard that protects the foreign investor against third party interference in an investment. Under FPS, the investor must be protected from interference from both state powers and from third parties. Thus, the state must guard the investor against employee uprisings or civil disturbances as well as refraining from threatening the investor itself.[24]

1.2 In Noble Ventures v. Romania[25], the Claimant's claim was rejected by the arbitral tribunal on the basis that they weren't able to determine any specific failure on the part of Romania to exercise due diligence in providing security to the investor's investments.

1.3 The obligation of the host state to protect the investor and investment is not unlimited. The FPS standard is one of performance rather than result, so strict liability is not available to the investors should the host attempt to protect but fail. The ICJ's opinion in the ELSI case should be noted here, that the court's refusal to find that states must 'warranty that property shall never in any circumstances be occupied or disturbed'[26]applies to investor protection as well.

1.4 Further in the same case, the arbitral tribunal had determined that the guarantee of 'the most constant protection and security' was also the basis for a complaint concerning the time taken (16 months) for a decision on an appeal against an order requisitioning the factory. The ICJ's chamber examined this argument and found that the time taken, though undoubtedly long, did not violate the treaty standard in view of other procedural standards under Italian Law.

[24] Schefer Krista, International Investment Law, 2nd Edition, Edward Elgar Publications.
[25] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct 12, 2005)
[26] Elettronica Sicula SpA (ELSI), United States v Italy, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15,(1989) 28 ILM 1109, ICGJ 95 (ICJ 1989), (Jul 20 1989), International Court of Justice [ICJ]

1.5 The tribunal in Lauder v. Czech Republic denied a violation of the standard of FPS. It reached the result that the only duty of the host state under the 'protection and security' clause had been to grant the investor access to its judicial system.[27]

1.6 Here, The Supreme Court of Binda had admitted Airfresh's appeal against the closure of its facilities, which means that the investor has been granted access to the judicial system. Further the Arbitral tribunal's opinion in AAPL v. Sri Lanka read that "...both the oldest arbitral tribunal precedent and the latest ICJ ruling confirms that the language imposing on the host state an obligation to provide 'protection and security' or 'full protection and security required by international law' could not be construed according to the natural and ordinary sense of the words as creating a 'strict liability'. The rule remains that: 'The State into which an alien has entered is not an insurer or a guarantor of his security. It does not and could hardly be asked to; accept an absolute responsibility for all injuries to foreigners'.

1.7 This conclusion, arrived at more than three decades ago, still reflects, in the tribunal's opinion, the present status of International Law Investment Standards as reflected in 'the worldwide BIT network'. [28] Thus there will be no strict liability on the host state i.e. Republic of Binda for full protection and security since it is clearly evident from para (d) of the facts that security measures were offered by the local police, despite this the facility was sabotaged.

1.8 In the Pantechniki case, it was held by the tribunal that the claimant couldn't say that it felt entitled to rely upon a high standard of police protection. Given the scale and the magnitude of the local community's agitation, the police were unable to intervene, as opposed to the police

[27] Lauder v Czech Republic, Final Award, IIC 205 (2001), (Sept 3, 2001), Ad Hoc Tribunal (UNCITRAL)
[28] Asian Agricultural Products, Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (Jun 27, 1990)

authorities' refusal to intervene. The Albanian authorities were powerless in the face of social unrest of this magnitude.[29]

1.9 Similarly, in the given circumstances the sabotaging by the violent agitators happened despite security measures offered by the local police. The Govt. of Binda took all the measure in its capacity to protect the investor but for the public health policy as there was contamination in the water bore wells because of which many health issues were being faced by the people of neighbor of Smallnadu. And to control this, the govt. of Binda took this measure, so there was no breach of full protection and security. Thus, the govt. of Binda did not infringe Article 3(2) of the Nuland-Binda BIT.

ISSUE 2

A. CHALLENGE TO MR. WHITE'S APPOINTMENT AS ARBITRATOR:

1. Respondent has lost confidence in Mr. White's ability to act as an independent and impartial arbitrator in this case due to connections between him and the Claimant through his dear niece. To make matters worse, Claimant actively tried to conceal these connections. This dishonesty should be taken into account when the Tribunal considers whether the doubts as to Mr. White's impartiality and independence are justified. His appointment may be challenged under Article 19.3[30] of the BIT.

2. THAT MR. WHITE'S CONNECTION TO OXFORD THOUGH HIS NIECE BREACHES THE IBA GUIDELINES:

[29] Pantaechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (July 30, 2009).

[30] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 19.3

2.1 Even though the Parties have not expressly chosen the IBA Guidelines, they are a widely recognised set of rules that evidence best practice and are even considered to represent a worldwide standard.[31] This situation falls within Article 2.2.2 of the IBA Guidelines which puts in the Waivable Red List a *"close family member of the arbitrator has a significant financial interest in the outcome of the dispute"*, defining close family member to include any family member with whom a close relationship exists.

2.2 In this case, Oxford's appointed arbitrator, Mr. White's niece is the Senior Investment Manager in Young and Cooper, which is one of Oxford's largest investors with a 10% share. Since the outcome of this arbitration would have an effect on the finances of the company, the same financial outcome may be attributed to her, thus proving her pecuniary interest. The explicit statement of her being dear to Mr. White, despite Mr. White having multiple nieces, proves that she is a 'close relative' under Article 2.2.2[32] of the IBA Regulations.

3. THAT MR. WHITE'S APPOINTMENT BREACHES ARTICLE 19[33] OF THE BIT:

3.1 Article 19.2[34] states that the appointed arbitrators must disclose any circumstance which may give rise to doubts regarding their impartiality, independence and freedom from conflict of interest. Article 19.3 allows the disputing party to challenge an arbitrator appointed under the treaty on the basis of justifiable doubts regarding the arbitrator's independence, impartiality, or freedom of conflicts of interest.

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[31] Nigel Blackaby & Constantine Partasides, Redfern & Hunter on International Arbitration,5th Edition, Oxford, pg. 258, Para 4.88

[32] Article 2.2.2, International Bar Association Regulations.

[33] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 19.

[34] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 19.2

3.2 The grounds for justifiable doubts are given under Article 19.10[35]. It is a compulsory provision due to the existence of the word 'shall'. Article 19.10.1 validates doubts on grounds of relatives having an interest in the outcome of the particular arbitration. This is differentiable from other rules such as the IBA Guidelines, which have restricted the term 'relatives'. However, in this BIT, a liberal view has been taken, and therefore, the Tribunal must interpret it as such, in light of the VCLT.

3.3 Oxford's appointment of Mr. White imposed on him the duty to disclose any information that may give rise to doubts. However, even though he claims to have satisfied the requirement, he has conveniently left out his relative's relation to the arbitral proceeding which gives rise to such doubts. This allows the challenge of arbitrator under Article 19.3 and for justification of doubt under Article 19.10.

B. THAT THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE:

1. THAT ARTICLE 15[36] HAS NOT BEEN SATISFIED

1.1 That the Claimant has not exhausted local Remedies:

1.1.1 Article 15.1 [37] requires the Claimant to exhaust local remedies before initiating arbitration. The only exception to this rule is if there are no local remedies available.

1.1.2 Oxford only attempted negotiation, before approaching this tribunal for arbitration. Apart from the traditional court system, Binda has recently established commerce specific courts under

[35] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 19.10

[36] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.

[37] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.1

the Commercial Courts Act, 2015. This court system was also utilized by Airfresh in attempting to resolve their disputes. This shows that domestic legal remedies were available to the investor.

1.1.3 Negotiation does not satisfy the requirement as it is not before the relevant domestic courts. Oxford has not approached any of the domestic courts, as required under Article 15.1. Since this is a compulsory clause, as the interpretation of the word "must" implies, in light of the VCLT, a breach of this clause precludes Oxford from approaching the tribunal for arbitration.

1.2 That Article 15.4[38] has not been satisfied:

1.2.1 Article 15.4 states that the parties shall use their best efforts to resolve the disputes amicably through negotiation, consultation or other third party procedures for atleast 6 months before initiating arbitration.

1.2.2 Oxford attempted to negotiate a settlement, however, it is argued that neither did they use their best efforts, nor did they pursue it for the requisite 6 months before initiating arbitral proceedings.

1.2.2.1 Oxford attempted to negotiate a settlement with the municipalities requesting them to hold the escalation clause for 5 years. It is submitted that the reason for the austerity measures is the monetary situation due to Petrollar's international diktat, which reduced 80% of Binda's required oil supply. Thus, emergency actions were required. Oxford asking for the continuation of the clause is unreasonable as it would render the emergency actions invalid, thus continuing the crisis in the nation state, and disallowing the regular functioning of the government. Thus, the negotiations failed due to Oxford's unreasonableness and disregard for the object of the BIT as set out in the Preamble.

[38] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.4

1.2.2.2 The austerity measures were enacted in "early 2018". However, the arbitration was initiated by Oxford on or before 14/5/2018. By then, the parties had already selected their arbitrators. Thus, the requisite 6 month period under Article 15.4 is not satisfied, and this precludes the claimants from approaching the arbitral.

1.3 Therefore, since Oxford has not satisfied Article 15's prerequisites, their right to approach the court for arbitration stand precluded.

2. THAT THIS TRIBUNAL DOES NOT HAVE RATIONE PERSONAE JURISDICTION:

2.1 **That Oxford is not an 'investor':**

2.2 Article 2 of the BIT states that the treaty applies to […] a party relating to investments of investors of another party in its territory. Under Article 1.4, exclusions of the term investment have been given, which includes pre-operational investment.

2.2.1 In the *Salini* case, the tribunal held that the claimant needs to qualify as an investor under both, the BIT as well as the ICSID Convention. Article 25 of the ICSID Convention also requires an investment for the court to have jurisdiction.

2.2.2 It is submitted that the acts of the claimant do not amount to investment under Article 1.4 as they are pre-operational expenditure, incurred before the commencement of substantial business. The factual matrix says that **"***Oxford looked forward to***"** being able to repatriate its earnings. Further, the substantial business in question was the waterfront development, as that project was supposed to produce majority of the profits, which Oxford had merely been directed to do. However, Oxford did not commence its operation, and thus, the provision of clean drinking water is merely a pre-investment scheme, as discussed by the tribunal in the *Mihaly*[39] case.

[39] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar 15 2002)

2.2.3 The claimants, by attempting to approach this court under the SIAC rules have breached Article 25[40] of the ICSID Convention, and thus do not qualify under it. Thus, the claimants having failed to establish themselves as investors, and their activities as investments, the court lacks Ratione Personae jurisdiction.

3. THAT THIS TRIBUNAL DOES NOT HAVE RATIONAE MATERIAE JURISDICTION

3.1 Article 13.3[41] of the BIT limits the jurisdiction to claims in respect of breach of treaty, and precludes disputes upon breach of contract. This defines the *ratione materiae* jurisdiction of the court.

3.2 The Claimants have approached this court alleging breach of contract and thereby claiming breach of treaty. Thus, the claims are arising solely from the breach of contract.

3.3 As was held in the cases of *Vivaldi* and *Impregilo v. Pakistan*¸ the threshold to establish breach of treaty is much higher than establishing breach of contract. This principle has been imported in Article 13[42] of the BIT. Thus, simply by alleging breach of contract, an issue of breach of treaty does not arise. Thus, since the issue of breach of treaty has not been established, the *Rationae Materiae* jurisdiction under Article 13.3 is not satisfied.

4. THAT THE TREATY DOES NOT APPLY TO THIS DISPUTE:

4.1 Article 2.4[43] of the BIT states that the treaty shall not be applicable to any measure by a local government. 'Measure' has been defined under Article 1.8[44], and 'local government' has been defined under Article 1.7.

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[40] Article 25, Convention of the International Centre for the Settlement of Investment Disputes.
[41] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 13.3
[42] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 13.
[43] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 2.4
[44] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 1.

4.2 The Claimant has approached this court alleging breach of the treaty against Binda. The act alleged to have caused the breach is the municipalities enacting austerity measures.

4.3 It is submitted that the municipality squarely falls within the definition of "local government" and the municipality enacted regulations in respect of austerity measures. Thus, under Article 2.4, the treaty itself cannot apply to this measure. Therefore, any provision under this treaty providing any jurisdiction to this court also stands inapplicable in the present case.

C. THAT BINDA HAS NOT BREACHED THE TREATY IN RELATION TO NATIONAL TREATMENT:

Article 4[45] of the BIT provides for National Treatment. It states that each party to the BIT shall not apply to the investors or their investments of the other party, measures which accord less favorable treatment than that it accords, in like circumstances to its own investors. The test for National Treatment has been provided in the case of Pope & Talbot[46] - (1) identification of the relevant subjects for comparison; (2) consideration of the relative treatment each comparator receives; and (3) consideration of whether any factors exist that justify any deviation in the treatment. A fourth test of discriminatory intent[47] also needs to be satisfied.

1. IDENTIFICATION OF RELEVANT SUBJECTS FOR COMPARISON:

1.1 According to this test, it is necessary to identify the subject under which comparison must be made. This is incorporated into Article 4 in the phrase 'like circumstances'. Meaning thereby that the domestic and foreign investors must operate under similar circumstances for the rule to apply. Thus, for this, the investors must be in the same business[48]. Another tribunal held that

[45] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 4.

[46] Pope & Talbot v Canada, Award on the Merits of Phase 2, (Apr 10 2001), at 9–37.

[47] Alex Genin v. Estonia, Award, (Jun 25, 2001), 17 ICDIS Review – FILJ (2002)395, at para 369; Methanex v. USA, Final Award, (Aug 3, 2005), 44 ILM (2005) 1345, Part IV Chapter B, Para 12.

[48] Feldman v. Mexico, Award, (Dec 16, 2002), 18 ICSID Review – FILJ (2003) 488, Para 171.

only direct competitors are comparable.[49] Thus, a narrow interpretation must be given to the phrase 'like circumstances'

1.2 Oxford was in the business of selling purified water to about 500 Million people, at an escalation clause of 10% per year. The other investors were merely operating in the environmental sector, under an exemption, but it is nowhere evident that they were in the same business as Oxford. Further, they were tasked with cleaning up of the river *because* the domestic companies lacked the ability to do so. Oxford, being specialized in this business, was allowed to operate in Binda, upon the Junjee River.

1.3 The domestic investors did not have any expatriation of money from Binda, as they were based in Binda itself. However, Oxford, being a foreign firm, repatriated its profits to Petrollar. This is an important factual difference which needs to be considered, as was held by a tribunal[50].

1.4 Thus, Oxford and the domestic investors did not have 'like circumstances'.

2. CONSIDERATION OF THE RELATIVE TREATMENT:

2.1 According to Article 4, the relative treatment accorded by the Host state must not be any less favorable than that it accords to its own investors. Thus the state only has the onus of according the same treatment to its foreign investors as it would to its domestic investors. The onus of proving damage as a result of the alleged discriminatory conduct lies on the claimant.[51]

2.2 The austerity measures which were adopted by Bingee affected all the investors. The restriction upon outward remittance of money was a general legislation which not only affected Oxford but also affected the rest of the state, including the other major investors in Binda. Thus,

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[49] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability, (Apr 28,2011).

[50] Clayton, Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04

[51] Nicholas DiMascio and Joost Pauwelyn, Nondiscrimination in Trade and Investment treaties: Worlds apart or two sides of the same coin?, 102(1) AJIL 48, 70 (2008).

even if a wide definition is given to the term 'like circumstances', there is still no breach of National treatment. The actions by Binda had generic applications and were not discriminatory.

3. ARGUENDO: JUSTIFICATION OF NATIONAL TREATMENT:

3.1 Even if there is a breach in the obligation of national treatment, it may be a justified breach. These justifications nullify the effect of the breach of obligation. If the differences in treatment are based on a reasonable basis, even treatment that is not the same can be accepted.[52] It may be justified on the grounds of public interest.[53] It is thus evident that reasonable criteria are sufficient to justify the breach of national treatment.

3.2 The monetary and fiscal measures passed by Binda were due to the impending economic crisis which loomed large over the State. The International diktat issued by Petrollar and the sudden stoppage of 80% oil supply to Binda, the world's 4th highest consumer of oil, triggered the emergency response from the state, as permitted under Article 32 and for the protection of the public interest.

3.3 Oxford, being one of the largest foreign investors in the country, was one of the largest sources of repatriation of money from the state, but was not the only one, Airfresh being one of the others. However, due to the sudden change of circumstances, the government enacted legislations to ensure that the money being expatriated was contained in the country to prevent massive economic fallout.

4. THAT BINDA DID NOT HAVE DISCRIMINATORY INTENT:

4.1 Discriminatory intent, although not necessary, is definitely persuasive in determining the breach of National Treatment standards. Unequal treatment is not less favourable if it is intended

[52] SD Myers v. Government of Canada, Final Award (concerning the apportionment of costs between the Disputing Parties), (Dec 30, 2002); Pope & Talbot v Canada, Award on Merits of Phase 2 (Apr 10, 2001)

[53] SD Myers v. Government of Canada, Final Award (concerning the apportionment of costs between the Disputing Parties), (Dec 30, 2002)

to address a policy problem that only one competitor causes[54]. In order to sustain the claim, intention of discrimination and existence of like circumstances must be proved[55].

4.2 The intention of behind the legislation was not to discriminate against the investor, but was to prevent the economic fallout which would have arisen from the change in circumstances.

D. THAT BINDA HAS NOT BREACHED THE DUTY TO PROVIDE FREE TRANSFER OF FUNDS

1. THAT ARTICLE 6[56] IS NOT APPLICABLE:

1.1 Article 6 accords a duty to the Host state to permit investors to transfer funds related to their investments. 'Funds' has also been defined in the Article in the form of a list.

1.2 Oxford was merely directed by the government to incorporate the waterfront project into its development. However, there is no evidence of a formal agreement or a contract to that effect. Further, since Oxford has not acted upon this direction, it cannot claim vested rights[57] and thus cannot claim the right to free transfer of funds.

1.3 The profit from the water treatment facility does not fall under the definition of funds as provided in Article 6. Only the escalation clause was fixed under the contract. The rate, although was agreed upon, is not necessarily part of the contract, as is evident from the facts. Therefore, Oxford cannot claim free transfer of funds for this either.

2. IMF ARTICLES OF AGREEMENT – MONETARY SOVEREIGNTY:

[54] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, Award on Jurisdiction and Liability, (Apr 28,2011).
[55] Methanex Corporation v. United States of America, UNICTRAL, Final Award on Jurisdiction and Merits,(Aug 3, 2005) at Part IV, Chapter B p.3
[56] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 6.
[57] Oscan Chinn, United Kingdom v. Belgium, PCIJ Series A/B No 63, ICGJ 313 (PCIJ 1932), (Dec 12 1934)

2.1 According to Article VIII of the IMF Articles of Agreement, the principles of which has been accepted by 184 countries and thus giving it the status of Customary International Law[58], every state has the exclusive right to determine its own monetary unit, to give the unit legal meaning, to fix the exchange rate and to regulate, restrict and prohibit the conversion and transfer[59] and has been accepted under Article 32.3 of the BIT.

2.2 Binda's currency is BNR, which has an exchange rate of 1 USD = 70 BNR. Binda has the exclusive rights of determining, restricting and prohibiting the conversion and transfer of BNR in its state. Due to the impending economic crisis as a result of the extreme elasticity of the price of crude oil, Binda determined its transfer rate. Thus, under this Article, Binda is justified.

3. That Binda's acts are justified under Article 6.3[60]

3.1 Article 6.3 allows the Host State to prevent the transfer of funds, under certain conditions. Article 6.3.(ii) allows compliance with judicial, arbitral and administrative decisions and awards.

3.2 *Administrative action* has been defined in Black's Law Dictionary as – "A decision or an implementation relating to the government's executive function or a business's management"[61].

3.3 The Finance Ministry of Binda restricted the outward remittances of money due to the international diktat and monetary situation. This action was executive in nature, as it did not create any law. It executed the available law by restricting the investors. Thus, it is protected under Article 6 of the BIT.

E. THAT BINDA HAS NOT EXPROPRIATED OXFORD'S PROPERTY

[58] Interpretation by the International Monetary Fund of Its Articles of Agreement, The International and Comparative Law Quarterly, Vol. 16, No. 2 (Apr. 1967), pp. 289-329, https://www.jstor.org/stable/757379.
[59] Article VIII of the IMF Articles of Agreement.
[60] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 6.3
[61] Bryan A. Garner, Black's Law Dictionary – pp. 53, 10th edition, 2014.

As stated the state of Bingee's municipalities finance and state of its economy worsened during the period of 2017 and early 2018 and then 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. Municipalities in turn enacted regulation under the general legislation in respect of austerity measures, to cap the escalation increase in drinking water purchased from Oxford to 5% per year. Because of the escalation clause the Oxford who was also permitted to operate environmental facilities were badly affected by the measure adopted by Bingee[62].

1. POLICE POWER ARTICLE 32[63] OF THE BIT:

1.1 A bona fide regulatory act (or its application to an individual investor) that genuinely pursues a legitimate public-policy objective (such as the protection of the environment and public health and safety) may not be designated as expropriatory, despite an adverse economic impact. This follows from the doctrine of police powers of States which, in its contemporary meaning, goes well beyond the fundamental functions of custody, security and protection and encompasses the full regulatory dimension of States.

1.2 The act of the state clearly falls under Article 32.1 of General Exception and Article 33 Security Exception, where it justifies the act of the state in directing the investor to revise downward the escalation clause from 10% to 5% per year and thus this does not amount to expropriation.

1.3 Article 32.2 clearly says that nothing in this treaty shall apply to non-discriminatory measure of general application taken by a central bank or monetary authority of a Party in pursuit

[62] Factual Matrix

[63] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 32.

of monetary and related credit policies or exchange rate policies as the state of Binda was going through economic pressure and due to this Binda restricted the outward remittance of money by Binda and other major investment in Binda, due to the deteriorating domestic economy situation.

1.4 The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.[64]

2. THAT THERE IS NO ABUSE OF POWER:

2.1 Any provision on expropriation must now provide safeguards that would ensure the useof environmental protection measures. Its argument seems to proceed on the basis that, where there is a general measure taken to protect the interests of the community through the legislative process, such a measure should not be regarded as an expropriation.[65]

2.2 The general exception of measures taken to protect health, morals, environment and the public policy that are used in the sphere of international trade will have to be accommodated within the provision.[66]

2.3 Doctrine of Police Power- In sum, the police powers doctrine accepts that a non-discriminatory taking of property without compensation can be lawful, if decided for a reason of public interest. The requirement that an expropriation must be made for a public purpose is recognized by most legal systems and is a rule of international law. The taking of property must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private

[64]Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec 16, 2002)
[65]Methanex v. United States, UNCITRAL, Final Award on Jurisdiction and Merits (Aug 3, 2005)
[66]Muthucumaraswamy Sonarajah, The International Law on Foreign Investment, Pg.272, 3rd Edition, Cambridge Publications.

gain or an illicit end. This condition is reflected in most domestic legal systems as well, which indicates a convergence of approaches among States in various regions with different legal cultures.[67]

2.4 A less full-fledged crisis might invoke a response within the police powers of a State and hence not violative of international law. For example, in the course of privatizing its banking industry, the Czech Republic[68] intervened to engage in the forced administration of one bank when it appeared that bank was in crisis and endangered the stability of the Czech banking system. The tribunal in the case determined that this was a permissible exercise of the Czech Republic's police powers.

2.5 The *CMS* case[69] addressed the issue of immediacy of the peril cursorily and in conjunction with its discussion of essential interest. It stated that the crisis in Argentina 'was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse'. Yet the tribunal then suggested that the relative effect of the crisis did not 'allow for a finding in terms of preclusion of wrongfulness'. This ambiguity was also present in its conclusion with respect to its discussion of 'essential interest'. In the present case the escalation clause was reduced from 10% to 5% for the purpose of handling the economic crisis that the state of Binda was going through. Such an economic crisis affects public at large and thus police powers are necessary to protect the public interest. Thus, since public interest is a valid reason to invoke police powers, the steps taken by the state are justified.

[67]UNCTAD Series on International Investment Agreements II, Page 29
[68]Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, (Mar 17, 2006)
[69]CMS Gas Transmission Company v.The Republic of Argentina (Respondent)Case No. ARB/01/8, Award (May 12, 2005)

PRAYER

In light of the submissions made, the Respondent hereby respectfully requests the Tribunal to find and order that:

- Claim 1

    1. **The tribunal has no jurisdiction over the claims.**
    2. **The Respondent has not expropriated the Claimant's investments.**
    3. **The Respondent has not failed, to accord fair and equitable treatment to the claimant, and to meet its legitimate expectations regarding the claims.**
    4. **The Respondent has provided full protection and security to the investments.**

And accordingly order that the Respondent does not need to pay compensation to the Claimant.

- Claim 2

    1. **The tribunal has no jurisdiction over the claims.**
    2. **The Respondent has not expropriated the Claimant's investments.**
    3. **The Respondent has not breached the treaty in relation to National treatment.**
    4. **The Respondent has not denied the free transfer of funds to the claimant.**

And accordingly order that the Respondent does not need to pay compensation to the Claimant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Sd/-

(Counsel on Behalf of the Respondent.)