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

ARBITRATION MOOT COURT COMPETITION 2018

BEFORE THE LD. ARBITRAL TRIBUNAL, FINLAND

UNCITRAL ARBITRATION RULES, 2010

ARB. NO. _____/2018.

In the Matter of:

AIRFRESH FACILITIES……..…….CLAIMANT

v.

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

&

BEFORE THE LD. ARBITRAL TRIBUNAL, SINGAPORE

UNCITRAL ARBITRATION RULES, 2010

ARB NO. _____/2018.

In the Matter of:

OXFORD.....……..…….…….CLAIMANT

v.

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

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

&	And
¶	Paragraph
AIR	All India Reporter
AJIL	American Journal of International Law
All ER	All England Reports
Annex.	Annexure
Anr.	Another
Arb	Arbitration
Arb int.	Arbitration International
Art.	Article
Berkeley J. Int'l L.	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
BNR	Binda National Rupee
Brit.Y.B.Int'l L.	British Year Book of International Law
CA	Court of Appeal
Civ	Civil
Co.	Company
Com. L J	Commercial Law Journal
Comm	Commercial
CUP	Cambridge University Press
Doc.	Document
edn./ed.	Edition

Govt.	Government
HL	House of Lords
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
ICSID	International Center for Settlement of Investment Disputes
ILM	International Legal Material
ILR	International Law Reports
Inc	Incorporation
J. Int'l Arb.	Journal of International Arbitration
LR	Law Reportors (England)
LT	Law Times Reports
Ltd	Limited
Misc.	Miscellaneous
NAFTA	North American Free Trade Agreement
No	Number
Nov	November
NY	New York
Ors.	Others
p./pp.	Page
Para	Paragraph
PC	Privy Council
PCA	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
PICC	Principles of International Commercial Contracts
Pvt.	Private
QB	Queen's Bench
QBD	Queen Bench Division
Rep	Report
Rev	Review
RIAA	Reports of International Arbitral Awards
s	Section
SCC	Supreme Court Cases
SCC Arbitraton	Stockholm Chamber of Commerce Arbitration
SCR	Supreme Court Reporter
Trib	Tribunal
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations
UNCITRAL	United Nations Conference on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
USD	US Dollar
v	Versus
Vol	Volume
YBCA	Yearbook of Commercial Arbitration

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STATEMENT OF JURISDICTION

CLAIM 1

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

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

CLAIM 2

The parties in the instant case, has the honour to submit this dispute before the Arbitral Tribunal validly constituted in accordance with UNCITRAL Arbitration Rules under Article 16 of the Bilateral Treaty concerning the Consent to Arbitration between the Government of Republic of Binda and the Kingdom Emirates of Petrollar.

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

STATEMENT OF FACTS

BACKGROUND

1. Binda is one of the world's most populous democracies. It has two main national problems: shortage of drinking water, and untreated wastewater industrial discharge. 65% of wastewater remains untreated, and hence every water body in Binda is polluted. As a result, national healthcare costs have escalated greatly, and Binda is facing a public health crisis. Under Binda's written Constitution, the individual states of the Union are free to set up Special Economic Zones (SEZs) for promoting economic growth through Foreign Direct Investment (FDI) and development of infrastructure.
2. Binda provided 100% FDI for proposed investments in environmental projects. Incentives offered to various foreign investors for concept planning and engineering and construction of treatment plants for environment industry included a 50-year-tax-free leasing of lands for constructing pollution control facilities. The income earned by foreign investors was to be determined based on a fixed charge in BNR of wastewater treated, and drinking water produced. An expensive wastewater collection pipe network extending to thousands of kilometers was established subsequently. Simultaneously, a nationwide pre-treatment program was established in Binda.
3. The legal protection for foreign investments for environment programmes were provided under the Bilateral Investment Treaties (BITs) and multilateral treaties of Binda with other countries. Binda's major supplier of crude oil was Milddle Eastern Nations, where the price was pegged to the USD. Inflation led to the crude oil prices rising from 50 USD to 80 USD per barrel. The President of Petrollar, world's largest economy, whose currency is dominated in USD, in an attempt to secure peace in the Middle East, isolated embargo, a middle eastern nation as it was developing weapons of mass destruction. As a

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

CLAIM 1

4. A foreign investor Airfresh, a corporation established in Nation State of Nuland, invested in the Southern state of Kukatuka in Binda, by constructing a regional environment project for the waste management, sludge disposal and for air pollution control. Investment treaty protections under the Nuland- Binda BIT were given to the foreign investments. Airfresh commissioned the construction of facilities and they met all the environmental discharge parameters of waters, waste and air pollution.
5. The facilities were operating in accordance with the rules and regulations of state pollution control board. Subsequently, in March 2018 the residents who were residing adjacent to facilities launched a public agitation on the grounds that the facilities were contaminating the water bore wells close to their community. When the series of samples of bore well water over a 6-month period were taken it was found that the alleged pollution of the public drinking water were unproved. Nevertheless, the state administration filed a claim before NGT who found in the favor of the public. Further the claim was filed in appellate NGT, who also gave the same decision. Due to backlog of cases in SC, the case could not be heard for at least 6 months. Subsequently, Airfresh

facilities initiated investor-state arbitration under UNCITRAL Arbitration Rules and sought a claim of BNR 200 crores.

CLAIM 2

6. The northern state of Bingee is the largest state in Binda and has the biggest river called Jungee.Jungee river is polluted with toxic material due to industrial discharges and human cadaver from religious rituals, and this is a major issue as it is the only safe drinking water source for around 500 million residents of Binjee and neighbouring states. Oxford is a company incorporated in Petrollar nation. It invested its services to provide clean drinking water to residents of Bingee at a rate of 50 BNR per 1000 litres.

7. There was an agreed escalation clause of 10% per year on the same rate for 5 years, under a contract between Oxford and Bingee State. Oxford was also in-charge of waterfront development along the Jungee River. State of Bingee directed Oxford to change the escalation clause from 10% to 5% for public policy reasons, as the economy worsened. Oxford attempted to settle the matter by conciliation, however, failed. It attempted negotiation with the municipalities to maintain the original escalation calsue as 10% according to the 5-year contract, but was still unsuccessful. Oxford raised investor-state arbitration claim against Binda under Petrollar- Binda BIT alleging expropriation, breach of treaty related to national treatment and denial of free transfer of funds, and sought damages of BNR 1000 crore.

8. Oxford appointed Prof. Mark White as its arbitrator, Respondent State, Binda, appointed Prof. Black, and the presiding arbitrator is Prof. Gray. Binda challenged the appointment of Prof White as arbitrator, alleging conflict of interest as Prof. White's niece, who was close to him, worked as a Senior Investment Manager in Young & Coopers, an international firm which is a 10% shareholder in the claimant company Oxford.

STATEMENT OF ISSUES

FOR CLAIM 1

-I-

RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

-II-

THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULAND- BINDA BIT HAVE BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

FOR CLAIM 2

-I-

THE ARBITRATOR SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL.

-II-

RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PATROLLAR-BINDA BILATERAL INVESTMENT TREATY.

-III-

RESPONDENT HAS NOT COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

-IV-

CLAIMANT HAS NOT BEEN DENIED THE FREE TRANSFER OF FUNDS BY THE RESPONDENT.

SUMMARY OF ARGUMENTS

CLAIM 1

ISSUE 1: RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

It is submitted that Binda is not liable for the expropriation of the investments under the Nuland- Binda BIT because it has been taken in the interest of the public. If the regulations which have been taken in the interest of the public and in accordance with the due process shouldn't be considered expropriatory. The respondents disregard of due process would be when an expropriation lacks legal basis when the investor has no recourse to domestic courts or administrative tribunals in order to challenge the measure or when the State engages in abusive conduct. Airfresh facilities has been given the fair chance to be heard before the impartial tribunals therefore not liable for disregarding due process.

ISSUE 2: THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULLAND-BINDA BIT HAVE BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

It is submitted that the investments which are being made by Nulland under Nulland-Binda BIT has been accorded Fair and Equitable Treatment. There was no denial of the justice as the decision was made in the objective manner and also the action were taken in the good faith and further the legitimate expectations were not violated. The protection and promotion of security has been provided to the Airfresh Facilities as there was no physical destruction of the property. Therefore the standard of FET has been complied with, by the Respondents.

CLAIM 2

ISSUE 1: THE ARBITRATOR SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL.

It is submitted that Prof. Mark White, arbitrator for the Claimant Oxford, should be removed

from the Arbitral Tribunal. As per the requirements of UNCITRAL Rules, Prof. White failed to disclose any facts regarding his close personal relationship with his niece, which will affect his independence and impartiality as an arbitrator.

ISSUE 2: RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PATROLLAR-BINDA BILATERAL INVESTMENT TREATY.

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

ISSUE 3: RESPONDENT HAS NOT COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

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

ISSUE 4: CLAIMANT HAS NOT BEEN DENIED THE FREE TRANSFER OF FUNDS BY THE RESPONDENT.

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

ARGUMENTS ADVANCED
CLAIM 1

ISSUE I: RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER NULAND-BINDA BILATERAL INVESTMENT TREATY.

1. It is contended before that Binda is not liable for the expropriation of the investments under the Bilateral Investment treaty because **(A.)** it has been done for the interest of the public and **(B.)** the due process of law has been followed.

(A) THE ACTIONS WHICH WERE UNDERTAKEN BY RESPONDENT WERE IN THE INTEREST OF THE PUBLIC.

2. It is contended that Respondent is not liable for the expropriation of the investment of the Nuland under the Nuland- Binda BIT. It is of utmost importance to note that the investments made in India must be established or acquired in accordance with the national laws of India. [1]The tribunal in one of the case of *Methanex Corp v. United States*[2] (Final award of the Tribunal on Jurisdiction and Merits) has held that-

> *"[A] Non-discriminatory regulation for a public purpose, which is enacted in accordance with the due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to then private foreign investor…"*

3. Therefore action which is been taken by the NGT against foreign investor will not render it to expropriation because the regulatory action which has been taken by the state administration and decision which was given by NGT was in the favour of the welfare at public at large.[3]

[1] Christoph H. Schreuer, Art 44 *(Rules of Procedure*), THE ICSID CONVENTION: A COMMENTARY, (2001) pp.675. 25 Rule 20, Arbitration Rules, ICSID Convention, 1968.
[2]Methanex v. United States (2005) 44 ILM 1345.
[3] ‖ d, Facts - Claim 1, Annexure 1, Moot Proposition.

4. Further in the case of *R v. Secretary of State for Health*,[4] the Queen's Bench Division held-

> *"The law indicates that in cases of true expropriation full compensation is payable save in "exceptional" circumstances. In my judgment it is quite obvious that the circumstances are exceptional. Tobacco usage is classified as a health evil, albeit that it remains lawful. There is no precedent where the law has provided compensation for the suppression of a property right which facilitates and furthers, quite deliberately, a health epidemic…"*

5. In the following case in hand there should not be any compensation which is required to be provided to the claimant because by the operation of their facilities the nearby communities of the state were being affected because of the contamination of water bore well and therefore the state has undertaken such an action in order to stop the continuous contamination of water bore wells which was situated close to the communities and which could further lead in the deterioration of the health of the local communities.[5]
6. Also 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.[6] The taking of the property must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private 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. [7]
7. Further, the Regulatory takings are those takings of property that fall within the police powers of a state, or the state measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country. [8] Expropriations tend

[4] R v. Secretary of State for Health [2017] UKSC 41.
[5] ₱ d, Facts- Claim 1, Annexure 1, Moot Proposition.
[6] Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INTL. L. 3, (2008).
[7] Expropriation, UNCTAD Series on Issues in International Investment Agreements II: United Nations, 2012.
[8] United Nations Conference on Trade and Development (UNCTAD), *'Taking of Property'* UNCTAD/ITE/IIT/15 (New York and Geneva, 2000), United Nations Publication, Sales Nos. E.00.II.D.4 (19).

to be severe deprivations of ownership rights whereas regulations are much less interference[9] preventing an owner from using the property in a way that unjustly enriches him[10] and is generally not an unfair surprise. In the following case in hand there is a regulatory interference on the part of the state for the closure of the facilities for public health as this process is nowhere providing enrichment to the government in any ways.

8. A State has a right to adopt regulatory measures and any foreign investor entering the country should assume the risk of being regulated by the host state.[11]
9. Further, as a principle of customary international law, where economic injury results from a bonafide regulation within the police powers of a State or if it is in pursuit of State's political, social or economic ends, [12] or if the investor faces any adverse consequences due to the measures adopted to address grave economic security and other situations prevailing in the country [13]or for the maintenance of public order, [14] then the State is not liable to pay compensation.[15]It is contended that the police powers doctrine recognizes a State's sovereign right to make Regulatory changes in certain circumstances and that a non-discriminatory taking without compensation can be lawful if it is done for the legitimate public interest and public welfare reason.[16]
10. It is further contended that the measures adopted by NGT for the closure of Airfresh facilities were adopted in good faith to promote public welfare. A state is not responsible for the loss of the property or for the other economic disadvantages resulting from regulation, forfeiture for crime, or other action of the kind that is commonly accepted as

[9] SD Myers Inc v Government of Canada (Partial Award) (13 November 2000) 8 ICSID Rep 4 (58).
[10] Ibid.
[11] SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 170-171(1st ed. Hart Publishing 2008).
[12] OECD, *Draft Convention on the Protection of Foreign Property*, (1967) 7 ILM 117 (1968).
[13] Supra 12.
[14] *Harvard Draft Convention on International Responsibility of States for Injuries to Aliens* (1961) 55 AJIL 548.
[15] Supra 2.
[16] Saluka Investments BV (The Netherlands) v. The Czech Republic, ICGJ 368 (PCA 2006).

within the police powers of the State, if it is non-discriminatory, not designed to cause the alien to abandon the property to the State or sell it at a distress price. [17] A governmental authority cannot be faulted for acting in a manner validated by its courts. [18] A good faith effort on the part of the State agencies to fulfill the requirements on host State laws will be a powerful indication that the standard has been met.[19]

11. Furthermore the BIT entered between The Government of the Republic of Binda And The Eswatinian Kingdom Of Nuland provides for the following clause in the Annexure A of the BIT. It provides-

> *"Actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization."*[20]

12. It is therefore submitted that the State Administration has further took the steps in order to protect and safeguard the health of the Public at large which is being affected by the effluents from the Airfresh's hazardous Waste facilities and which was affecting the public health and welfare at large.

(B) THE ACTIONS OF THE RESPONDENT WERE IN ACCORDANCE TO THE DUE PROCESS OF LAW.

13. It is contended that due process of law has been duly followed by the government of Binda. The due-process principle requires (i) that the expropriation comply with the procedures established in domestic legislation and fundamental internationally recognized rules in this regard and (ii) that the affected investor have an opportunity to have the case reviewed before an independent and impartial body (right to an independent review).[21]

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[17] American Law Institute, *'Restatement (third) Foreign Relations of the US',* 1 s 712, comment g. (1987).
[18] Robert Azinian et al v. United Mexican States (Award) (1 November 1999) 39 ILM 537.
[19] GAMI Investments Inc v United Mexican States (Merits) (15 November 2004) 44 ILM 545 (561) (UNCITRAL 2005).
[20] Annexure-An Interpretation of Expropriation in Article 5 (Expropriation), Moot Proposition.
[21] Supra 9.

Examples of disregard of due process would be when an expropriation lacks legal basis (no law or procedure properly established beforehand to order the expropriation), when the investor has no recourse to domestic courts or administrative tribunals in order to challenge the measure or when the State engages in abusive conduct. But it is contended that the Airfresh facilities has been given the fair chance to be heard before the impartial tribunals that is NGT and when he was not satisfied with the decision as rendered by the NGT, he forwarded his claim to appellate NGT.

14. Further in the case of *Methanex v. United States* [22] the tribunal's view was of the following Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alias,* a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating govt. to the then putative foreign investor contemplating investment that the govt. would refrain from such regulation.[23]
15. In *Amco v. Indonesia and Middle Eastern Cement Shipping Ltd v. Egypt* [24]illustrates that the nature of the interests of the host state that could be involved. The foreign investor has to operate within the confines of the company and securities legislation of the host state. Interference based on such legislation is fully justified, provided procedures indicated in them satisfy due process standards.
16. Examples of disregard of due process would be when an expropriation lacks legal basis (no law or procedure properly established beforehand to order the expropriation), when

[22] Supra 2.
[23] Supra note 14.
[24] Amco v. Indonesia and Middle Eastern Cement Shipping Ltd v. Egypt (1984) 23 ILM 351 at 369 (¶. 23).

the investor has no recourse to domestic courts or administrative tribunals in order to challenge the measure or when the State engages in abusive conduct.[25]

17. Therefore it is contended that the foreign investors in the following case has been provided with the fair chance to be heard before the tribunals and forward their complaints. The procedure has been duly followed and the investors has been provided the recourse to the domestic courts or the administrative tribunals in order to challenge that the state is engaged in the abusive conduct. Further to keep a check on the increasing backlog of cases, in 2015 the Commercial Courts Act 2015 requiring only disputes relating to commerce including investments to be filed before newly established commercial courts in all the states of Binda.

ISSUE II: THE INVESTMENTS WHICH ARE BEING MADE BY CLAIMANT UNDER NULLAND-BINDA BIT HAVE BEEN ACCORDED FAIR AND EQUITABLE TREATMENT.

18. It is contended that the investments which are being made by Nulland under Nulland-Binda BIT has been accorded Fair and Equitable Treatment and also full protection and security has been provided to the foreign investors according to the provisions of BIT. Fair and equitable treatment is a minimum standard of treatment[26] which includes obligations and burden on the Contracting state, [27]to follow the due process of law,[28] to provide full protection and security, the prohibition of arbitrary and discriminatory

[25] Supra 7.
[26] Occidental Exploration and Production Company v Ecuador (Award) (1 July 2004) 17(1) WTAM 165 [190]; See Also CMS Gas Transmission Company v Argentina Republic (Award) (12 May 2005) 44 ILM 1205 [294]; GUILLERMO AGUILAR ALVAREZ & W. MICHAEL REISMAN (ed), THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION, 216 (1st edn, Martinus Nijhoff Publishers 2008).
[27] Suez, Sociedad General de Aguas de Barcelona S.A., & InterAgua Servicios Integrales Del Agua S.A. v Argentina (Jurisdiction) (16 May 2006) ICSID Case No ARB/03/10 [55].
[28] Elettronica Sicula SpA (ELSI) United States of America v Italy (20 July 1989) ICJ Rep 15 (76); Asylum Judgment Columbia v Peru (20 November 1950) ICJ Rep 1950 226 (284).

measure and the obligation towards the investor[29] and providing a reasonably stable environment consistent with investor's expectations to invest.[30] It is a treatment to be understood in an even-handed and just manner[31], conducive to fostering the promotion of foreign investment[32] by way of asserting that all States had to accept the international minimum standard by bringing their national laws up to that standard.[33]

19. There has been no violation of the Fair and Equitable Standard of Treatment because **(A.)** there has been no breach of FET by not performing contract in Good Faith **(B.)** there has not been any violation of the legitimate expectations **(C.)** then there has been protection and security of investments provided to the investors.

(A) THERE WAS NO BREACH OF THE FAIR & EQUITABLE TREATMENT AS THE CONTRACT WAS PERFORMED IN GOOD FAITH.

20. It is contended that the actions which were taken in good faith for a public purpose. In an equitable treatment, a balance must be struck between the protections of the investor and public interest which the host State may properly seek to protect by weighing the investors legitimate and reasonable expectations on one hand and the host State's legitimate regulatory interest on the other. The Tribunal in *Genin v Estonia*[34]accepted that the circumstances of political and economic transition prevailing at the time justified heightened scrutiny. Such regulation by a State reflects a clear and legitimate public purpose.[35] Therefore the investment which are being made by the foreign investors in the Respondent Country has been accorded the fair and equitable treatment as they were for

[29] Noble Ventures Inc v Romania (Award) (12 October 2005) ICSID ARB/01/11 (112).
[30] Vivendi v Argentine (Award) (20 August 2007) ICSID Case No ARB/97/3 [07/04/15].
[31] Equity Sdn Bhd & Anr v Republic of Chile (Award) (31 January 2006) 44 ILM 91.
[32] Azurix Corp. v Argentine Republic (Award) (14 July 2006) (ICSID Case No ARB/01/12) [130]; See also Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (1st edn Oxford University 2008) 110.
[33] SIR R JENNINGS & SIR A WATTS (eds), OPPENHEIM'S INTERNATIONAL LAW 2-4 (9th ed., Longman 1992).
[34] Alex Genin Eastern Credit Limited Inc and AS Baltoil v The Republic of Estonia (Award) (25 June 2001) 6 ICSID Rep 236 (2001).
[35] Ibid.

the legitimate public interest and they have been provide that the fair chance of hearing under due process of law.

21. Further, in the case of *SD Myers Inc v Government of Canada*,[36]the tribunal noted that a breach occurs when it is shown that an investor has been treated in "such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective". Some treaties refer to "fair and equitable" treatment simpliciter,[37] certain others qualify the words with a reference of "international law" [38] or "customary international law".
22. Art 3(2) of the Nulland-Binda BIT entitles the Claimant to full protection of its investments, explicitly providing that those investments "shall at all times be accorded FET and full protection and security in the territory of the other contracting party."
23. Further, in *Siemens v. Argentine Republic Case*[39]it was held that the burden rests on Claimant to prove that, at the time the BIT was concluded, the minimum standard of treatment is different than the one set out in Neer. It is evident that the minimum standard of treatment, even if seen as an evolving concept, would not exclude rational, reasonable regulatory changes, undertaken in good faith. Here the article that deals with fair and equitable treatment does not provide for a different treatment from the customary international standard. It refers to *"non-discriminatory and unreasonable*" measures and says that the same cannot be imposed on the investors to ensure that they are treated in a fair and equitable manner. Article 3(2) of BIT also provides that the investors investments shall all the time will be provided that FET in the territory of other contracting party. [40]

[36] Supra 9.
[37] For example: The India-Netherlands BIT; Ecuador-Canada BIT (arbitrated in the Occidental case); Netherlands-Czech Republic BIT (arbitrated in the CME case).
[38] Art 1105 of the North American Free Trade Agreement (NAFTA).
[39] Siemens v. Argentina ICSID Case No. ARB/02/8.
[40] Article 3 of the BIT, Annexure- I; Moot Proposition.

24. It is therefore contended that it has nowhere mentioned in the agreement entered that they should be provided with the differential treatment from the customary international law.[41] Also the measures are undertaken by the government are taken in good faith as well as protection for the larger public interest.

(i) <u>There has not been a denial of Justice.</u>

25. It is contended that there has been no denial of the justice accorded to the foreign investors. A denial of justice might be caused due to lack of due process; [42] if the relevant courts refuse to entertain the suit; administer justice in a seriously inadequate way, or if there is clear and malicious misapplication of law.[43] The governmental action should be so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. [44]

(ii) <u>The decision was made in an objective manner.</u>

26. It is contended before that the decision was made in the objective and rational manner rather than an improper purpose, they will be able to defeat any claim made under this standard.[45] The interpretation of FET must account for legitimate public interests in regulating the investments to achieve national objectives and the enforcement of laws.[46] There can't be any inconsistent conduct in a regulatory body taking the necessary actions to enforce the law, absent any specific undertaking that it will refrain from doing so. [47]

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[41] Annexure 1, Agreement between the Government of the Republic of Binda and The Eswatinian Kingdon of Nuland for Promotion and Protection of Investments; Moot Proposition.
[42] Robert Azinian, Kenneth Davitian, & Ellen Baca v Mexico (Award) (1 November 1999) ICSID Case No ARB (AF)/97/2).
[43] Ibid [¶239, 269].
[44] LFH Neer & Pauline Neer (USA) v United Mexican States (15 October 1926) IV RIAA 60 (1926) (61-62); See also Pope & Tablot Inc v Government of Canada (Interim Award) (26 June 2000) 7 ICSID Rep 69 (87).
[45] 19 NORBERT HORN (ed), ARBITRATING FOREIGN INVESTMENT DISPUTES PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 180 (1st edn, Kluwer Law International 2004).
[46] ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES- STANDARDS OF TREATMENT 268 (1st edn, Wolters Kluwer 2009).
[47] Lauder v The Czech Republic (Award) (3 September 2001) 9 ICSID Rep 66.

(B) THERE WAS NO VIOLATION OF LEGITIMATE EXPECTATIONS AND PRESENCE OF ARBITRARINESS.

27. Where the FET Standard is considered to protect an investor's expectations with regard to the investment which has been done by it in the host state, this tribunal should consider whether the Claimant's expectations at the time of investment were legitimate.[48] 'Legitimate Expectations' must be evaluated objectively: an Investor's expectations are legitimate where they are reasonably based on specific representations[49] made at the time of investment, FET does not cover the subjective as investors may have made.

28. As the Tribunal in *Saluka* observed:

> "*No investor may reasonably expect that the circumstances prevailing at the time the investment is made 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 to regulate domestic matters in the public interest must be taken into consideration."*[50]

29. An important aspect of FET is the fact that there needs to be a predictable legal framework for the investors. The investors need to be provided with a law that has a degree of certainty so as to enable them to carry on with their investments and make decisions based on the framework which is available at the point in time. Unless the modification is arbitrary, or affects the "*basic expectations*" of the investor, the FET standard provides legitimate scope for regulatory flexibility. [51]

30. Further in the case of *Generation Ukraine v. Ukraine*[52] has *dicta* to the like effect. The tribunal suggested that the vicissitudes of the host state economy were relevant in determining the investor's legitimate expectations. The FET standard should not be the basis on which rules favorable to the foreign investor can be made and his expectations

[48] Tecmed v LG & E Energy Corp., LG & E, 130.
[49] Parkerings v. Lithunia, ICSID Case No ARB/05/08.
[50] Saluka Investments; B.V. v Czech Republic , Partial Award, 2006 WL 1342817 (March 17, 2006) ("Saluka - Award"), at ¶ 307 (Investor's Schedule of Legal Authorities at CL-081).
[51] Supra 7.
[52] Generation Ukraine v. Ukraine (Award, 16 September 2003); (2005) 44 ILM 404 329, 468.

protected without looking at competing factors to relevance to the state and its economy at the time of regulation.

31. Fair expectations are frustrated in a case wherein the clear guidelines that would have allowed the investor to prevent the non-renewal of a permit enforce rights or explore the ways to maintain their permit, are not generated. In the present case there is no violation of the Airfresh's fair expectations because the local police has provided with the protection to the investors and their property. [53] The tribunal should find that Binda Government's action are not in a violation of Airfresh's legitimate expectations. When an investor's fair expectation are not being violated, it is a violation of FET in itself.

(C) PROMOTION AND PROTECTION OF SECURITY HAS BEEN PROVIDED TO AIRFRESH FACILITIES AND WERE TREATED NON-DISCRIMINATELY.

32. It is contended that the promotion and protection of security has been provided to Airfresh Facilities and were treated non- discriminately.

(i) There has been no physical destruction of property.

33. The investor has a right to be free from any act or measure that constitutes inequitable treatment and also should not suffer physical destruction of its property, or be subjected to serious threat of physical destruction.[54] In the present case there has been no physical destruction of the property per se and as a result the promotion and security has been provided to the foreign investors.

[53] ‖ d., Claim 1, Moot Proposition.
[54] Supra 35.

(ii) <u>The laws were indiscriminately applied.</u>

34. In the absence of some specific representation to the contrary, the investor is bound by host State's law at the date of investment[55], and cannot bring a complaint of unfair treatment for a subsequent faithful application of it.[56] In the case of *Noble Ventures Inc v. Romania*[57] it was held that the standard does not provide an absolute protection against physical or legal infringement. In terms of the law of state responsibility, the host state is not placed under a strict liability to prevent such violations. Rather, it is generally accepted that the host State will have to exercise- due diligence and will have to take such measures protecting the foreign investment as are reasonable under the circumstance.
35. In the case of *CME v. Czech*[58] it was held that the full protection & security of investments includes providing investors with favorable environment & conditions where they can invest. The countries can create favorable conditions for the foreign investments by setting up the SEZs, environment of the skilled labour, expertise & planning etc.
36. It is contended that the Claimants have been provide with the favorable conditions for the foreign investments. The foreign investors with the experience and expertise in concept planning were identified to estimate available options for citing and determining costs.[59] Also the SEZs have already been established in the state as the individual states have been allowed for the same. Also the legal protection for foreign investments involving the planning, design and construction and the operations of the pollution control, drinking water generating facilities is provided under the Bilateral Investment Treaties. [60]
37. It is therefore submitted that the host country has provided Full protection and security of investment to Airfresh Facilities and therefore treated them non discriminately.

[55] Oscar Chinn case Britain v Belgium PCIJ (12 December 1934) 1934 PCIJ (ser A/B) No 63.
[56] MTD Equity Sdn Bhd v Republic of Chile (Award) (25 May 2004) 44 ILM 91 [109].
[57] Noble Ventures Inc v. Romania [Award of 12 October 2005].
[58] CME v. Czech 2006 9 ICSID Rep 264, (2006) 9 ICSID Rep 412.
[59] ¶ 9, Background Moot Proposition.
[60] ¶ 10, Background, Moot Proposition.

ARGUMENTS ADVANCED
CLAIM 2

ISSUE I: THE ARBITRATOR SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL.

38. It is submitted by the Respondent that Prof. Mark White should be removed from the arbitral tribunal. The challenge of arbitrator for the Claimant Oxford, Prof. White, by the Respondent, Republic of Binda, is valid in nature. Article 11 of the UNCITRAL Rules state that when a person is to be appointed as an arbitrator, he or she must disclose any circumstances likely to give justifiable doubts to his impartiality or independence. In this particular case, Mr. White failed to disclose any facts regarding his close relationship with his niece who worked as Senior Manager in Young & Coopers, an international financial firm which had 10% shares in the claimant company, Oxford[61].

(A) THERE ARE JUSTIFIABLE DOUBTS AS TO THE ARBITRATOR'S IMPARTIALITY AND INDEPENDENCE.

39. Article 12 (i) of the UNCITRAL Rules states, any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. Many institutional rules follow the example of ICC in requiring prospective arbitrators to disclose any circumstances which would be liable to cast doubt on their impartiality and independence.[62] They are obliged thereafter to carry out their duties as private judges, conducting the arbitral proceedings diligently and impartially.[63]

40. The fact that Mr. White had a niece who was closely related to him and who worked as Senior Investment Manager in Young & Coopers, a financial firm which was a

[61] Moot proposition, under Claim 2, pp.7.
[62] E. GAILLARD & J. SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1055-1058 (Kluwer Law International, 1999).
[63] ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES, ARBITRATION CONTRACTUAL OBLIGATIONS (Oxford Publications, 2005).

shareholder in the claimant company, Oxford, was a valid reason to give raise to "justifiable doubts" to Mr. White's impartiality and independence in the eyes of a reasonable man.

41. In *HSMV. Corp. v. ADI Ltd., Central District Court for California, United States of America*[64], the court found that despite the fact that article 12 does not explicitly require an arbitrator to investigate whether he or she has questionable relationships or interests, the disclosure requirement imposed in Article 11[65] implies such a duty. An arbitrator is thus "obligated to conduct a conflicts check to see if he must disclose any circumstances that might cause his impartiality to be questioned[66].

42. In a dispute arising out of a construction contract, an ex-officer of the employer- authority which had awarded the contract was appointed as arbitrator. In his official capacity he was dealing with all matters of the contract and he had also corresponded with the contractor, and hence the Supreme Court of India held that his continuance as the arbitrator would not be fair to the parties[67].

43. According to Article 12 (ii) of the UNCITRAL rules, a party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made. In *ICS v. Argentina*[68], the challenge of a claimant-appointed arbitrator was upheld, because it was concluded that there was a sufficiently serious conflict given by the fact that the arbitrator was a partner in a firm that had a concurrent representation in a separate, long-running case against Argentina, which gave rise to objectively justifiable doubts as to the arbitrator's impartiality and independence. According to the French law,

[64] HSMV. Corp. v. ADI Ltd., Central District Court for California, United States of America, 8 November 1999, 72 F. Supp. 2d 1122 (C.D. Cal. 1999).
[65] Article 11, UNCITRAL Arbitration Rules, 2010.
[66] Ibid.
[67] Bharat Coking Coal Ltd v L.K. Ahuja & Co, AIR 2001 SC 1179.
[68] ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9.

an arbitration can be set aside if it is found at a later stage that there is a relationship between the arbitrator and party such as to cast doubt the arbitrator's impartiality or independence.[69]

44. In another case *Colfey Ltd. v Bingham*, the Court removed the arbitrator on the ground of apparent bias where the defendant had appointed arbitrators in his favour and the arbitrator had also failed to disclose his past involvement with the defendant.[70]

45. Article 19 of the BIT between the Government of Binda and Kingdom Emirates of Petrollar provides for Challenges of Arbitrators. Article 19.10 (1) of the Treaty clearly states that a justifiable doubt to the impartiality and independence of an arbitrator will arise if the the arbitrator or his associates/relatives have an interest in the outcome of the arbitration, and hence challenge of Mr. White as arbitrator is valid in nature.

(i) Impartiality Of Arbitrator.

46. Whether an arbitrator is impartial or not depends on the facts of the case, and whether the arbitrator can resolve the dispute objectively or not. Impartiality is the "test for the lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute."[71] This is a subjective test and it aims at the actual presence of bias and not apparent bias, which is generally inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral functions.

47. In the case *PT ReasuransiUmum Indonesia v Evanston Insurance Co*[72], the Court held that where a reasonable person would conclude that the arbitrator was partial to one of the parties involved, it would be considered to be case of partiality. One German Court held

[69] Philipp Brothers v ICCO, 1990 REV, ARB 880 CA Paris Apr.6, 1990.
[70] Cofely Ltd. v Bingham, [2016] EWHC 40 (Comm).
[71] M.S.Donahey, *The Independence and Neutrality of Arbitrators*, J.INT'L ARB. (1992).
[72] PT ReasuransiUmum Indonesia v Evanston Insurance Co, (1993) 8 International Arbitration Report (No1) B-1-B-4, Yearbook Commercial Arbitration, XIV-1994, pp788-791.

that an arbitrator could be challenged where the circumstances invoked gave rise to reasonable grounds for objectively suspecting its impartiality, and that the proof that the arbitrator actually lacked impartiality as not required.[73] Similarly, after also stating that proof of actual partiality was not required, another German Court ruled that a challenge would be successful where objective circumstances gave rise to justifiable doubts as to the impartiality or independence of the arbitrator.[74]

48. When assessing an arbitrator's impartiality and independence, "totality of circumstances" must be taken into account.[75] Close personal relationship, as a general rule, will cause justifiable doubts to arise as to an arbitrator's impartiality and independence. In the current case, it can be said that the relationship between Mr. White and his niece is a close personal relationship. There is an affirmative duty on behalf of the arbitrator to disclose any potential conflict of interests, which is the first tier of protection for an unbiased trial.[76] This has also been reiterated in the case of *Barcon Associates, Inc. v Tri-County Asphalt Corp*[77].

(ii) <u>Independence Of Arbitrator.</u>

49. Independence is a term that refers to the relationship between the arbitrator and the parties and indicates prior or current personal, social or business contact between them[78]. As mentioned in the case *Suez et al. v Argentina*[79], "independence relates to the lack of relations with a party that might influence an arbitrator's decision.

[73] Kammergericht Berlin, Germany, 9 SchH 01/05, 12 July 2005.
[74] CLOUT case no.665 [Oberlandesgericht Naumburg, Germany, 10 SchH 03/0, 19 December 2001].
[75] Van Den Berg, *The Relevance of Expertise in Commercial Arbitration*, 30 YBCA 240-241 (2005).
[76] Ruffin Woody v Person County, 374 S.E.2d 165 (1988).
[77]Barcon Associates, Inc. v. Tri-County Asphalt Corp, 86 N.J. 179 (1981).
[78] W.M. Tupman, *Challenge and Disqualifications of Arbitrators in International Commerical Arbitration*, 38 I.C.L.Q. 29 (1989).
[79] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, ICSID Case No. ARB/03/19.

50. If an arbitrator were to be materially interested in the financial fortunes of one of the parties involved i.e. by owning shares in the company, the "independence" standard would not be met and the person could be disqualified from being an arbitrator. Nor would an arbitrator with family ties or other emotional connection to one of the parties be considered "independent."[80]

51. In its *Ury v. Galeries Lafayette* decision, which concerned a domestic arbitration, the *Cour de cassation* held that "an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.[81]

(B) THERE WAS NO DISCLOSURE OF CIRCUMSTANCES BY THE ARBITRATOR.

52. Article 11 of UNCITRAL Rules states that when a person who is approached in connection with his or her possible appointment as arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. If any circumstances arise which are likely to give rise to justifiable doubts as to an arbitrator's independence or impartiality, he must disclose those circumstances forthwith or at the earliest opportunity to the parties and to his fellow arbitrators, if any[82]. In the current case, Prof. Mark White failed to comply with disclosure requirements under the UNCITRAL Arbitration Rules[83]. Even though he submitted a statement of full disclosure before his appointment as an arbitrator, he failed to mention the important detail regarding his close personal relationship with his niece, who works as a Senior Investment Manager in the firm which has 10% shares in the claimant company, Oxford.

[80] Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. Intl. Arb., 325-353 (2003).
[81] Consorts Ury v S.A. des Galeries Lafayette, JCP, Ed.G., Pt.II, No.17,189 (1972) Cass 2e civ. , Apr.13,1972.
[82] REDFURN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 205 (4thed., 2004).
[83] Article 11, UNCITRAL Arbitration Rules, 2010.

53. There is a solemn duty on the arbitrator who is put in the position of a judge to disclose to the parties which it is likely to give rise to a reasonable doubt about his independence in the minds of the party[84]. In *Satyendra Kumar v Hind Constructions Ltd*[85], speaking for the High Court, Chief Justice Chagla stated an arbitrator must show *uberrima fides* to the parties whose disputes he is going to arbitrate. In another case *Alpha Projektholding GMBH v Ukraine*[86], the ICSID Tribunal stated that certain facts or circumstances "*are of such a magnitude that failure to disclose them could in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment"*[87]

54. The arbitrator should have no direct or indirect connection with a party that creates an appearance of partiality. In this situation, actual bias is irrelevant. The real test is whether a reasonable person who was not a party to the dispute would think that this connection was close enough for the arbitrator to be biased[88]. This test to determine the bias of an arbitrator was further reiterated in *Simmons v Secy. of State for the Environment*[89]. Hence, personal friendship, hostility, an employment or professional relationship which is either direct or through other members of a firm in which the arbitrator is a partner, are examples of relationships which may cause a responsible outsider to have reasonable suspicion. If there is any real doubt about the matter, the arbitrator should disclose the facts to the parties and should ask if they object to his accepting the appointment.

55. An arbitrator ought to be an indifferent and impartial person between the disputants[90].

The arbitrator must be absolutely disinterested and impartial, as was stated in separately in both *Nihal Chand v Shanti Lal*[91] and *Ghulam Mohd. Khan v Gopaldas Lal Singh*[92]. It

[84]Murlidhar Roongta v S Jagannath Tibrewaala, 2005 (1) Arb LR 103, 114 (Bom).
[85]Satyendra Kumar v Hind Constructions Ltd, AIR 1952 Bom 227.
[86]Alpha Projektholding GMBH v Ukraine, ICSID Case No. ARB/07/16.
[87] Ibid.
[88] Metropolitan Properties v Lannon, (1969) 1 QB 577.
[89] Simmons v Secy. of State for the Environment, 1985 JPL 253.
[90] WHARTON, WHARTON'S LAW LEXICON, 65 (17th ed. Universal Law Publishing & Lexis Nexis 2017).

was observed in a case[93], a railway company, which was a party to arbitration, had appointed one of its shareholders as an arbitrator. The arbitrator was thus disqualified.

56. The real test is whether an arbitrator has an interest in any of the parties, and the interest disqualifies the arbitrator if it produces a bias in the mind of the arbitrator. Actual bias need not be proved[94], which had happened in the current case at hand.

57. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made[95].

ISSUE II: THE RESPONDENT IS NOT LIABLE FOR THE EXPROPRIATION OF INVESTMENTS UNDER PATROLLAR-BINDA BILATERAL INVESTMENT TREATY.

58. As per the International Law, there is no definite definition of the term "Expropriation". Therefore, various tribunals have defined the term expropriation on a case-by-case basis, referring to applicable rules of international law.[96]

59. It is contended that the act of Bingee municipalities to direct Claimant to revise its escalation cost from 10% per year to 5% per year does not amount to expropriation. In *Methanex Corp. v. United States of America*[97]it was held:

[91] Nihal Chand v Shanti Lal, AIR 1935 Oudh 349.
[92] Ghulam Mohd. Khan v Gopaldas Lal Singh, AIR 1933 Sind 62.
[93] Sellar v Highland Rly Co, (1919) 56 SC LR 216 HL.
[94] Kemp v Rose, (1858) 1 Giff 258: 65 ER 910.
[95] Motharam Dowlatram v Mayadas Dowalatram, AIR 1925 SIND 150.
[96] Metalclad Corporation v. The United Mexico States (ICSID Case No. ARB(AF)/97/1).

> *"[A] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor."*

60. It is further contended that the actions taken by Respondent, in reference to revision of the escalation clause, were undertaken only after following **(A.)** due process of law and for a **(B.)** public purpose.

(A) THE ACTIONS OF THE RESPONDENT WERE IN ACCORDANCE TO THE DUE PROCESS OF LAW.

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

(i) Actions Were Taken In Accordance With The Domestic Legislation.

62. It is hereby contended that in the present case, necessary emergency fiscal measures were implemented by passing general legislation requiring all municipalities and state government departments to resort to austerity measures. Further, the municipalities, in turn enacted regulations under the general legislation in respect of austerity measures, to cap the escalation increase in drinking water purchased from Claimant to 5% per year.

(ii) Claimant Had A Fair Chance Of Hearing.

63. It is further contended that Claimant was free to challenge the actions of municipalities before the court of Bingee established under Commercial Courts Act 2015 which dealt with disputes specifically relating to commerce and investments.

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[97] Supra 2.

64. The need to serve a prior notice on the investor before expropriation is not a necessary requirement as per the due process principle, especially in the given case where an expropriation measure was taken in circumstances of imminent emergency.

65. It is therefore contended that the municipality of Bingee had taken due course of law so as to direct Claimant to reduce the escalation clause and thus it doesn't result in expropriation.

(B) THE ACTIONS TAKEN BY RESPONDENT WERE IN PURSUANCE OF A PUBLIC PURPOSE.

66. It is hereby contended that as per Article 5 of Bilateral Investment Treaty between The Government of Republic of Binda and The Kingdom of Petrollar on The Promotion and Protection Of Investments, which deals with the aspect of expropriation, the sub clause 5 of the same clearly states that any measures taken by a Party that are designed to protect the legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation.[98]

67. In the given case, the matter pertains to drinking water for the public which clearly concerns with the public welfare. Respondent has already been facing the shortage of drinking water as well as has issues in regard to wastewater management.[99]

68. In *Emmanuel Too v. Greater Modesto Insurance Associates*[100] it was laid down:

> *"a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the state or to sell it at a distress price."*

69. Further, in the text given by G.C. Christie, she concluded:

[98] Article 5:Expropriation, Bilateral Investment Treaty between The Government of Republic of Binda and The Kingdom of Petrollar on The Promotion and Protection Of Investments, Annexure II, Moot Proposition.
[99] Moot Proposition. Background, ¶ 1.
[100] Emmanuel Too v. Greater Modesto Insurance Associates, et al., Award No. 460-880-2.

> *"the refusal to permit the alienation of real property, or of personal property not easily removable from the State issuing the prohibition, would seem, under some circumstances, to amount to an expropriation for which, accordingly, compensation is payable. If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property."*[101]

70. Therefore, the actions of Bingee Municipality were undertaken in accordance with the due course of law, as necessary formalities were performed and were directed towards public welfare, as drinking water is considered to be one of the most important constituent of public health. Thus, the actions of the municipality do not result in expropriation.

ISSUE III: RESPONDENT HAS NOT COMMITTED A BREACH OF THE STANDARD OF NATIONAL TREATMENT.

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

72. It is hereby contended that so as to determine the breach of national treatment standard, the first step would be to compare the treatment accorded to a foreign investor and a domestic one[102] operating in the same economic sector[103] and the second would be to

[101] Christie, G.C., *What Constitutes a Taking Under International law?* 38 BRIT Y.B. INT'L. L. 307 at 307-331 (1962).
[102] Pope & Talbot Inc v Govt. of Canada (Award on Damages) (31 May 2002), 7 ICSID Rep 43 (107-125) (UNCITRAL).
[103]Ibid; See also S D Myers Inc v Government of Canada (Partial Award) (13 November 2000) 40 ILM 1408.

assess a reasonable nexus to rational Government policies[104] and the elements of discrimination against the foreign owned producers.[105]

73. In evaluating whether there is discrimination in the sense of the treaty one should only compare like with like[106] competing for the same business.[107]

74. In the present case, there were two types of restrictions that were imposed by Bingee's municipality. The first were the monetary restrictions, i.e. there were certain restrictions that were imposed on the transfer of funds from Binda to foreign countries. The ministry allowed a minimal transfer of funds which wa closely monitored by Reserve Bank of Binda.[108] The second were the austerity measures that were adopted by Bingee.[109]

75. However, the monetary measures affected only the foreign investors, that is because, as per the monetary measures that were undertaken, the companies who wanted to transfer their funds back to their parent country were unable to do and were affected by it, as the financial instability of the Bingee government could not have afforded to allow the same. The domestic investors were not affected by this particular measure because there was no transfer of money taking place from Binda to any other foreign country, so there was no point that the domestic companies will also be affected by the same. In the case of domestic companies, the money had to remain within the economy of Binda and it couldn't have affected the economic stability of the country. There was no discrimination by the Municipality of Bingee against any foreign investor, *per se*.

[104] United Parcel Service of America Inc v Government of Canada (22 Nov. 2002) 7 ICSID Rep 285.
[105] ANDREW NEWCOMBE & LLUISPARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES- STANDARDS OF TREATMEN 159 (1st ed. Wolters Kluwer 2009).
[106] Nykomb Synergetics Technology Holding AB v Republic of Latvia (16 December 2003) 11 ICSID Rep 153.
[107] Supra 2.
[108] ¶ d., Facts pertaining to Claim 2, Moot Proposition.
[109] ¶ e., Facts pertaining to Claim 2, Moot Proposition.

76. Secondly, coming to the part of austerity measures, it is clearly mentioned that both the domestic as well as the foreign investors were affected by it and there was no bias seen towards the domestic producers.[110]

77. It has been previously held that the State can justify the measure based on legitimate non-nationality based public policy considerations[111] applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.[112]

78. It is finally contended that, the State can enforce legislation for the purpose of protecting and preserving its sovereignty and ensuring the public welfare of the citizens, even if it is negatively impacting the foreign investor and their investment. This view is held by both, the state practice[113] as well as jurisprudence.[114]

ISSUE IV: CLAIMANT HAS NOT BEEN DENIED THE FREE TRANSFER OF FUNDS BY THE RESPONDENT.

79. The principle of free transfer of funds refers to the freedom that has been rendered on the foreign investor investing in a particular country to repatriate their earnings or any other amounts that have been invested by them in the host country back to their parent country.

[110] ¶ f., Facts pertaining to Claim 2, Moot Proposition.
[111] Middle East Cement Shipping and Handling Co S.A. v Egypt (Award) (12 April 2002) 7 ICSID Rep 178 (2005) [89-91]; See also Marvin Feldman v Mexico (Merits) (16 December 2002) 7 ICSID Rep 341 [177].
[112] GAMI Investments Inc v United Mexican States (Merits) (15 November 2004) 44 ILM 545 [14] (UNCITRAL 2005).
[113] Exon-Florio amendment, *Omnibus Trade and Competitiveness Bill*, 1988, section 5021 (Pub. L. No. 100–418, 102 Stat. 1107; 50 U.S.C. App. § 2170); EU, Directive 94/22/EC of the European Parliament and the Council of 30 May 2004 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, Official Journal L 164, 3–8 (1994).
[114] 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], 18–26.

80. "Trade and Commerce with foreign countries" is a subject of the Union List (List I) of the seventh schedule of the constitution.[115] The Union List contains items upon which the central government has the sole authority to make laws or take decisions in that respect.

81. The Ministry of Finance, Government of Binda restricted the outward remittance of money by Binda and other major investors in Binda. The ministry, however allowed minimal funds transfer out of Binda in a carefully monitored monetary program by the Reserve Bank of Binda. The above actions were basically initiated by the union government through the ministry of finance. The union government clearly had the right to initiate such measures as the said subject matter was pertaining to the union list.

82. The Union List forms the part of the seventh schedule, which is a part of the constitution. On a hierarchy basis, the constitution is considered to be supreme and prevails over the treaty law or national legislation.[116] The Reserve Bank of Binda has the right to monitor the outflow of money from the territory of the Respondent to other foreign nations.[117]

83. Thus, the actions taken by the government of Binda to put a reasonable restrain on the outward remittances keeping in mind the dampening monetary situation in the country is justified and in public interest. These actions, *per se*, do not render a denial of free transfer of funds upon Claimant. These measures were taken citing required fiscal prudence due to deteriorating domestic situation.

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[115] Entry 41, Union List (List I), Seventh Schedule, Constitution of Binda, 1949.
[116] ¶ 16, Background, Moot Proposition.
[117] Section 58, Reserve Bank of Binda Act, 1934.

PRAYER

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

CLAIM 1

1. **HOLD** that the Respondent is not liable for expropriation.
2. **DECLARE & ADJUDGE** that the Claimants have been granted Fair and Equitable Treatment.

CLAIM 2

1. **HOLD** that the Arbitrator be disqualified from the Arbitral Tribunal.
2. **HOLD** that the Respondent is not liable for expropriation.
3. **DECLARE & ADJUDGE** that the actions of the Respondent have not resulted in violation of the doctrine of National Treatment.
4. **DECLARE & ADJUDGE** the actions of the Respondent are valid restraints to the Free Transfer of Funds.

All of which is respectfully affirmed and submitted

Sd/-

Counsel for Respondent

Place: Arbitral Tribunal, Finland (Claim 1)

Arbitral Tribunal, Singapore (Claim 2)