BENCH MEMORANDUM

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2014 FDI International Arbitration Moot

Bench Brief Committee: Mr. Felipe Aragón Barrero, Ms. Maria Tereza Rezende Borges, Miss Christy Burzio, Mr. John D. Roesser and Mr. Louis A. Russo

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LIST OF ABBREVIATIONS AND SYMBOLS

Art	Article
BIT	Bilateral Investment Treaty
CAC	Collective Action Clause
FET	Fair and Equitable Treatment
FSC	Forum Selection Clause
ICJ Statute	Statute of the International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ILC Articles	International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts
IMF	International Monetary Fund
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SIDBS / Washington Convention/ ICSID	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
SRA	Sovereign Debt Restructuring Act No. 45/12
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration (2006 version)
VCLT	Vienna Convention on the Law of Treaties
WBDRF	World Bank's Debt Restructuring Facility
WTO	World Trade Organisation

PURPOSE OF THE BENCH MEMORANDUM

Dear Arbitrator,

The purpose of the Bench Memorandum at hand is to provide you with an outline of the potential arguments that may rise from the FDI Moot 2014 Case and their analysis. To achieve this, the authors have included some of the most common primary sources on the issues raised, in the main body of this Memorandum. Each reference is cited in full in the footnotes on its first appearance and an appropriate short form is used subsequently.

More detailed explanation of the relevant legal issues has been provided in separate boxes that you may ignore if you would prefer a shorter account. You may wish to consider this Memorandum in conjunction with the Bench Skeleton where we have adopted a more adversarial posture.

This Memorandum is only intended as an aid to arbitrators in the evaluation of the arguments put forward by the participating teams. It is for the arbitrators to evaluate the quality of each argument and assess the advocates' knowledge of the 2014 Case, the relevant law and their advocacy skills. Thus, in the performance of the aforesaid tasks your personal evaluation of the merits of the Case or the views of the authors of the Bench Memorandum are not to be confused with the independent assessment of each argument. Accordingly, please note that:

a. The inclusion of any argument in the memorandum is not a testament to its quality.
b. The Memorandum is not an exhaustive list of relevant cases and is not a comprehensive treatise on the legal issues raised in the 2014 Case.

Finally, please feel free to contact the authors with any suggestion or criticism. We look forward to meeting you in Malibu.

Sincerely,

The 2014 Bench Brief Committee.

DRAMATIS PERSONAE

Claimant	Calrissian Is a hedge fund incorporated in, and in accordance with the laws of, the Corellian Republic. It acquired a number of sovereign bonds issued by Respondent which are subjected to the SRA
Corellia/Respondent	The Corellian Republic Is the home state of Calrissian (Claimant), a party to the State-State arbitration in 2003
Herald	The Global and Financial Herald Is a newspaper that reported on the context of the economic crisis in Dagobah
IMF	International Monetary Fund Is an institution which facilitated and recommended to the Respondent terms for an effective sovereign debt restructuring process
PCA	Permanent Court of Arbitration Rendered a State-State decision under the interpretation or application of the BIT, pursuant to Article 7
Respondent	The Federal Republic of Dagobah Is the Respondent state in the current dispute. Calrissian is located in the territory of the Respondent
Wold Bank	The World Bank The World Bank's Debt Restructuring Facility aided the cash buybacks of the 2001 sovereign bonds
Yavin	Kingdom of Yavin Is an international financial hub. The 2012 bonds are governed by the Law and Forum of Yavin

TIMELINE

DATE	EVENT
Pre 1992	Dagobah relatively stable economy until the 1980s by adopting an inward-orientated development policy characterised by moderately free markets.
1992	Corellia-Dagobah BIT signed.
Early 2001	Dagobah faced with an unsustainable debt burden, 2 ½ year economic crisis.
7 May 2001	Dagobah restructured its sovereign debt and exchanged existing bonds for new ones issued: ▪ Reduced the bonds value by 43%; and ▪ Provided the possibility of cash buybacks with the assistance of the WBDRF. Consequence: haircut of 50%, caused major losses to bondholders, among which were several investors from Corellia.
[At this time]	IMF presented recommendations to appropriately implement the sovereign debt restructuring process, as well as prevent further increase of its debts and another future crisis.
Second half 2001	Failed diplomatic negotiations as to whether Sovereign Bonds were protected by the Corellia-Dagobah BIT.
[At this time]	Corellian bondholders accepted Dagobah's restructuring exchange offer.
29 April 2003	Award of the Arbitral Panel, stating that Sovereign Bonds were "Investments" under the BIT. Therefore, Bondholders afforded protection and Dispute Resolution Mechanism under BIT.
19 May 2003	Dissenting Opinion by Professor Andreas Jeger, stating that Sovereign bonds could not constitute investments under the wording of the BIT.
August 2003	Bonds Issued
2005	Bond totalling 10% of the aggregate nominal value of all bonds issued were acquired by Calrissian on the Secondary market in Corellia. Dagobah's economy seemed stable and showing signs of recovery at this time.
2010	Dagobah affected by financial crisis of 2008. 2010 fears grew as to its financial stability, concerns of a possible governmental default.
14 September 2011	IMF gave recommendations to Dagobah as "its debt estimated at more than $400billion is unsustainable":

DATE	EVENT
	▪ Recommended implementation of a new sovereign debt restructuring; ▪ Bailout of $150 billion as long as Dagobah refinanced and reduced its outstanding debt in bonds through exchange offer.
12 December 2011	The Global Financial Herald Article, informing readers that Dagobah's economy was fragile and that it seemed probable there would be another debt restructuring in the near future.
28 March 2012	Dagobah enacted the Sovereign Restructuring Act (SRA). Terms: ▪ All bonds governed by Dagobah's laws—if 75% aggregate nominal value agreed, it would also bind remaining bondholders; ▪ Before SRA, affected bonds did not allow for amendment unless *all* bondholders agreed to it.
29 November 2012	Dagobah offered bond exchange. Terms: ▪ New bonds worth approximately 70% of the net value of the outstanding sums under the original bonds; and ▪ Exchange offer observed the IMF policies regarding sovereign debt restructuring.
12 February 2013	85% of bondholders subject to the SRA agreed to participate, offer extended to remaining creditors, almost all of whom accepted the offer.
30 August 2013	Calrissian commenced Investor-State Arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (Request Received 9 September 2013).
4 October 2013	Dagobah submits answer to SCC and argues against Calrissan's commencement of arbitration proceedings.
28 November 2013	SCC Appoints Mr Picard. Designate Alderaan, in the Kingdom of Yavin, as the seat of arbitration.
8 January 2014	Case referred to Arbitral Tribunal.
15 January 2014	Conference call between parties to establish issues to be addressed.
3 February 2014	Arbitral Procedural Order No 1 published, identifying the issues to be addressed.
23 June 2014	Arbitral Procedural Order No 2 published: Clarifications
1 September 2014	Arbitral Procedural Order No 3 published: Clarifications

PROCEDURAL ORDER

JURISDICTION

1. Whether the Tribunal has jurisdiction over the dispute concerning the sovereign bonds owned by Claimant under the Corellia-Dagobah BIT;

2. What is the effect of the PCA Arbitral Tribunal's decision on the jurisdiction of the Tribunal in the present case; and

3. Whether the Tribunal should rule on the claims asserted in view of the forum selection clause contained in the sovereign bonds.

MERITS

4. Whether the Respondent's debt restructuring measures amount to a breach of the FET treatment standard under the Corellia-Dagobah BIT; and

5. Whether the Respondent's actions are exempted from breaching the Corellia-Dagobah BIT, in case the debt restructuring was a measure necessary to safeguard the Respondent's essential security interests.

ARGUMENTS AND ANALYSIS

I. APPLICABLE LAW

The applicable law to the procedural matters of the Case are enshrined in the Arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce Rules and the Official rules of the Foreign Direct Investment International Arbitration Moot.[1] The seat of the arbitration is the city of Alderaan in the Kingdom of Yavin, and its domestic rules of procedure, which are identical to the UNCITRAL Model Law on International Commercial Arbitration (2006), are the *lex arbitri*. The applicable law to the substantive issues of the Case is the BIT, which in turn is to be interpreted in accordance to Article 31 and 32 of the VCLT.[2]

The VCLT interpretation approach is a process of progressive encirclement where the interpreter starts with the ***ordinary meaning*** of the terms of the treaty, then in their ***context*** and finally in light of the treaty's ***object and purpose***; and through this three-step inquiry relatively closes in upon the proper interpretation.[3]

Context here includes the text of the underlying treaty and any instrument accepted as a related instrument by both parties in connection with the conclusion of the treaty.[4] The tribunals must also consider any subsequent agreement between the parties regarding the interpretation of the treaty; any subsequent practice in application of the treaty, which establishes an agreement between the parties; and, any relevant rule of international law applicable to the relationship of the parties.[5] The tribunal is required to utilise this method of interpretation in ***good faith***. If interpretation leads to '*ambiguous*', '*obscure'* or '*manifestly absurd or unreasonable'* results, the tribunal may then have recourse to ***supplementary means*** including the travaux preparatoires[6] of the treaty and the circumstances of its conclusion.

Relevant rules of international law are defined by reference to sources of international law recognised by Article 38(1) of the ICJ Statute. These are: general or particular international conventions and treaties signed and ratified by the parties, which have established express rules applicable to the issues at hand; international customary law; general principles of international law; and finally as a subsidiary source, judicial decisions and arbitral awards of international forums (subject to the caveat that no doctrine of stare decisis applies in international law) and legal doctrine as espoused by distinguished publicists.[7] Dagobah, Corellia and Yavin are all parties to the VCLT and the New York Convention. All three are

[1] Uncontested Facts, page 45
[2] Special thanks to the 2013 Bench Brief Committee for providing a template on which this part is based
[3] *Aguas de Tunari SA v Bolivia (Jurisdiction)* ICSID ARB/02/3, para 90-92
[4] Art 31(2) VCLT, *Enron Corporation and Ponderosa Assets LP v Argentine Republic (Jurisdiction)*ICSID ARB/01/3, paras 46-47
[5] Art 31 VCLT, C. McLachlan, *'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention'* , (2005) 54 International and Comparative Law Quarterly, page 279, *Enron v Argentina (Jurisdiction)* para 46-47, C. McLachlan et al, *International Investment Arbitration: Substantive Principles* (OUP, 2008) paras 66-69
[6] Negotiating documents forming the preparatory works to the treaty in question
[7] A. Pellet, 'Article 38' in A. Zimmerman et al (eds), *The Statute of the International Court of Justice* (OUP, 2006)pages 746-789

also members of the UN, WTO, IMF and World Bank. Notably, they are not parties to the Washington Convention. [8]

II. JURISDICTION AND ADMISSIBILITY

A. JURISDICTION OF SOVEREIGN BONDS

i. THE TERM 'INVESTMENT': ART 1 CORELLIA – DAGOBAH BIT

- There were two Bond Offerings. 2001 – New Bond Offer, 2010 – SRA New Bond Offer. The dispute before the tribunal is not concerned with the bonds affected by the 2001 sovereign debt restructuring, but only with the bonds that were held by Claimant and were affected by the enactment of the SRA and by the 2012 sovereign debt restructuring.[9]
- The predominant problem with the Case BIT is that no explicit reference is made to "Sovereign Bonds" and therefore it is down to the teams to skilfully interpret the BIT in the most favourable way, to either include or exclude such instruments within the term "investment."

There is currently no universally accepted definition for what constitutes an "*investment*." The absence of a common definition has the benefit of defining the term "investment" in accordance to the object and purpose of the investment instrument that contains it. Accordingly, the tribunal must consider the underlying treaty, the definition of investment therein, and the types of assets and rights which it purports to protect.

The underlying treaty in an investment dispute is ***lex specialis*** and as such, tribunals have to apply the express will of the parties contained in such treaties, even if the expansion includes sovereign bonds. On the other hand, it seems that the common interpretation to an expansion definition is linked with an obvious investment. Therefore, transactions that, taken into isolation, may not qualify as investments may nevertheless be so considered, if all things accounted for, they may be taken as part of the overall operation of an investment.

The Respondent will argue that a narrow interpretation should be given to the term "investment," so as to exclude Sovereign Bonds from the BIT's protection. [*Appendix 3 & 6*]

- **BIT Wording:** No express reference to sovereign bonds, thus limited evidence that parties intended to protect them.[10] "Private," not "Public Capital," is referenced in the Preamble.[11] Similarly, an absence of an exclusion of sovereign bonds should not create unlimited jurisdiction for the tribunal.[12]

[8] Uncontested Facts, page 49, question 7
[9] Uncontested Facts, page 50, question 12
[10] Uncontested Facts, page 2, para 6
[11] Art 31 & 32 VCLT
[12] *Tokios Tokeles v Ukraine (Dissenting Opinion of Prosper Weil)* ICSID ARB/02/18, paras 28-30 and *Abaclat v Argentine Republic* (*Dissenting Opinion of Georges Abi-Saab)* ICSID ARB/07/5, para 91

- **A Bond is not an "Investment"**: Bonds represent a commercial transaction and not an investment risk.[13] Not all funds committed to governments are investments.
- **Ambiguous Outcome**: Sovereign bonds are diverse[14] and generalisations would be misleading to the interpretation of "investment."[15]
- **Policy Argument:** If sovereign debt is a covered investment, this would hinder the ability of debtor nations and their creditors to work out their debt obligations in an efficient manner that facilitates economic development.[16]

The Claimant will seek to persuade the tribunal to give the term "investment" a broad interpretation so as to protect Sovereign Bond's under the BIT. [*Appendix 2 & 6*]

- **One Investment:** The bond issue and acquisition even though on the secondary market should be classed as the same economic/investment operation.[17]
- **BIT Wording**: "*Every asset . . . direct and indirect . . . that has the characteristics of an investment. . . . Forms may include."* Non-exhaustive broad interpretation[18] covers everything of economic value.[19] There is no specific exclusion of sovereign bonds, as seen in trade practice.[20]
- **A Bond is an "Investment":** Classed as portfolio investments[21] involving *private capital*.[22] Bonds are an *economic resource* that the BIT (preamble) intends to protect. Under Art 1(vi) the bonds could also be defined as an "*intangible property."*[23]
- **"Characteristics of Investment":** Non-exhaustive list, which *may* include, having directly or indirectly[24] these characteristics. However, there was a Commitment of Capital (Acquisition), Expectation of Gain (Interest payment and other benefits), and Assumption of risk (Crisis risk).[25]

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[13] *Republic of Argentina v Weltover Inc.* 504 U.S 607 (1992): the US Supreme Court held that the issuance of sovereign bonds was a 'commercial activity' under the Foreign Sovereign Immunities Act of 1976

[14] Uncontested Facts, page 21, Appendix 4

[15] *Abaclat v Argentine Republic* (*Dissenting Opinion of Georges Abi-Saab)* ICSID ARB/07/5, paras 70-72

[16] D. Stirk, '*Investment Protection of Sovereign Debt and Its Implications on the future of Investment Law in the EU'* (2012) 29 Journal of International Arbitration, pages 183-204, see also *Du Pont de Numours & Co v Mexico* 118 F. Supp. 41 (1953)

[17] *Abaclat v Argentine Republic* ICSID ARB/07/5, paras 359 and 376, see also *Holiday Inns S.A Occidental Petroleum Corporation et al v Government of Morocco* ICSID ARB/72/1, paras 350-351 and *CSOB v Slovak Republic (Jurisdiction)* ICSID ARB/97/4, para 82

[18] *Abaclat v Argentine Republic* ICSID ARB/07/5, paras 354-355.

[19] K. Yannaca-Small, *Arbitration under International Investment Agreements; A Guide to Key Issues* (OUP 2010) pages 245-247, UNCTAD, *Sovereign Debt Restructuring and International Investment Agreements* (July 2011) and K.P Gallagher**,** *'The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties,* The Ideas Working Paper Series, Paper no. 02/2011, pages 15-17

[20] Examples of Trade Agreements that specifically exclude Sovereign Bonds: US-Uruguay BIT 2005 – Annex G 'Sovereign Debt Restructuring' , Peru-Singapore FTA 2008- Chapter 10, Art 10, 18 'Public Debt' (majority of Peru' IIA's exclude sovereign debt), and Canada-Columbia FTA – Art 838

[21] G. Sacerdoti, '*Bilateral Treaties and Multilateral Instruments on Investment Protection'*, (1997) 269 Hague Academy of International Law, page 307

[22] Uncontested Facts, page 21, Appendix 4, see also The World Bank's, *2014 International Debt Statistics Report* (February 2014): reporting on worldwide sovereign bonds

[23] *Black's Law Dictionary*, other definitions can be sourced by advocates to demonstrate the ordinary meaning of such a term

[24] *CSOB v Slovak Republic (Jurisdiction)* ICSID ARB/97/4, paras 78-79

[25] *Fedax N.V v Venezuela (Jurisdiction)* ICSID ARB/96/3, paras 42-44 and *CSOB v Slovak Republic (Jurisdiction)* ICSID ARB/97/4, paras 77 and 90

- **Ambiguous Outcome**: In a crisis, lenders are reimbursed first, while equity holders stand behind. This general principle would be violated if sovereign debt instruments were not protected under BIT's.[26]

ii. TERRITORIAL LINK OF THE INVESTMENT; ART 1 CORELLIA-DAGOBAH BIT

In investment disputes it has not been contested that commitment of money or another resources is predominantly one of the essential elements of an investment. In case of sovereign bonds traded on the secondary market, there is an issue of whether resources invested by the bondholder must be transferred to the host state, in other words if there is any necessity of a territorial link.[27] It is the "link" that is at question in this Case.

There are two predominant arguments[28] in this arena. Firstly, that the transaction of purchasing sovereign bonds should be seen as part of a larger investment, and that the money which is generated by this overall transaction is ultimately available to the host country. Secondly, and conversely, that the investor purchases outside of the host country, with an emphasis on geographic location, and does not transfer money directly, therefore presenting limited/no nexus to the host state.[29] Other factors which have been utilised to question a territorial link include the bonds' choice of law clause, forum selections clauses, the use of the money by the host state and the ability to trace the purchase money.

The Respondent will forward the test that there is a lack of control and involvement, focusing on geographical purchase, to dispute the territorial link of the bonds. [*Appendix 3 & 6*]

- **BIT wording:** The territory is "where" the investment is made and not "for the use or benefit of whom."[30] In this instance, the place of acquisition was Corellia in 2005, and the bonds were payable in Yavin.[31]
- **Practical Application**: Sovereign bonds are intangible capital flows, thus their situs is difficult to determine. Dagobah had no involvement in negotiations, and is completely unaware of bondholders due to secondary trading. Therefore, outside of the protection/ scope of the BIT and no evidenced territorial link.[32]
- **Legal Nexus:** No legal connection, the current 2010 Bonds' dispute resolution clause chooses the Kingdom of Yavin Law and Courts, thus outside its territorial scope.[33]

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[26] L.T Wells, 'Property Rights for Foreign Capital: Sovereign Debt and Private Direct Investment in Times of Crisis', in *The YearBook on International Investment Law and Policy* 09/10 (OUP, 2010), pages 447-504
[27] Z. Douglas, *The International Law of Investment Claims* (CUP, 2009) page 191
[28] There are many schools of thought on this issue but the two common arguments are described
[29] N 27, page 180
[30] *Abaclat v Argentine Republic (Dissenting Opinion of Georges Abi-Saab)* ICSID ARB/07/5, para 99, *SGS Societe Generale SA v Republic of the Philippines (Jurisdiction)* ICSID ARB/02/6 para 99, *Canadian Cattleman for Fair Trade v United States (Jurisdiction),* NAFTA, para 127, see also R. Dolzer, 'The Notion of Investment in Recent Practice', in Charmovitz et al (eds) *Law in the Service of Human Dignity: Essays in Honour of Floretino Feliciano* (CUP, 2005) pages 269 and 272
[31] Uncontested Facts, page 50, question 11 and page 56, question 33
[32] Uncontested Facts, page 21, Appendix 4
[33] *Abaclat v Argentine Republic (Dissenting Opinion of Georges Abi-Saab)* ICSID ARB/07/5, paras 78, 80-81, 82 generally and *Bayview v Mexico* (Preliminary Objections) ICSID ARB(AF)/05/1, paras 101-102

The Claimant will argue that there has been a commitment and use of funds by Dagobah, and use the "where and the benefit of whom" test to evidence a territorial link. [*Appendix 2 & 6*]

- **BIT wording**: Broad definition,[34] thus the territory is the place in which the funds deriving from the acquisition will be used.[35] The funds from the sovereign bonds were used in and by Dagobah for its economic development.[36]
- **Practical Application**: Bonds were issued/guaranteed by Dagobah, to raise capital for its own means, according to its laws. Dagobah retained the control to change the bonds' terms affecting investors (SRA).[37] A territorial link can still be found even if the bonds are traded on secondary markets.[38] The trading platform does not change the nature of the debt linked to Dagobah.
- **Legal Nexus:** The dispute settlement clause is of a procedural nature and does not relate to the contractual performance of the investment.[39]

[34]Uncontested Facts, page 7, Appendix 1, '*in the territory of the other party*', territorial link also referred to in: The preamble, Art 2 (Promotion and Protection, full protection and security), Art 3 (Compensation for losses), Art 4(4) (Expropriation), Art 8 (Settlements), and Art 9 (Subrogation), BIT

[35] Test/Interpretation sourced from the following case law, *Abaclat v Argentine Republic* ICSID ARB/07/5, paras 359, 374, 376, *Fedax N.V v Venezuela (Jurisdiction)* ICSID ARB/96/3 para 41, SGS S*ociete Generale de Surveillance SA v Islamic Republic of Pakistan (Jurisdiction)* ICSID ARB/01/13 paras 136-140*, SGS v Republic Philippines*, para 111 and *Ambiente Ufficio v Argentine Republic (Jurisdiction)* ICSID ARB/08/09, paras 498-499

[36] Uncontested Facts, page 3 para 16 and page 21, Appendix 4, see also *Inmaris Perestroika v Ukraine* ICSID ARB/08/08, para124

[37] Uncontested Facts, page 23, Appendix 5

[38] Art 5 BIT, identifies investments made in different currencies that are protected by the BIT, see also; *Abaclat v Argentine Republic* ICSID ARB/07/5, paras 358-360 and 366 and *Fedax N.V v Venezuela (Jurisdiction)* ICSID ARB/96/3 para 40

[39] *Abaclat v Argentine Republic* ICSID ARB/07/5, paras 379-380 and 498

B. EFFECT OF THE 2003 PCA DECISION

- NB, the advocates may wish to argue this point first, and then move onto the specific interpretation of "investment" and "territorial link" (as above).
- NB, Disputes: 2003 – Art 7 BIT State-State (PCA found sovereign bonds were protected 'investments' under the BIT), 2014- Art 8 BIT Investor-State (today's dispute).

Most BITs provide for two forms of arbitration: (1) treaty parties can bring claims against each other concerning the "interpretation and/or application" of the treaty; and (2) for investors to bring arbitral claims against host states for alleged treaty violations adversely affecting their investments. The main question to be answered under this procedural order is, what is the legal effect of a "binding" state-to-state award on treaty interpretation of subsequent investor-state arbitrations (today's dispute)?[40]

There are many outcomes to this question, all with plausible sources to substantiate a claim. However, it is important that advocates are ***clear*** on the route they are taking. They may start by arguing or dismissing a claim that it is binding, and then move onto an alternative route regarding the persuasive nature of the award.

The Respondent should argue that the PCA decision is neither binding nor persuasive; concluding that the SCC can render a conflicting award. [*Appendix 6*]

- **BIT Wording:** A separate two-track system, no express clause dictating that the state-state decision will bind investor-state tribunals.[41] Thus, no mechanism to restrict, refer,[42] or bind all interpretations of the BIT exclusively to Art. 7 (State-State). This would impose a form of judicial legislation[43] without the parties' clear consent.[44]
- **Different Ratione Personae and Materiae:** 2003 involved a state-state dispute on the basis of "interpretation or application," whilst the 2014 involves an investor-state dispute on the basis of treaty investment breaches. In order to protect investors' rights, investor-state tribunals must insist on exclusive competence to interpret and apply the law.[45]
- **Rules of International Law**: Inserting a binding hierarchy or strict precedent system goes against the prevailing norms in international adjudication and arbitration.[46]
- **Not "Persuasive"**: the BIT does not protect the bonds as they are not "investments" and lack a "territorial link" (as argued above).

[40] Advocates may also want to address the admissibility and or persuasive nature of the Dissenting Opinion of the PCA Award, Uncontested Facts, page 17, Appendix 3
[41] BIT's with express clauses include; 2012 U.S Model BIT, Art 30(3) and 2004 Canada Model BIT Art 40(2), NAFTA Art 1131(2), see also *Mathanex Corp v USA* (Final Award) NAFTA, para 20
[42] As example is seen in Art 267 TFEU of the ECJ
[43] *Nuclear Test Case (Australia v France) (Opinion of Judge Gros)* 1974 I.C.J 253, para 297, see also *AMINOIL*, Award, March 24, 1982, 21 I.L.M. 976, paras 1015-1016
[44] *Cases of Dual Nationality,* XIV UN Reps. International Arbitration Awards, para 30
[45] *The Republic of Ecuador v The USA (Opinion of W.M Reisman)* PCA 2012-5, para 25
[46] *The Republic of Ecuador v The USA (Opinion of W.M Reisman)* PCA 2012-5, para 38 and *Empresas Lucchetti, S.A & Lucchetti Peru, S.A v Peru* (Final Award) ICSID ARB/03/04, paras 6-10, *SGS v Philippines* ICSID ARB/02/6 and *Enron v Argentina (Jurisdiction, Ancillary Claim)* para 25

The Claimant should argue that the PCA award is binding or alternatively highly persuasive. [*Appendix 6*]

- **BIT Wording**: Confers wide jurisdiction[47] over "*any dispute* . . . concerning the *interpretation or application* of the Treaty . . . submitted for *binding decision.*" The 2003 dispute concerned a matter of treaty interpretation and application as to the protection of sovereign bonds.[48]
- **The Term "Binding"**: Clear that the state of Dagobah agreed that such a decision, interpretive[49] or otherwise, would be binding upon them.[50] Moreover, no express limitation of its binding effect, therefore binding in general on the treaty parties, investors, and future tribunals.[51] Interpreting the article differently could render Art. 7 otiose.[52]
- **"Persuasive"**: Alternatively, the award is persuasive in its assessment that sovereign bonds are protected by the BIT, as the dispute was similar both factually and legally to the current dispute.[53] Using the PCA award as an influential authority will further promote the consistency and certainty of the investment obligations contained within the treaty.[54]

C. FORUM SELECTION CLAUSES

"*Whether the Tribunal should rule on the claims asserted in view of the forum selection clause contained in the sovereign bonds"*

	Old Bonds	New Bonds
Governing Law	Dagobah	Yavin
Forum Selected	Dagobah	Yavin

THE CLAIMANT will argue that the ***FSC Does Not Apply*** and that the Tribunal ***May Decide***, and that Claimant ***May Initiate*****,** the ***Dispute***

- An Arbitral Tribunal convened under the BIT seated in the Kingdom of Yavin **is entitled** to decide the present dispute despite the FSC contained in the Old Bond Offering.

[47] *The Mavrommantis Palestine Concessions (Collection of Judgements),* 1924 P.C.I.J, Series A, no 2, page 11
[48] Uncontested Facts, page 2, paras 6-8
[49] *Kasikili/Sedu Island (Bots v Namib)*[1999] ICJ 1045, page 1075
[50] Res Judicata and Collateral Estoppel principles arise from such a conclusion, See, Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 2006) Chapter 16, *CME v Czech Republic* (2001) (*Opinion of Christoph Schreuer and August Reinisch)*, *AMCO v Indonesia* ICSID ARB/81/1, para 30, *Duke Energy International Peru Investments v Republic of Peru* ICSID ARB/03/28 award, para 245
[51] A. Roberts, '*State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority'* (2014) 55(1) Harvard International Law Journal, pages 59-60 and 63
[52] Advocates should question the purpose of Art 7's inclusion, and therefore see if what the Respondent suggests downgrades the autonomy of the contracting parties' wills and intentions
[53] Art 38 (1) (d) ICJ Statute, see also *Azurix v Argentina* ICSID ARB/01/12, para 391, *ADC v Hungary* (Award) ICSID ARB/03/16, para 293, *AES Corp v Argentina (Jurisdiction)* ICSID ARB/02/17 paras 27-33, and *Bayindir v Pakistan (Award)* ICSID ARB/03/29, paras 144-145
[54] See C. Schruer and M. Weiniger, 'A Doctrine of Precedent?' in *The Oxford handbook of International Investment Law* (OUP 2008) Chapter 30, pages 1189-1206, G. Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?,* (2007) 23 Arbitration International, pages 357-378.

- **FSCs are of a procedural nature,** just aiming to determine the place of settlement of a dispute (and they apply only to claims based on contractual rights accordingly may not affect treaty claims.[55] Treaty Claims and contract claims are distinct based upon different legal standards: "an exclusive jurisdiction clause in a contract between the claimant and the respondent state … cannot operate as a bar to the application of the treaty standard."[56]

- **BIT wording:**
  - **<u>This is a dispute governed by the BIT:</u>** Article 8(1) '***investor of one Party*** and the other Party in connection with an ***investment***':
    - '***Investor of a Party***' 'means a party or a ***national of a party*** that attempts to make, is making or has made an investment in the '***territory***' of the other party. (Art 1.)
      - ***National of a Party***
        - Subsection (a) does not apply because a hedge fund is not a natural person.
        - Subsection (b) does apply. Claimant is *incorporated in, and in accordance with the laws of, the Corellian Republic.* [*Appendix 6*]
        - Plus, the name "& Co." denotes that it has some form of joint stock ownership, which is one of the enumerated corporate entities listed in subsection (b) ('public establishment, *joint-stock corporations* or partnerships, foundations or associations, regardless of whether their liability is limited or otherwise.')
    - ***Investment***: See *Section A(i)* (A broad interpretation should be given to the term Investor/'Investment', so as to include both Sovereign Bond offers into the BIT Definition. [*Appendix 2 & 6*])

- **Application of the Collective Action Clause**
  - Even if the majority did vote for the restructuring under the majority clause of the 2012 offer such actions under the CAC would not prevent Claimant from filing an arbitral claim. The CAC only bars the contractual causes of action not the treaty claims. And Calrissian's main claim is on Dagobah's violation of BIT Art. 2, not on contract (the sovereign bond) itself.
  - The enactment of the Sovereign Restructuring Act (SRA) by Dagobah is a unilateral sovereign behaviour. These claims are therefore sufficiently established as treaty claims for the purpose of the jurisdictional phase.

[55] *Abaclat and Others v. The Argentine Republic*, 2011, ¶¶ 379, 498); *see also AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005.
[56] Compania de Aguas del Aconquija, S.A. & Compagnie Generale des Eaux v Argentine republic (2001); *see also* BIT Art.4.3,4.4

- **Yavin is the clear choice**: And it makes good sense to allow the arbitration to proceed in Yavin. Yavin is an international financial hub, which is customarily chosen in international financial and capital market transactions. Its law will be developed to address the complexities of the dispute.

- **FSC Does Not Prevent Tribunal from hearing treaty-based claims:** Tribunals acting on the basis of a BIT may decide treaty-based claims ***despite*** the existence of a forum selection clause in investment contracts.

- **No express waiver:** The FSC does not include an express waive of Claimant's rights under the BIT.

- **Specific Trumps General:** The principle of generalia specialibus non derogant dictates that the dispute resolution provision of the BIT be given effect over the forum selection clause of the bond.

THE RESPONDENT will argue that the ***FSC Applies*** and that the Tribunal ***May Decide,*** and Claimant ***May not Initiate,*** **the** ***Dispute***

- **Dagobah Has Exclusive Jurisdiction:** The forum selection clause contained in the old sovereign bonds grant exclusive jurisdiction to the Courts of Dagobah. FSC directs: "Any dispute arising from or relating to this contract" to be "exclusively resolved before the Courts of Dagobah." Claimant consented to this.

- **FSC is of a Contractual In Nature:** Claim is a contractual one with an alleged breach of treaty. FSC only involves modifying the terms of the bonds and reducing the face value without the consent of all investors → potential anticipatory breach of contract (Claimant would not receive the originally promised sum after debt restructuring).

- **Application of the BIT**
  - BIT does not cover this type of dispute. The FSC should apply because it makes good sense for a local Dagobah court to apply Dagobah's law—the very law that governed the vast majority of restructured bonds.
  - Article 8: "disputes in connection with an investment" are to be presented to arbitration tribunals → purchase of sovereign bonds cannot be seen as an "investment"

- **This is NOT a dispute governed by the BIT:** Article 8(1) governs "legal disputes between and ***investor of one Party*** and the other Party in connection with an ***investment.***"
  - "***Investor of a Party***" "means a party or a ***national of a party*** that attempts to make, is making, or has made an investment in the "***territory"*** of the other party. (Art 1.)
    - ***National of a Party***

- Subsection (a) doesn't apply because hedge fund is not a natural person.
- Subsection (b) does not apply because Claimant is a hedge fund [*Appendix 6*]. Hedge fund *is not* one of the enumerated corporate entities listed in subsection (b) ***('public establishment, joint-stock corporations or partnerships, foundations or associations, regardless of whether their liability is limited or otherwise.')***

▪ ***Investment***: See *Section A(i) supra* (A narrow interpretation should be given to the term 'investment', so as to exclude Sovereign Bonds from BIT protection. [*Appendix 3 & 6*])

- **Application of the Collective Action Clause**
  - 2012 CAC would prevent Claimant, a holdout, of the sovereign bond from filing.
  - The CACs provided that if bondholders wanted to initiate any legal action, they would need to gather at least 20% of the nominal value of the issue in order to sue. More than 85% of *holders* of the bondholders subjected to the SRA participated. Unlikely therefore of the holdouts, Claimant could hold more than 15% of the *nominal value* of the issue claim under the BIT.

- **Tribunals should respect FSCs/Party Autonomy:** Investment Tribunals may not obviate the terms of contracts that are the basis of claims asserted before them. (*See Vivendi v Argentina Annulment; Art. 3 of the ILC Articles; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, August 6, 2003, para.161 stated: Tribunal should respect the valid forum selection clause, which concern contractual claims.) Enforcing FSC respects party autonomy.

- **Applying FSC Prevent Forums Shopping:** Admitting the present claims—despite the existence of a FSC—would encourage parallel proceedings and international forum shopping and undermine the very purpose of CACs provided in the bonds, *i.e.,* to facilitate the debt restructuring process by reducing the risk of 'holdout' litigation (*NML Capital v Argentina*, 2012, ¶ 27).

  - Debt restructuring serves the purpose of the BIT to "stimulate … the economic development of [Contracting] Parties" (Preamble of BIT – Appendix 1).

III. MERITS

A. FAIR AND EQUITABLE TREATMENT

Article 2(3) of the SRA retrofitted a statutory aggregated Collective Action Clause in the old bonds:

> *"3. Bondholders may participate in the process with some or all of the eligible titles they own. For the eligible titles (securities) to be amended, a quorum of at least half of the aggregate outstanding capital ('participating capital') will be required to participate in the process, and a qualified majority in favor of the amendment of at least seventy five per cent (75%) of the participating capital will have to vote to approve the exchange."*[57]

The final and binding effect of decision taken by the Bondholders pursuant to Article 2(3) of the SRA was established in Article 2(8):

> *"8. Since the approval decision of the Ministerial Council will be published in the Government Gazette, the decision of the Bondholders, as witnessed by the Process Manager, applies erga omnes, binds the bondholders and investors of the eligible titles (securities) as a whole and prevails over any potential contrary legislation, of any kind, general or specific provisions of law or regulation issued by the administration or agreement. In the case of exchange of the eligible titles (securities), the eligible titles (securities) that are superseded will be cancelled automatically with the registration in the System of the new titles (securities) and any right or obligation derived therefrom, including all rights and obligations that at any time formed part of them, will be extinguished."*[58]

Until this date, Greece is the only country that has used a similar approach to restructure its sovereign debt. At least one investment arbitration case resulted from the Greek debt restructuring,[59] although no award has been rendered so far.

- THE CLAIMANT: Respondent's partial default on the sovereign bonds held by Claimant and the retrofit application of the Collective Action Clause contained in the SRA amounts to a breach of fair and equitable treatment.[60]
- THE RESPONDENT: Respondent shall argue that its actions did not violate the FET.[61]

i. DEFINITION OF FAIR AND EQUITABLE TREATMENT

[57] Appendix 5, page 25.
[58] Appendix 5, page 26.
[59] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Procedural Order No. 1, 20 December 2013.
[60] Appendix 6, pages 29-30.
[61] Appendix 6, pages 36-37.

One of the points of contention between the parties will likely be the definition of fair and equitable treatment.

FET standard is incorporated in Article 2(2) of the Corellia-Dagobah BIT:

> *"2. Investments of each Party or of nationals of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment in its territory of nationals of the other Party."*[62]

The wording of Article 2(2) of the Corellia-Dagobah BIT does not refer to international law, customary international law or the minimum treatment standard. Thus, there is no reason to limit its application to the customary international law minimum.[63]

It should be noted that there is a general consensus that FET constitutes an absolute standard, *i.e.* it has normative content independent from municipal laws and from other standards[64]. However, both the scope of protection granted by FET and the best methodological approach to assess its violation remain controversial in investment arbitration practice.[65]

The tribunal may wish to consider the preamble of the Corellia-Dagobah BIT in interpreting the FET standard, which recognizes:

> *"that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;"* and
> *"the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration."*[66]

- THE CLAIMANT: Fair and equitable treatment is an evolving standard that should be assessed on a case-by-case basis[67] and which ought to be interpreted in line with the objective of the BIT to protect investments and create conditions favourable to investments.[68]
- THE RESPONDENT: Fair and equitable treatment requires a balanced interpretation, which does not exaggerates protection granted to investors.[69] The investor's expectations

[62] Appendix 1, page 8.
[63] R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP 2012), page 124.
[64] K. Yannaca-Small, '*Fair and Equitable Treatment Standard: Recent Developments'*, in Standards of Investment Protection (OUP 2008), page 111.
[65] R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP 2012), page 133.
[66] Appendix 1, page 7.
[67] See, f.i., *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award (Final), 3 September 2001, para. 292. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award (II), 20 August 2007, para. 7.4.12.
[68] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 104.
[69] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 300.

must always be balanced against the need for governmental action in times of crisis.[70] Instead of a strict definition, tribunals generally identify a number of elements that constitute the standard,[71] none of which was violated in this case.

ii. SCOPE OF PROTECTION UNDER FAIR AND EQUITABLE TREATMENT

Despite the controversies in the definition and scope of application of FET, several tribunals have recurrently identified a few elements which are protected under the standard, most notably[72]: legal stability and legitimate expectations,[73] protection against denial of justice,[74] freedom from coercion[75] and compliance with contractual obligations (default).[76]

Accordingly, the parties are expected to argue over whether Respondent's conduct violated any of these elements.

It should be noted that there are no publicly available decisions discussing FET in the context of sovereign bonds, so the tribunal may wish to take into consideration decisions relating to default, unilateral amendment of contracts and regulatory changes made by the State in the context of crisis.

THE CLAIMANT:

- **Default:** Default of sovereign debt amounts to a breach of FET when the State commits an outright repudiation of the contract.[77] A unilateral modification of the bond terms to provide a Collective Action Clause and its subsequent use to partially default on the holdout creditors amounts to an outright repudiation of the contract.

[70] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1005.
[71] K. Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in Standards of Investment Protection (OUP 2008), page 118.
[72] K. Yannaca-Small, '*Fair and Equitable Treatment Standard: Recent Developments'*, in Standards of Investment Protection (OUP 2008), page 118. R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP 2012) *passim*.
[73] K. Yannaca-Small, '*Fair and Equitable Treatment Standard: Recent Developments'*, in Standards of Investment Protection (OUP 2008), page 122-123. See, f.i., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 300.
[74] *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 [Spanish], para. 443-444. K. Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in Standards of Investment Protection (OUP 2008), page 118.
[75] R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP 2012), page 147.
[76] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 146. *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, para. 269-277.
[77] R. Dolzer, C. Schreuer, *Principles of International Investment Law* (OUP 2012), page 141. C. Schreuer, *Fair and Equitable Treatment*, Available at: http://www.univie.ac.at/intlaw/wordpress/pdf/99_fair_equit_treatm_zuerich.pdf, pages 127-128.

- **Denial of justice:**[78] Denial of justice occurs if the State prevents the investor from accessing its legal system.[79] It is not relevant which branch of government perpetrated the act of denial of justice.[80] Accordingly, when the State enacts targeted legislation to defeat claims of investors[81] – *i.e.* in this case, to prevent claims by holdout creditors – it violates FET.

- **Stability of the legal framework and legitimate expectations:** Stability of the legal framework is an essential element of fair and equitable treatment.[82] This interpretation is supported by the Preamble of the Corellia-Dagobah BIT.[83] Fair and equitable treatment is violated when the legal framework is altered in order to abrogate the rights of creditors.[84] It is also violated when the legislation unilaterally modifies the contract and the legal framework for the contractual obligations of the parties.[85] A change is legislation is only possible so long as it does not affect the investor's legitimate expectations.[86] In the present case, Respondent unilaterally altered the bond terms, undermining Claimant's expectations that a restructuring would only occur in the terms it expressly consented to.

- **Coercion:** Respondent's exercise of government power to unilaterally amend the bonds constitutes a coerced alteration of its terms. After this amendment, Respondent exercised economic coercion to compel the creditors to settle, offering only one "take-it-or-leave-it" option. On a previous occasion, the use of retrofitted CACs in the Greek debt

[78] Teams may also wish to argue that Respondent does not have an exhaustion of local remedies defence to a denial of justice claim, since Claimant had no legal action to challenge the SRA [Appendix 6, item 22, page 50] and the automatic cancellation of the old bonds conditions any future action by Claimant to gathering at least 20% of the nominal value of the issue [Uncontested Facts, para. 21, page 4].

[79] *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 [Spanish], para. 443-444. J. Paulsson, *Denial of Justice in International Law* (CUP 2005), page 44.

[80] *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 [Spanish], para. 444. J. Paulsson, *Denial of Justice in International Law* (CUP 2005), pages 44-46.

[81] "It is not difficult to see that the retroactive application of law by judges must be characterised as a denial of justice if the courts thereby make themselves the tools of 'targeted legislation'" J. Paulsson, *Denial of Justice in International Law* (CUP 2005), pages 147-148, 199.

[82] K. Yannaca-Small, '*Fair and Equitable Treatment Standard: Recent Developments'*, in Standards of Investment Protection (OUP 2008), page 122-123. See, f.i., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 300.

[83] "Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards" [Case Records, p. 7]. On the importance of preamble for establishing stability of the legal framework within the scope of fair and equitable treatment, see f.i. *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 183. *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 124.

[84] See M. Waibel, *'Opening Pandora's Box: Sovereign Bonds in International Arbitration'* (September 7, 2007). American Journal of International Law, Vol. 101, pp. 711-759, 2007. Available at SSRN: http://ssrn.com/abstract=1566482. p. 753.

[85] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 525-527.

[86] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 529.

restructuring has been deemed a credit-restructuring event by the market,[87] which does not happen in cases of *voluntary* bond exchanges.[88]

THE RESPONDENT:

- **No default:** Respondent is not in default. The terms of the bonds were amended by law, without any violation to Dagobah's legislation.[89] The bonds exchange was approved pursuant to the amended terms.[90] Accordingly, Respondent did not repudiate its contract nor did it default on its debt.

- **No denial of justice:** A prohibition of denial of justice does not equate a right of access without qualification; limitations are acceptable as long as they are reasonable and do not impair the essence of the right.[91] Respondent did nothing more than utilize the market standard provision[92] in the statutory Collective Action Clause introduced by the SRA. This type of legal regime would only replicate at the level of the sovereign borrower the same protection enjoyed by corporate borrowers in many countries.[93] Likewise, the CAC contained in the new bonds is market standard.[94]

- **Stability of the legal framework and legitimate expectations:** Respondent did not violate Claimant's legitimate expectations nor did it undermine legal stability. Respondent never made any assurances that it would not attempt to restructure its sovereign debt,[95] nor did its legislation forbid the alteration of bond terms by the SRA.[96]

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[87] The EMEA DC resolved that a Restructuring Credit Event had occurred following the exercise by The Hellenic Republic of collective action clauses to amend the terms of Greek law governed bonds. (DC EMEA, Available at: http://www2.isda.org/attachment/NDA5Ng==/Greece_credit%20event%20occurred%2003-09-2012.pdf).

[88] ISDA, *Greek Sovereign Debt FAQ (last updated March 19, 2012),* Available at: http://www2.isda.org/attachment/NDEyNQ==/Greek_Sov_Debt_FAQ_Update_03-19-2012_FINAL.pdf, page 3.

[89] Appendix 6, item 22, page 50.

[90] Appendix 6, item 23, page 50.

[91] J. Paulsson, *Denial of Justice in International Law* (CUP 2005), page 138.

[92] Indeed, the G-10 approved a 75% supermajority to approve debt restructuring and suggests the same percentage should suffice to allow bondholders to accept an exchange of the bonds for new debt instruments. See Report of the G-10 Working Group on Contractual Clauses, Available at: http://www.bis.org/publ/gten08.pdf, pages 3-6. Also, Greece proceeded the same way in 2012, imposing a 50% majority and, so far, such clause has not been deemed illegal (J. Zettelmeyer, C. Trebesch, M. Gulati, *The Greek Debt Restructuring: An Autopsy*, Working Paper Series, WP 13-8 (2013), Available at: http://www.iie.com/publications/wp/wp13-8.pdf).

[93] M. Waibel, *'Opening Pandora's Box: Sovereign Bonds in International Arbitration'* (September 7, 2007). American Journal of International Law, Vol. 101, pp. 711-759, 2007. Available at SSRN: http://ssrn.com/abstract=1566482. p. 750. L. C. Buchheit, M.G. Gulati, *How to Restructure Greek Debt* (May 7, 2010). Available at SSRN: http://ssrn.com/abstract=1603304, page 12.

[94] "The Working Group is of the view that an arrangement that concentrates the power to initiate litigation within a bondholder representative upon instruction of 25% of the bondholders (or at the representative's own initiative), subject to certain limited exceptions, […], and a provision explicitly prohibiting individual enforcement action could effectively place a brake on disruptive creditor litigation" See Report of the G-10 Working Group on Contractual Clauses, Available at: http://www.bis.org/publ/gten08.pdf, pages 6. See also M. Waibel, *Steering Sovereign Debt Restructurings Through the CDS Quicksand* (July 14, 2012). Available at SSRN: http://ssrn.com/abstract=2017772, note 14, page 6.M. G. Gulati, J. Zettelmeyer, *Engineering an Orderly Greek Debt Restructuring* (January 29, 2012). Available at SSRN: http://ssrn.com/abstract=1993037, page 5.

[95] Appendix 6, item 18, page 49.

[96] Appendix 6, item 22, page 50.

Claimant could not have a legitimate expectation that legislation governing the bonds would not change in absence of an explicit promise or guarantee by the State.[97] Also, Claimant could not have legitimately expected that bonds were safe from future restructuring, since they were rated as "B"[98] by Poor's Standard which indicates a vulnerability[99] of the bond from the moment when acquired by the Claimant. Whilst stability of the legal framework is desirable, this standard is not absolute; the State retains its regulatory power to adapt to changing of circumstances, especially in a case of crisis.[100] Respondent's solution was balanced and proportional in the context of economic crisis.[101] The SRA enacted by Respondent was a milder option than a forced restructuring.

- **No coercion:** None of the elements typically associated with coerciveness in sovereign debt restructurings[102] is present in this case. The simple introduction of a statutory Collective Action Clause is not considered a 'mandatory' or 'coercive' debt restructuring by the market[103], since it does not affect the creditors' rights.[104] The debt swap was the decision of the majority of the bondholders after extensive negotiations with Respondent, who did not evade its duty to convince the creditors that a debt restructuring was necessary to avoid default and a worst devaluing of the bonds. Moreover Claimant could have participated in the committee of creditors consulted during the restructuring process, but it missed the deadline to do so.[105]

iii. HARM

[97] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331.
[98] Appendix 7, item 31, page 56.
[99] For a definition of the rating standards, see http://www.standardandpoors.com/ratings/definitions-and-faqs/en/us.
[100] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 290-291. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 260-261.
[101] L. C. Buchheit, M.G. Gulati, *How to Restructure Greek Debt* (May 7, 2010). Available at SSRN: http://ssrn.com/abstract=1603304, page 11.
[102] H. Enderlein, et al., '*Sovereign debt disputes: A database on government coerciveness during debt crises*', Journal of International Money and Finance (2011), doi:10.1016/j.jimonfin.2011.11.011.
[103] When Greece adopted the same course of action in 2012, the DC EMEA did not find that the simple act of retrofitting a collective action mechanism in the existing bonds amounted to a credit restructuring event (DC EMEA, Issue Number 2012022901, 29 February 2012).
[104] M. Waibel, *Steering Sovereign Debt Restructurings Through the CDS Quicksand* (July 14, 2012). Available at SSRN: http://ssrn.com/abstract=2017772, page 28.
[105] Appendix 7, item 35, page 56.

Some tribunals have found that FET is only violated if State's action caused harm to the investor, although few of them have discussed the issue thoroughly.[106] Accordingly, while the parties should not address quantum of damages at this point of the proceedings, they may wish to discuss whether or not Respondent's actions caused any harm to Claimant.

- THE RESPONDENT: The introduction of a Collective Action Clause by the SRA did not cause harm to Claimant. A failure to renegotiate all bonds[107] would result in default[108] and a consequent downgrade of the bonds to junk status. Without Respondent's action, Claimant would have suffered a greater loss. Also, the haircut in the value of the bonds was not directly caused by Respondent; it was rather the decision of the majority of creditors pursuant to the mechanisms contained in the SRA.
- THE CLAIMANT: Respondent's unilateral introduction of the CAC in the old bonds allowed the majority to force Claimant into sustaining a haircut of approximately 30%. Also, in case of default, Claimant would have been able to try to collect its credit by pursuing Respondent's commercial assets located in foreign countries. Accordingly, Respondent's decision to retrofit an aggregated CAC in the old bonds directly harmed Claimant by reducing its credit and its possibilities of collection.

[106] See, f.i. *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, para. 284.

[107] The existence of a *pari passu* clause (Appendix 6, item 15, page 49) may be argued to justify why the deal was an all-or-nothing situation. For an interpretation of the *pari passu* clause in this sense, see *NML Capital v Argentina*, 2012.

[108] Appendix 6, item 20, page 50.

B. ESSENTIAL SECURITY

i. ESSENTIAL SECURITY STANDARD: CUSTOMARY OR TREATY STANDARD?

The first analysis which is necessary before assessing allegations based on the protection of the host State's essential security interest is the applicable standard. In construing the specific terms of the BIT the adjudicator must also take into account the connection that these terms may have with customary international law plays. The principal approach in investment treaty arbitration has been the consolidation of the treaty standard with the customary law standard.[109] Another interpretative method is assuming that the relevant treaty includes a unique standard agreed by the Contracting States, which could then imply a higher or lower threshold than the customary standard.

Article 6(2) of the BIT reads:

"Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures that are necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

THE RESPONDENT: The Tribunal should apply the Treaty standard of the "essential security interests."

- ***Lex specialis*:** The Treaty is the first source (*lex specialis*) the Tribunal must refer to as the claims and defenses submitted by the Parties in this proceeding derive from the BIT.[110] The BIT provides for an autonomous standard, which contains its own concepts of "necessity" or "essential security interests." Only if there has been a breach of a treaty obligation and the treaty exception contained in article 6(2) does not save that breach, then and only then can the adjudicator analyse whether under customary law (Article 25 of the ILC Articles) can the host State be exempt of international responsibility.

"*Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.*"[111]

- **Self-judging standard:** The standard contained in the BIT is to be auto-interpreted by the host State. Both concepts of "measures that are necessary"[112] and "**its own** essential

[109] Jürgen Kurtz: *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, Jean Monet Working Paper No. 2008/6, p. 7.
[110] *LG&E v. Argentine Republic*, ICSID ARB/02/1 (Decision on Liability), para. 206.
[111] *CMS v. Argentine Republic*, ICSID ARB/01/8, (Annulment), para. 129.
[112] Article 6(2) BIT.

security interest" reflect the intention of the Contracting Parties to the BIT to grant deference to the State when invoking this exception.[113]

- **Treaty standard in Article 6 BIT**:
  - Necessary measures;
  - For the maintenance or restoration of international peace or security, or;
  - The protection of its own essential security interests.

THE CLAIMANT: The Tribunal should apply the customary standard of the essential security interests.

- **The origin of the standard:** The essential security standard contained in the BIT is inseparable from the customary law standard insofar as the definition of necessity and the requirements for the application of the exception have been defined and developed under customary international law.[114]

- **Not Self-judging standard**: Article 6 (2) BIT is not a self-judgment clause.[115] The Contracting States did not grant one party unilateral capacity to evade its international responsibilities. If they would have done this the clause would be rendered inoperative as the host State could raise this defence always alleging state of necessity. Therefore, the exemption must be narrowly construed and the Tribunal may not rely on the host State's judgment of "necessity."[116] All of these are objective requirements to be assessed by the Tribunal.

- **Customary standard is found in Article 25 ILC Articles:**
  - "grave and imminent peril;"[117]
  - The measure adopted by the host State must be the "only way" available;[118]
  - The host State must not have 'contributed to the situation of necessity.'[119]

ii. SUBSUMPTION OF THE FACTS IN THE STANDARD

THE RESPONDENT:

[113] The wording of Article 6(2) BIT —"**its own** essential security interest" —could be construed as a self-judging clause similar to the one found in Article XXI GATT which provides that WTO members are not prevented from "taking any action **which it considers necessary** for the protection of its essential security interests."
[114] *Sempra v. Argentine Republic,* ICSID ARB/02/16 (Award), para. 376; *Enron v. Argentine Republic,* ICSID ARB/01/3 (Award), para. 333; See *Report of the Study Group of the International Law Commission, Fragmentation of International Law : Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/Cn.4/L.682 (April 4, 2006), para. 102; *Case concerning Oil Platforms (Iran v. USA)* 2003 ICJ No. 90.
[115] The wording of Article 6 (2) BIT is almost identical to Article XI of the Argentine-US 1991 BIT, which has been qualified by ICSID Tribunal as not self-judging; See A. Newcombe/L. Paradell: *Law and Practice of Investment Treaties. Standards of Treatment*, Kluwer Law International, 2009, p. 492-493.
[116] See R. Dolzer/C. Schreuer: *Principles of International Investment Law*, OUP, 2012, p. 184.
[117] Article 25(1)(a) ILC Articles; *Gabčíkovo–Nagymaros Dams Project Case,* 1997 ICJ 7, 40.
[118] Article 25(1)(a) ILC Articles; *CMS v. Argentine Republic*, ICSID ARB/01/8 (Award), paras. 323-324.
[119] Article 25(2)(b) ILC Articles; *CMS v. Argentine Republic*, ICSID ARB/01/8 (Award), paras. 328-329; *Enron v. Argentine Republic,* ICSID ARB/01/3 (Award), paras. 294 *et seq*; *Sempra v. Argentine Republic,* ICSID ARB/02/16 (Award), paras. 333 *et seq*.

- Respondent adopted a "**necessary measure:"** The SRA was a condition for the US$150 billion bailout from the IMF,[120] which was in turn absolutely necessary to face the financial crisis, avoiding default.

- In order to protect its **'essential security interests**:' "Essential security interests" is not a general and abstract defined concept. Taking into account a set of conditions in which a State remains, the assessment of its "essential security interests" has to be done on a case-by-case basis.

"States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order"[121]

- In the present case an economic crisis can affect essential security interest.[122] The economic and financial stability is necessary to fulfil obligations towards citizens and foreigners. Without the bailout, Dagobah defaults on payments; it loses the market's confidence, which in turn exacerbates the situation. This can generate political instability and affect Dagobah's national security.[123]

THE CLAIMANT:

- There was no **"grave and imminent peril"** due to the economic crisis: The circumstances required to qualify as a state of emergency under customary international law are very strict must threaten. Only situation in which "the very existence of the State and its independence"[124] can constitute and exemption of international responsibility. Economic crisis is not a "grave and imminent peril" which can exclude international responsibility.[125]

- The SRA was not the **'only way'** available: In order to plead the necessity defence the State's action must be the only way a state can safeguard its interests.[126] Dagobah could have renegotiated the debts in more favourable conditions. Dagobah had other means available to reduce its debt in the mid/long term like reducing public expenditures or carry out privatization of public services.

- Dagobah is internationally responsible as it **contributed to the situation of necessity**. Dagobah incurred in negligent government policies: heavy borrowing, budget deficit and

[120] Uncontested Facts, para. 16.
[121] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, (Award), para. 175.
[122] *LG&E v. Argentine Republic*, ICSID ARB/02/1 (Decision on Liability), para. 251; *CMS v. Argentine Republic*, ICSID ARB/01/8 (Award), para. 319.
[123] See Preamble of the SRA.
[124] *Sempra v. Argentine Republic,* ICSID ARB/02/16 (Award), para. 348.
[125] See *CMS v. Argentine Republic*, ICSID ARB/01/8 (Award), para. 355; *Enron v. Argentine Republic,* ICSID ARB/01/3 (Award), para. 307.
[126] *CMS v. Argentine Republic*, ICSID ARB/01/8 (Award), para. 323.

massive tax evasion.[127] Dagobah's strict austerity measures prevented sufficient economic recovery after the 2001 crisis.

- In any event, under Article 27 of the ILC Articles invocation of any circumstance precluding wrongfulness is without prejudice to "the question of compensation for any material loss caused by the act in question." Therefore, Claimant is entitled to compensation as a consequence of the SRA.

[127] Uncontested Facts, para. 3 and 14; Appendix 4.