MEMORIAL
ON BEHALF OF THE CLAIMANT

CALRISSIAN & CO., INC.

THE FEDERAL REPUBLIC OF DAGOBAH

CLAIMANT

RESPONDENT
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<td>Art.</td>
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<td>2.</td>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>3.</td>
<td>CAC</td>
<td>Collective Action Clause</td>
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<td>4.</td>
<td>Calrissian</td>
<td>Calrissian &amp; Co., Inc.</td>
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<td>CD BIT</td>
<td>Agreement between the Corellian Republic and the Federal Republic of Dagobah for the promotion and protection of investments</td>
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<td>6.</td>
<td>CIL</td>
<td>Customary international law</td>
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<td>Dagobah</td>
<td>The Federal Republic of Dagobah</td>
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<td>e.g.</td>
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<td>9.</td>
<td>FET</td>
<td>Fair and equitable treatment</td>
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<td>10.</td>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>11.</td>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td><strong>12.</strong></td>
<td>ILC</td>
<td>International Law Commission</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>NAFTA</td>
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<td><strong>17.</strong></td>
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<td><strong>18.</strong></td>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>PCA Award</td>
<td>Award of the PCA Arbitral Tribunal dated 29 April 2003</td>
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<td><strong>20.</strong></td>
<td>SCC</td>
<td>The Arbitration Institute of the Stockholm Chamber of Commerce</td>
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<td><strong>21.</strong></td>
<td>SRA</td>
<td>Sovereign Debt Restructuring Act No. 45/12 of the Federal Republic of Dagobah</td>
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21. Thirlway  

22. Tudor  

23. UNCTAD (FET)  

24. Valasek & Dumberry  

25. Waibel  

26. Wendlandt  

27. Yannaca-Small  

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<td>5.</td>
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STATEMENT OF FACTS

Parties to the dispute

1. The Claimant, Calrissian & Co., Inc. is a Corellian hedge fund that holds a number of sovereign bonds issued by the Respondent.

2. The Respondent, the Federal Republic of Dagobah, is an emerging market with a relatively stable economy until the end of the 1980s.

The Corellia-Dagobah BIT

3. In 1992 Corellia and Dagobah entered into the Agreement for the promotion and protection of investments (CD BIT). The CD BIT contained standard clauses of protection such as national treatment, fair and equitable treatment, full protection and security and protection against expropriation.

The First Debt Restructuring

4. In 2001, after a decade of heavy borrowing on international financial markets, combined with high government budget deficits, partly caused by massive tax evasion, Dagobah was faced with an unsustainable debt burden and descended into a two-and-a-half year long economic crisis.

5. On 7 May 2001 Dagobah’s inability to meet its debt obligations led to government enacting a sovereign debt restructuring and offering bondholders to exchange their sovereign bonds for new bonds with face value reduced by 43%. The bondholders were provided with a vague possibility of cash buybacks with assistance of the World Bank’s Debt Restructuring Facility. The restructuring caused major losses to bondholders.

6. In order to save at least a part of their investments, Corellian bondholders accepted the restructuring offer made by Dagobah and pursued no litigation proceedings against it.
After the default of 2001 Dagobah made representations as to its economic stability, which induced the Claimant to acquire a new set of sovereign bonds issued by Dagobah.

**The PCA decision**

7. Concerned about the Dagobah’s restructuring, Corellia initiated diplomatic negotiations with the Respondent to ensure that its nationals investing in Dagobah’s economy, including bondholders, were – definitely and without a doubt – protected by the CD BIT.

8. Dagobah resisted accepting this evident fact and Corellia appealed to the Permanent Court of Arbitration in accordance with Art. 7 of the CD BIT to receive an official confirmation that sovereign bonds were investments under the CD BIT.

9. On 29 April 2003, the PCA Arbitral Tribunal issued a final and binding award. It decided that sovereign bonds were investments within the definition of the CD BIT and that Corellian bondholders were entitled to the protection granted in the CD BIT. The PCA Award has never been challenged by Dagobah.

**The Second Debt Restructuring**

10. At the beginning of 2010, a new recession hit Dagobah. The causes of the second crisis were similar to those of the first one: expansive borrowing policy, no adequate reforms on the revenue side, unaddressed tax evasion.

11. The IMF suggested a number of measures to help Dagobah reduce its debt-to-GDP ratio but the only measure taken by Dagobah was to restructure its sovereign bonds.

12. On 28 May 2012, Dagobah enacted the Sovereign Restructuring Act (SRA) applicable to all bonds governed by Dagobah’s law. The SRA stated that if a qualified majority of the owners of 75% of the aggregate nominal value of all outstanding bonds governed by domestic law agreed to modify the terms of the bonds, this decision would bind all the remaining bondholders. Bondholders were never invited to take part in the preparation of the SRA. On 29 November 2012, Dagobah offered bondholders to exchange their bonds for new ones worth approximately 70% of the net value of the bonds. As more than 85% of bondholders
accepted the offer, all bonds were exchanged. The exchange was extended to the holdout creditors, including the Claimant.

13. As the result of the restructuring, the value of the Claimant’s investment dropped by 30%. Attempts to settle amicably the dispute between Calrissian and Dagobah were unsuccessful and therefore Calrissian commenced the present proceedings.
Arguments on Jurisdiction

Issue I. The Tribunal’s jurisdiction over the dispute concerning the sovereign bonds owned by the Claimant under the CD BIT

14. The Claimant submits that the Tribunal has jurisdiction Ratione Materie (I) as the Claimant made an investment in terms of the CD BIT (A) and the territorial link requirement (if such applies) is satisfied (B). The Tribunal also has jurisdiction Ratione Personae and Ratione Voluntatis (II).

I. Jurisdiction Ratione Materiae

A. Sovereign Bonds constitute an investment according to the wording of CD BIT

15. The question that arises out of case law and commentaries is whether definitions in a BIT should be applied directly or they should be interpreted in the light of a more general concept of investment. The main approaches are (i) the subjective one, (ii) the objective one and (iii) the “inherent meaning of investment” concept developed by the Romak tribunal.

16. The subjective approach concentrates on the definition of investment in the respective BIT (i), the objective approach seeks to define some particular criteria which qualify an asset as investment (ii), the “inherent meaning of investment” approach suggests that the term has an objective meaning irrespective of the tribunal settling the dispute (iii).

17. However, only the subjective approach is applicable in the present case. According to this approach, the sovereign bonds purchased by the Claimant constitute investments.

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1 Heiskanen, p. 59, Harb, p. 12.
2 Ibid.
(i) Sovereign bonds under the “subjective approach”

18. For tribunals other than ICSID tribunals there is only one level of determination of jurisdiction. Within this level the meaning of the term “investment” is analyzed only with respect to the applicable investment agreement. However, even some ICSID tribunals incline to direct examination and independent application of BITs, as in Middle East Cement.

19. The prevailing role of the BIT over objective features of investment was declared by many arbitral tribunals. The tribunal in Petrobart stated that investment must be “interpreted in the context of each particular treaty in which the term is used”. Similarly the Annulment Committee in MHS found

“the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction”.

20. The subjective approach is not only the most universal one, but also the only applicable to define the investments within the CD BIT, as it respects the broad and non-exhaustive definition of “investment” enshrined in the agreement.

21. Firstly, as stated in the PCA Award, the term “investment” is defined “in broad terms”, adopting such comprehensive expressions as “every asset… that has the characteristics of an investment”, “forms that an investment may take include”. It is therefore apparent that Art. 1 of the CD BIT adopts a non-exhaustive list of mere examples of investment assets.

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4 Dugan, p. 281.
5 Yannaca-Small, p. 250; Dolzer & Schreuer, p. 61; Heiskanen, p. 59; Scheiternig, p. 30.
6 Dugan, p. 281; Middle East Cement (Award), paras 135-138; Ibid (Jurisdiction), paras. 71-73.
7 Inmaris, para. 130; CMS (Annulment), para. 71; Biwater, para. 312; Ambiente, para. 46.
8 Petrobart, p. 69.
9 MHS, para. 74.
10 PCA Award (Appendix 2).
11 CD BIT, Art. 1.
12 Ibid.
22. Secondly, Art. 1 of the CD BIT provides not a rigorous but a very vague test for an asset to be qualified as an investment. The asset should have

“the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.

23. The listed characteristics appear to be mere examples of those possibly present in different types of investments.

24. Nothing prevents the sovereign bonds from being qualified as investments under this vague test.

25. Indeed, the required “commitment of capital” is present as the purchase price was paid by the Claimant and funds were used for the benefit of the Respondent. This is enough to show that a transaction with financial instruments constitutes a commitment of capital into host state’s economy (see paras. 55-58 below).

26. The “expectation of gain or profit” requirement is satisfied in sovereign bonds as a type of investment since the interest, received by the Claimant, was listed by the Parties among other types of “returns” in the definition of this term in Art. 1 of the CD BIT.

27. As to the “assumption of risk”, the sovereign bond default risk is sometimes not accepted as an investment risk by scholars. This however does not prevent the states from including bonds as investments in their BITs among other debt instruments. For example, the USA Model BIT 2012 contains the three-requirement test similar to the one in CD BIT and at the same time expressly names bonds as investment. In this case it would thus be unreasonable to cast doubt on presence of the risk-criterion in the bonds subject to the proceedings.

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13 Ibid.
14 CD BIT, Art. 1.
15 For similar reasoning see Fedax, para. 41, Abaclat, paras. 374, 378.
17 USA Model BIT 2012, Art. 1.
28. Therefore, even if construed strictly, the three requirements to investment for the purposes of application of Art. 1 of the CD BIT are met by the sovereign bonds purchased by the Claimant.

29. Thirdly, among examples of investments Art. 1 also lists:

   “other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges”  

30. This broad provision also provides for a non-exhaustive definition of investment under the CD BIT.

31. Fourthly, in accordance with the case law below an asset is not deprived of BIT protection, even if it is not expressly mentioned in the treaty’s non-exhaustive definition of investment.

32. In Jan de Nul, the dredging operation, although not expressly or implicitly mentioned in the BIT, was considered as investment due to a broad definition of investment (“any kind of assets and any direct or indirect contribution in cash, in kind or in services, …”  

33. Similarly, in Bayindir, the training of personnel and provision of equipment, which were not apparently construed from agreement, were deemed to fall within the “every type of asset”-definition in the BIT.

34. It follows from the above that nothing prevents the sovereign bonds from being investment according to the non-exhaustive provisions in the CD BIT. Parties obviously did not intend to limit the definition in the CD BIT to the examples given in Art. 1, nor did they suggest any strict requirements to the definition of investment which the sovereign bonds would not meet.

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18 CD BIT, Art. 1.
19 Jan de Nul, paras. 97-106.
20 Bayindir, paras. 115-121.
(ii) The “objective” approach should be rejected

35. The objective approach seeks to define general and independent criteria of investment that tribunals may apply to determine whether a particular asset qualifies as an investment, irrespective of a particular BIT. BITs therefore should be interpreted in the light of such independent meaning of the term investment.\(^{21}\) In ICSID case law, for instance, a “double keyhole approach”\(^{22}\) or a “double-barreled test”\(^{23}\) was developed, where the investment should fulfill the requirements of Art. 25 of the Washington Convention\(^{24}\) and the requirements of the BIT as well.

36. ICSID Tribunals suggested some combinations of typical features of investment. The most famous are those cited is \textit{Salini}, which accepted four basic elements of investment: commitment of capital, certain duration, participation in risks, contribution to the economic development of the host state.\(^{25}\) There is one more element that is often mentioned – regularity of profit and return.\(^{26}\)

37. However, this approach and the \textit{Salini}-test are inapplicable in the present dispute for the following reasons.

38. Firstly, the “objective” approach has an obvious ICSID-character. Other arbitration institutions do not have to filter the notion of investment in the BIT through some autonomous mechanism of investment qualification.\(^{27}\) Therefore, the dual approach is inapplicable in other institutions and even contrary to their rules.\(^{28}\)

\(^{21}\) Heiskanen, p. 59, Scheitering, p. 309.  
\(^{22}\) Dolzer & Schreuer, p. 61, Harb, p. 13.  
\(^{23}\) MHS, para. 55, Yanacca-Small, p. 249.  
\(^{24}\) ICSID Convention, Art. 25.  
\(^{25}\) Salini, para. 52.  
\(^{26}\) Schreuer, p. 140, Fedax, para. 43, Helnan, para. 77.  
\(^{27}\) Yanacca-Small, p. 249.  
\(^{28}\) Ibid, Dungan, p. 281.
39. Secondly, the discussed approach should be rejected as one “being controversial and having been applied by tribunals in varying manners and degrees”. To prove this statement one has only to compare the sets of features mentioned in e.g. Salini (4 criteria), Fedax (5 criteria), Phoenix (6 criteria), Saba Fakes (3 criteria). Thus the existence of an objective definition of investment appears to be doubtful.

40. Thirdly, tribunals themselves do not recognize Salini-criteria as constitutive features of investment as originally suggested by Schreuer. These hallmarks were not considered a “formal prerequisite for the finding that a transaction constitutes an investment.” Or similarly, they are not “a set of mandatory legal requirements”, but “benchmarks or yardsticks to help a tribunal”.

41. Therefore, the “objective” approach is absolutely inapplicable to the dispute at hand. Only the definition of investment in the BIT has a constitutive character.

(iii) The “inherent meaning of investment” concept should be rejected

42. The concept argues that the term investment has an objective meaning in itself irrespective of the tribunal arbitrating the dispute. According to this meaning an investment is a “contribution that extends over a certain period of time and that involves some risk”.

43. However, such approach neglects the definition enshrined in the BIT which may differ from the “inherent meaning”. It is the definition in the BIT which reveals the real intention of the

29 Abaclat, para 364.
30 Salini, Ibid.
31 Fedax, Ibid.
32 Phoenix, para. 114.
33 Saba Fakes, para. 110.
34 Schreuer, p. 140.
35 CSOB, para. 90.
36 Phillip Morris, para. 206.
37 RSM Production Corporation, para. 241. See also M.C.I. Power Group, para. 165.
39 Romak, Ibid.
state parties and should play the crucial role in defining the investment during the arbitral proceedings.⁴₀

44. To repeat the words of the Annulment Committee in *MHS*, the tribunal’s failure to consider the BIT definition of investment is “a gross error”.⁴¹ The application of the “inherent meaning of investment” concept would deprive the CD BIT definition of investment of its meaning.

45. Consequently, the sovereign bonds issued by Dagobah constitute an investment according to a broad and non-exhaustive definition chosen by the State Parties for Art. 1 of the CD BIT.

**B. Territorial link requirement is satisfied**

46. During the PCA proceedings⁴² and in the Answer to the Request for Arbitration⁴³ the Respondent argued that the lack of territorial link between the sovereign bonds and the host state should bar the Tribunal’s jurisdiction. However, these contentions are baseless since there is no territoriality requirement for an investment in the BIT (i). In any case, the bonds at hand demonstrate a significant territorial link with Dagobah (ii).

47. (i) Many bilateral and multilateral investment treaties contain a definition of investment with a requirement of the investment being made in the territory of the host State, while other treaties do not have such a strict wording.⁴⁴ The same requirement may also be enshrined in the provision on the treaty’s scope of application.⁴⁵ However, the CD BIT does not contain a provision on the scope of application and does not mention any territoriality requirement in the definition of investment.

48. Previous tribunals decided to decline jurisdiction on the ground of absence of the territorial nexus to the host state, however in these disputes an obvious breach of an unambiguous territoriality requirements in investment agreements was present.

⁴⁰ CMS, para. 71, Biwater, para. 312, Petrobart, p. 69.
⁴¹ MHS, para. 74.
⁴² Uncontested Facts, para. 10.
⁴³ Answer to the Request for Arbitration (Appendix 6), para. 5.
⁴⁴ Knahr, p. 42.
49. For instance, in *Canadian Cattlemen* the tribunal declined its jurisdiction as there was no investment according to Art. 1101 of NAFTA which contains a strict territoriality requirement as to scope and coverage of the treaty. This article was deemed to be “a provision of overriding effect”.\(^{46}\) A similar decision was rendered by the arbitral tribunal in e.g. *Bayview\(^{47}\)* and in *Grand River*,\(^{48}\) where the tribunal also deemed this provision to operate as “gateway” to NAFTA arbitration.\(^ {49}\)

50. However, no provision in the CD BIT can serve as “overriding” for the whole BIT or a “gateway” to arbitration. The *Romak* tribunal stresses that neither references to “territoriality” in special BIT provisions nor the wording of the preamble can substitute a clear territoriality criterion in the BIT’s definition of investment, which is the only imposing an independent requirement “for purposes of establishing the existence of an “investment”.”\(^ {50}\)

51. In case of absence of a territoriality requirement in a BIT the *Romak* tribunal provided for a clear and fair approach:

> “The Tribunal considers that, unless contracting States have made “territoriality” an express pre-requisite for treaty coverage (which is not the case in the BIT), references to “territory” normally refer to the benefit that the host State expects to derive from the investment.”\(^ {51}\)

52. The CD BIT contains no territoriality requirement. Moreover, Dagobah clearly derived benefit from bond issuance since the relevant funds were used for budgetary purposes.\(^ {52}\) Thus, the Claimant’s territorial link argument shall be unsuccessful.

\(^{46}\) *Canadian Cattlemen*, para. 159.  
\(^{47}\) *Bayview*, para. 122.  
\(^{48}\) *Grand River*, para. 76.  
\(^{49}\) Ibid.  
\(^{50}\) *Romak* para. 237.  
\(^{51}\) *Romak*, Ibid.  
\(^{52}\) *Procedural Order №* 3, para. 30.
53. (ii) Alternatively, in case the Tribunal considers the territorial nexus to be relevant, it is present in sovereign bonds issued by the Respondent because of the special character of financial instruments as investments.

54. To start with, there are two basic categories of investment: equity and debt, and each of them has its distinctive features.\(^{53}\) Sovereign bonds constitute debt investments as any other type of financial instruments. According to case law, one of the important and unique features of financial instruments as investments is their specific connection to the host state.

55. Firstly, the fact that the transaction itself may take place in another state on secondary market does not deprive it of the connection with the issuing state. Crucial in the case of financial instruments is the place where the acquired funds are used. This was confirmed by the PCA decision as to sovereign bonds\(^ {54}\) and by other arbitral tribunals which settled the investment disputes concerning financial instruments.

56. According to the *Fedax* reasoning:

   “It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere… The important question is whether the funds made available are utilized by the beneficiary of the credit…”\(^{55}\)

57. Similarly, the *Abaclat* tribunal stated that there is no doubt that the funds arisen through the bonds “served to finance Argentina’s economic development”\(^ {56}\) as:

   “With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred”\(^ {57}\)

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\(^{53}\) Salacuse (2), p. 3.

\(^{54}\) PCA Award, (Appendix 2).

\(^{55}\) Fedax, para. 41.

\(^{56}\) Abaclat, para. 378.

\(^{57}\) Abaclat, para. 374.
58. The sovereign bonds purchased by the Claimant provided the state of Dagobah with additional funds which were made available to it and were used for its budgetary purposes. Therefore, in the case of financial instruments and Dagobah’s sovereign bonds in particular the place of purchase does not play any substantial role.

59. Secondly, taking the abovementioned into consideration, there is no distinction between the original purchase of bonds from the issuer and the purchase on the secondary market.

60. In *Abaclat*, for instance, the sovereign bonds were divided into security entitlements to be traded on the secondary market. But the tribunal did not take this “technical nuances” into consideration, as bonds and their entitlements were recognized as parts of “one and the same economic operation” which make sense only together.

61. It was similarly mentioned by the tribunal in *Ambiente*:

   “To seek to split up bonds and security entitlements into different, only loosely and indirectly connected operations would ignore the economic realities, and the very function, of the bond issuing process.”

62. The mentioned division into bonds and securities is not the case in the present dispute, so the difference between the original and the secondary-market acquisition of sovereign bonds here becomes hardly noticeable and the transactions themselves hardly separable.

63. Thirdly, the investment in the form of sovereign bonds should be located in the host state due to the seat of the sovereign debt. As highlighted by Schreuer:

   “In cases involving financial obligations the locus of the investment can often be determined by reference to debtor and its location. In this way financial instruments issued by states have their situs in that State.”

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58 Procedural Order No 3, question 30.
59 *Abaclat*, para. 361.
60 *Ambiente*, para. 425.
61 Procedural Order No 2, question 10.
62 Schreuer, p. 140, para. 198.
64. Therefore, the sovereign bonds purchased by the Claimant have their *situs* in Dagobah as the debtor-state. The territorial link requirement is thus apparently fulfilled.

65. In addition, rejecting the jurisdiction over sovereign bonds for the lack of territorial link would contradict the dispute settlement practice concerning shares. Bonds and shares are both a securitized capital and are both traded on secondary market. Especially the position of indirect shareholders, who own their investment through „several corporate layers“, is similar to one of sovereign bondholders.

66. Arbitral tribunals tend not to reject claims concerning the indirect shareholders. Therefore, bondholders should not be treated less preferable than indirect shareholders, whose investment also has no immediate connection to the host state.

67. To sum up, “not all investment activities are physically located in the host State”. In particular, financial instruments as a special type of investment. There is no convincing territoriality requirement in the CD BIT and thus no possibility to bar the Tribunal’s jurisdiction on such grounds. But if the Tribunal finds the territorial link essential, sovereign bonds will easily fulfill this requirement by virtue of the unique nature of financial instruments as investments.

68. It follows from the above that the Tribunal has jurisdiction Ratione Materiae over the sovereign bonds issued by Dagobah and purchased by the Claimant. There is no reason to reject the jurisdiction on any grounds – neither because of existence of some universal definition of investment nor because of absence of a territorial link to the host state.

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63 Scheiternig, p. 315.
64 Scheiternig, p. 315.
65 Valasek, Dumberry pp. 51-55, Azurix (Jurisdiction), para.74.
66 Schreuer, para. 197.
67 Ibid, Scheiternig, p. 323.
II. Jurisdiction Ratione Personae and Jurisdiction Ratione Voluntatis

A. Jurisdiction Ratione Personae

69. Calrissian is an investor according to the definition in the CD BIT, which states that an “investor of a Party” is “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”. 68

70. Firstly, the Claimant is the “national of a Party” being a Corellian hedge fund. 69 Therefore, Calrissian fulfills the incorporation criterion for determination of the nationality of legal entities contained in Art. 1 of the CD BIT.

71. Secondly, the Claimant “has made…an investment” (see paras. 19-34 above) and this investment was made “in the territory of the other Party” (see paras. 46-67 above).

72. Consequently, the Claimant is a foreign investor according to the wording of the CD BIT and therefore the Tribunal has jurisdiction Ratione Personae.

B. Jurisdiction Ratione Voluntatis

73. The Tribunal should also have jurisdiction Ratione Voluntatis as the consent of both parties to the arbitration is present. The Claimant consented by filing the Request for Arbitration to the SCC and the Respondent made it explicitly by concluding the BIT with Corellia and granting the jurisdiction over disputes with foreign investors to either ICSID, or its Additional Facility, or to the SCC. 70

74. The procedural requirement of making an effort to amicable settlement of the dispute prior to the arbitral proceedings has also been completed, although the negotiations turned out to be unsuccessful. 71

68 CD BIT, Art. 1.
69 Uncontested Facts, para. 22.
70 CD BIT, Art. 8.
71 Procedural Order No 2, para. 25.
75. Therefore, the both Parties to the dispute expressly consented to the arbitration under the aegis of SCC.
Issue II. The effect of the PCA Arbitral Tribunal’s decision on the
jurisdiction of the Tribunal in the present case

76. The Claimant submits that the conclusions of the PCA Arbitral Tribunal are binding on the
present Tribunal since the PCA Award constitutes a binding decision following the CD BIT’s
text (I), the PCA Award is consistent with the purpose of the CD BIT (II), and the
circumstances of the PCA dispute and the case at hand do not differ substantially (III).

I. The PCA Award constitutes a binding decision

77. By adding Article 7(2) to the CD BIT the States delegated to a state-to-state tribunal an
authority to interpret the provisions of the CD BIT. Following the wording of Article 7(2) a
decision of an arbitral tribunal (including the PCA Arbitral Tribunal’s award) shall be binding.

78. It is a common practice that such clauses in investment treaties do not contain limitations on
their binding effect exclusively to a given dispute.72 There are three main approaches to
construe the clause73:

(i) The narrow approach: state parties are bound by an award only in the given dispute.

(ii) The intermediate approach: the effect of a state-to-state tribunal’s award covers only state
parties, however, not limiting its force by a single dispute.

(iii) The broad approach: an award is binding upon state parties, investors and any emerging
investor-state tribunal.

79. The narrow and intermediate approaches are impractical. The intermediate construction may
contribute to the inequality of states and investors. Indeed, state parties would have to
conform to the interpretation of a state-to-state tribunal whereas investors and an investor-

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72 Roberts, p. 59.
73 Roberts, p. 59-60.
state tribunal would not. Furthermore, the narrow approach means that there is potentially no practical use to the state-to-state dispute resolution clause.

80. The Claimant submits that expressly formulating the status of an arbitral award as “binding” the state parties intended to extend its effect on any further investor-state arbitration. Indeed, "to promote certainty and consistency, state-to-state awards should be considered binding on the treaty parties and future investor-state tribunals". If Corellia and Dagobah had desired to impose any restrictions on a decision of an arbitral tribunal then this desire would have been expressly stated in the text of the CD BIT. Any other interpretation of the dispute resolution mechanism at hand would make Article 7(2) useless and impractical.

81. Broches stressed that investor-state tribunals shall be

“bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration”.

82. It shall be noted that the timing of the PCA Award does not preclude its binding force on the present Tribunal. In accordance with case law and doctrine, the applicability of a BIT’s interpretation and a bona-fide intentions of states may also be questioned when an interpretative decision was issued during or after the investor-state proceedings.

83. The PCA Award however was issued long before the present case has been initiated. Accordingly, there may be no doubt that neither of the Parties to the CD BIT had intended to intervene with the course of the arbitration proceedings or acted in bad faith.

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74 Roberts, p. 60.
75 Roberts, p. 60.
76 Roberts, p. 29.
77 Broches, p. 377.
78 Pope & Talbot, paras. 11-16.
II. The PCA Award is consistent with the purpose of the CD BIT

84. Indeed, acknowledgment of the fact that sovereign bonds are investments under the BIT did not contradict to the purposes of the BIT and caused no harm to the investors. On the contrary, the PCA Award ensured the protection of sovereign bonds as investments and thus contributed to creation of favorable conditions for investors,\textsuperscript{80} stimulation of the flow of private capital\textsuperscript{81} and establishment of a stable framework for investment.\textsuperscript{82}

85. Any interpretation of the BIT’s provisions made in pursuance of the above mentioned objectives shall be deemed reasonable and legitimate.\textsuperscript{83}

III. Circumstances of the PCA dispute and the case at hand do not differ substantially

86. Albeit the PCA Award was issued before the current economic crisis in Dagobah, its interpretation of the notion of investment under the BIT shall still be deemed relevant. There are no grounds to assume that the PCA Award needs reconsideration as the situation in Dagobah now is almost in every aspect similar to the previous sovereign default.

87. Heavy borrowing, high government budget deficit, unsustainable debt burden affected the economy of Dagobah in 2001 and in 2008. Moreover, up to the onset of the second economic crisis Dagobah had the same unresolved problems, e.g. massive tax evasion.\textsuperscript{84}

88. In both cases these factors led to sovereign debt restructurings and the exchange of investors’ bonds. Thus, the economic circumstances surrounding the said disputes cannot affect the interpretive force and binding effect of the PCA Award.

89. The basic nature of the sovereign bonds subject to Dagobah’s present restructurings is in general the same as of the bonds that were subject matter of the PCA Award. Nothing affected or changed the legal nature of sovereign bonds as investments. Moreover, the PCA

\textsuperscript{80} Article 2 of the CD BIT.
\textsuperscript{81} CD BIT, Preamble.
\textsuperscript{82} CD BIT, Preamble.
\textsuperscript{83} SGS v. Philippines, para 116.
\textsuperscript{84} The Global Financial Herald article (Appendix 4), p. 22.
Tribunal in its reasoning was guided, inter alia, by three criteria of an investment (the commitment of capital, the expectation of gain, the assumption of risk)\(^8\) and the sovereign bonds did not cease to meet them after being restructured.

90. In sum, the conclusions of the PCA Award are binding on the present Tribunal since this was the intention of the parties to the CD BIT and since the PCA Award was rendered in a situation similar to the present dispute.

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\(^8\) The PCA Award (Appendix 2), D(i).
Issue III. The Tribunal’s ability to rule on the asserted claims in light of the forum selection clause contained in the sovereign bonds

91. The Claimant submits that the present Tribunal should rule on the asserted claims and that the forum selection clause of the bonds should be neglected since Calrissian’s claims are based on the CD BIT and not on contract (I). Furthermore, the Respondent breached the CD BIT by exercising its sovereign power (II).

I. Calrissian’s claims are based on the CD BIT

92. The below case law suggests that the existence of a contract forum selection clause does not preclude the investor from asserting a BIT claim under the BIT dispute settlement mechanism. As pointed out in *Vivendi*, \(^{86}\)

> “[w]here ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract … cannot operate as a bar to the application of the treaty standard” \(^{87}\)

93. Similarly, the *Abaclat* tribunal stated that the contractual forum selection clauses applied only to claims based on contractual rights and did not affect treaty claims. The claims in *Abaclat* were based on alleged breaches by Argentina of the BIT and not on contractual rights under the bond documents. Therefore, the forum selection clauses in the bonds were found “irrelevant” for the purposes of investment arbitration. \(^{88}\)

94. In this regard, the Claimant submits that its claims are treaty claims since it seeks compensation for the breach of the CD BIT standard. Indeed, the enactment of the SRA and the subsequent bond restructuring by the Respondent amount to the violation of the FET standard under the CD BIT as demonstrated below in Issue 4 and Issue 5.

\(^{86}\) Wendlandt, p.536.

\(^{87}\) Vivendi, para. 101.

\(^{88}\) Abaclat, para. 495.
95. In other words, the actions of Dagobah constitute a breach of its international obligations under the CD BIT. Although the bonds as commercial contracts were breached as well, the Claimant invokes in these proceedings the violation of a BIT standard. Hence, the dispute should be settled pursuant to the CD BIT mechanism.

II. The Respondent breached the CD BIT by exercising its sovereign power

96. It has been suggested that in order to violate a BIT the breach of an investment contract should result out of behavior going beyond that which an ordinary contracting party could adopt. To take the words of the Impregilo tribunal,

“[o]nly the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT”.

97. In case the Tribunal accepts the above view, the Claimant submits that the Respondent exercised its sovereign power. The Respondent did so to enact the SRA introducing a new restructuring mechanism and reduce its payment obligations towards the creditors. Indeed, no private contractual party can enact legislation to avoid its obligations.

98. The actions of Dagobah were very similar to those of Argentina in the course of its economic crisis in 2001. In respect of those actions, the Abaclat tribunal held that:

“[s]uch actions were based on a sovereign decision of Argentina outside of a contractual framework. Thus, Argentina’s actions were the expression of State power and not of rights or obligations Argentina had as a debtor under a specific contract”.

99. As the result, the claims in Abaclat were found to be treaty claims and the tribunal neglected the contractual forum selection. Similarly, the actions of Dagobah are sovereign as well and thus the Claimant asserted treaty claims.

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89 Impregilo, para.260, see also Joy Mining, para. 72, see also Schwebel, p. 431-432.
90 Abaclat, para. 325.
100. For the above reasons, the present dispute does not derive from the mere failure of Dagobah to perform the payment obligation under the sovereign bonds, but from the Respondent`s decision to intervene with its sovereign power. Therefore, Calrissian`s claims are treaty claims and it is the present Tribunal that should rule on them.
Arguments on Merits

Issue IV. The breach of the FET standard under the CD BIT by Respondent’s debt restructuring measures

I. General interpretation of the FET standard

101. The Claimant submits that the Respondent’s debt restructuring measures amounted to a violation of the FET standard contained in Art. 2(2) of the CD BIT. The provision reads as follows:

“Investments of each Party or of nationals of each Party shall at all times be accorded fair and equitable treatment…”\(^{91}\)

102. and may pose certain difficulty for interpretation due to its imprecision. The Claimant submits in this regard that the FET provision shall be interpreted in accordance with Art. 31 of the VCLT which is binding on Corellia and Dagobah,\(^ {92}\) i.e. “in accordance with the ordinary meaning to be given to the terms … and in the light of its object and purpose”\(^ {93}\)

103. Under the “ordinary meaning” approach the terms “fair” and “equitable” mean “just”, “even-handed”, “unbiased”, “legitimate”.\(^ {94}\) The object and purpose of the CD BIT as reflected in its preamble\(^ {95}\) indicates the Parties’ intention to “promote greater economic cooperation”, “stimulate the flow of private capital” and create “a stable framework for investment”.\(^ {96}\) In other words, the FET standard shall be understood in accordance with the VCLT as a treatment in an even-handed and just manner, with the aim to create favorable conditions for foreign investments.

\(^{91}\) CD BIT, Art. 2(2).
\(^{92}\) According the Procedural Order No. 2, question 7.
\(^{93}\) Art. 31(1) of the VCLT.
\(^{94}\) MTD, para 113, referring to the Concise Oxford Dictionary of Current English.
\(^{95}\) The BIT preamble was also used for the interpretation of the FET standard in Tecmed Award, paras. 155 and 156 and MTD, paras. 110-112.
\(^{96}\) CD BIT, Preamble (Appendix 1 to the Problem).
104. However, the “ordinary meaning” approach is not instructive enough due to the vagueness of the standard. The tribunal in Mondev suggested in this regard that “[a] judgment what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case”. But an investment tribunal cannot adopt its own voluntary standard and “must be disciplined by being based upon State practice and judicial or arbitral case law”.

105. In arbitral case law the FET standard was dealt with in terms of multiple fact patterns – i.e. situations where FET is deemed violated. These fact patterns include frustration of investor’s legitimate expectations, failure to ensure stable legal environment and procedural propriety, and bad faith. Although not binding, arbitral practice gives useful guidance to arbitrators and is usually applied by investment tribunals. Such approach ensures consistency and predictability of international investment law. Therefore, it seems appropriate and practicable to analyze the relevant case law to show that Dagobah failed to treat Calrissian fairly and equitably.

106. In light of the above, the Claimant submits that the Respondent’s conduct violated the FET standard as it failed to protect the investor’s legitimate expectations and provide a stable legal environment (II). In addition, Dagobah’s restructuring measures failed to meet the procedural propriety requirement (III) and were taken in bad faith (IV).

II. Protection of investor’s legitimate expectations and stability of legal environment

The FET standard is understood to include the protection of investor’s legitimate expectations. In this regard, it is submitted that the Respondent frustrated the Claimant’s legitimate expectations that the state would duly perform its obligations under the bonds (A) and maintain a stable legal framework for the investment (B).

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98 ADF, para. 184; see also Mondev, para. 119.
99 These concepts will be dealt with in detail in paras. 109-127 below.
100 Similar fact patterns were analyzed in terms of FET breach in Tecmed, para. 154; MTD, para. 115, Waste Management, para . 98.
101 Tecmed, para. 154; followed by MTD, para. 114, Diehl, p 359, Saluka, para. 302.
A. *Legitimate expectations created by bond issuance*

107. It is recognized that breach of an investment contract is at variance with FET. As noted by Christoph Schreuer,

“…a willful disregard by a government authority to abide by its contractual obligations, abuse of government authority to evade agreements with foreign investors … may well lead to a finding that the standard of fair and equitable treatment has been breached”.¹⁰²

108. This conclusion is supported by case law. For example, the tribunal in *Mondev* concluded that

“…a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 [containing the FET standard] and with contemporary standards of national and international law concerning governmental liability for contractual performance.”¹⁰³

109. The tribunal in *Noble Ventures* also found that the FET standard covers the obligation to abide by contracts.¹⁰⁴

110. In the present case, the acquisition of Dagobahian sovereign bonds by Calrissian represents an investment contract. Indeed, the bonds are the very instruments through which the investment has been made. Further, the investment contract has been breached by the Respondent since its actions ultimately amounted to refusal to pay the sums due under the contract. As a result, the face value of the investments decreased by approximately 30%.¹⁰⁵ Hence, the Respondent’s conduct disappointed the Claimant’s legitimate expectation created by the issuance of the bonds that Dagobah would respect its obligations. Indeed, finding otherwise would mean that a state may disregard its obligations with impunity simply stating that those contractual obligations did not create any legitimate expectations.

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¹⁰² Schreuer (FET), p. 380.
¹⁰³ Mondev, para. 134.
¹⁰⁴ Noble Ventures, para. 182.
¹⁰⁵ Uncontested Facts, para. 18.
111. Further, certain investment tribunals concluded that only a violation of an investment contract brought about by the employment of sovereign power would lead to violation of FET standard.\textsuperscript{106} The Claimant would like to note, however, that this was the very case in the matter at hand. As discussed above in paras. 98-101, Dagobah violated the investment contract by enacting the SRA and implementing the restructuring process – the actions that could be taken by a sovereign only and not by any private contractual party. Thus, the Respondent’s actions violated the FET standard.

\textbf{B. Legitimate expectations with respect to a stable legal framework}

112. The stable and predictable administrative and legislative framework is essential for an investor.\textsuperscript{107} The importance of consistency and stability of legal environment was stressed in \textit{Tecmed}:

\begin{quote}
“\textbf{The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments}”.\textsuperscript{108}
\end{quote}

113. Accordingly, drastic change of regulatory framework and failure to provide a stable legal regime for investment was held to violate the investor’s legitimate expectations. In \textit{CMS}, the investor’s decision to invest was based in part on the regulatory regime for the gas transportation and distribution sector. Due to the economic crisis Argentina radically changed the regulatory framework. The tribunal noted that “the measures … did in fact entirely transform and alter the legal and business environment under which the investment was decided and made.”\textsuperscript{109} It further held that such change violated the FET standard, since “a

\begin{flushleft}
\textsuperscript{106} Consolidum R.F.C.C., para 33-34 ; Impregilo, paras 266-270.
\textsuperscript{107} Tudor, p. 171.
\textsuperscript{108} Tecmed, para. 154.
\textsuperscript{109} CMS (Award), para. 275.
\end{flushleft}
stable legal and business environment is an essential element of FET”\textsuperscript{110} and “FET is inseparable from stability and predictability”.\textsuperscript{111}

114. In the case at hand, the Respondent similarly altered the legal framework in which the investment was made. This transformation was of significant nature since Dagobah retroactively introduced through the SRA the collective action mechanism (CACs) allowing to change the investment value without the investor’s consent.\textsuperscript{112} It is not the internationally accepted practice to introduce CACs retroactively. For example, the model Eurozone CAC was mandatory only for the bonds issued after the introduction of such CAC.\textsuperscript{113}

115. This collective action provision significantly restricted Calrissian’s ability to manage its investment. Probably, Calrissian would have not acquired the bonds had such restriction been in force at the moment of acquisition.

116. The above does not mean that the host state shall freeze its legal system for the benefit of the investor. “Reasonable evolution” of the host state’s law is acceptable – such as adjustment of environmental or labor regulations.\textsuperscript{114} But in the present case, the transformation of legal framework was far from reasonable evolution. Evolution means gradual and foreseeable development of the legal system. Dagobah’s SRA and the following restructuring were, to the contrary, rapid: on the facts of the case, Calrissian had only 10 days to respond to the exchange offer\textsuperscript{115} and only 3 days to react to the consultation invitation.\textsuperscript{116} Moreover, when acquiring the bonds Calrissian could not have predicted the introduction of the collective action provision, especially that it will be given a retroactive effect.

117. For these reasons, the breach of investment contract by Dagobah and failure to provide a stable legal environment violated the FET standard.

\textsuperscript{110} CMS (award), para. 274.  
\textsuperscript{111} CMS (Award), paras. 276.  
\textsuperscript{112} Uncontested Facts, para. 17.  
\textsuperscript{113} Eurozone CAC Explanatory Note, section 2 “Scope of Application”.  
\textsuperscript{114} Schreuer (FET), p. 374  
\textsuperscript{115} SRA, Art. 2(2).  
\textsuperscript{116} Procedural order No. 3, question 35.
III. Transparency and procedural propriety

118. The Claimant submits that the Respondent breached the FET standard also due to the fact that transparency and procedural propriety requirements were violated when implementing the SRA and bond restructuring.

119. Procedural flaws such as failure to act transparently or to notify the investor of certain legal action affecting him lead to the violation of FET standard.117 Accordingly, in Middle East Cement the investor’s ship was seized and auctioned but the investor was not properly notified thereof. The tribunal held that a notification in a newspaper did not suffice and that a direct communication to the investor was possible and thus necessary. The tribunal emphasized that even in the absence of a legal duty the ship owner should have been notified.118

120. Similarly, in Metaclad,119 Tecmed,120 and Maffezini121 certain actions detrimental to the investor (denial of construction permit, revocation of license, transfer of investors’ funds respectively) were taken without notifying the investors and giving them the right to be heard. In all these cases the state was held to have breached the FET standard.

121. In the present case, the Respondent failed to notify the investor directly about the preparation of the SRA, only a public notice has been given. More than that, the state authorities provided no opportunity for investors to express their opinion regarding the SRA bill and influence the adoption of the same. After the enactment of the SRA, no means were available to challenge the law.122 At the same time, the SRA was of crucial importance for the bondholders for two reasons. Firstly, it gave way to the following debt restructuring which had severe adverse effect on the investment’s value. For this reason, Calrissian should have been properly notified and consulted before the adoption of such measures. Secondly, the SRA introduced

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117 See e.g. UNCTAD (FET), p. 51.
118 Middle East Cement (Award), para 143.
119 Metaclad, Award, para 91;
120 Tecmed, para. 162.
121 Maffezini, para. 83.
122 Procedural order No. 2, para. 22.
the collective action mechanism that gave power to third persons to make decision affecting the Claimant’s investment. Most unexpectedly, the collective action mechanism was introduced retroactively. In accordance with due process, no regulation detrimental to the investor may be given a retroactive force.

122. It shall be noted that the Respondent was perfectly able to consult bondholders before the adoption of the SRA, as it did before making the bonds exchange offer. But the Respondent chose not to since the SRA was more important than the subsequent restructuring offer: the law created the legal basis, the “ground” for the restructuring, trying to “legitimize” it. The following restructuring was only a technical measure that logically followed from the SRA. In light of this, the Respondent’s conduct is tainted by serious procedural flaws, which constitute violation of FET.

IV. Good faith

123. Bad faith is considered to be at variance with FET. At the same time, bad faith is not a prerequisite for breaching the FET standard. Nevertheless, the facts of the case at hand suggest that Dagobah’s acts show malicious intent.

124. Indeed, after the first restructuring in 2001 Corellia raised the issue of whether the BIT protection covers Corellian bondholders. After the PCA decision in favour of Corellia, the possibility of investment claims against Dagobah under the BIT in case of another restructuring increased. Thus in 2012, anticipating another possible restructuring, Dagobah enacted the SRA which introduced the collective action mechanism. In this way Dagobah created an artificial legal basis to justify the subsequent restructuring. Previously in 2001, there has been no legal basis for the restructuring at all. In this way Dagobah tried to inject “legitimacy” into the subsequent restructuring but such attempt does not preclude the international wrongfulness of the state’s actions.

123 Procedural Order No. 2, para. 21.
125 CMS (Award), para. 280; endorsed by Siemens, para 299; Azurix (Award), para 372.
126 Uncontested Facts, para. 6.
125. In light of the above arguments, the Claimant submits that the Respondent’s debt restructuring measures violated the FET provision of CD BIT.
Issue V. Wrongfulness of the Respondent’s actions in the given circumstances

127. The Claimant submits that the necessity defense stipulated in Art. 6(2) of the CD BIT equates the CIL necessity defense (I). Further, Dagobah did not satisfy the CIL necessity requirements and thus wrongfulness of its actions is not precluded (II).

I. Treaty necessity defence equates the CIL necessity

128. The CD BIT shall be interpreted “in the light of its object and purpose”. Such interpretation supports the conclusion that Art. 6(2) of the treaty does not stand apart from the CIL.

129. Indeed, the wording “essential security interests” indicates that the treaty drafters wished to preserve a state’s right to act in situations similar to those encompassed by the customary international law principles of force majeure, distress, and necessity. The CIL defense of necessity is rather strict and precludes the wrongfulness of a state’s actions only in a very limited number of situations thus granting investors a high level of protection. At the same time, the purpose of the BIT as evidenced in its title is to promote and protect investments. Consequently, its essential security provision (Art. 6(2)) was not meant to undermine the protection of foreign investors. Thus if one distinguishes between treaty essential security provision and the stricter CIL necessity defense, an investor would have less protection under the BIT than under the CIL. This would contradict the purpose of the treaty. Hence, treaty necessity provision shall be deemed equal to the CIL necessity.

130. Case law and doctrine support the above conclusion. For example, it has been pointed out that “In general, such an emergency clause should not be construed in a manner that places the investor into a less favorable legal

127 Art. 31 of the VCLT.
128 Art. 6(2) of the CD BIT.
129 For similar analysis regarding the US-Argentina BIT see Alvarez & Khamsi, pp. 433–435.
situation than that accorded under customary international law.”

131. Further, tribunals in *Enron* and *Sempra* analyzed a BIT provision identical to Art. 6(2) of CD BIT and found that the relevant treaty provision is inseparable from CIL standard as it did not deal itself with the necessity conditions. Thus it was held that the treaty imported the CIL defense of necessity.

132. In addition, the importing of the CIL necessity into Art. 6(2) of the CD BIT is not at variance with the *effet utile* doctrine. Pursuant to the doctrine, a treaty provision is to be interpreted so as to give it substantive meaning. Accordingly, the reading of Art. 6(2) in light of the CIL does not render the provision meaningless: it makes explicit that investors may invoke the CIL necessity in arbitration and that this defense is consistent with the object and purpose of the BIT. In fact, essential security is not the only provision that is based on CIL but nevertheless reinforced in the BIT. Another example is the right to compensation in case of expropriation. This provision is not rendered meaningless as well when interpreted with reference to the CIL.

133. Further, the VCLT requires that a treaty shall be interpreted taking into account “any relevant rules of international law applicable in the relations between the parties” – including CIL rules. Moreover, the International Court of Justice, when discussing the “essential security” clause in the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran (a predecessor to the modern BITs) in the *Oil Platforms* case concluded that it needed to be interpreted in light of customary international law. In addition, it is reasonable

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130 Dolzer & Schreuer, p. 169.
131 Enron, paras. 333–34; Sempra, paras. 346, 355, 375–76
132 Thirlway, p. 44.
133 Bjorklund, p. 497.
134 Art. 31(3)(c) of the VCLT.
135 Case concerning Oil Platforms, para. 41.
to suggest that the CD BIT drafters intended the essential security provision to incorporate the better developed CIL principle.\textsuperscript{136}

134. All these arguments indicate that Art. 6(2) of the CD BIT shall be read in light of the CIL necessity defense.

II. Dagobah did not satisfy the CIL necessity requirements

135. CIL defense of necessity is codified in Art. 25 of the ILC Articles\textsuperscript{137} which reads as follows:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.

136. The Claimant submits that the Respondent did not satisfy the Art. 25 requirements since Dagobah’s actions were not aimed at safeguarding its \textit{essential interest against a grave and imminent peril} (A) and the state’s measures were not the \textit{only means} available and practicable (B). Moreover, Dagobah has itself \textit{contributed to the situation of necessity} (C).

\textbf{A. No essential interest and grave and imminent peril}

137. According to the ILC Commentary on Art. 25, whether an interest is “essential” depends on the circumstances of the case and the condition is satisfied only when it is threatened by a

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\textsuperscript{136} Bjorklund, p. 496.
\textsuperscript{137} CMS (Award), para. 315; Enron, para. 303; Sempra, para. 344; LG&E, para. 245; Case Concerning the Gabčíkovo-Nagymaros Project, at 40; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at 196.
grave and imminent peril.138 Also, the circumstances shall be so as to compromise “the very existence of the State and its independence”.139

138. A crisis similar to that experienced by Dagobah occurred in Argentina in 2001-2002. The circumstances were subject to scrutiny by tribunals in CMS, Enron, Sempra and LG&E and only one of them found the requirements of an essential interest and grave and imminent peril satisfied. It shall be noted that the Argentine economic crisis was accompanied by “massive strikes involving millions of workers, fatal shootings, the shutdown of schools, businesses, transportation, energy, banking and health services, demonstrations across the country, and a plummeting stock market, culminating in a “final massive social explosion” in which five presidential administrations resigned within a month”.140

139. The Dagobahian crisis was serious as well.141 But it was nowhere near to threaten the existence of the state since it was only of economic and social and not of political nature. Thus the Respondent’s actions do not satisfy the essential interest and grave and imminent peril tests.

B. Not the only means

140. The only means requirement provides that breaching the international obligation must be the only way for the state to guard its essential interest.142 If other steps, even more costly or less convenient, are available, Art. 25 cannot be successfully invoked.143

141. In the matter at hand the restructuring of the sovereign debt was definitely not the only means through which Dagobah could have addressed the economic crisis. The Respondent could have deferred the bonds’ maturity date, or implement any other alternatives suggested by the

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138 Crawford, p. 183.
139 Enron, para. 306.
140 LG&E, para. 216
141 Procedural Order No. 3, para. 38.
142 Crawford, p. 184.
143 Crawford, p. 184.
IMF.\textsuperscript{144} Notably, a tribunal in such situations has only to establish that there were alternative measures without analyzing whether the alternatives would have been more effective.\textsuperscript{145}

142. In addition, necessity does not terminate the obligation\textsuperscript{146} – a state may utilize this defense only for the minimal period of time when there were no other means to preserve the essential interest. After such period, compliance with the obligation shall fully resume. However, the breach of obligations by Dagobah was not temporary since the SRA and the exchange offer decreased the value of the Claimant’s investment forever. Thus, the Respondent failed to satisfy requirement of temporary character of the breach.

\textit{C. Dagobah substantially contributed to the state of necessity}

143. A financial crisis in a state is the result of both certain exogenous factors and the state’s own actions. The mere existence of exogenous factors contributing to the crisis does not preclude the state’s responsibility.\textsuperscript{147}

144. The facts of the present case indicate that Dagobah’s contribution to the crisis was significant. After the default in 2001 Dagobahian financial system followed an “expansive borrowing policy which has not been complemented by adequate reforms on the revenue side”,\textsuperscript{148} which led the country to the crisis of 2012. In addition, the reliable and independent\textsuperscript{149} Global Financial Herald points out that

\begin{quote}

“the significant issue of tax evasion had remained long unaddressed, which, combined with the austerity measures … amplified the government’s revenue crisis”.\textsuperscript{150}

\end{quote}

145. As mentioned above in paras. 88-91, the Dagobahian default of 2001 was also caused by the same reasons – “heavy borrowing on international financial markets” and “massive tax

\textsuperscript{144} Procedural Order No. 3, para 36.
\textsuperscript{145} CMS (Award), para. 323, Sempra, para. 351.
\textsuperscript{146} Crawford, pp. 160-161.
\textsuperscript{147} CMS (Award), para. 329.
\textsuperscript{148} The Problem, Appendix 4, para. 2.
\textsuperscript{149} Procedural Order No. 3, para 39.
\textsuperscript{150} The Problem, Appendix 4, para. 4.
evasion”. It appears that the Respondent failed to learn that lesson and did not address the serious flaws in its fiscal policy, which led to another crisis. Consequently, Dagobah shall bear the responsibility for the state of necessity it created and cannot invoke Art. 25.

146. It remains to be noted that all the conditions governing necessity shall be cumulatively satisfied. This is not the case for the reasons stated above.

147. For the reasons above, Dagobah’s actions are not exempted from breaching the CD BIT in light of the CIL defense of necessity which is applicable in the matter at hand.

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151 Uncontested Facts, para. 3.
152 Gabčíkovo-Nagymaros Project, paras. 51-52, CMS (Award), para 330.
In the light of the foregoing, the Claimant respectfully requests this Tribunal to find that:

(I) the Tribunal has jurisdiction over the claims submitted by the Claimant;

(II) the conclusions of the PCA Arbitral Tribunal are binding on the present Tribunal;

(III) the present Tribunal should rule on the claims asserted by the Claimant despite the forum selection clause contained in the sovereign bonds;

(IV) the Respondent’s debt restructuring measures amounted to a breach of the fair and equitable treatment standard under the Corellia-Dagobah BIT;

(V) the Respondent’s actions are not exempted from breaching the Corellia-Dagobah BIT.

RESPECTFULLY SUBMITTED ON 18 SEPTEMBER 2014

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On behalf of the Claimant,

Calrissian & Co., Inc.