MEMORANDUM FOR THE CLAIMANT, TEAM ALIAS - AZEVEDO

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Calrissian & Co., Inc
(Claimant)

v.

The Federal Republic of Dagobah
(Respondent)

MEMORIAL ON BEHALF OF THE CLAIMANT
20 September 2014
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STATEMENT OF FACTS

1. In 1992 the Corellian Republic and the Federal Republic of Dagobah concluded the Agreement for the Promotion and Protection of Investments (hereinafter referred to as the „BIT“). It was part of a privatization and internationalization plan undertaken by Dagobah’s government to stimulate economic growth.

2. In 2001 Dagobah descended into a two-and-a-half year long economic crisis. On 7 May 2001 government restructure sovereign debt and bondholders had the opportunity to exchange their bonds for new ones.

3. Those bonds would significantly reduce the bonds’ face value by 43% and provide the possibility of cash buybacks with the assistance of the World Bank’s Debt Reduction Facility. The expected reduction was estimated at 50% of the bonds’ net present value and such restructuring caused major losses to bondholders.

4. Afterwards the International Monetary Fund (“IMF”) provided certain recommendations for Dagobah to appropriately implement the sovereign debt restructuring process in order to prevent further increase of its debt and another future crisis. Dagobah has not implemented all of them but the bonds restructuring.

5. According to Article 7 of the BIT Corellia initiated arbitral proceedings against Dagobah administered by the Permanent Court of Arbitration, under UNCITRAL Arbitration Rules providing for State-to-State dispute settlement.

6. On 29 April 2003, the PCA Arbitral Tribunal finally decided, that sovereign bonds were investments within the definition of the Corellia-Dagobah BIT. The arbitrators, however, were divided as to the award.

7. On 19 May 2003, the dissenting arbitrator presented his opinion, in which he held that sovereign bonds could not constitute an investment in accordance with the wording of the BIT.

8. By then, the Corellian bondholders had already accepted a restructuring offer made by Dagobah.

9. Although Dagobah followed the IMF’s recommendations, the new recession hit the country at the beginning of 2011. On 14 September 2011 the IMF suggested the implementation of a new sovereign debt restructuring that would reduce its debt.

10. On 28 May 2012, Dagobah, following the IMF’s recommendations, enacted the Sovereign Restructuring Act (“SRA”).
11. On 29 November 2012, the Dagobah’s government offered bondholders the option to exchange their bonds for new ones worth approximately 70% of the net value of the outstanding sums under the original bonds. The exchange offer observed the IMF’s policies regarding sovereign debt restructuring.

12. Since more than 85% of holders of bonds decided to participate in the exchange offer, on 12 February 2013 all of such bonds were exchanged for new ones on the terms provided by the exchange offer.

13. The new bonds included provisions regulating Collective Action Clauses, which 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.

14. The new bonds were governed by the law of the Kingdom of Yavin, an international financial hub customarily chosen in international financial and capital market transactions. The new bonds also specified Yavin’s courts as the forum for resolving disputes related to them and also included provisions regulating collective action.

15. On 30 August 2013 Corellian hedge fund (Calrissian & Co., Inc., hereinafter referred to as „the Claimant”) commenced arbitral proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce pursuant to the investor-State dispute settlement provision contained in the Corellia-Dagobah BIT.

ARGUMENTS

PART ONE: JURISDICTION

I. The Tribunal has jurisdiction over the dispute concerning the sovereign bonds owned by the Claimant under the Corellia-Dagobah BIT

16. The Claimant respectfully asks the Tribunal to reject the Respondent’s allegations and confirm its jurisdiction to hear the Claimant’s claims. In due case, the Claimant’s first submission is that the sovereign bonds are an investment in the meaning of the BIT, and the Respondent’s assertions to the contrary should be rejected as totally baseless. The Claimant will demonstrate that the Tribunal has jurisdiction to decide over claims arising out of the Corellia-Dagobah BIT as all preconditions listed in its Article 1 are fulfilled (A). Furthermore, the Claimant submits that sovereign bonds do not lack the territorial link (B).

All conditions listed in Article 1 of the BIT are fulfilled
17. The BIT as an agreement concluded between the parties is one of the most important act in the formation of any disputes. The Claimant submits that purchasing sovereign bonds is an investment in the meaning of the BIT due to the fact that they possess all distinctive features required therein from the investment: “investment” means every asset that an investor owns or controls, directly or indirectly, that has 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. The BIT does not contain enumerative designated list of investments. There is an inexhaustible number of legal instruments, that may be mentioned at these points. Due to the systematic creation of new instruments, one is not able to predict, how newly created form of investment would function. Countries in order to facilitate the issue, constantly create more transparent documents, which may include tangible or intangible, movable or immovable property, and related property rights. In the present case there exist an information about Forms that an investment may take include. Word “may” in this phrase means, that it is not an exhaustive catalogue and the list of these investments is not limited.

18. We can use the example of the USA – Singapore BIT. USSFTA – besides being considered innovative - comes with explanatory notes, which explains that whether an asset should qualify as an investment or not. When so, it shall be depend on its economic nature: The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk. Same criteria were considered in Draft OECD Multilateral Agreement on Investment. Furthermore, while taking the abovementioned into consideration, it occurs that forms of debt are more likely to have the characteristics of an investment. Sovereign bonds are such form of debt.

19. Nevertheless, the three criteria which were concluded in the BIT (the commitment of capital, the expectation of gain or profit, and the assumption of risk), should be considered when determining whether the investment fits to this Tribunal’s jurisdiction. These characteristics are amongst five criterias set out by Professor Schreuer, who suggests, that they may be used in order to establish, whether a particular dispute may be considered as

\[1\) BIT, Article 1
\[2\) BIT, Article 1
\[3\) BIT
\[4\) USSFTA, Note 15-1.
\[5\) OECD, p. 11 n.2
\[6\) USSFTA, Note 15-2
an investment dispute\textsuperscript{7}. Therefore the Claimant requests the Tribunal to rule its decision, regarding the existence of an BIT-qualified investment, on the criteria mentioned in the BIT.

1. **The sovereign bonds fulfill 'the extended duration' criterion**

20. The Claimant submits that sovereign bonds fulfill the extended duration criterion of an investment. Host States desires to encourage long-term commitments of capital from abroad, upon which they can rely for economic development. The preamble of the BIT provides, that the Parties recognize that *investment will stimulate the flow of private capital and the economic development of the Parties*\textsuperscript{8}. Operations of limited duration are, from the Host States’ point of view, *unpredictable and prone to withdrawal or non-renewal when conditions deteriorate, worsening financial stability in the country*\textsuperscript{9}. No investor is able to predict, whether it will gain profits from investing in sovereign bonds.

21. While establishing, whether an asset is or is not an investment, the time also matters. In Salini v. Morocco case the tribunal opined that *minimum length of time for an investment ‘according to doctrine’ is two to five years*\textsuperscript{10}. The sovereign bonds issued by the Dagobah were issued in August 2003\textsuperscript{11}, with maturity date of 12 years. The Claimant submits that this period suffices to qualify the sovereign bonds in dispute as long-term commitment of capital upon which the Respondent could – and still can rely – for its economic development.

2. **The sovereign bonds fulfill 'the commitment of capital' criterion**

22. The Claimant submits that the sovereign bonds fulfill the commitment of capital criterion of an investment. In the Salini v. Morocco case the tribunal explained that the commitment of the investor may be either financial or through work. Contribution of financial resources was confirmed to meet the criteria of an investment\textsuperscript{12}. The Claimant respectfully asks the Tribunal to confirm the fulfillment of the 'commitment of capital' criterion.

3. **The sovereign bonds fulfill 'the assumption of risk' criterion**

23. Claimant submits, that the assumption of risk is an undeniable characteristic of the sovereign bonds. First of all, the existence of extended duration – up to 12 years of

\textsuperscript{7} Schreuer C., page 140
\textsuperscript{8} BIT, Preamble, Line 3
\textsuperscript{9} Rubins N., p. 291
\textsuperscript{10} Salini v. Jordan, para. 52
\textsuperscript{11} Procedural order No 2, para 11
\textsuperscript{12} Bayindir v. Pakistan, para 100
maturity period (in the present case) implies the existence of a risk - the operational significance of ‘risk’ and ‘duration’ practically coincides. The time factor reinforces two types of risk, that are the most common. When it comes to investing in sovereign bonds – there is political risk and credit risk. Several prominent commentators agree that 'political risk' implies threats to the profitability of a project that derive from some sort of governmental action or inaction rather than from changes in economic conditions in the marketplace. A host government might, by act or omission, reduce the investor's ability to realize an expected return on his investment. The sovereign bonds are prone to this form of risk - The Respondent's action – enactment of the Sovereign Restructuring Act – forced onto the Claimant an unfavorable exchange of the sovereign bonds resulting in sudden loss of profit.

24. Credit risk is associated with the potential for loss due to failure of a borrower to meet its contractual obligation to repay a debt in accordance with the agreed terms. This form of risk was found to be a persuasive factor when determining the existence of an investment by Fedax N. V. v Venezuela tribunal. Due to excessive borrowing policy the financial solvency of the Respondent was put into question at the end of 2011 with government debt reaching unsustainable levels. The Claimant’s chances to profit from its investment were substantially mitigated. Furthermore, due to the abovementioned, one cannot assume that since it bought the bonds, in any case, the government would buy them back according to the original assumptions. The lack of such assurance gives rise to a risk. Due to the abovementioned, the Claimant requests the Tribunal to consider the assumption of risk as an characteristic attributable to the sovereign bonds.

4. The sovereign bonds fulfill 'the expectation of gain' criterion
25. Expectation of the profit is an indispensable aspect of every true investment and is inextricably linked to the concept of the debt instruments, such as sovereign bonds. The definition of bond states that a bond is a debt investment in which an investor loans money to an entity (corporate or governmental) that borrows the funds for a defined period of

13 Dolzer R., Schreuer C., p. 75
14 Moran Theodore H., p. 106
15 Kinsella N. Stephan, Rubins Noah D., chapter 1
16 Global Association of Risk Professionals
17 Fedax Jurisdiction, para. 40
18 Appendix 4
19 Schreuer C., Renisch A., p. 14
time at a fixed interest rate\textsuperscript{20}. The Claimant submits that its investment in the sovereign bonds was procured solely for generating profit, thus it expected gainings.

26. Due to the fulfillment of all of the mentioned criteria, those listed in the BIT, in particular, the Claimant urges the Tribunal to find the sovereign bonds as an investment falling within the scope of Article 1 of the BIT.

5. **The investment does not lack a territorial link**

27. The Claimant submits that the sovereign bonds are linked to the Respondent’s territory in a sufficient way to qualify them as an investment covered by Article 1 of the BIT. The Respondent contests the sovereign bonds’ validity as protected investment due to the fact that the Claimant acquired them on the secondary market asserting that such operation is not linked to its – the Respondent’s – territory.

28. The case law shows, that even when a particular transaction does not qualify as an investment, the jurisdiction of the Tribunal may still be upheld. Prof. Schreuer states, that when an ancillary transaction is made between separate entities, it does not deprive one of them from a direct relation to the investment\textsuperscript{21}. In Abaclat case, the tribunal stresses that the security entitlements cannot be viewed in isolation. They make sense only, when the economic transaction of bond issuance is viewed as a whole.\textsuperscript{22} Although, the sovereign bonds were obtained in the secondary market, capital obtained by the Respondent through the issuance of bonds in 2003 remains available to the Host State. It would be reckless to grant protection only to the initial bondholder, even though that at the issuance of the bonds it should have been expected that the bonds would have been listed in the secondary market. Mere change of the holder should not deprive the sovereign bonds of their character as an investment.

29. Due to these the Claimant respectfully requests the Tribunal to confirm that sovereign bonds are an investment linked to the territory of the Respondent, as a certain amount of capital remains committed and at the Respondent’s disposal.

II. **The PCA Award has an impact on the Tribunal’s jurisdiction in the present case**

30. The Respondent asserts, that the PCA award has no impact on the interpretation of the Article 1 of the BIT. The Claimant finds, that such argument stands contrary to the wording of Article 7 of the BIT – state-to-state dispute resolution clause, according to

\textsuperscript{21} Schreuer C., p. 112  
\textsuperscript{22} Abaclat,v. Argentina, para 358
which the PCA award was rendered. The Respondent’s restrictive interpretation would result in Article 7 of the BIT becoming obsolete, which is inconsistent with the general principle of the international law. The Claimant will demonstrate that the PCA Award has binding effect in the present case [A], and if the Tribunal decides to the contrary, the Claimant proposes, that despite the fact that the Tribunal is not formally obliged to directly applicate the PCA award when interpreting Article 1 of the BIT, it would be appropriate to carefully consider it when determining the Tribunal’s jurisdiction in the present case [B].

The PCA Award constitutes interpretation affecting interpretation of the BIT

1. The PCA Award’s interpretation of the Article 1 of the BIT binds the Tribunal in the present case

31. The Claimant respectfully asks the Tribunal to find, that the PCA Award is a binding interpretation of Article 1 of the BIT and it should be taken into consideration when determining whether the sovereign bonds are an investment in the meaning of the BIT.

32. The PCA Award was rendered in accordance with Article 7 of the BIT. It provides, that any disputes between the Parties concerning the interpretation or the application of this Agreement shall, as far as possible, be settled by diplomatic channels or, if the dispute cannot thus be settled, it shall be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. Similar mechanism is incorporated in variety of BITs: 2012 U.S. Model BIT, 2003 Indian Model BIT, 2004 Canadian Model BIT and 2008 German Model BIT. According to Article 7 of the BIT the Parties may resolve the interpretative ambiguities through negotiations conducted by their respective agents or rely on objective ruling of an arbitral tribunal in a case of disagreement. According to the International Court of Justice such subsequent agreement represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. The same rule is stipulated in the general international law in Article 31.3.(a) of the Vienna Convention on the Law of Treaties.

23 Brabandere E., 'pp. 245-288. (10)
24 BIT, Article 7.1 and 7.2;
25 U.S. Model Bilateral Investment Treaty, Indian Model BIT, Canadian Model BIT, German Model BIT
26 Kasikili/Sedudu Island, para. 49
27 VCLT, Article 31.3.(a)
33. Moreover, some commentators\textsuperscript{28} have found the term\textit{ authentic} to be similar in meaning to\textit{ binding}. The PCA award is the final binding decision rendered according to the Article 7 of the BIT. Therefore, it constitutes authentic interpretation of the BIT, which binds the Tribunal.

34. If parties cannot come to terms over the interpretation of a treaty, the arbitration is considered to be the best mean of settling questions of interpretation\textsuperscript{29}. Not only the arbitrators will apply the general rules of jurisprudence, but also will ensure an objective ruling over the dispute, resulting in a more balanced interpretation. Finally, Aron Broches concluded that an investor-state tribunal interpreting a treaty would be\textit{ bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration}\textsuperscript{30}. Therefore, the Claimant respectfully requests the Tribunal to consider the PCA Award as an authentic interpretation of Article 1 of the BIT.

35. The Claimant acknowledges, that there is a disagreement about the time-extent of interpretative awards rendered according to state-to-state dispute provisions. However, it is the Claimant's submission, that it does not concern the situation raised by the Respondent, which is that since the award was rendered during the first financial crisis in 2001, it should not apply in the present case. Such narrow construction could be considered relevant, if the dispute was raised during an pending investor-state arbitration. In the present case the dispute has arisen years after the interpretative award was rendered.

36. The Article 7 of the BIT does not include any limitations as to the time-extent of the interpretation issued by a tribunal. As treaties should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose\textsuperscript{32}, there is no ground for implying, that any limits to the binding effect exist. Moreover, it is considered, that if state-to-state tribunals have jurisdiction over pure instant disputes, giving that award binding effect with respect to the instant dispute would deprive the award of any practical effect\textsuperscript{33}. Due the

\textsuperscript{28} Gardiner Richard K., p. 32
\textsuperscript{29} Oppenheim L. F., para 553
\textsuperscript{30} Broches A., p. 377
\textsuperscript{32} VCLT, Article 31.1
\textsuperscript{33} Roberts A., p. 60
abovementioned, the Claimant asks the Tribunal to find that the PCA Award’s binding effect extends over the present case.

2. **The Tribunal is invited to apply “the res judicata” principle, when interpreting the Article 1 of the BIT**

37. The Claimant submits, that the Tribunal should apply the *res judicata* principle, when determining its jurisdiction. There are numbers of cases before international courts and arbitral tribunals which found the *res judicata* as a legally binding principle\(^{34}\). For two centuries, the *res judicata* has been considered as a general principle of the international law\(^{35}\). ICJ referred to the *res judicata* as *a well-stablished and generally recognized principle of law*\(^{36}\). The Claimant finds it reasonable to refer the *res judicata* in the dispute concerned.

38. There are some obligatory conditions to refer to the *res judicata* in the arbitral proceedings. It should be taken into account, that there is a need to make these conditions as flexible and nonrestrictive as they could be. As Christopher Schreuer and August Reinish write: *It has been recognized that if too restrictive criteria of identity with regard to the 'object', the 'ground', and 'the facts' of different cases are used, the doctrine of res judicata would rarely apply. This had led international courts and tribunals to refrain from an overly formalistic approach vis-a-vis the question of identity of issues*\(^{37}\). Transferring it on the ground of the PCA Award and the pending case, the Claimant would like to highlight the fact, that both relate to the same subject matter - definition of investment under the Article 1 of the BIT and serve the same factual interest – protection of investors. The PCA proceedings were issued in order to ensure the protection of the general interest of investors protected by the BIT, both from Dagobah and Corellia, while the present case revolves around the Claimant’s violated interest. The common interest is one of the main conditions for the application of *res judicata*. This conclusion comes both from authorities and courts and tribunals. For instance, in the award of the European Commission of Human Rights in Martin v. Spain case, the Tribunal decided decided that: *although, formally speaking the parties were different, the Commission held that they were 'essentially the same'*\(^{38}\). The formulation *essentially stays in opposite to formally*, what

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\(^{34}\) See Lammasch H.

\(^{35}\) Schreuer C., Reinisch A., Legal Opinion 5, 2002 p. 135

\(^{36}\) Schreuer C., Reinish A., Legal Opinion, 6 (2002)


\(^{38}\) Martin v. Spain, para. 76
should suggest to examine, if it is common interest between parties taking part in proceedings. It is confirmed by the Bin Cheng’s statement that: \[t\]here is invariably in municipal legal systems a doctrine [res judicata] to the effect that once a matter is judicially determined that matter may not be litigated again by the same parties or parties in the same interest\[39\].

39. The second condition regards the compliance with the requirements of the same ground (legal arguments). It is apparent PCA case and the present case is based on the BIT and regard the same subject matter. In both cases the BIT is a binding source of law.

40. The last requirement refers to the same issue (the facts). There is no doubt that the PCA case and the present case relate to the same treatment of sovereign bonds, which is interpretation of the definition of the investment according to Article 1 of the BIT. As the Claimant mentioned: there is no question that Claimant is an investor as defined by the BIT and that the Arbitral Tribunal to be constituted in these proceedings will have jurisdiction to hear and decide on its claims\[40\].

41. As the Claimant mentioned above, in the context of res judicata being applicable to already decided disputes it is necessary, as ILA’s 2004 report state, to look at the underlying nature of a dispute and not at its formal classification\[41\]. It is not required the proceedings were literally identical in two compared cases\[42\].

42. The PCA had already stated, that bonds are investment in the sense of the BIT and it is in a legitimate interest of the Tribunal to refer to the res judicata in the present case. It is not only aimed at preventing of already decided issues, but also to award off any pointless costs. At the same time, it serves the purpose of legal security by avoiding divergent decisions in virtually identical cases\[43\], which, what is entirely apparent, would have got an adverse influence on an authority of international courts and tribunals. It is also worth to mention that investment awards have an opportunity to play a role in counteracting the increasing fragmentation of international law\[44\].

3. The PCA award might be a source of inspiration due to the similarity between those cases

\[39\] Cheng, Bin, 336
\[40\] Appendix 6, para 10
\[41\] Yannaca-Small K., p. 6
\[42\] Schreuer C., Reinish A., Legal Opinion, 24
\[43\] Ibidem
\[44\] Schreuer C., Weiniger M., p. 2
43. If the Tribunal finds that the PCA award is not binding, the Claimant submits, that it should be treated as a source of inspiration, since *judicial and arbitral decisions play a very important role in international judicial and arbitral decision-making*.\(^{45}\) The reality stays in the contradiction with the theory presented above since *many investment tribunals very often refer to previous decisions of investment tribunals*.\(^{46}\) Moreover, the practice of citing previous decisions is *indeed, as such, not problematic, and forms part of the legal reasoning of arbitral tribunals*.\(^{47}\) This practice of tribunals is important in the present case, because of subsidiary role of the previously awarded cases. It allows to apply the PCA Award in the pending case as a source of inspiration or kind of instructional source of law based on similarity between these two cases. Arbitral decisions play a role in defining international law.\(^{48}\) Thus, PCA decision to apply bonds as investment in the light of BIT should be a subsidiary source of law for the Tribunal.

44. A justified application of the previous awards as a subsidiary source of law is conditioned by the similarity of the cases. The obligation for arbitral tribunals to render a reasoned award is contained in Article 48 (3) of the ICSID Convention and in Article 32 (2) of the UNCITRAL Arbitration rules likewise provides for an obligation to render a reasoned award, unless of course parties have decided otherwise.\(^{49}\)

45. Tribunals refer to similarity as an argument to reference to previous award in various numbers of cases. In *RMS* case the Tribunal simply consider legal aspects of applying previous award because of the similarity: *having regard to the fact similarity between this and the Helnan case, the Tribunal considers the reasoning in the Hellnan [sic] Award is persuasive and applicable here*.\(^{50}\) Tribunals argue for the same practice in many cases concerning especially standards of investment protection (Argentina's cases). For instance, in Camuzzi case, the Tribunal pointed out that previous awards should be taken into consideration even despite some differences between the cases: *the same conclusion has been shared by the tribunals in CMS and Enron (Additional Claim), among various others. This Tribunal has no reason not to concur with that conclusion, even though some*

\(^{45}\) See: Guillaume, p. 14
\(^{46}\) Brabandere E., pp. 245-288. (6)
\(^{47}\) Brabandere E., pp. 245-288. (10)
\(^{48}\) Brabandere E., pp. 245-288. (3)
\(^{49}\) Brabandere E., pp. 245-288. (10)
\(^{50}\) RSM v. Grenada, para. 6.1.3
of the elements of fact in each dispute may differ in some respect\textsuperscript{51}. Tribunal in Saipem v. Bangladesh case expands this view and highlights additionally, that it is even a requirement to pay due consideration to earlier decisions in order to meet the legitimate expectations of the community of States and investors and both to seek to contribute to the harmonious development of investment law having regard to the certainty of the rule of law despite on non-binding character of the previous decisions\textsuperscript{52}. The only exclusion in referring to the previous awards is entirely different grounds of the cases\textsuperscript{53}, which has no application between PCA award and the present case.

46. Furthermore, Tribunals refer to paramount importance of previous decision as a source of solely useful inspiration. In AES case Tribunal argued, that it had application even in cases, which are based on different BITs, while only provisions of the different treaties are similar. The a\textit{maiori ad minus} interpretation ought to be applied also between PCA and present case, since the BIT in both cases are the same. This assumption is even confirmed by the ICJ in Cameroon v. Nigerian case: \textit{[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases […][t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases.}

47. From the tribunals’ perspective citing previous awards is valuable and set guidelines, since it results in adding justification to the position adopted by tribunals, which serves to creating consistent line of reasoning. It has positive influence on authority of tribunals\textsuperscript{54}. Due to these and for the abovementioned reasons the Claimant respectfully asks the Tribunal to consider the PCA Award as a persuasive and valuable source of inspiration when interpreting Article 1 of the BIT.

48. Summing up, the Claimant respectfully asks the Tribunal to consider the PCA Award as binding in the present case with respect to the qualification of sovereign bonds as an investment. If the Tribunal rejects the argumentation regarding Vienna Convention and Article 7 of the BIT, the Claimant asks the Honorable Arbitrators to examine the \textit{res judicata} rule. If the Tribunal rejects these arguments, Claimant would like to point out,

\begin{itemize}
\item\textsuperscript{51} Camuzzi v. Argentina, para. 82.
\item\textsuperscript{52} \textit{Saipem v. People’s Republic of Bangladesh}, para. 90
\item\textsuperscript{53} \textit{Ibidem}
\item\textsuperscript{54} Brabandere E., pp. 245-288. (10-13)
\end{itemize}
that even if the PCA award is not binding, it has immeasurable suggestive value when deciding the present case.

III. THE FORUM SELECTION CLAUSE CONTAINED IN THE SOVEREIGN BONDS DOES NOT AFFECT THE TRIBUNAL’S JURISDICTION OVER THE DISPUTE

49. Forum selection clause at its core either requires or permits its parties to pursue their claims in a designated national court. This mechanism is a common feature of an investment contract; it allows parties to ensure that, if dispute concerning the contract arises, it will be resolved in a forum most favorable to their interest. However in the present case it is being used as a stumbling block to this Tribunal’s jurisdiction. Therefore, the issue to be determined is whether the forum selection clause, that was included in the sovereign bonds, overrides arbitration clause from the Article 8 of the BIT and if it does - then to what extent.

50. The Claimant shall present the Tribunal with the following two submissions regarding this issue: the Tribunal has jurisdiction over the claims due to their non-contractual nature (A), and the Claimant did not waive his right to arbitrate (B).

**Claims brought before the Tribunal are admissible due to their non-contractual nature**

51. The Claimant adduces that the claims brought before the Tribunal are of non-contractual nature and as such cannot fall within the scope of disputes embraced by the forum selection clauses.

52. Before entering into the detailed analysis of the issue, it is relevant to underline essential elements of all dispute resolution clauses that are important in this context. The disputed clause states that: *any dispute arising from or relating to this contract will be exclusively resolved before the Courts of…*. The forum selection clause is embracing all violations related or resulting from contractual rights and obligations stipulated in old sovereign bonds and referring them to relevant courts.

53. Now the arbitration clause from the Article 8 (2) of the BIT provides that: *Each Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to binding arbitration…*

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55 Born Gary B., p. 65
56 Dolzer R., Schreuer C., p. 73
57 Answer to Request for Arbitration, para 9
58 Procedural Order No. 2, para 16
arbitration before (…). The definition of dispute, which article 8 (2) refers to as any legal dispute between an investor of one Party and the other Party in connection with an investment…59. The arbitration clause by virtue refers to any legal dispute in connection with an investment.

54. The Claimant would like the Tribunal to acknowledge, that there is an substantial difference of scope between these two clauses. Moreover, the scope of forum selection clause does not interfere with the BIT arbitration clause – rights asserted under a contract are fundamentally different from those asserted under a treaty60 - the same conclusion being reached by the prominent authorities in the field of the international law61 - and should be claimed under their respective dispute resolution clause62. As the tribunal in Impregilo v. Pakistan stated - the treaty enquiry is fundamentally different from the contractual enquiry63.

55. The distinction between two types of claims: contract-based and treaty-based is well-founded both in doctrine64 and in the case law. According to prof. Schreuer, the most important case on the subject is Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic - the Vivendi I case65.

56. The Vivendi case arose from a concession contract of 1995 concluded by a French company (CGE), and its Argentine affiliate, with Tucumán, a province of Argentina, concerning the operation of a water and sewage system. Article 16.4 of the concession contract contained a forum selection clause referring the parties to the administrative tribunals of Tucumán66. The tribunal in Vivendi distinguished between claims based on the treaty and claims based on the concession contract. Later the tribunal found that due to fact that claims filed by the CGE against Argentina were based on the violation by Argentina of the BIT, the forum selection clause in the concession contract did not affect the claimant’s right to go to the international arbitration based on the Argentina-France BIT. This approach was followed by a number of tribunals67. Furthermore, in Oxford’s Handbook on International Investment Law one may read that A state cannot rely on an

59 BIT, article 8 (1)
60 Azurix Award, para 54
61 Crawford J., p.358
62 Azurix Award, para. 28
63 Impregilo v. Pakistan, para. 258
64 Muchlinski P., Ortino F., Schreuer C., p.963
65 Schreuer C., p. 134
66 Muchlinski P., Ortino F., Schreuer C, p. 965
67 Eg. CMS v. Argentina, Enron Award, Siemens AG v. Argentine Republic
exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty\textsuperscript{68}.

57. To assume jurisdiction of this Tribunal, there has to be a breach of substantive treaty provision found\textsuperscript{69}. In order to determine the nature of claims, the Tribunal may consider the formula that is increasingly used in recent arbitration jurisprudence\textsuperscript{70}: when tribunals consider their jurisdiction to entertain treaty claims, the tribunals must satisfy itself that it has jurisdiction over the dispute as presented by the Claimant. Similar proposal came from Judge Higgins, in her Separate Opinion for Oil Platforms case, where she argued that in order to determine whether the claims are plausibly based upon the treaty, it is necessary to accept pro term the facts as alleged by the Claimant to be true and in that light interpret relevant articles of the treaty\textsuperscript{71}. All claims procured by the Claimant are based on the violation of relevant BIT standards. Therefore, if the Tribunal decides to apply the above formula, the Claimant asks the Tribunal to find claims as treaty claims.

58. Alternatively, the Tribunal may refer to Ambatielos and Oil Platforms cases in order to establish a relationship between the Claimant’s claims and the BIT. According to Ambatielos it is essential to determine, whether claims advanced in respect of the treaty provisions are of sufficiently plausible character to warrant a conclusion that claims are based on the treaty\textsuperscript{72}. In Oil Platforms case the court stipulated that it is essential to determine whether claims pleaded by the claimant are indeed violations of the treaty, falling within the scope of its provisions\textsuperscript{73}. The claims advanced by the Claimant are based on article 2 and 6 of the BIT and were brought before this Tribunal as a result of breach of those articles by The Respondent through actions not related to rights and obligations incorporated into the sovereign bonds. Therefore, the Claimant requests to consider the claims advanced by the Claimant as treaty claims.

59. The forum selection clause cannot serve as a mechanism for pursuit of treaty claims resulting from rights vested upon the investor through the BIT, as the Article 8.2 of the BIT contains a closed catalogue of fora to which the investor may refer its treaty related claims. This catalogue cannot be modified by the investor-Host State contract. Therefore,

\textsuperscript{68} Muchlinski P., Ortino F., Schreuer C, p. 966  
\textsuperscript{69} Société Générale para 162.  
\textsuperscript{70} Eg. Salini v. Jordan, para 137; Impregilo v. Pakistan, para 237  
\textsuperscript{71} Islamic Republic of Iran v. USA p. 57  
\textsuperscript{72} Ambatielos, para. 18  
\textsuperscript{73} Islamic Republic of Iran v. USA, para 16.
as national courts of Dagobah and Yavin are not stipulated as adequate, and as such do not have the power for resolving the investor-Host State disputes, the scope of forum selection clause is limited solely to contractual claims connected to sovereign bonds, which are not a subject matter of the present case.

60. The arbitration clause allows for pursuit of all possible claims related to investment, including those stemming from the BIT itself. Tribunals established in accordance with that article are vested with power to resolve disputes falling within the scope of Article 8 of BIT. Bearing that in mind the Claimant invites the Tribunal to find, that the Claimant is entitled to pursue rights granted by the BIT by bringing claims only before this Tribunal.

61. Due to abovementioned the Claimant asks the Tribunal to find that the insertion of forum selection clause into the sovereign bonds does not amount to extinguishment of the Tribunal’s jurisdiction in regard to the claims based on the BIT.

**The Claimant did not waive its right to arbitrate under the BIT**

62. The Claimant respectfully submits that the forum selection clause does amount to explicit waiver of right to arbitrate under the BIT.

63. According to the practice jurisdiction the waiver is constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced. For example, waiver of the right to arbitrate occurs whenever one participates in litigation without reservation brought of his right to arbitrate under relevant provisions of contract or international treaty. The investor could voluntarily give up a right to arbitrate, if it is conclude in the provisions of the BIT and must be established in an unequivocal manner and that ... [it] must not run counter to any important public interest. The waivers or abandonment of right must be the objective intention of the subject party. It results from the cardinal rule of interpretation of treaties - that each and every clause has to be interpreted as significant rather than meaningless by giving ordinary meaning to the terms of a treaty provision. The right to arbitrate according to

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74 Zhang v Shanghai Wool and Jute Textile Co Ltd, p. 133.
75 Barberà, Messegué and Jabardo v. Spain, para 82; Oberschlick v. Austria, para 51.
76 Håkansson and Sturesson v Sweden, para 67, McGonnell v. United Kingdom, para 44 and Lundevall v. Sweden, para 34.
77 Comandate Marine Corp v. Pan Australia Shipping PtyLTD, para. 192
78 Eureko Partial Award, 248.
79 Gaffney, p. 22.
Article 8 (2) of the BIT is a fundamental and crucial right vested upon the investor in the BIT, allowing for effective pursuit of claims resulting from other substantive provisions\(^{80}\).

64. Therefore the right to arbitrate should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so\(^{81}\). In the present case there is no such explicit waiver of right to arbitrate contained in the forum selection clause. The Claimant asks the Tribunal to find that the Claimant did not waive his rights to arbitrate vested upon him through the Article 8 (2) of the BIT.

**PART II: MERITS OF THE CLAIM**

**IV. The Respondent’s debt restructuring measures amount to a breach the FET standard under Corellia-Dagobah BIT**

65. The Respondent has violated its obligations under Article 2 of the BIT by adopting the measures (namely the SRA) that fell within the scope of breaching the fair and equitable treatment standard. In any matter the Respondent’s actions cannot be exempted from breaching the BIT.

66. The Respondent has violated legitimate expectations, stable and predictable framework, what caused financial losses to the Claimant. Measures undertaken by the Respondent effected in denial of justice. The Respondent’s actions cannot be exempted from breaching the BIT as they do not fulfill the prerequisites of applying non-precluded measures and were not proportionate and discriminated the Claimant.

67. On 28 May 2012, Dagobah enacted the Sovereign Restructuring Act („SRA”)\(^{82}\). The exchange of the bonds which took place on 12 February 2013\(^{83}\) accordingly to the provisions of this act caused financial losses to the Claimant. Thus, it constitutes violation of fair and equitable standard. What is more, restructured bonds contained Collective Action Clauses, which effected in denial of justice as long as it stated, that *if bondholders wanted to initiate any legal action, they would need to gather at least 20% of the nominal value of the issue to sue*\(^{84}\). Besides, all measures undertaken by the Respondent were discriminatory.

**Enactment of the SRA and ensuing restructuring violated the legitimate expectations of the Claimant**

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\(^{80}\) Muchlinski P., Ortino F., Schreuer C, p. 1005

\(^{81}\) ELSI, para 160.

\(^{82}\) Uncontested Facts, para. 17

\(^{83}\) Ibidem, para. 19

\(^{84}\) Ibidem, para. 21
68. The SRA was enacted after Dagobah was hit by the second recession in 2011, after the Respondent was given the suggestion to implement a new sovereign bond restructuring that would reduce the debt\textsuperscript{85}. However, the restructuring act was applicable to all bonds governed by Dagobah’s law\textsuperscript{86} and it stated that decision made by only 75% of the aggregate nominal value of all outstanding bonds would bind all the remaining bondholders\textsuperscript{87}. The bonds were originally issued in August 2003, but the Claimant acquired them in 2005 in the secondary market\textsuperscript{88}. Those bonds had a maturity of 12 years\textsuperscript{89}, what means, that the Claimant would not have been obliged to realize them until 2015. Nevertheless, in the present case, it was forced to participate in the exchange offer made by the Respondent.

69. According to Article 2 (3) of the SRA at least seventy five per cent (75%) of the participating capital will have to vote to approve the exchange\textsuperscript{90} of the sovereign bonds. The Claimant asserts that this provision is discriminatory and that SRA has a retroactive effect. What is more, by enacting the SRA the Respondent violated certain previous warranties granted to Claimant, including, but not limited to, that of maintaining a stable economic and legal environment\textsuperscript{91}. Such activities of the Respondent falls within the scope of violating the legitimate expectations as long as they measure to breach of the fair and equitable standard. In MTD v. Chile the tribunal stated that fair and equitable treatment encompassed such fundamental standards as good faith, due proces, non-discrimination, and proportionality\textsuperscript{92}. In the present case none of those standards was followed while enacting the SRA.

70. First of all, the Respondent’s activities, namely enacting of the SRA, were undertaken with the bad faith. Although the Respondent informed the bondholders of the on-going draft, it did not invite the bondholders to participate in it\textsuperscript{93}. Such behavior reflects bad faith. The investors expected the Respondent not to force the law regarding the bonds, as they are the investment in the meaning of the BIT. According to that, the Claimant bears

\textsuperscript{85} Ibidem, para. 15.
\textsuperscript{86} Ibidem, para. 17
\textsuperscript{87} Ibidem
\textsuperscript{88} Procedural Order No. 2, para. 11
\textsuperscript{89} Ibidem, para. 14
\textsuperscript{90} SRA, p. 25 of the record
\textsuperscript{91} Request for Arbitration, para. 13
\textsuperscript{92} Dolzer R., Schreuer Ch., p. 143
\textsuperscript{93} Procedural Order No. 2, para. 21
the risk of such investment. Contrary to the BIT’s provisions, the Respondent did not secure those risks. Such behavior lays within the bad faith.

71. Alternatively, even if this Tribunal finds, that Respondent’s did not behave within bad faith, the Claimant asserts that the factor of good or bad faith does not necessarily have to be proved. Such approach was presented in Mondev case: a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.94 Such approach was also presented by the tribunal in Tecmed case: Fair and equitable treatment was part of the bona fide principle recognized in international law, although bad faith from the State [was] not required for its violation.95 Similar approach was presented in Saluka case, where the Tribunal stated that the party may expect the host state not to act in manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions) manner. Thus, there is no need to legitimize the Respondent’s bad faith and still it occurs that the Respondent violated the fair and equitable treatment standard.

72. The measures undertaken by the Respondent had retroactive effect, what stands opposite to the due process standard. Article 1 cc of the Sovereign Debt Restructuring Act states that a title is considered a bond (...) whose issuing date precedes the 31st December 201197. The SRA was enacted on 28 May 201298 and on 12 February 2013 the Claimant was forced to participate in the exchange offer made by the Respondent99. In consequence, the Claimant’s bonds were exchanged for new ones, giving a retroactive effect to the SRA100. This is due to the fact, that if the Claimant was not forced to exchange the bonds, it would be obliged to exchange them in 2015, under different conditions, which were taken into consideration at the time of the investment. The Claimant, however, was deprived of the ability to decide, when does he want to exchange the bonds. Instead, he was forced to do so on terms served by the Respondent, what stands opposite to the fair and equitable standard. Simultaneously, the SRA had the retroactive effect as it affected the bonds which were already issued.

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94 Mondev International Inc v. United States, para.116, see also: Gallagher N., para. 3.27;
95 Tecmed, para. H7
96 Saluka v. Czech, para. 309
97 The SRA, article 1 cc (page 23 of the record)
98 Request for Arbitration, para. 3
99 Request for Arbitration, para. 5
100 Ibidem
73. The Respondent failed to provide due process also by not giving the Claimant the possibility to be heard. According to Procedural Order no. 2 *Dagobah did not invite the bondholders to participate in drafting the SRA*[^101]. Such behavior violates the fair and equitable standard. In Thunderbird case the Tribunal did not find the violation of FET, *because the claimant had been given a full opportunity to be heard and to present evidence and that the proceedings were subject to a judicial review by the courts*[^102]. In the present case the situation is different – the Claimant was not given any opportunity to be heard, therefore, this Tribunal is invited to use the approach of the Thunderbird Tribunal and rule that the Respondent has violated its obligations under BIT.

74. What is more, measures undertaken by the Respondent were discriminatory. It resulted in violation of the Claimant’s right to fully control its investment and exchange the bonds in 2015. The Respondent must have had the knowledge that Carlissian’s *bonds represented approximately 10% of the value*[^103]. The Respondent as the issuer of those bonds was aware of the fact. Nevertheless, it enacted the SRA which stated that *at least seventy five (75%) of the participating capital will have to vote to approve the exchange*[^104]. Such provision is discriminatory for outstanding 25% of the participating capital, which in the case at hand is in significant part represented by the Claimant.

    **Enactment of the SRA resulted in not providing stable predictable legal framework for the Claimant**

75. The essential factor in investing in bonds is that the investor is able to predict the development of the economic situation in the future. Within unstable legal framework it is impossible. In the case at hand the Claimant was hoping for *stable economy*, as it was committed by the Dagobah’s government[^105]. The Claimant has made its investment also relying on the BIT preamble which states: *agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards*[^106]. Those commitments given by the Respondent were violated.

76. In the present case the Claimant took into account several factors before making an investment in sovereign bonds. Those were stable economy, as pledged by the government

[^101]: Procedural Order no. 2, para. 21  
[^102]: Dolzer R., Schreuer Ch., p. 292  
[^103]: Procedural Order no. 2, para. 24  
[^104]: The SRA, article 2.3, p. 25  
[^105]: Procedural Order no. 2, para. 18  
[^106]: Appendix 1, the preamble, p. 7
and BIT’s preamble. The Claimant, when buying the sovereign bonds in 2003, took into consideration also the fact, that in 2003 Dagobah was considered to be past the most difficult period\textsuperscript{107}. Those factors let the Claimant put faith that the Respondent would provide treatment, that would not affect those expectations.

77. In Tecmed case the Tribunal found that the fair and equitable treatment standard required the Contracting Parties to provide to international investments treatment, that does not affect the basic expectations that were taken into account by the foreign investor to make the investment\textsuperscript{108}. Similar, in SD Myers case the Tribunal stated: \textit{Whereas the prudent investor will in light of these rulings, carefully examine the laws before investing, the host state must at all times be aware that its legal order forms the basis of legitimate expectations which must be taken into account in future reforms}\textsuperscript{109}. The Claimant consequently asserts that it has fulfilled its obligations to carefully examine the law before investing. It claims, however, that the Respondent failed to take into account the legitimate expectations of the other Party in its reforms. This behavior constitutes violation of fair and equitable standard.

78. In the present case, the Respondent failed in realizing those conditions, thus it breached the fair and equitable standard by not securing the Claimant’s legitimate expectations.

\textbf{CAC in new sovereign bonds amount to denial of justice of the Claimant}

79. The new bonds provided by the Respondent included the Collective Action Clause („CAC”), which stated, 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\textsuperscript{110}. The old bonds did not contain such clause. The Claimant asserts that wording of the CAC leads to factual denial of justice and as such is violating article 2 (2) of the BIT.

80. The Claimant asserts that \textit{retroactive effect given to the collective action mechanism amounts to a violation of Article 2 of the BIT}\textsuperscript{111} as it effected in denial of justice. When speaking about denial of justice one could say that this standard can only be violated by an act of a state or by procedural denial of access to justice. However, \textit{this duty may be

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\textsuperscript{107} Appendix 4, The Global Financial Herald, 12 December 2011, p. 21
\textsuperscript{108} Tecmed, para. 58
\textsuperscript{109} Dolzer R., Schreuer Ch., p. 146
\textsuperscript{110} Uncontested Facts, para. 21
\textsuperscript{111} Request for Arbitration, para. 11
violated not only by the courts but also through legislative or executive action\textsuperscript{112}. In the case at hand it was violated through legislative action.

81. What is more, in Loewen case the Tribunal pointed that: \textit{The modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organization of the State}\textsuperscript{113}. In the case at hand, new bonds (understood as an act) were issued by the executives of Dagobah (namely Dagobah’s government\textsuperscript{114}). Therefore new bonds shall be defined as an act of a State.

82. The Respondent by enacting the SRA has taken away from the Claimant its right to efficient access to justice. It put an obligation that a party that wanted to initiate any legal action shall \textit{gather at least 20\% of the nominal value of the issue in order to sue}\textsuperscript{115}. Such condition is discriminatory and leads to practical impossibility to access to the proceedings. In the present case, not only the investors suffered from exchanging their bonds under not favor circumstances, but their possibility to assert their right was limited.

83. In Azinian case the Tribunal ruled that: \textit{A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way}\textsuperscript{116}. In the present case, not even such situation could occur, as the Claimant would have to gather 20\% of nominal value of the issue to even ask the courts to entertain a suit. Despite the fact, that unfavorable exchange of bonds took place. Not only the Claimant suffered losses from the Respondent’s activities, but to sue it would need to convince other bondholders and bring the suit. The courts would refuse to entertain a suit if there was not proper nominal value of the issue collected. Finally, it was the Respondent who refused to give to the investors full enjoyment of the right to justice. This leads also to double discrimination.

84. In Ambatielos case the Tribunal held: \textit{The foreigner shall enjoy full freedom to appear before the courts for the protection or defense of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law; (...) to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of}

\textsuperscript{112}Dolzer R., Schreuer Ch., p. 142
\textsuperscript{113}Loewen v. USA, para. 70
\textsuperscript{114}Uncontested Facts, para. 18
\textsuperscript{115}Uncontested Facts, para. 21
\textsuperscript{116}Azinian v. Mexico, para. 102
the country. This standard was violated in the present case in the very beginning as the right of the Claimant to bring actions before the courts was violated, even before it could be used. The Claimant’s full freedom to appear before the courts was denied. Giving the condition of gathering 20% of the nominal value of the issue violated such freedom to appear and discriminates bondholders who possess smaller amounts of nominal value of the issue.

85. As the measures undertaken by the Respondent amount to factual denial of justice and violation of fair and equitable treatment standard, the Claimant asks this Tribunal to oblige the other party of the dispute to take appropriate measure and revoke the law, that would protect equally the Claimant and the national investors. Following prof. Schreuer: whenever a foreign investor has been subject to a seriously unlawful act, the local authorities are required to take appropriate measures so as to ensure that justice is done. On this basis the Claimant requests as mentioned above.

V. Respondent’s actions cannot be exempted from breaching the BIT.

86. The Respondent failed to comply with its obligations under the BIT. The Respondent’s action cannot be exempted from breaching the BIT under Article 6 (2) because it did not satisfy requirements arising from it. What is more, the Respondent cannot invoke necessity to justify breaching the BIT since the measures taken do not fulfill conditions from Article 25 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

The Respondent's actions do not fulfill conditions of non-precluded measures

1. Non-precluded measures clause in the BIT

87. Circumstances precluding wrongfulness in international investment law can be divided to general circumstances formulated in customary law and those that are specific for investments and can be included in the BITs. The circumstances precluding wrongfulness in customary international law comprise Chapter V of Articles on Responsibility of States for Internationally Wrongful Acts. Article 25 of the International Law Commission (ILC) is widely accepted as a statement of the customary international law of necessity.

88. Article 6 (2) of the BIT states that nothing in this Treaty shall be constructed: to preclude a Party from applying measure that are necessary for the fulfillment of its obligations with

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117 Ambatielos, para. 325
118 Dolzer R., Schreuer Ch., p. 164
119 Bjorklund A., para. 315; Enron Award, para. 303, Sempra Award, para 344
respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests\textsuperscript{120}. This article may (but the Claimant asserts that does not) indicate the existence of a non-precluded measures (NPM). However, in this case there are no prerequisites for its application, and therefore Respondent's actions are not exempted from breaching the Corellia - Dagobah BIT.

89. The non-precluded measures clause should be interpreted to reflect the intention of the contracting Parties and the aim of the BIT\textsuperscript{121}. There are several approaches concerning NPM clause. According to the first approach the NPM clauses are primary rules distinct from the state of necessity\textsuperscript{122}. The second approach treats the NPM clause as a secondary rule (\textit{lex specialis}) that excludes the law of necessity (as a part of international customary law - \textit{lex generalis})\textsuperscript{123}. The third approach treats NPM clause as inseparable from the customary law insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined\textsuperscript{124}. The state of necessity and NPM clauses are distinct rules of law\textsuperscript{125}. William W. Burke-White and Andreas von Steden emphasize that \textit{the only circumstances in which the treaty rule could be said to replace the customary rule are it is the only circumstances the treaty specifically indicates that it replaces customary rules or if the treaty provision and the customary rule are in such direct conflict that they cannot co-exist}\textsuperscript{126}.

90. The maintenance or restoration of international peace, security or the protection of its own essential security interests are circumstances excluding liability that are not recognized by the conditions from article 25 of States for Internationally Wrongful Responsibility Act, but their base is located in the Corellia-Dagobah BIT. These circumstances excluding liability will be subject to the provisions of Article 56 of Responsibility of States for Internationally Wrongful Act and will be treated as special\textsuperscript{127}. Article 56 of Responsibility of States for Internationally Wrongful Act states that \textit{the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles}.

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\textsuperscript{120}The BIT, p. 10
\textsuperscript{121} Bottini G., p. 148.
\textsuperscript{122}CMS Annullment, para. 133.
\textsuperscript{123}CMS Annullment, para. 133.
\textsuperscript{124}Sempra Award, para. 376.
\textsuperscript{125} von Steden W., Burke-White & Andreas W.p. 18
\textsuperscript{126} Ibidem
\textsuperscript{127}Enron Award, para. A12.
2. The debt restructuring was not a measure necessary for the protection of Respondent's essential security interests

91. The debt restructuring was not necessary mean to fulfill the Respondent's obligations with regard to the protection of its essential security interests. BITs are basically supposed to promote and protect investment. In the present case the statement of the International Law Commission (ILC) is important. The customary defense of necessity is available in the limited circumstances in which the action taken is the only way for the State to safeguard an essential interest against a grave and imminent peril and that action does not seriously impair an essential interest of another state. The ICJ confirmed this most restrictive reading of necessity in the Gabcikovo-Nagymaros Project case, finding that the defense was inapplicable because other means were available to Hungary to remedy the situation.

92. In the present case, the situation of the Respondent was not so complicated that it could justify excluding responsibility on the basis of Article 6 (2) of the BIT. The Respondent could have taken other steps to rescue their essential security interests. Such approach is established by Arbitral Tribunals, which adjudicated on cases regarding Argentina, e.g. in CMS, Sempra and Enron and stressed that Argentine had more opportunities to save their essential security interests.

93. In the CMS case, the Claimant asserted that severe as the crisis was, it did not involve “grave” or “imminent” peril nor has it been established that the Respondent state did not contribute to the emergency as most of the causes underlying the crisis were endogenous. Moreover, it is asserted that the Respondent has not shown that the measures adopted were the only means available to overcome the crisis. In the instant case, the Respondent had also several alternative measures to protect their interests. The Respondent did not choose to undertake those measures. The Dagobah could comply with the International Monetary Fund recommendations by undertaking less intensive measures than enacting the SRA, as the IMF suggested several measures that would enable the State to reduce its debt. The debt restructuring was just one among many others.

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128Luzi Roberto A., p. 16
129ILC Draft Articles, art. 25 [in:] von Steden W., Burke-White & Andreas W.
130Gabcikovo, para. 42. [in:] William W. Burke-White & Andreas von Steden, p. 37
131Bottini G., p. 155.
132CMS Award, para. 314.
133Uncontested Facts, para. 15 & para. 17.
94. The circumstances referred to in Article 6 (2) of the BIT are exceptions. Any exception must be clearly stated in the BIT and would receive a strict interpretation (*interpretatio restrictiva*)\(^{134}\). It must also be kept in mind that the scope of the BIT should normally be understood and interpreted as attending to the concerns of both parties\(^{135}\). The Respondent's actions were not necessary means to fulfill the Respondent's obligations in regard to the maintenance or restoration of international peace or security. The situation of the economic crisis, in which was the Respondent in the literal interpretation of the Corellia-Dagobah BIT does not mean derogation peace or security in the country of the Dagobah. Consequently, the economic crisis cannot in this case be indicated as circumstances excluding liability.

3. Respondent has contributed to the situation therefore it cannot refer to the non-precluded measures clause

95. The Respondent has contributed to the deteriorating economic situation, hence it cannot rely on NPM clause. Contribution was flagrant and significant. Dagobah had an impact on the crisis through its monetary policy and decisions regarding finances. The States must be especially prudent in the economic decision-making at a time when they are young democracy.

96. The interpretation and application of NPM clauses will therefore prove critical to determining both state freedom to respond to exceptional circumstances and the scope of investment protections accorded under BITs\(^{136}\).

The Respondent cannot exclude its responsibility on the basis of state of necessity

97. In case the Respondent would argue, that its responsibility is excluded on the basis of state of necessity, the Claimant asserts, that it cannot be excluded on such basis. The Claimant argues that the Respondent did not fulfill conditions of rightful invocation of necessity, that are specified in customary international law.

1. The Respondent did not fulfill the conditions of invocation of necessity

98. The circumstances precluding wrongfulness in customary international law are contained in Chapter V of Articles on Responsibility of States for Internationally Wrongful Acts. The six circumstances are: consent (Article 20), self-defense (Article 21), countermeasures (Article 22), force majeure (Article 23), distress (Article 24) and necessity (Article 25).

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\(^{134}\)CMS Award, para. 313.

\(^{135}\)CMS Award, para. 360.

There is an additional circumstance in Article 26 concerning *ius cogens*. Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law.\(^{137}\)

99. Article 25 of the ILC Articles is widely accepted as a statement of the customary international law of necessity.\(^{138}\) The Article contains four requirements, that the state has to comply with to invoke necessity as a ground for precluding wrongfulness of the act that not in conformity with an international obligations. First of all, the act have to be *the only way for the State to safeguard an essential interest against a grave and imminent peril* and it must not *seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole*. In any case, the state may not invoke necessity if the obligation in question excludes such possibility or if *the State has contributed to the situation of necessity*.

100. Conditions included in this Article are strict to prevent possible abuse and must be accomplished cumulatively so only rarely will the state be able to preclude wrongfulness on the ground of necessity.\(^{139}\) In the Claimant’s opinion Article 25 cannot be invoked by the Respondent in the present case, because the Article relates exclusively to obligations between sovereign States.\(^{140}\) Thus in relations between a state and an investor the state cannot base its defense on necessity.

101. If the Tribunal finds that Article 25 of the ILC Articles applies in the case, the Claimant asserts, *ex abundanti cautela* (out of an abundance of caution), that the Respondents actions do not fulfill conditions from article 25 of States Responsibility for Internationally Wrongful Act.

102. Respondent’s actions are not the only way for the State to safeguard an essential interest against a grave and imminent peril. Article 25 para. 1 (a) demands that the interest is essential, it is in a grave and imminent peril and the measure undertaken is the only way to safeguard it. Even if one assumed that a severe economic crisis can constitute a threat to the Respondent’s essential interest,\(^{141}\) in the Claimant’s opinion the debt restructuring was not the only way to safeguard it. In CMS vs. Argentina case the Tribunal emphasized that there have been many serious economic and social crises in different

\(^{137}\)Draft Articles
\(^{138}\)Bjorklund A, para 344.
\(^{139}\)Draft Articles
\(^{140}\)BG Final Award, para. 408.
\(^{141}\)Bjorklund A., p. 483-485.
countries but Renegotiation, adaptation and postponement have occurred but the essence of the international obligations has been kept intact\textsuperscript{142}. The Commentary of International Law Commission to Article 25 states that the plea is excluded if there are other means available, even if they may be more costly or less convenient\textsuperscript{143}.

103. The Respondent faced the economic crisis in 2001\textsuperscript{144}. It was engendered by borrowing on international financial markets, combined with high government budget deficits” and also tax evasion\textsuperscript{145}. At that time the Respondent restructured its sovereign debt for the first time. The Respondent had almost ten years to draw conclusions and take appropriate measures to safeguard its economy\textsuperscript{146}. What is more, the debt restructuring was among many other suggestions made by the IMF, none of which the Respondent decided to implement by the time of decision on the debt restructuring\textsuperscript{147}. That is why the Claimant claims that measures taken by the Respondent were excessive and constitute the breach of the BIT and were not the only way to safeguard its essential economic interest.

2. **Respondent has contributed to the situation therefore it cannot refer to the state of necessity**

104. Article 25 prohibits the state from invoking necessity as a ground for precluding wrongfulness, if the State has contributed to the situation of necessity. The latter condition, which is meant to prevent a party from taking legal advantage of its own fault\textsuperscript{148}, is not fulfilled. As mentioned above, the Respondent had the chance to prevent the crisis or at least to alleviate its effects – the crisis does not appear suddenly, the problems mounts for years. The Respondent should have implemented complex reforms, when the debt started to accrue. Although they were exogenous factors and the crisis of 2008 affected many nations\textsuperscript{149}, the Respondent cannot deny its partial responsibility for the severity of crisis\textsuperscript{150}.

105. Another argument against the possibility to invoke necessity can be derived from Article 27 of the ILC Articles. It states that the state has to comply with the obligation again if and to the extent that the circumstance precluding wrongfulness no longer exists.

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\textsuperscript{142}CMS Award, para. 355.
\textsuperscript{143}Draft Articles
\textsuperscript{144}Uncontested Facts, para. 3
\textsuperscript{145}Uncontested Facts, para. 3
\textsuperscript{146}CMS Award, para. 354
\textsuperscript{147}Procedural Order No 3, para. 36
\textsuperscript{148}Enron Award, para. 311
\textsuperscript{149}Uncontested Facts, para. 14
\textsuperscript{150}CMS Award, para. 328
In present case the investors afflicted by the debt cannot expect that they would reclaim the money they lost as a result of debt restructuring. The temporary character of necessity has been confirmed by the ad hoc Committee in CMS case\textsuperscript{151}.

3. **Actions taken by the Respondent impair an essential interest of investors and the Corellian Republic**

106. In the Claimant’s opinion the debt restructuring impaired essential interests of investors, including the Claimant, and the Corellian Republic. One of the aims of the BIT is to protect investors from the effects of unstable situation in the host state\textsuperscript{152}. Although Article 25 does not enumerate *expressis verbis* beneficiaries of the treaty, the Claimant agrees with the Tribunal in CMS vs. Argentine case that if the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties\textsuperscript{153}. In the present case the Respondent has undertaken measures that were in opposition to investors’ essential interests and thus it impaired the essential interest of the Corellian Republic.

\textsuperscript{151} CMS Annulment, para. 137
\textsuperscript{152} The BIT, Preamble
\textsuperscript{153} CMS Award, para. 357
PRAYERS FOR RELIEF

The Claimant respectfully prays to the Tribunal for the following relief:

- Declare that this Tribunal has jurisdiction to hear the dispute;
- Declare that this Tribunal is bound by the PCA Arbitral Tribunal’s decision on jurisdiction;
- Declare that this Tribunal will rule on the claims asserted in view of the forum selection clause contained in the sovereign bonds;
- Declare that the Respondent has violated article 2 of the BIT by breaching the fair and equitable treatment standard;
- Declare that the Respondent’s actions cannot be exempted from breaching the BIT;
- Rule that the Respondent shall pay compensation to the Claimant.

Counsels for the Claimant

Team Azevedo

20 September 2014