Arbitration Institute of the Stockholm Chamber of Commerce

IN THE PROCEEDING BETWEEN

Calrissian & Co., Inc.

(Claimant)

v.

The Federal Republic of Dagobah

(Respondent)

CASE NO. 2013/063 C

MEMORIAL FOR CLAIMANT
ARGUMENTS ON JURISDICTION ........................................................................................................... 4

I. THE SCC TRIBUNAL HAS JURISDICTION BECAUSE THE PCA TRIBUNAL’S DECISION HAS
ALREADY ESTABLISHED THAT SOVEREIGN BONDS ARE AN INVESTMENT ......................................... 4

  1. Maintaining the PCA Tribunal’s reasoning gives full effect to Article 7(2) of the
Corellia-Dagobah BIT .......................................................................................................................... 5

  2. In the alternative, the SCC Tribunal should follow the PCA Tribunal’s decision ...... 6

  A. The SCC Tribunal is interpreting the same treaty as the PCA Tribunal..................... 6

  B. The SCC Tribunal has no compelling contrary grounds to differentiate its reasoning
from that of the PCA Tribunal ......................................................................................................... 7

II. THE SOVEREIGN BONDS HELD BY CALRISSIAN FULFILL THE REQUIREMENTS OF ARTICLE 1
OF THE CORELLIA-DAGOBAH BIT ...................................................................................................... 8

  1. Calrissian’s sovereign bonds are an investment .......................................................... 9

     A. The Corellia-Dagobah BIT provides the required characteristics for investment ....... 9

     B. Calrissian’s sovereign bonds fulfill the Corellia-Dagobah BIT’s definition of
investment......................................................................................................................................... 11

     C. Calrissian’s investment was made in Respondent’s territory ..................................... 13

  2. Calrissian is a protected investor.................................................................................. 14

III. THE SCC TRIBUNAL HAS JURISDICTION OVER CALRISSIAN’S CLAIM DESPITE THE
SOVEREIGN BONDS’ FORUM SELECTION CLAUSE ........................................................................ 15

  1. The SCC Tribunal has jurisdiction over treaty claims .............................................. 15

     A. The SCC Tribunal has sole jurisdiction over Calrissian’s treaty claim ................ 16

     B. In the alternative, the SCC Tribunal’s jurisdiction is secured over treaty claims even
though they involve contractual components .......................................................................... 18
2. The sovereign bonds’ contractual forum selection clause cannot waive Calrissian’s right to arbitration under the Corellia-Dagobah BIT ......................................................... 19
   A. Respondent’s consent to arbitration cannot be withdrawn ........................................ 19
   B. Calrissian has not waived its right to arbitration ...................................................... 20

ARGUMENTS ON MERITS ..................................................................................................... 24

IV. RESPONDENT VIOLATED ITS OBLIGATION OF FAIR AND EQUITABLE TREATMENT .......... 24
   1. Fair and Equitable Treatment is an autonomous standard ......................................... 24
       A. Respondent’s measures were arbitrary ................................................................. 26
       B. Respondent’s measures were unreasonable ......................................................... 28
       C. Respondent frustrated Calrissian’s legitimate expectations .................................. 29

V. THE DEFENSE OF NECESSITY CANNOT EXCUSE DAGOBAH’S BREACH OF THE CORELLIA-
   DAGOBAH BIT ...................................................................................................................... 31
   1. Respondent’s breach of Fair and Equitable Treatment towards Calrissian does not
      fall under the Corellia-Dagobah BIT’s NPM clause .................................................. 31
          A. Article 6(2) of the Corellia-Dagobah BIT is not self-judging .............................. 32
          B. Dagobah’s essential security interests are not at stake ........................................ 33
          C. Respondent’s measures were not necessary ...................................................... 34
   2. Respondent cannot invoke the customary defense of necessity and is fully responsible
      for its breach of the Corellia-Dagobah BIT ................................................................. 36
          A. Respondent’s financial crisis was not a grave and imminent peril .................... 37
          B. Respondent’s essential interests are not seriously impaired ............................... 38
          C. Respondent’s measures were not the only way to address its financial crisis ....... 39
          D. Respondent’s measures seriously impair an essential interest of Corellia through its
             bondholders ............................................................................................................. 40
          E. Respondent contributed to its financial crisis ...................................................... 41

PRAYER FOR RELIEF ............................................................................................................. 42
## LIST OF AUTHORITIES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ARTICLES</strong></td>
<td></td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th><strong>JOURNALS</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Blyschak</strong></td>
</tr>
<tr>
<td><strong>Burke-White/Von Staden</strong></td>
</tr>
<tr>
<td><strong>Henry</strong></td>
</tr>
<tr>
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</tr>
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</tr>
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</tr>
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</tr>
<tr>
<td><strong>Musurmanov</strong></td>
</tr>
<tr>
<td><strong>Potestà</strong></td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
</tbody>
</table>
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# LIST OF LEGAL SOURCES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
</tr>
<tr>
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</tr>
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<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Case</td>
<td>Description</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
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</tr>
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</tr>
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<tr>
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</tr>
<tr>
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</tr>
<tr>
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<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
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<tr>
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</tr>
<tr>
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</tr>
<tr>
<td><strong>Siemens v Argentina</strong></td>
<td>Siemens A.G. v Argentina Republic, ICSID Case No. ARB/02/8, Award, (Feb. 6, 2007)</td>
</tr>
<tr>
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<td>Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003)</td>
</tr>
<tr>
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<td>TSA Spectrum de Argentina S.A. v. Argentina Republic, ICSID Case No. ARB/05/5, Award, (Dec. 19, 2008)</td>
</tr>
<tr>
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</tr>
<tr>
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<td>Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, (July 3, 2002)</td>
</tr>
<tr>
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</tr>
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</table>

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STATEMENT OF FACTS

1. Calrissian & Co., Inc. ("Calrissian"), a hedge fund, is a national of Corellia and Claimant in this dispute. Respondent is the Republic of Dagobah. Dagobah is an emerging market.

2. Calrissian purchased sovereign bonds on the secondary market, which were initially issued by Dagobah. Respondent enacted legislation that changed the terms of the bonds, including those held by Calrissian. This change removed the requirement of unanimous consent of bondholders to renegotiate the terms of the bonds and led to the addition of a retroactive collective action clause ("CAC") and financial losses to bondholders.

Dagobah’s 2001 economic crisis

3. In early 2001, Dagobah experienced a sovereign debt crisis plunging it into a two-and-a-half year economic crisis, which was caused, among other things, by its heavy borrowing on financial markets and public budget deficits.

4. On 7 May 2001, Dagobah underwent a sovereign bond restructuring that resulted in a sovereign bond exchange offer causing major losses to Corellian bondholders. Following the 2001 sovereign debt restructuring, Dagobah’s government declared its "commitment to a more stable economy and financial sector" and issued sovereign bonds in 2003, which Calrissian later acquired. These sovereign bonds had a 12-year maturity rate and the funds derived from them were invested into Dagobah’s state budget.

The PCA Tribunal’s award

5. Concerned with how Dagobah’s sovereign debt restructuring might impact its economy and its nationals, Corellia entered diplomatic negotiations in order to confirm that sovereign bonds fall under the definition of investment found in Article 1 of the Corellia-Dagobah BIT. Corellia and Dagobah did not agree on whether sovereign bonds were an investment under the Corellia-Dagobah BIT.

6. To resolve this, Corellia began arbitral proceedings against Dagobah seeking a decision clarifying the interpretation of the above-mentioned sovereign bonds. On 29 April 2003, the Permanent Court of Arbitration ("PCA") Tribunal rendered its interpretative decision
that ‘sovereign bonds’ are ‘investments’ for the purposes of the Corellia-Dagobah BIT. Dagobah did not challenge the PCA Tribunal’s award.

Dagobah’ Sovereign Debt Restructuring Act ("SRA")

7. In 2010, a recession hit Dagobah. Fearing a new sovereign debt crisis in Dagobah, the International Monetary Fund ("IMF") suggested that Dagobah make many changes to address its adverse financial state, especially if it wished to benefit from a major bailout. After considering all the alternatives suggested by the IMF, Dagobah settled on conducting a sovereign debt restructuring by enacting the SRA in 2012.

8. The SRA imposed a qualified majority agreement to amend the sovereign bonds. This removed a single bondholder’s capacity to oppose such amendments, which was secured under the old bonds’ regime. Bondholders were only given a three-day window to participate in consultations regarding the SRA.

Dagobah’s exchange offer

9. Dagobah made a sovereign bond exchange offer to its bondholders which, in substance, reduced the sovereign bonds’ face value by 30% and established retroactive CACs limiting bondholders’ access to legal action. A majority of the bondholders accepted the offer. Calrissian, however, was part of the holdout minority.

Proceedings before the Stockholm Chamber of Commerce

10. In 2013, Calrissian commenced arbitral proceedings before the Stockholm Chamber of Commerce ("SCC") pursuant to Article 7(1) of the Corellia-Dagobah BIT.
SUMMARY OF ARGUMENTS

11. **JURISDICTION.** The SCC Tribunal has jurisdiction. First, the PCA Tribunal’s interpretation that ‘investment’ under Article 1 of the Corellia-Dagobah BIT includes sovereign bonds, is binding. Calrissian’s sovereign bonds are, therefore, an ‘investment’ over which the SCC Tribunal has jurisdiction. Second, should the SCC Tribunal not consider the PCA Tribunal’s decision binding, Calrissian’s sovereign bonds fulfill the characteristics of investment as set out in Article 1 of the Corellia-Dagobah BIT and thus Calrissian is an investor. Third, the forum selection clause in Calrissian’s sovereign bonds does no bar to the SCC Tribunal’s jurisdiction because the dispute brought by Calrissian is based on Respondent’s breach of the Fair and Equitable Standard guaranteed in Article 2 of the Corellia-Dagobah BIT and Calrissian’s right to procedural arbitration cannot be waived or withdrawn by Respondent.

12. **MERITS.** If the Tribunal finds that it has jurisdiction and rules on the merits of the case, Calrissian submits that, first, Respondent violated the Fair and Equitable Treatment guaranteed in Article 2 of the Corellia-Dagobah BIT. Respondent acted arbitrarily in removing the requirement of unanimous consent to renegotiate the bonds’ terms, and enacted the SRA which unreasonably negated a clause requiring unanimous consent to modify Calrissian’s investment. Respondent also violated Calrissian’s legitimate expectations of a stable economic and legal environment. Second, Respondent’ breach of the Corellia-Dagobah BIT does not fall under the scope of the Corellia-Dagobah BIT’s non-precluded measures clause, and thus cannot be excused under the BIT. Dagobah is not exonerated from liability because of necessity as a circumstance precluding wrongfulness under customary international law.
ARGUMENTS

ARGUMENTS ON JURISDICTION

13. The Tribunal has jurisdiction to decide on the merits of the claim because: (i) the Tribunal is bound by the Permanent Court of Arbitration ("PCA") Tribunal’s decision\(^1\) that sovereign bonds are investments; (ii) even if the Tribunal does not find that it is bound by the PCA Tribunal’s decision, the criteria of investment under the Corellia-Dagobah BIT are met; (iii) Calrissian is an investor in the territory of Dagobah; and, (iv) the bonds’ forum selection clause does not bar the Tribunal’s jurisdiction or the dispute’s admissibility before the Tribunal.

I. **THE SCC TRIBUNAL HAS JURISDICTION BECAUSE THE PCA TRIBUNAL’S DECISION HAS ALREADY ESTABLISHED THAT SOVEREIGN BONDS ARE AN INVESTMENT**

14. The SCC’s Tribunal has jurisdiction pursuant to Article 8 of the Corellia-Dagobah BIT because the PCA Tribunal has already established that sovereign bonds are an investment under Article 1 of the BIT.

15. On 29 April 2003, pursuant to Article 7 of the Corellia-Dagobah BIT, the PCA Tribunal decided on a State-to-State dispute,\(^2\) and interpreted ‘investments’ under this treaty as including sovereign bonds:

> the language of Article 1 is broad and permissive enough to allow the acquisition of sovereign bonds to be qualified as an “investment” within the meaning of the BIT, in which case such bonds may enjoy the protection granted by the standards contained therein.\(^3\)

16. The SCC Tribunal is bound by the PCA Tribunal’s interpretation of investment because this (1) gives full effect to Article 7(2) of the Corellia-Dagobah BIT, and in the

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\(^1\) Corellian Republic v. Federal Republic of Dagobah, Award of the Arbitral Tribunal, PCA Case Number 000-00, (Apr. 29, 2003) [hereinafter PCA Tribunal’s decision].

\(^2\) Uncontested Facts at para 11.

\(^3\) PCA Tribunal’s decision, p. 16
alternative; (2) there are no compelling grounds to differentiate the PCA Tribunal’s analysis from the present dispute.

1. **Maintaining the PCA Tribunal’s reasoning gives full effect to Article 7(2) of the Corellia-Dagobah BIT**

17. Upholding the PCA Tribunal’s interpretation of investment is in accordance with the will of the Parties as expressed in the Corellia-Dagobah BIT. Indeed, Article 7(2) of the Corellia-Dagobah provides:

> If a dispute between the Parties cannot thus be settled, it shall, upon the request of either Party, be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules of international law [emphasis added].

18. The wording of Article 7 of the Corellia-Dagobah BIT indicates the binding nature State-to-State dispute as an interpretation mechanism. Like in the ICJ Statute ("The decision of the Court has no binding force except between the parties and in respect of that particular case"[emphasis added]), the Parties could have indicated that a decision rendered under the State-to-State dispute mechanism is binding "between the parties" only, but they did not. Moreover, while Article 7 specifies that decisions rendered under that article are "binding", Article 8, however, does not. This proves the different nature of the two articles and explains why Article 7 allows a subsequently binding ‘authentic interpretation’ of the Corellia-Dagobah BIT. As argued by Roberts, interpretative State-to-State awards "should be considered binding on the treaty parties and future Investor-State tribunals" because they develop "a theory of shared interpretive authority" within a particular treaty.

19. Thus, whether Respondent agrees or not with the PCA Tribunal’s interpretation of Article 1 of the Corellia-Dagobah BIT, it is nonetheless an ‘authentic interpretation’ falling

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4 *VCLT*, art. 31 23.
5 *Agreement Between the Corellian Republic and the Federal Republic of Dagobah for the Promotion and Protection of Investments*, Corellia-Dagobah, June 13, 1992, art. 7(2), [hereinafter Corellia Dagobah BIT]
6 *ICJ Statute*, Article 59.
7 *Roberts*, at pp 60-61.
under treaty’s guarantee of "binding decision[s]" on the "interpretation and application" of its provision at the request of the Parties.10

20. The *Ecuador* case addressed the interplay of Investor-State and State-to-State dispute resolution, and provides a relevant analogy for this case. Ecuador, which was dissatisfied with a previous Investor-State award, submitted a claim in the form of a State-to-State dispute concerning, among other things, a provision of the U.S.-Ecuador BIT which had been interpreted in the previous award. The U.S. contended that since the U.S.-Ecuador BIT does not provide for an appeals mechanism, the Tribunal did not have jurisdiction to somehow re-interpret the same article under a different claim.11

21. Although the *Ecuador* award has not been publicly released, the Tribunal reportedly dismissed Ecuador’s claim.12 The same line of reasoning applies in the current case, as re-interpreting Article 1 of the Corellia-Dagobah BIT would effectively force Corellia into a process of appeal, which it has not consented to in the Corellia-Dagobah BIT.

22. In the case at hand, the SCC Tribunal proceedings do not amount to questioning the States Parties’ authority to interpret the Corellia-Dagobah BIT. Rather, investors are applying a binding State-to-State arbitration award that interpreted the Corellia-Dagobah BIT as provided by Article 7(2) of the Corellia-Dagobah BIT, thus maintaining the authority of the Parties over the BIT’s terms.

2. **In the alternative, the SCC Tribunal should follow the PCA Tribunal’s decision**

23. Should the Tribunal not find the PCA Tribunal’s decision to be binding, it should nevertheless follow its reasoning because (A) it is interpreting the same treaty and (B) there are no compelling contrary grounds to dismiss the PCA Tribunal’s reasoning.

A. **The SCC Tribunal is interpreting the same treaty as the PCA Tribunal**

24. The SCC Tribunal ought to follow the PCA Tribunal’s reasoning because it has to interpret the same treaty, under similar factual circumstances.

10 *Corellia-Dagobah BIT*, art. 7(1).
11 Respondent’s Memorial on Jurisdiction in Ecuador v USA at para 48.
25. The PCA Tribunal’s award refers to ‘sovereign bonds’ in general as opposed to a specific type of bond, contrary to what Respondent argues\(^{13}\)—that is, that the PCA Tribunal was referring specifically to pre-SRA bonds and not all sovereign bonds categorically. Indeed, there is no compelling reason to differentiate the pre-SRA bonds from post-SRA bonds because the PCA Tribunal’s decision affirmed that all sovereign bonds are an investment under Article 1 of the Corellia-Dagobah BIT. The PCA Tribunal concluded:

26. Notwithstanding the fact that the list of examples does not expressly refer to sovereign bonds, […] , sovereign bonds fulfill all three of the characteristics of investment included in the definition: the commitment of capital (acquisition of the bonds); the expectation of gain (interest payments and other promises); and the assumption of risk (which became so clear with the very occurrence of the crisis that it deserves no further explanation).\(^ {14}\)

**B. The SCC Tribunal has no compelling contrary grounds to differentiate its reasoning from that of the PCA Tribunal**

27. The SCC Tribunal must follow the PCA Tribunal’s interpretation of investment as there are no compelling contrary grounds not to. The general practice of arbitral tribunals is to refer to decisions from other tribunals in similar cases, while justifying one’s reasoning when distinguishing from what has been previously established.\(^ {15}\)

28. As Schreuer explains, "a coherent case law strengthens the predictability of decisions and enhances their authority.”\(^ {16}\) In this case, the SCC Tribunal can only dismiss the PCA Tribunal’s interpretation of ‘investment’ under the Corellia-Dagobah BIT if it has compelling reasons to do so. In *Saipem*, the Tribunal stressed that:

> It [the Tribunal] must pay due consideration to earlier decisions of international tribunals. […] subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the

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\(^{13}\) Federal Republic of Dagobah, Calrissian & Co. v. Federal Republic of Dagobah, Case SCC No 00/2013, Answer to the Request for Arbitration, at para 8, (Stockholm Chamber Com.) [hereinafter Answer to Request]\(^{14}\) PCA Tribunal’s decision, at p. 15.

\(^{15}\) Dolzer/Schreuer, at p 44; Weidemaier, at p 1091, 1110; Binder, at pp 26, 84; Kaufmann-Kohler, at p 357.

\(^{16}\) Dolzer/Schreuer, at p 33.
legitimate expectations of the community of States and investors towards certainty of the rule of law.17 [Emphasis added]

29. The PCA Tribunal’s award does not set a precedent that sovereign bonds should always, under any BIT, be considered investments, but rather gave what Roberts describes as an ‘authentic interpretation’18 of Article 1 of the Corellia-Dagobah BIT as comprising sovereign bonds. Further, the sovereign bonds under dispute in the PCA Tribunal’s award do not significantly differ from the bonds currently held by Calrissian. The facts in both disputes are highly similar, in that they revolve around the issuance of sovereign bonds by the Respondent falling under the Corellia-Dagobah BIT.19

30. Tribunals ought to demonstrate that the facts and reasoning from previous awards were sufficiently different to depart from their conclusions.20 In Camuzzi, the Tribunal stated that it had "no reason not to concur with [an earlier] conclusion, even though some of the elements of the fact in each dispute may differ in some respects."21 This demonstrates that minor differences in facts are not a valid ground to depart from an otherwise similar claim.

31. In sum, as there are no compelling grounds to not apply the PCA Tribunal’s award, the SCC Tribunal must employ its interpretation of Article 1 of the Corellia-Dagobah BIT.

II. THE SOVEREIGN BONDS HELD BY CALRISSIAN FULFILL THE REQUIREMENTS OF ARTICLE 1 OF THE CORELLIA-DAGOBAH BIT

32. Should this Tribunal not find the PCA Tribunal’s decision binding, Calrissian contends that the SCC Tribunal has jurisdiction because (1) Calrissian’s sovereign bonds are investments pursuant to Article 1 of the Corellia-Dagobah BIT and (2) Calrissian is an investor under the definition found in Article 1 of the Corellia-Dagobah BIT. These two facts provide the Tribunal with jurisdiction under Article 8 of the Corellia-Dagobah BIT.

17 Saipem v Bangladesh, at para 90; Austrian Airlines v. Slovak Republic at para 84.
18 Roberts, at pp 60 – 61.
20 Schill, at pp 9, 14.
21 Schill, at p 14; Camuzzi v Argentina at para 82.
1. Calrissian’s sovereign bonds are an investment

33. In order for the SCC Tribunal to have jurisdiction, Calrissian’s sovereign bonds are to be evaluated in light of (A) the Corellia-Dagobah BIT’s criteria for investment. Calrissian contends that (B) its sovereign bonds fulfill these criteria.

A. The Corellia-Dagobah BIT provides the required characteristics for investment

34. The criteria to be fulfilled for Calrissian’s bonds to qualify as investments are found in Article 1 of the Corellia-Dagobah BIT, which defines an investment as follows:

   "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.22

35. In accordance with the principles set out in Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), the Corellia-Dagobah BIT’s definition of ‘investment’ must be "interpreted in good faith in accordance with the ordinary meaning" to be given to the terms of the Corellia-Dagobah BIT, in its context, and "in the light of its object and purpose."23

36. Calrissian’s sovereign bonds are assets directly owned by Calrissian,24 which means that they fulfill the "every asset that an investor owns or controls" element of the definition of investment under the BIT. As will be demonstrated below, the sovereign bonds also fulfill the second part of the definition requiring investments to have certain characteristics.

37. The Corellia-Dagobah BIT acknowledges that there are diverse ranges of characteristics that can suggest that an asset is an investment. Article 1 of the BIT first outlines three characteristics of an investment—"the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."25 The conjunction "or" between the characteristics indicate that they do not need to be shown cumulatively. Article 1

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22 Corellia-Dagobah BIT, art. 1
23 VCLT, art 31.
25 Corellia-Dagobah BIT, art. 1
proceeds to provide an illustrative list of "forms that an investment may take." [Emphasis added]

38. There is a clear correlation between the U.S. 2012 Model BIT that has an identical formulation to the Corellia-Dagobah BIT, which demonstrates, that this formulation restricts the definition of investment to only three characteristics. In the same way, Article 1 of the Corellia-Dagobah BIT narrows the definition of investment to three alternative characteristics as far as the application of the treaty is concerned.

39. The Tribunal should not consider nor apply the reasoning of the Tribunal in Romak, as the parties to the Corellia-Dagobah BIT clearly intended for three alternatives. The BIT interpreted in Romak, Switzerland-Uzbekistan BIT, refers to investment as "includ[ing] every kind of asset," a definition which the Tribunal found to be "ambiguous or obscure." Since the Switzerland-Uzbekistan BIT provides no characteristics of investment, the Tribunal decided to "determine its contours" by importing the Salini criteria of investment developed under ICSID. The Romak Tribunal sought an inherent meaning to investment so that its scope would not be limited to the types of investments listed in Article 1(2) of the Switzerland-Uzbekistan BIT.

40. Moreover, departure from the ‘inherent’ definition of investment finds considerable support in legal writing. As an analogy, the application of an inherent definition of investment under Article 25 of the ICSID Convention has been rejected by some scholars because "the duty to ascribe a 'core meaning' to 'investment' [...] falls upon the contracting states to the ICSID Convention, not the tribunal." Following the same line of thought, the Tribunal in Abaclat refused to apply the criteria developed in Salini. The Tribunal rejected the Salini criteria in interpreting investment, because they are found

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26 Corellia-Dagobah BIT, art 1.
28 Musurmanov, at p 105.
29 Musurmanov, at p 174
30 Musurmanov, at p 189
31 Musurmanov, at p 190
32 Musurmanov, at p 177
33 Musurmanov, at p 178-79
34 Musurmanov, at p 121; Ho, at pp 633, 633, 646-47.
neither in the ICSID Convention, nor in the U.S.-Argentina BIT.35 The Tribunal should be mindful of the importance of abiding by a treaty’s wording since States’ are free to insert the criteria "it [the State] considers as essential in an investment" in the BIT.36 As a matter of fact, countries that wanted to exclude financial instruments from the definition of investment in BITs have done so expressly.37 Tribunals must then rely on the ordinary meaning of a BIT’s provisions rather than "interpreting a variety of jurisdictional conditions into the notion of investment."38

41. The criteria for determining whether Calrissian’s bonds qualify as investment are thus exclusively those enumerated in Article 1 of the BIT, which are not cumulative, because ‘or’ is used as a conjunction between the different criteria.

B. Calrissian’s sovereign bonds fulfill the Corellia-Dagobah BIT’s definition of investment

42. Calrissian’s sovereign bonds fulfill the definition of investment provided in Article 1 of the Corellia-Dagobah BIT, because they satisfy the three characteristics of an investment: they entail (i) commitment of capital, (ii) expectation of gain, or (iii) assumption of risk.

i. Commitment of Capital

43. Calrissian’s sovereign bonds meet the commitment of capital criterion. By definition, sovereign bonds are debt instruments in which bondholders advance liquidity to issuing countries in exchange for a promise of repayment in principal and interest for the issued bonds.39 Consequently, the commitment of capital has been described as a tangible manifestation of the investor’s intervention on the host State.40

44. The purchase of the sovereign bonds, in exchange for payment at a later date with interest from Respondent, constitutes a contribution.41 The Annulment Tribunal in Malaysian Historical Salvors arrived at the same conclusion, that "the term “investment” is the

35 Abaclat v Argentina, at para 365.
36 Musummanov, at p 122; citing Coppins, at p 174.
37 Viterbo, at p 26; Japan-Peru BIT, art. 838; Canada-Colombia BIT, art. 838 n.11; Canada-Chile BIT, art G-40.
38 Musummanov, at p 122; citing Coppins, at p 185.
39 Waibel, at pp 711, 719.
40 Gilles, at p 216.
41 Abaclat v Argentina, at para 366.
commitment of money or other assets for the purpose of providing a return."\(^\text{42}\) In the case at hand, there was a commitment of capital when Calrissian purchased its sovereign bonds since it created a flow of capital from bondholders to Respondent.

**ii. Expectation of gain or profit**

45. Calrissian’s sovereign bonds involve the expectation of gain or profit. The Tribunal in *Biwater Gauff* stated that there is no absolute expected rate of return required for an asset to be characterized as expecting a profit,\(^\text{43}\) so long as there is an expected rate of return. An expectation of profit lies in the uncertain realization of this rate of return.\(^\text{44}\)

46. The Tribunal in *Abaclat* stated that "bonds are defined as a debt, in which an interested party loans money to an entity (corporate or governmental) that borrows the funds for a defined period of time at certain interest rates."\(^\text{45}\) The Tribunal then specifies that sovereign bonds have the same characteristics, "with the specificity that they are issued by governments and are usually denominated in a foreign currency."\(^\text{46}\) In general, therefore, sovereign bonds not only have an expected rate of return,\(^\text{47}\) the payments are also made over a certain period of time.\(^\text{48}\) Thus, the criticism made in *Joy Mining Machinery Limited*\(^\text{49}\) is not applicable here as there is no single lump sum payment.\(^\text{50}\)

47. In this case, Calrissian has an expectation of gain on its sovereign bonds because they involve interest rates,\(^\text{51}\) therefore fulfilling the expectation of gain or profit criterion.

**iii. Assumption of Risk**

48. The bonds under dispute fulfill the assumption of risk criterion. The Tribunal in *Fedax N.V.* concluded that the occurrence of a dispute for repayment of promissory notes is evidence of the risk taken by bondholders.\(^\text{52}\) In *Phoenix Action*, while discussing the risk

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\(^\text{42}\) *Malaysian Historical Salvors v. Malaysia*, at para 57.
\(^\text{43}\) *Biwater Gauff v Tanzania*, at para 318-19.
\(^\text{44}\) Gilles, at p 216.
\(^\text{45}\) *Abaclat v Argentina*, at para 11-12.
\(^\text{46}\) *Abaclat v Argentina*, at para ¶ 14
\(^\text{47}\) *Abaclat v Argentina*, at para ¶ 11
\(^\text{48}\) *Abaclat v Argentina*, at para 12
\(^\text{49}\) *Joy Mining v Egypt*, at para 13.
\(^\text{50}\) *Joy Mining v Egypt*, at para 57
\(^\text{51}\) *SRA*, Art. 2(1).
\(^\text{52}\) *Fedax v Venezuela*, at para 40.
of owning a bankrupt business, the Tribunal stated that the risk is, "that the investor loses the amount he has paid." The Tribunal in *Salini* even asserted that "any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation" was part of the risk taken by the Claimant company.

49. Sovereign bonds are generally exposed to the risk of default. In this case, Claimant’s sovereign bonds are characterized by risk since they are exposed to Respondent’s default on making full payment.

**C. Calrissian’s investment was made in Respondent’s territory**

50. Calrissian’s sovereign bonds fulfill the territoriality criterion. Contrary to what Respondent contends, Calrissian’s purchase of the bonds on the secondary market does not bar the bonds’ territorial link.

51. The Tribunal must continue to apply the VCLT, which establishes that "a treaty shall be interpreted […] in the light of its object and purpose." Considering the Corellia-Dagobah BIT aims at "stimulat[ing] the flow of private capital," the disembodied and cross-border nature of investment transactions in interpreting Calrissian’s bonds’ territorial link must be emphasized.

52. The Tribunal in *Fedax* said,

> 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 are at its disposal elsewhere.

53. In *Abaclat*, the majority ruled that sovereign bonds, even if acquired on the secondary market, were considered investments "made in Argentina" following that 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." In *Abaclat*, the Tribunal

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53 *Phoenix Action v Czech Republic*, at para 127.
54 *Waibel*, at p 726
55 *Answer to Request for Arbitration*, at para 6.
56 VCLT, art 31(1).
57 Corellia-Dagobah BIT, preamble.
58 *Fedax v Venezuela*, at para 41; *CSOB v Slovakia*, at para 77-78.
59 *Abaclat v Argentina*, at para 374.
takes into account the sovereign bond’s complete process in evaluating the territoriality criterion:

the payment of the lump sum price for the bonds and the payment of the purchase price by the individual holders of security entitlements happened at different points in time, the latter constitutes the basis for the former. […] Without the prior insurance to be able to collect sufficient funds from the individual purchasers of security entitlements, the underwriters would never have committed to the payment of the lump sum payment.60

54. The Tribunal in CSOB v. Slovakia concluded that certain transactions could form "an integral part of an overall operation that qualifies as an investment."61 In this case, the PCA Tribunal adopted the same approach in interpreting territorial link in the context of sovereign bonds:62

[t]he fact that the transaction in itself may take place in a State other than the issuing State or that the bonds may have been paid with reference to a currency different from that of the host State does not prevent a commitment of funds to the host State and, therefore, does not prevent an investment from having a territorial link with the issuing State.63

55. The PCA Tribunal’s decision, which is binding, determined that a territorial link is established by determining where the funds are ultimately used, rather than the transaction’s location.64 In this case, the funds were used in Dagobah. Thus, the investment does not lack a territorial link.

2. Calrissian is a protected investor

56. Calrissian is an ‘investor of a Party,’ as set out in Article 1 of the Corellia-Dagobah BIT, and thus, is protected by the Corellia-Dagobah BIT. The required criterion is that Calrissian must be a national of Corellia.

60 Abaclat v Argentina, at para 376.
61 Abaclat v Argentina, at para 72.
62 PCA Tribunal’s decision, Part D.
63 PCA Tribunal’s decision, Part D.
64 PCA Tribunal’s decision, Part D.
57. Calrissian is "a hedge fund incorporated in, and in accordance with the laws of, the Corellian Republic."\footnote{Answer to Request for Arbitration, at para 2; Uncontested facts, at para 22.} Article 1 of the Corellia-Dagobah BIT defines ‘national of a Party’ as:

any legal person established in the Territory of one of the Parties in accordance with the respective national legislation such as public establishments, joint-stock corporations or partnership, foundations or associations, regardless of whether their liability is limited or otherwise.\footnote{Corellia-Dagobah BIT, Art. 1}

58. Being incorporated in accordance with Corellian laws, Calrissian qualifies as a legal person and, furthermore, as a ‘national of a Party’ pursuant to the Corellia-Dagobah BIT.

59. For the above reasons, Calrissian requests that the Tribunal concludes in its favor and dismisses Respondent’s unfounded jurisdictional claim.

III. THE SCC TRIBUNAL HAS JURISDICTION OVER CALRISSIAN’S CLAIM DESPITE THE SOVEREIGN BONDS’ FORUM SELECTION CLAUSE

60. The SCC Tribunal has jurisdiction over this dispute because (1) Calrissian is presenting a treaty claim, (2) the SCC Tribunal can and must rule over disputes under the Corellia-Dagobah BIT regardless of the sovereign bonds’ "exclusive" forum selection clause, and (3) Calrissian has not waived its right to arbitral proceedings under the Corellia-Dagobah BIT.

1. The SCC Tribunal has jurisdiction over treaty claims

61. The SCC Tribunal has jurisdiction over the dispute because Calrissian is pursuing arbitration on behalf of Respondent’s breach of the Fair and Equitable Treatment standard\footnote{Request for Arbitration, at para 11; Uncontested Facts, at para 23.} guaranteed in Article 2(2) of the Corellia-Dagobah BIT. The SCC Tribunal has jurisdiction regardless of the sovereign bonds’ forum selection clause because (i) Calrissian’s claim is solely a treaty claim, and in the alternative, (ii) the SCC Tribunal’s jurisdiction is secured over treaty claims even if they involve contractual components.
A. The SCC Tribunal has sole jurisdiction over Calrissian’s treaty claim

62. The SCC Tribunal has jurisdiction over the present dispute because it is exclusively based on a treaty claim. On the one hand, Article 8 of the Corellia-Dagobah BIT designates the Centre for the Settlement of Investment Disputes Between States and Nationals of Other States, the Centre’s Additional Facility and the SCC as the exclusive fora under which a "legal dispute between an investor of one Party and the other Party in connection with an investment" can be submitted. On the other hand, the very wording of the old bonds’ forum selection clause—"any dispute arising from or relating to this contract will be exclusively resolved before the Courts of [Respondent]"—points out to the contractual nature of the disputes it encompasses.

63. Contrary to Respondent’s claim that its local courts have exclusive jurisdiction over the dispute because of the old bonds’ forum selection clause, Tribunals "repeatedly have held […] that they have jurisdiction over a claim involving a contract with a choice of forum clause conferring exclusive jurisdiction on a local forum if the claim is based on a violation of the BIT."

64. In Vivendi v Argentina (I), under the France-Argentina BIT, the Tribunal interpreted a concession agreement between Compañía de Aguas del Aconquija, the Argentine affiliate of CGE, a French corporation, and the Argentine Province of Tucumán. The agreement included a forum selection clause providing for the exclusive jurisdiction of Tucumán’s administrative tribunals with regards to "interpretation and application of th[e] Contract." The Tribunal found that the alleged breaches concerned the nonperformance of the contract, and that the "crucial connection" between alleged breaches of the France-Argentina BIT and breaches of contract made them hard to

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68 Corellia-Dagobah BIT, Art. 8(2).
69 Corellia-Dagobah BIT, Art. 8(1)
70 Procedural Order No. 2, at para 16.
71 Answer to Request for Arbitration, at para 9.
72 Vandeveld, at p 488.
73 Vandeveld, supra note 78, p. 488
74 Vivendi(I), at para 24.
75 Vivendi(I), at para 25
76 Vivendi(I), at para 27
77 Vivendi(I), at para 77
distinguish without interpreting the contract. The Tribunal stated that "given the 
[contractual] nature of the dispute," the forum selection clause applied and therefore the 
dispute had to be submitted to local courts.

65. In 2002, however, an Annulment Committee found that the Vivendi v Argentina (I) 
Tribunal had "manifestly exceeded its powers" in declining to evaluate the alleged 
treaty breaches on the merits because of the Tribunal’s jurisdiction on treaty claims. The Annulment Committee reiterated that a forum selection clause applies only when the 
"essential basis of a claim […] is a breach of contract," which was not true of the 
Claimant’s allegations in Vivendi (I) v Argentina. Most importantly, the Annulment 
Committee affirms:

[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 between the claimant and the respondent state or one of its subdivisions cannot 
operate as a bar to the application of the treaty standard [emphasis added].

66. Claims must thus be adjudicated in their appropriate forum and "according to their 
respective sources of law."

67. In this case, Respondent breached the Fair and Equitable Treatment guaranteed in Article 
2 of the Corellia-Dagobah BIT. Calrissian’s claim rests entirely on Article 8 of the 
Corellia-Dagobah BIT. Moreover, as established in Vivendi (I) (Decision on 
Annulment), since the fundamental basis of the dispute is a treaty standard—the Fair and 
Equitable Treatment—guaranteed in the Corellia-Dagobah BIT, the SCC Tribunal’s

78 Vivendi(I), at para 8
79 Vivendi(I), at para 79
80 Vivendi(I), at para 79-80.
81 Henry, at pp 935, 960.
82 Vivendi v Argentina (I) (Annulment), at para 111-12.
83 Vivendi v Argentina (I) (Annulment), at para 98
84 Vivendi v Argentina (I), at para 111-12.
85 Vivendi v Argentina (I) (Annulment), at para 101.
86 Henry, at p 958.
87 Request for arbitration, at para 11; Uncontested facts, at para 23.
88 Vandevelde at p 488; SGS v Pakistan at para 145. Occidental Exploration v Ecuador, at para 47.
jurisdiction can never be barred by the contractual forum selection clause found in Calrissian’s sovereign bonds.89

B. In the alternative, the SCC Tribunal’s jurisdiction is secured over treaty claims even though they involve contractual components

68. Even if the Tribunal were to accept that Calrissian’s claim involves contractual components, the SCC Tribunal’s jurisdiction is nonetheless secured because the investor can choose to present its claim as either a treaty claim or a contractual claim90 and the Corellia-Dagobah BIT’s jurisdiction is broadly worded, for it comprises "any legal dispute between an investor of one Party and the other Party in connection with an investment."91 Indeed, Article 8 of the Corellia-Dagobah BIT confers a wide jurisdiction to the SCC Tribunal, allowing it to rule over "any legal dispute between an investor of one Party and the other Party in connection with an investment."92 Schreuer remarks that those provisions which "extend the tribunals' jurisdiction to ‘any dispute relating to investments’" are generally interpreted by Tribunals as including jurisdiction over contract claims.93 By contrast, the bonds’ forum selection clause conferring jurisdiction to Respondent’s courts have a much narrower scope, as it applies to "any dispute arising from or relating to […] contract."94 As agreed by Schreuer, where "competing competences exist" and one forum has a more comprehensive jurisdiction, this forum should hear the entire dispute.95

69. Besides, Tribunals adjudicating a treaty dispute are entitled to consider the contractual aspects of the dispute without challenging the characterization of a claim from treaty-based to contract-base. As expressed in *Azurix*:

    [e]ven if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent

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89 *Vivendi v Argentina (I) (Decision on Annulment)*, at para 101.
80 *Voss*, at p 11.
91 Corellia-Dagobah BIT, art. 8.
92 Corellia-Dagobah BIT, art. 8.
93 Schreuer (I), at p 8.
94 Procedural Order No. 2, at para 16.
95 Schreuer (I), at p 8.
under the BIT, *they cannot per se transform the dispute under the BIT into a contractual dispute* [emphasis added].

70. In this case, the SCC Tribunal has the broadest jurisdiction and therefore it should hear the dispute at the exclusion of Respondent’s courts. Were contractual elements linked to the present treaty dispute, they would not bar the SCC Tribunal’s jurisdiction because they are peripheral to Calrissian’s claim that Respondent breached the Fair and Equitable Treatment assured by Respondent in Article 2(2) of the Corellia-Dagobah BIT.

2. **The sovereign bonds’ contractual forum selection clause cannot waive Calrissian’s right to arbitration under the Corellia-Dagobah BIT**

71. The forum selection clause contained in Calrissian’s bonds does not bar the SCC Tribunal’s jurisdiction because (A) Respondent’s offer to arbitration in the Corellia-Dagobah BIT cannot be withdrawn and (B) Calrissian has not waived its right to arbitration.

A. **Respondent’s consent to arbitration cannot be withdrawn**

72. Respondent’s consent to arbitration in Article 7 of the Corellia-Dagobah BIT cannot be withdrawn. As stated in Calrissian’s Request for Arbitration, Respondent and Corellia have expressed their consent "to submit disputes between an investor of one Party and the other Party in connection with an investment ‘to binding arbitration before […] the Arbitration Institute of the Stockholm Chamber of Commerce’" in Article 8(2)(c) of the Corellia-Dagobah BIT.\(^97\) This offer is valid and irrevocable.\(^98\)

73. The *Vivendi (I)* Annulment Committee observed that an exclusive forum selection clause in a contract cannot be invoked by a State to "avoid the characterization of its conduct as internationally unlawful under a treaty."\(^99\) Otherwise, forum selection clauses would be an easy way for States to avert the high standards of protection for investors guaranteed in BITs and a shortcut to resort to their much less demanding domestic laws.\(^100\) As argued by Weiler and Wälde, this would "harm to the goals of universal investment..."
protection envisaged by [investment] treaties," as their objective is to favor investment by imposing "general obligations on host countries." They explain that States arguing the exclusion of the investors’ BIT arbitration rights on the basis of a forum selection clause:

[would be acting] contra factum proprium and in bad faith by attempting to reap the general benefits of signing investment treaties (in terms of reciprocity and reputation) without having to face up to the regulation and potential scrutiny that such treaties entail.103

74. For this reason, BIT arbitral tribunals have an enduring duty to decide upon claims concerning treaty breaches.104

75. Furthermore, considering that international rules prevail over domestic rules, "it is difficult to explain how a provision in a domestic law contract covers and alters the rights provided for in an international treaty." Contractual forum selection clauses under a Host State’s domestic laws are "ineffective in removing the authority of a panel whose jurisdiction is based on a treaty."107

76. In this instance, and contrary to Respondent’s contention, cannot withdraw the consent it gave to Calrissian’s Investor-State dispute under Article 8 of the Corellia-Dagobah BIT.

B. Calrissian has not waived its right to arbitration

77. The forum selection clause found in Calrissian’s sovereign bonds does not amount to a waiver of Calrissian’s right to Investor-State arbitration because (i) an investor cannot waive its right to arbitration under a BIT, and in the alternative, (ii) Calrissian has not waived its right to arbitration under the Corellia-Dagobah BIT.

i. An investor cannot waive its right to arbitration under a BIT

78. Calrissian cannot waive its right to arbitration pursuant to Article 7 of the Corellia-Dagobah BIT. In fact, Tribunals have seldom considered a contractual choice-of forum

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101 Blyschak, at 148, citing Weiler/Wälde.
102 Blyschak, at 148, citing Weiler/Wälde.
103 Blyschak, at 148, citing Weiler/Wälde.
104 Schreuer (I), at p 8.
105 Schreuer (I), at p 6.
106 Voss, at p 324.
107 Blyschak, at p 127.
clause as a waiver of an investor’s arbitration rights under a treaty because these exist by virtue of the Host State’s irrevocable offer to arbitration. Under BITs, investors are offered to participate in arbitration when the BIT criteria are fulfilled. The provisions to which both State Parties have given their consent cannot be amended unilaterally.

79. The Tribunal in Vivendi v Argentina (I) held that the forum selection clause in CGE’s concession contract had not waived CGE’s right to Investor-State arbitration because the cause of action for CGE’s claim rested on the France-Argentina BIT. Many tribunals have adopted the same reasoning. The Tribunal in Azurix refused to recognize forum selection clauses as a waiver of arbitration rights because "the claims or causes of action before [the Tribunal were] different in nature from any claims which ABA could bring before the [local courts] under the Contract Documents."

80. In Vivendi v Argentina (II), the Tribunal similarly concluded that "the existence of the dispute resolution clause in the concession contract [did] not preclude the Claimants from bringing the […] arbitration." In TSA Spectrum, the Tribunal further asserted that "it [was not] relevant that the parties concluded the forum selection clause in the Concession Contract after the entry into force of the BIT."

81. Consequently, Calrissian cannot waive its right to arbitration pursuant to Article 7 of the Corellia-Dagobah BIT, because the Respondent’s offer to arbitration in the Corellia-Dagobah BIT still stands. This offer was accepted by Calrissian when it commenced arbitral proceedings before the SCC Tribunal.

108 Henry, at p 981.
109 Blyschak, at p. 127; citing Weiler/Wälde.
110 Henry, at p 957.
111 Shaw, at p 930.
112 Vivendi v Argentina (II), at para 53-54.
113 Henry, at p 981.
114 Azurix, at para 79.
115 Vivendi (II) v Argentina, at para 45.
116 TSA Spectrum v Argentina, at para 55.
117 Uncontested Facts, at para 22.
ii. In the alternative, Calrissian did not explicitly waive its right to Investor-State arbitration under the Corellia-Dagobah BIT

82. Were the Tribunal to decide that an investor’s right to Investor-State arbitration can be waived, Calrissian has not given a clear and explicit consent to this effect, despite the sovereign bonds’ forum selection clause.

83. The Vivendi Annulment Committee held that if ever the concession agreement’s forum selection clause were interpreted as excluding the BIT Arbitral Tribunal’s jurisdiction, "a clear indication of an intention to exclude that jurisdiction would be required."\(^{118}\)

84. In Azurix, Argentina, as Respondent, contended that the forum selection clause "for all disputes that may arise out of the bidding’ [was] an express waiver of ‘any other forum, jurisdiction or immunity that may correspond.’"\(^{119}\) The Tribunal stated that although was the clause at stake was an explicit waiver of any other fora,\(^{120}\) contractual claims and treaty claims remain different, and that waiver’s generality amounted to the exclusion of otherwise competent courts.\(^{121}\)

85. In Aguas del Tunari, a distinction was made by the Tribunal between exclusive forum selection clauses and express waivers.\(^{122}\) The Tribunal found that while forum selection clauses did nor bar the ICSID Tribunal’s jurisdiction, "if the host State and the investor agreed separately to waive ICSID arbitration expressly, such a waiver would be effective."\(^{123}\) Waivers of jurisdiction must, however, be "unequivocal" to this effect.\(^{124}\)

86. In the present case, Calrissian has not explicitly waived its right to Investor-State arbitration pursuant to Article 7 of the Corellia-Dagobah BIT in the sovereign bonds’ forum section clause. In addition, there is no evidence to the effect that Respondent and Calrissian agreed separately to explicitly waive the SCC Tribunal’s jurisdiction. Rather,

\(^{118}\) Vivendi v Argentina (I) (Decision on Annulment), at para 76.
\(^{119}\) Henry, at para 29.
\(^{120}\) Azurix, at para 80.
\(^{121}\) Azurix, at para 81.
\(^{122}\) AdT v Bolivia, at para 118.
\(^{123}\) Henry, at para 114.
\(^{124}\) Spiermann, at p 210.
Calrissian has unequivocally shown its acceptance of Respondent’s offer to arbitration in commencing arbitral proceedings before the SCC Tribunal.\textsuperscript{125}

\textsuperscript{125} Uncontested Facts, at para 22.
ARGUMENTS ON MERITS

IV. RESPONDENT VIOLATED ITS OBLIGATION OF FAIR AND EQUITABLE TREATMENT

87. Respondent violated the Fair and Equitable Treatment ("FET") provided in Article 2 of the Corellia-Dagobah BIT. It did so by (A) arbitrarily removing the obligation of unanimous consent of bondholders to renegotiate the terms of the bonds, which led to the addition of a CAC with retroactive effect, (B) by adopting unreasonable measures in relation to its sovereign debt restructuring, and (C) by breaching previous warranties by failing to maintain a stable economic and legal environment.126

1. Fair and Equitable Treatment is an autonomous standard

88. Respondent breached the FET clause found in Article 2 of the Corellia-Dagobah BIT. The clause provides that:

Investments of each Party or of nationals of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals of the other Party.127 [Emphasis added]

89. Reference to international law is not present in Article 2 of the Corellia-Dagobah BIT and therefore does not apply. The wording of this clause indicates the existence of an autonomous FET standard. If the parties had intended for another standard to apply, such as the international minimum standard of treatment ("MST"), they could have made it clear in the BIT.128 In addition, States that want their FET clause to reflect the MST make explicit referrals to this effect in their BITs by linking the term ‘treatment’ to international law.129

127 Corellia-Dagobah BIT, art. 2(2).
128 Newcombe & Paradell, at p 226; Vasciannie, at p 105.
129 Cf. NAFTA, art. 1105.
90. There would be no added value to BITs if the MST was included in them, with this logic the FET standard cannot be equivalent to the MST.\textsuperscript{130} Such inclusion would only cause confusion.\textsuperscript{131} FA Mann argued, that when a tribunal comes across the terms ‘fair and equitable’ it should "not be concerned with a minimum, maximum, or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."\textsuperscript{132} Since the Corellia-Dagobah BIT does not refer to an established international standard that could be applied, the terms ‘fair and equitable’ "are to be understood and applied independently and autonomously."\textsuperscript{133} Hence the inclusion of the terms ‘fair and equitable’ in Article 2 of the Corellia-Dagobah BIT refer to the autonomous standard.

91. The Tribunal must also follow the general rule of interpretation of Article 31(1) of the VCLT to interpret the Corellia-Dagobah BIT. This rule provides that:

\begin{quote}
[a] treaty shall be interpreted in good faith 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{134} [Emphasis added]
\end{quote}

92. This means that the term ‘fair and equitable’ will have to be interpreted and given its ordinary meaning in the context of the Corellia-Dagobah BIT.\textsuperscript{135} The BIT does not qualify the term ‘fair and equitable’, or refer to customary international law or any other international standard, thus the autonomous FET standard must be applied.

93. The determination of an FET breach is fact dependent and case specific.\textsuperscript{136} Tribunals can therefore be guided by previous FET interpretations to establish the content of the standard, as an ordinary meaning approach based on a dictionary definition is not sufficient.\textsuperscript{137} Although the autonomous FET standard does not have one definite

\begin{footnotes}
\footnotetext{130}{FA Mann, at p 244.}
\footnotetext{131}{FA Mann, at p 244.}
\footnotetext{132}{FA Mann, at p 244.}
\footnotetext{133}{FA Mann, at p 244.}
\footnotetext{134}{VCLT, art. 31(1).}
\footnotetext{135}{Newcombe & Paradell, at p 264.}
\footnotetext{136}{Mondev v USA, at para 118; Schreuer (II), at p 364.}
\footnotetext{137}{Salacuse, at p 230; Diehl at p 312.}
\end{footnotes}
interpretation, "tribunals have developed specific criteria, norms, and principles to determine whether host states have given fair and equitable treatment to investors."138

94. There are agreed upon elements, by Tribunals and authors alike, that form the autonomous FET standard.139 These elements are not cumulative and the violation of one is sufficient to conclude that a breach occurred. They include, the need for the State to (1) act in good faith, (2) act in a non-discriminatory manner, (3) act transparently, (4) not act arbitrarily, (5) not deny access to justice to investors (i.e. provide due process), (6) provide freedom from coercion and harassment, and, lastly, (7) to protect investors’ legitimate expectations.140

95. Respondent violated three elements of the FET standard: (A) arbitrariness, (B) freedom from coercion and unreasonableness, and (C) protection of investors’ legitimate expectations.

A. Respondent’s measures were arbitrary

96. Calrissian submits that Respondent violated the Corellia-Dagobah BIT’s FET clause by arbitrarily removing the requirement of unanimous consent of bondholders to renegotiate the terms of the bonds.141 This measure ultimately led to the addition of a CAC with a retroactive effect.142

97. There is general consensus among arbitral tribunals that "a state’s obligation to refrain from arbitrary conduct is included in its obligation to provide fair and equitable treatment."143 It was further elaborated in CMS that an arbitrary measure in itself contravenes the basic principle of FET.144

98. Tribunals have defined the meaning of ‘arbitrariness’ in the context of FET and have referred to the ordinary meaning of the word ‘arbitrary’ as defined in Black’s Law

138 Salacuse, at p 230.
139 Stone, at pp 83-84; Salacuse, at pp 230-231; Schreuer (II), at pp 374-385; Vasciannie, at pp 103, 133; Newcombe & Paradell, at p 264; see also, MTD v Chile, at para 110-12; Saluka v Czech Republic, at para 286-295; PSEG v Turkey, at para 239; Siemens v Argentina, at para 291-300.
140 Stone, at pp. 83-84; Salacuse, at pp 230-231; Schreuer (II), at pp 374–385; Vasciannie, at pp 103, 133.
141 Request for Arbitration, at para 11.
142 Uncontested Facts, at para 19-21.
143 Stone, at p 95; El Paso v Argentina, at para 230.
144 CMS v Argentina, at para 290.
Dictionary to conclude that it means, "depending on individual discretion; (...) [Of a judicial decision] founded on prejudice or preference rather than on reason of fact."\textsuperscript{145} Moreover, the Tribunal in *Occidental* concluded that even if a decision was not "founded on prejudice or preference rather than on reason and fact" but led to "confusion and lack of clarity," it could be classified as an arbitrary measure.\textsuperscript{146} This demonstrates that intent to act arbitrarily is not a necessary condition to a finding of arbitrariness.\textsuperscript{147}

99. The Tribunal in *Tecmed* further determined the threshold needed for a breach under the autonomous FET standard to occur. They concluded that:

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. 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 I may know beforehand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.\textsuperscript{148}

This definition of FET was further cited and followed by other tribunals.\textsuperscript{149}

100. In the present dispute, Respondent enacted the SRA, which allowed it to amend the terms and conditions of Calrissian’s investment. This change removed the requirement of unanimous consent of bondholders to renegotiate the terms of the bonds.\textsuperscript{150} As a result, Respondent, in renegotiating the terms of the bonds, included a retroactive CAC, which modified the previously established mechanism that bondholders could use to initiate legal action.\textsuperscript{151} The new mechanism provides that in order to "initiate any legal action, [bondholders] would need to gather at least 20% of the nominal value of the issue in

\begin{itemize}
  \item \textsuperscript{145} *Lauder v Czech Republic*, at para 221; *CMS v Argentina*, at para 291.
  \item \textsuperscript{146} *Occidental Exploration v Ecuador*, at para 163.
  \item \textsuperscript{147} *Occidental Exploration v Ecuador*, at para 163.
  \item \textsuperscript{148} *Tecmed v Mexico*, at para 154.
  \item \textsuperscript{149} *MTD v Chile*, at para 114; *Roussalis v Romania*, at para 316.
  \item \textsuperscript{150} *Uncontested Facts*, at para 17.
  \item \textsuperscript{151} *Uncontested Facts*, at para 21.
\end{itemize}
order to sue." Calrissian never agreed to this addition or to have its bond restructured.

101. It is unfair and unjust for Calrissian to have new terms and conditions added to its investment, which it never consented to. Furthermore it is ‘unfair’, for the new terms and conditions to also have a retroactive effect. This frustrated Calrissian’s legitimate expectation of a stable legal framework, a breach that will be addressed further in this memorial. As stated in *Occidental Exploration v Ecuador*, it is not necessary for the Respondent to have intended to act in a prejudicial or preferential manner, to deem the measure arbitrary. Hence Calrissian does not have the burden of establishing Respondent’s intent. The effect of the measure and its unfair and unjust result on Calrissian’s investment is sufficient for the tribunal to declare a breach of the FET clause of the Corellia-Dagobah BIT.

B. Respondent’s measures were unreasonable

102. The implementation of the SRA by Respondent was unreasonable and thus violated Calrissian’s right to FET.

103. To determine the ‘unreasonableness’ of a measure, the Tribunal must analyze the (1) "existence of a rational policy" and (2) "the reasonableness of the act of the state in relation to the policy." In analyzing the first element, the Tribunal in *AES* determined that "a rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter." However, because this two-prong test is cumulative establishing a rational policy is not sufficient. A relevant correlation must also exist "between the state’s public policy objective and the measure adopted to

152 Uncontested Facts, para. 21.
153 Uncontested Facts, para 22.
154 Uncontested Facts, para. 22
155 Occidental Exploration v Ecuador, at para 163.
156 AES v Hungary, at para 10.3.7.
157 AES v Hungary, at para 10.3.8.
158 AES v Hungary, at para 10.3.9.
achieve it." This second criterion must be evaluated in light of the "nature of the measure" and by the "way it is implemented." 159

104. In the case at hand, Respondent’s measure does not fulfill the requirements established in AES. 161 Respondent enacted the SRA in part to allow it to make changes to its sovereign bonds structure by overriding a clause that required unanimous consent to make modification to Calrissian’s investment. This was a coercive measure as it forced Calrissian to accept changes against its will despite its consent initially being required. 162 Furthermore, Respondent only provided Calrissian with a three-day window to accept an invitation to participate in the consultative process that would lead to the new bond offer. 163 This is a very short time frame considering the implications. As noted in AES, the way a measure is implemented can make it unreasonable. In this instance, the measure was unreasonable as it was implemented in a coercive manner.

C. Respondent frustrated Calrissian’s legitimate expectations

105. Respondent breached the legitimate expectations protected under FET in the Corellia-Dagobah BIT when it made representations to commit to a stable economic and legal environment it later failed to maintain.

106. Legitimate expectations is a central element of the autonomous FET standard. 164 Respecting these legitimate expectations is part of being fair towards investors. 165

107. There are three key elements to determine what can qualify as ‘legitimate expectations’. Firstly, expectations must be legitimate; legitimacy being
determined by three main conditions: reliance on the law, its objective and subjective reasonableness and the beneficial effect for the investor of
the law or governmental conduct said to give rise to such expectations. 166

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159 AES v Hungary, at para 10.3.9.
160 AES v Hungary, at para 10.3.9.
161 AES v Hungary, at para 10.3.8.
162 Uncontested facts, at para 17.
163 Procedural Order No. 3, at para 35.
164 Potestà, at pp 98-99; El Paso v Argentina, at para 227; Tecmed v Mexico, at para 154; Occidental Exploration v Ecuador, at para 183.
165 Salacuse, at p 231.
166 Téllez, at pp 432, 441.
Secondly, the expectations must have enticed the investor.\textsuperscript{167} Thirdly, the host state must have made representations or warranties, which it then repudiated.\textsuperscript{168}

108. Legitimate expectations can be created in many ways. An agreed upon expectation, for example, is that "the host State will not alter the legal and business environment and/or administrative practices upon which the investment has been made."\textsuperscript{169} In this vein, Schreuer notes, "legitimate expectations are based on the host state’s legal framework and on any undertakings and representations made explicitly or implicitly by the host state."\textsuperscript{170} Legitimate expectations can therefore arise from "rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments."\textsuperscript{171} Furthermore, representations that led to the investor’s legitimate expectations must have been made prior to or at the moment the investment took place.\textsuperscript{172}

109. In \textit{CMS}, the Tribunal concluded that, "a stable legal and business environment was an essential element of fair and equitable treatment."\textsuperscript{173} They included this element in the FET standard because the Argentine–U.S. BIT included, as an objective in the preamble, "to maintain a stable framework for investments and maximum effective use of economic resources."\textsuperscript{174}

110. In \textit{Parkerings}, the Tribunal concluded that the failure to maintain a stable and predictable legal framework could frustrate an investor’s legitimate expectations. The Tribunal warned that a mere evolution in law is not sufficient to conclude a State failed to maintain a stable legal framework.\textsuperscript{175} However, it is prohibited "for a state to act unfairly, unreasonable or inequitable in the exercise of its legislative power."\textsuperscript{176}

\textsuperscript{167} \textit{Continental Casualty v Argentina Republic}, at para 261.
\textsuperscript{168} \textit{Continental Casualty v Argentina Republic}, at para 261.
\textsuperscript{169} \textit{Tellez}, at p 438.
\textsuperscript{170} Dolzer \& Schreuer, at p 145.
\textsuperscript{171} \textit{UNCTAD FET}, at p 71.
\textsuperscript{172} \textit{UNCTAD FET}, at p 71; \textit{Bayindir v Pakistan}, at para 190; \textit{Duke v Ecuador}, at para 340; \textit{AES v Hungary}, at para 9.3.8 – 9.3.12.
\textsuperscript{173} \textit{CMS v Argentina}, at para 276.
\textsuperscript{174} \textit{CMS v Argentina; U.S.-Argentina BIT}, preamble.
\textsuperscript{175} \textit{Parkerings v Lithuania}, at para 332, 337.
\textsuperscript{176} \textit{Parkerings v Lithuania}, at para 332, 337.
111. In this case, Calrissian’s expectations were infringed by Respondent’s failure to maintain a stable and legal environment. Respondent made a series of warranties as to its commitment to a more stable economic system prior to Calrissian’s sovereign bond purchase. Respondent then modified the legal and economic framework of Calrissian’s investment through the adoption of the SRA. Most notably, the SRA modified Calrissian’s right to initiate legal action without its consent. This means that the legal framework Calrissian agreed and relied on at the time investing no longer exists in its initial form. This amounts to a violation of Calrissian’s legitimate expectations created at the time of its investment.

112. For the aforementioned reasons, the Tribunal must declare Respondent’s measures in violation of Article 2 of the Corellia-Dagobah BIT.

V. THE DEFENSE OF NECESSITY CANNOT EXCUSE DAGOBAH’S BREACH OF THE CORELLIA-DAGOBAH BIT

113. Respondent’s breach of the Fair and Equitable Treatment guaranteed to Calrissian under Article 2(2) of the Corellia-Dagobah BIT (1) cannot be excused by means of the Corellia-Dagobah BIT’s Non-Precluded Measures ("NPM") clause or (2) the customary international defense of necessity.

1. Respondent’s breach of Fair and Equitable Treatment towards Calrissian does not fall under the Corellia-Dagobah BIT’s NPM clause

114. Respondent’s breach of FET towards Calrissian does not fall under the scope of the Corellia-Dagobah BIT’s NPM clause. Article 6(2) provides:

   Nothing in this Treaty shall be construed […] to preclude a Party from applying measures that are necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. [Emphasis added]179

115. Such NPM provisions are often found in BITs to allow parties to be released from their treaty obligations in exceptional circumstances where their essential interests are at stake.

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177 Procedural Order 2, at para 18.
179 Corellia-Dagobah BIT, art 6.
Non-Precluded Measures clauses are different from the customary international law defense of necessity, as the:

116. NPM provision […] limits the applicability of an international treaty with respect to certain types of conduct [while the customary international law] state of necessity is a […] relieves liability after the fact.\(^{180}\)

117. In other words, if a State’s otherwise unlawful conduct falls under an NPM provision, there is no treaty breach.\(^{181}\)

118. Upon establishing that (A) NPM clauses are not self-judging, Calrissian contends that Respondent’s claim that its sovereign debt restructuring measures fall within the scope of Article 6 of the Corellia-Dagobah BIT\(^{182}\) is false since (B) no essential security is at stake and (C) enacting the SRA was not a necessary measure.

**A. Article 6(2) of the Corellia-Dagobah BIT is not self-judging**

119. Dagobah cannot unilaterally decide whether its measures fall within the scope of Article 6 of the Corellia-Dagobah BIT\(^{183}\) since NPM clauses are not self-judging.\(^{184}\)

120. The VCLT establishes "[treaties are] interpreted in good faith 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."\(^{185}\) Therefore, and according to Alvarez, it cannot be the parties’ intent to agree on self-judging clauses without an explicit provision to this effect in the treaty, because BIT’s object and purpose\(^{186}\) is the foreign investors’ protection.\(^{187}\) The self-judging nature of a clause can never be presumed, for

when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measure importing non-compliance with obligations assumed in a treaty, they do so expressly.\(^{188}\)

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\(^{180}\) Jung & Han, at p 400.

\(^{181}\) Jung & Han, at p 400.

\(^{182}\) Procedural Order No. 2, at para 12.

\(^{183}\) Alvarez & Khamsi, at p 417.

\(^{184}\) LG&EE v Argentina, at para 207.

\(^{185}\) VCLT, art 31.

\(^{186}\) Alvarez & Khamsi, at p 418.

\(^{187}\) Dolzer & Schreuer, at p 190.

\(^{188}\) CMS v Argentina, at para 339.
In *Gabcikovo-Nagymaros*, the ICJ confirms that "the State concerned is not the sole judge of whether [conditions for the customary state of necessity] have been met." \(^{189}\)

121. The GATT and in the 2004 U.S. BIT Model are good examples of treaties which include explicitly self-judging NPM clauses. \(^{190}\) In order to indicate the self-judging nature of their NPM provisions, the GATT and the 2012 U.S. Model BIT respectively use the terms "which it considers necessary" \(^{191}\) and "that it considers necessary." \(^{192}\) By contrast, the U.S.-Argentina BIT, which was interpreted in several arbitral following the Argentine economic crisis, contains an NPM clause which is not explicitly self-judging, as it only refers to "measures necessary for the maintenance of public order." \(^{193}\) The tribunals in LG&E, CMS, Enron, Sempra and Continental Casualty, which interpreted the U.S.-Argentina BIT’s NPM clause in the context of Investor-State disputes found it to not be self-judging. \(^{194}\)

122. Considering that Article 6(2) uses the wording "applying measures that are necessary" without explicitly stating that necessity is self-judging, Respondent is not the sole judge of whether its sovereign debt restructuring measures fulfill the requirements for precluding wrongfulness under article 6(2) of the Corellia-Dagobah BIT.

**B. Dagobah’s essential security interests are not at stake**

123. Respondent cannot invoke the protection of the Corellia-Dagobah BIT’s NPM clause because its essential security interests were not at stake when it breached the FET guaranteed to Calrissian. The Corellia-Dagobah BIT’s wording—"essential security interests"—rather than "essential interests"—does not point out to economic crises, but rather refers to situations compromising a state’s survival like war or insurrection, as argued by Alvarez. \(^ {195}\)

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\(^{189}\) *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, at para 51.

\(^{190}\) *CMS v Argentina*, at para 339.

\(^{191}\) *GATT*, art XXI.

\(^{192}\) *2012 U.S. Model BIT*, art 18.

\(^{193}\) *U.S.-Argentina BIT*, art XI.

\(^{194}\) *LG&E v Argentina*, at para 195; *CMS v Argentina*, at para 370-373; *Enron v Argentina*, at para 332; *Sempra v Argentina*, at para 374; *Continental Casualty v Argentina*, at para 187-88.

\(^{195}\) *Expert Opinion of José E. Alvarez in Sempra v Argentina*, at para 8.
124. Although tribunals have acknowledged that major economic crisis could affect a State’s essential security interests, a majority of arbitral awards rendered following the 1998-2001 Argentine economic crisis have established that such crises must threaten a State’s very existence to affect its essential security interests. In CMS, the Tribunal interpreted the term ‘essential security interests’ in the U.S.-Argentina BIT’s NPM clause196 and determined that although Argentina’s economic crisis was of "catastrophic proportions," Argentina’s essential security interests were not compromised.197 The Tribunal in Enron Corporation and Ponderosa Assets, L.P. similarly stated that the "argument that [a domestic financial crisis] compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing"198 and rejected Argentina’s defense of necessity.199 The Tribunal in Sempra came to the same conclusion.200

125. In this instance, Respondent enacted the SRA and conducted a sovereign debt restructuring in violation of the Corellia-Dagobah BIT’s standard of protection for investors claiming to promote its financial stability, which it claims to be an essential security interest.201 Despite experiencing economic hardships, Respondent’s essential security interests were not threatened because Respondent’s very existence was not compromised.202 As a matter of fact, although Dagobah underwent a recession in 2010203 and experienced some social unrest after 2008,204 its public services were not yet compromised in 2011205 and Respondent’s very existence was not endangered.

C. Respondent’s measures were not necessary

126. Respondent’s sovereign debt restructuring, which resulted in a breach of the Corellia-Dagobah BIT, was not necessary to maintain its financial security. Indeed, Article 6(2) of the Corellia-Dagobah BIT provides that

196 US-Argentina BIT, art. XI.
197 CMS v Argentina, at para 319-322.
198 Enron v Argentina, at para 306.
199 Enron v Argentina, at para 339.
200 Sempra v Argentina, at para 388.
201 Uncontested Facts, at para 16.
202 Sempra v Argentina, at para 348.
204 Procedural Order No. 3, at para 38.
nothing in this Treaty shall be construed [...] to preclude a Party from applying measures that are necessary for the fulfillment of its obligations [for] the protection of its own essential security interests.\textsuperscript{206}

127. The ‘necessary’ standard is in fact a nexus requirement, "requir[ing] a link between the actions taken by a state that would otherwise violate the treaty and the permissible objectives provided for in the NPM clause.\textsuperscript{207} According to the principles established in the VCLT, the term ‘necessary’ must be interpreted "in accordance with [its] ordinary meaning" and in light of the Corellia-Dagobah BIT’s object and purpose.\textsuperscript{208} The Oxford English Dictionary gives a narrow definition of ‘necessary’ as "that [which] is needed" or "indispensable, vital, essential; requisite."\textsuperscript{209}

128. In \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)}, the ICJ had to interpret a NPM clause very similar to Article 6(2) of the Corellia-Dagobah BIT, which read, "the present treaty shall not preclude the application of measures [by the state] necessary to protect its essential security interests."\textsuperscript{210} The ICJ concluded that "the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be ‘necessary’ for that purpose."\textsuperscript{211} The CMS and \textit{Sempra} Tribunals adopted an interpretation similar to that of \textit{Gabcikovo-Nagymaros}, which required that the measures constituting a treaty breach were the only means available for the state with regards to the situation.\textsuperscript{212}

129. In this instance, the sovereign debt restructuring conducted by the Respondent, which incurred severe losses to bondholders and imposed retroactive CACs on Calrissian, were not the only means available to maintain economic stability. As a matter of fact, the IMF had suggested "several measures" for the Respondent, which were all aim at reduce Respondent’s debt-to GDP ratio.\textsuperscript{213} For a reason unknown, Dagobah decided to focus on

\textsuperscript{206} Corellia-Dagobah BIT, art 6(2).
\textsuperscript{207} Burke-White & Von Staden, at p 342.
\textsuperscript{208} VCLT, art 31.
\textsuperscript{209} Oxford English Dictionary, accessed online.
\textsuperscript{210} Burke-White & Staden, at p 344.
\textsuperscript{211} Nicaragua v USA, at para 141.
\textsuperscript{212} Gabcikovo-Nagymaros, supra note 200, ¶ 42; Sempra, supra note 205, ¶ 350; CMS, supra note 156, ¶ 323
\textsuperscript{213} Uncontested Facts, ¶ 15
implementing a new sovereign debt restructuring and "decided not to implement any of the other IMF suggestions."\textsuperscript{214}

2. **Respondent cannot invoke the customary defense of necessity and is fully responsible for its breach of the Corellia-Dagobah BIT**

130. Respondent cannot be exonerated from its liability resulting from its breach of the Corellia-Dagobah BIT. The customary defense of necessity’s requirements are cumulative\textsuperscript{215} and found in Article 25 of the ILC:

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:

   i. is the *only way* for the State to safeguard an *essential interest* against a *grave and imminent peril*; and

   ii. *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:

   iii. the international obligation in question excludes the possibility of invoking necessity; or

   iv. *the State has contributed to the situation of necessity.*\textsuperscript{216}

   [Emphasis added]

131. As stated in *Gabcikovo-Nagymaros*,\textsuperscript{217} Article 25 from the ICL Articles is now widely recognized as reflecting the customary international law defense of necessity.\textsuperscript{218} Respondent cannot invoke this defense because (A) its financial crisis was not a grave and imminent peril, (B) Respondent’s financial stability is not an essential interest, (C) the SRA was not the only way to address it and (D) its adoption seriously impairs an

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\textsuperscript{214} Procedural Order No. 3, *supra* note 174, ¶ 36.
\textsuperscript{215} *Binder*, at p 74; *Newcombe & Paradell*, at p 516.
\textsuperscript{216} *ILC Articles*, art 25.
\textsuperscript{217} *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, at para 51.
\textsuperscript{218} *M/V/ Saiga (No. 2) (St. Vincent v. Guinea)*, at p 5; Occupied Palestinian Territory at para 140; *Dolzer & Schreuer* at p 184.
essential interest of Calrissian through its bondholders. In any case, (E) the defense of necessity is inadmissible because Respondent contributed to its financial crisis.

A. Respondent’s financial crisis was not a grave and imminent peril

132. Respondent’s economic crisis did not amount to a grave and imminent peril. In interpreting Article 25 of the ILC Articles, the Tribunal must consider that this provision codifies and reflects the international customary defense of necessity, which is to be narrowly interpreted as it originally applied only to measures necessary to a State’s self-preservation leading to violation of international obligations. The customary defense of necessity is rarely accepted because it is very restrictive and investment treaties provide extensive protection for investors. The peril has to be objectively established on the basis of the evidence reasonably available at the time, and cannot yet have occurred.

133. Respondent’s financial instability cannot be considered a grave peril. The CMS, Enron and Sempra tribunals, for instance, found that the 1998-2002 Argentine economic crisis did not fulfill the definition of a grave and imminent peril. In CMS, it was held that although the economic crisis was harsh, there was no "total economic and social collapse," while tribunals in Enron and Sempra further asserted that "events were not out of control or unmanageable."

134. The ICJ Nicaragua case gives an example of the rejection of the state of necessity defense because the peril was not imminent: "these measures were only taken, and began to produce their effects several months after the major offensive." Similarly, Respondent’s financial crisis was not an imminent peril. As a matter of fact, the SRA was enacted in 2012 to address Respondent’s inability to meet its debt obligations, nearly

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219 Newcombe & Paradell, at p 516.
220 Sloane, at p 454.
221 ILC Articles, art. 2.
222 Binder, at p 81.
223 ILC Draft Articles, arts. 24-25.
224 Newcombe & Paradell, at p 518.
225 Newcombe & Paradell, at p 518; CMS v Argentina, at para 355.
226 Newcombe & Paradell, at p 518; Enron v Argentina, at para 307; Sempra v Argentina, at para 349.
227 Nicaragua v USA, at para 237.
228 Uncontested Facts, at para 16-17.
two years after it was hit by a recession and another sovereign debt became evident. As a result, by the time the SRA came into effect in 2012, Respondent was already in a financial crisis which had been in the making for years. The SRA was thus adopted a posteriori of the financial crisis, and was well beyond "imminent in the sense of proximate."

B. Respondent’s essential interests are not seriously impaired

135. Respondent’s essential security interests were not seriously impaired by the economic crisis. The customary defense of necessity protects breaches of treaty obligations that are of a "lesser weight of urgency" than a State’s essential interest threatened by a "grave and imminent peril." The State makes a choice "between suffering the grave and imminent peril and violating an obligation protecting an interest of lesser importance." The essential interest at stake must outweigh all other considerations on a reasonable assessment of competing interests. The Sempra and Enron tribunals asserted that "the very existence of the State and its independence" must be at stake. The Tribunal in Enron went further in explaining the State invoking necessity must take into consideration the investors’ essential interests:

[b]e that as it may, in the context of investment treaties there is still need to take into consideration the interests of private entities who are the ultimate beneficiaries of obligation as explained by the English court case in OEPC noted? The essential interest of the Claimants would certainly be seriously impaired by the operation of Article XI or state of necessity in this case.

136. In the present case, though Respondent underwent a recession in 2010 and experienced some social unrest in the form of demonstrations, its economic hardships did not in

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231 Uncontested facts, at para 3-4.
232 Crawford, at p 183.
233 ILC Articles, at p 15.
234 ILC Articles, art. 25.
235 Sloane, at p 460.
236 ILC Articles, at p 84; Sempra v Argentina, at para 352.
237 Alvarez & Khamsi, at p 18; Enron v Argentina, at para 306; Sempra v Argentina, at para 348.
238 Enron v Argentina, at para 342.
240 Procedural Order No. 3, at para 38.
fact outweigh "all other considerations" and "competing interests." Respondent’s sovereign debt restructuring overlooked Corellian investors’ essential interest to be given "fair and equitable treatment and [and] full protection and security in the territory of [Respondent]" as well as its commitment to "create favourable conditions for investors of the other Party to invest capital in its territory" pursuant to Article 2 of the Corellia-Dagobah BIT. Respondent’s interests were not impaired to the point at which Respondent could breach its commitments to Corellia and its investors in an international investment treaty.

C. Respondent’s measures were not the only way to address its financial crisis

137. Respondent’s sovereign debt restructuring was not the "only way to safeguard an essential interest against a grave and imminent peril." In its Commentary, the ILC reiterates that in order for the State’s conduct to be justified by the customary defense of necessity, its measures must be the "sole means" available to remedy the situation. If alternative measures can be taken to address the situation, albeit "more costly or less convenient," the State’s responsibility cannot be excused.

138. In CMS, the Tribunal found that the measures taken by Argentina in addressing its sovereign debt crisis were not "the only steps available," noting a variety of policy alternatives such as "[…] the dollarization of the economy, granting of direct subsidies to the affected population or industries and many others." In addition to this, it was determined in Sempra that measures taken under the Argentine Emergency Law were not the only way to address the economic crisis:

[a] rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It is therefore difficult to justify the position that only one of them was available […]

241 ILC Articles, at p 84; Sempra v Argentina, at para 352.
242 Corelia-Dagobah BIT, art 2(1), 2(2).
243 Gabčíkovo-Nagymaros (Hungary v Slovakia), at para 54; Sempra v Argentina, at para 351.
244 ILC Articles, art. 25.
245 ILC Articles, art. 25.
246 CMS v Argentina, at para 324; Crawford, at p 183.
247 CMS v Argentina, at para 323.
248 Sempra v Argentina, at para 350.
139. Similarly, Respondent’s sovereign debt restructuring, which reduced the net present value of Calrissian’s sovereign bonds and amounted to imposing retroactive CACs, was not the only possible way to address Respondent’s financial instability according to Article 25 of the ILC. Respondent pursued a sovereign debt restructuring and "decided not to implement any of the other IMF suggestions." Respondent could have taken alternative measures such as granting direct subsidies to key industries in order to foster economic recovery.

D. Respondent’s measures seriously impair an essential interest of Corellia through its bondholders

140. Respondent’s sovereign debt restructuring did "seriously impair an essential interest" of Corellia through its national bondholders.

141. The customary international law on the treatment of aliens has held for centuries that a State’s "arbitrarily unreasonable" laws towards an alien were in fact an affront to the alien’s home State’s sovereignty, thus allowing diplomatic protection. As Borchard explained:

Each state in the international community is presumed to extend complete protection to the life, liberty, and the property of all individuals within its jurisdiction [...]. If it fails in this duty towards an alien, responsibility is incurred to the state of which he is a citizen, and international law authorizes the national state to exact reparation for the injury sustained by its citizen [emphasis added].

142. It thus follows from an interpretation of the customary international law on the treatment of aliens that "whoever uses a citizen ill, indirectly offends the state." In this instance, the injustices suffered by Calrissian through the decrease in its sovereign bonds’ value,
the restriction of its access to legal action through retroactive collective actions clauses\textsuperscript{257} and the removal of its individual right to oppose amendments to its sovereign bonds\textsuperscript{258} also affected Corellia’s essential interest to the economic prosperity of its nationals as well as the respect of Respondent’s international treaty obligations.\textsuperscript{259}

### E. Respondent contributed to its financial crisis

143. In any case, Respondent cannot invoke the state of necessity defense because it has "contributed to the situation giving rise to a state of necessity."\textsuperscript{260} Economic crises such as Respondent’s will always have been influenced by internal factors—a state’s domestic economic policy—as well as exogenous factors—international economic developments.\textsuperscript{261}

Tribunals in \textit{CMS}, \textit{Enron} and \textit{Sempra} found that the burden for Argentina’s economic crisis did not "fall entirely"\textsuperscript{262} on external factors. Argentina’s contribution to the crisis was substantial in that it "found its roots"\textsuperscript{263} in earlier economic crises and more than one political administration.\textsuperscript{264}

144. As early as 2003, Respondent experienced economic problems as a result of a perilous financial policy involving "a decade of heavy borrowing on international financial markets" and "high government budget deficits."\textsuperscript{265} Moreover, The Global Financial Herald asserts that Respondent’s "significant issue of tax evasion had remained long unaddressed."\textsuperscript{266}

\textsuperscript{257} \textit{Uncontested Facts}, at para 21.
\textsuperscript{258} \textit{Uncontested Facts}, at para 17, \textit{Procedural Order No. 2}, at para 17.
\textsuperscript{259} \textit{Mavrommatis (Greece v Britain)} at p 12.
\textsuperscript{260} \textit{Sempra v Argentina}, at para 353.
\textsuperscript{261} \textit{Binder}, at pp 77-78.
\textsuperscript{262} \textit{Sempra v Argentina}, at para 354; \textit{Enron v Argentina}, at para 311-312.
\textsuperscript{263} \textit{Sempra v Argentina}, at para 228-329
\textsuperscript{264} \textit{CMS v Argentina}, at para 328-329; \textit{Sempra v Argentina}, at para 353-354; \textit{Enron v Argentina}, at para 311-312
\textsuperscript{265} \textit{Uncontested Facts}, at para 3
\textsuperscript{266} \textit{Dagobah’s Economic Crisis in the Context, Global Financial Herald}, Dec. 12 2011
The Respondent respectfully asks the Tribunal to find that:

1. The PCA Tribunal's interpretation of 'investment' is binding;

2. The Tribunal has jurisdiction over Calrissian's claim;

3. The sovereign bonds' forum selection clause does not bar the Tribunal's jurisdiction;

4. Respondent breached the Fair and Equitable Treatment guaranteed in Article 2(2) of the Corellia-Dagobah BIT;

5. Respondent cannot invoke necessity to excuse its breach of the Corellia-Dagobah BIT.

TEAM FABELA

On Behalf of Claimant
Calrissian & Co., Inc.