TEAM: HIGGINS

GERMAN INSTITUTION OF ARBITRATION

IN THE PROCEEDINGS BETWEEN

CONTIFICA ASSET MANAGEMENT CORP.  
(CLAIMANT)  

V.  

REPUBLIC OF RURITANIA  
(RESPONDENT)  

CASE № **************

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<td>IMF Staff Team</td>
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<td>Principles</td>
<td>Principles for stable capital flows and fair debt restructuring – Report on implementation by the principles consultative group, (September 2011)</td>
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<td>Certain German Interests</td>
<td>Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p.14</td>
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<td>CMS</td>
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<td>Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), (May 22, 2007), Award.</td>
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<td>Fedax</td>
<td>Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (Jul 11 1997).</td>
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<td><strong>Saluka</strong></td>
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<td>Tokios Tokeles v. Ukraine, Decision on Jurisdiction, ICSID Case No. ARB/02/18 (29 April, 2004).</td>
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<tr>
<td>Waste Management, Inc. v. United Mexican States (“Number 2”), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)</td>
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ISSUE 1: The Tribunal has jurisdiction over the claims submitted by the claimant

1. Jurisdiction has to be determined solely based on the criteria mentioned in the BIT.

1. The Correlia-Dagobah Bilateral Investment Treaty ("BIT") constitutes the governing law for the present proceedings that have been instituted for the alleged violation of various treaty provisions. Consent of the parties forms the basis of every arbitral proceeding. In a contract-based arbitration, the consent is specific to the disputes that arise from that contract. A treaty-based arbitration is a unique category of contract-based arbitration where the Contracting States consent to claims by all the present and potential investors subject to the satisfaction of the nationality requirement along with the fulfillment of requirements for a valid investment.

A) The Tribunal has jurisdiction rationae materiae

2. The BIT defines investment in a broad, illustrative and non-exhaustive list of the possible forms of an investment stating that: "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." followed by a non-exhaustive list of the possible forms it may take.

3. It has been argued that he understanding of the concept of investment in financial markets differs from the one used in a foreign investment context. The question of whether sovereign debt instruments like bond security entitlements fall within the ambit of Art. 1 of the BIT is a question of interpretation, not an issue of consent. In further articles the Claimant therefore submits the context surrounding the present case in order to fulfill the general rule of
interpretation requirement set forward in the Vienna convention according to which “a treaty shall 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.”

4. The Respondent and Correlia had always had a close diplomatic and economic relationship. When entering into the BIT, the Respondent was fully in understanding of Correlia's generally known sophisticated financial and banking industry and of a legitimate expectation on the side of bond-oriented investors.

5. The Correlia-Dagobah BUT was a part of a privatization and internationalization play undertaken by Dagobah's government to stimulate economic growth. It would be an oversimplification to consider the privatization and internationalization process as merely a transfer of tangible property from the public sector to a private investor. Debt restructurialization is a complicated process affecting a variety of state activities, including financial instruments. Financial instruments inherently include bonds. The absence of which in a non-exhaustive list of possible forms of investment in its explicitly mentioned purpose of simply explanation the scope of the BIT to as widest range of recipients.

6. The simple purpose of BITs is, as stated in the preamble, promotion of “stimulating the flow of private capital.” It is a fact that foreign investors take relevant business decisions based on the existing legal framework of the host state. Possible investors come from a wide spectrum of fields and have to be able to predict their success in a reasonably stable legal environment. Legal representation of the Claimant, as a business in its objectively viewed character, considers as a noticeable object of Article 1 to communicate to mentioned recipients to assure them of a commitment on the part of the state. The list stated in Article 1 of the BIT can therefore not exclude or prevent other possible forms of business operations from the same level of examination as forms expressively stated in the BIT for both of these have to fulfill investment characteristics of commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and other characteristic that are not mentioned but inherently connected to the scope of the definition, meaning as a territorial link. The link need not be made explicit: the whole architecture of an investment treaty rests upon the imposition of constraints upon the exercise of territorial jurisdiction by the contracting state parties.

7. Most significant is the element that the transaction is of special importance to the economy of the host State (schreuer, par. 204)
B) COMMITMENT OF CAPITAL AND EXPECTATION OF GAIN AND PROFIT CHARACTERISTICS

8. The commitment of capital characteristic stresses that the transaction is of a special importance to the economy of the host state. Thorough analysis of where was the capital derived from the bonds specifically applied by the state in order to connect the commitment of the investor to a specific state activity would be futile and would not lead to a clearer understanding. As is stated in Procedural order No 3 the funds derived from the bonds formed part of the general state budget. It is reasonable to consider this basis as a fulfillment of a specific characteristic stated in the BIT.

9. It is a general understanding that bonds are a promises to pay and as such they inherently include an expectation of profit proportional to a risk they face. The Claimant, as a business venture, considers its activities as profit-making and the sole fact of retroactive sovereign intervention as an unjust obstacle in conflict with a transparent and stable environment of the financial market to which the Respondent, as a party to the BIT, voluntarily committed.

10. It is Claimants position that both stated characteristics are fulfilled and that none of these were at any point disputed by the Respondent.

ASSUMPTION OF RISK CHARACTERISTIC

11. Claimants disputed activities embodied in bonds face a number of potential risk, as many bussiness ventures do. Simultaneously, risk involved in a activity is compensated by a proportional profit. The higher the risk is the higher the targetet profit stands. With higher risk also a range of risks broadens until one reaches a random chance. The opposite applies for reverse course.

12. Bonds themselves face a number of possible risks. Such as changing interest rate risk which may be achieved by lifting out the existing bonds that pay a higher interest rate than the prevailing market rate. This increase in demand translates into an increase in bond price, further risks involve, f.e., reinvestment risk, inflation risk or liquidity risk. Some of which represent possible tools changing the value of the bonds more and some less. Some are even common for other financial products or activities.

13. Applying Respondents position by regarding listed risks as simply having commercial character would not be sufficient. Commercial character of an activity is recognizable as a very simple formula according to which from a certain entry value you receive a predictable output value. Unfortunately, on the basis of such an argumentation the present Tribunal would not be presented with the Claimants submission.
14. As was similarly determined by Ambiente tribunal given the risk of the host State's sovereign intervention, a risk that became manifested in Dagobah’s very default and restructuring, meaning the SRA Act, what is at stake is not an ordinary commercial risk.

15. Intervention manifested by SRA can not be considered as a mere default risk as in regular commercial meaning because the debt is honored, albeit with currency of lesser real value. The Respondent did not act as a regular commercial party to a contract. It misused its sovereign powers to enact a statute by which it altered its obligations without any compensation on the part of the investors. Such a risk, even with regard to previous historical sovereign restructuralisations, was not foreseeable to the purchasers since the effects of the SRA were applied retroactively.

16. Investment case law has seen financial instruments as a protected investment in majority of cases where such instruments were under scrutiny. Therefore, promissory notes and loans have been deemed to be covered. Adopting Respondents strict argumentation would deprive these instruments of the initial possibility of being protected by the BIT despite their proven contribution to a states economy, the primary objective of BITs everywhere.

17. On these grounds Claimant requests the Tribunal to rule that it has jurisdiction with respect to assumption of risk characteristics.

18. The question before the Tribunal is to decide whether the disputed bonds, i.e. their situs, is located in the host country. Unlike a factory in Ruritania, sovereign bonds, or bonds in general, are in their nature a form of investments-as-contractual rights and as such can not be as easily physically connected to a specific territory. Because the purpose of the territorial link requirement is not to exclude intangible forms of investment, it must therefore be read in an appropriate meaning.

19. The territorial link is necessary because a state’s jurisdiction in international law to enforce its laws and regulations is territorial, and, the raison d’être of an investment treaty is precisely to reduce the sovereign risk associated with a state's enforcement jurisdiction. Territorial link therefore “borders” states capability of executing its sovereign powers. As long as the investment is in these imaginary borders a state is able to intervene and a possible breach of its obligations exists.

20. As previously stated, in contrast to typical foreign investments, sovereign bonds are intangible capital flows, their situs is therefore more difficult to determine. Elements to be taken into account by the Claimant in the situs determination include the place of marketing and
listing, the courts with jurisdiction and the governing law. As to the first two elements the
disputed bonds were initially listed and acquired in Dagobah and domestic courts were also
awarded jurisdiction over contractual disputes concerning the bonds. As the governing law
was chosen the law of Dagobah until the bonds were replaced on 12 February 2013. This
change does not trigger the fact that at the time of breach the bonds were governed by the
law of Dagobah and the change therefore does not interest the tribunal in the present case.
In result of the governing law Dagobah had a factual ability to intervene in the bonds in the
same way it would have in any other tangible property, i.e. the factory in Ruritania.

21. To conclude the question of whether the bonds do constitute an investment for jurisdicctional
purposes, the Claimant submits that the answer is affirmative since: (i) they do fulfill broad
definition of investment in respect of expressively stated characteristics in Article 1; (ii)
their situs as intangible property is the host state; (iii) they satisfy the territorial link with
respect to their specific form as intangible property.

C. THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE.

22. The place of incorporation or the 'nationality' of an entity is the sole requirement for it to
qualify as an 'investor' under the BIT. The Claimant, Calrissian & Co., Inc., is a legal person
established in the territory and under laws of the Corellian Republic.

23. It is submitted that since the Contracting States are free to choose the applicable test for
determining who shall qualify as an investor, the jurisdiction of the present tribunal stands
restricted to what the parties have decided and laid down in the BIT.

24. The provisions of the BIT binds the tribunal and it cannot impose upon the parties a
definition of 'Investor' other than what the contracting parties to the treaty have themselves
agreed.

25. No such general principle of international law exists which requires an investigation into
how a corporation operates when the applicable treaty solely requires the investor to be
organized in accordance with the laws of a host state.

26. According to the Vienna Convention on the Law of Treaties, the words of a treaty provision
should be given a plain and ordinary meaning. As per the BIT, if the entity is incorporated
according to the law of the contracting state, it shall be entitled to protection of the BIT.

27. On the basis of aforementioned arguments, Claimant submits that requirements for
jurisdiction Ratione Personae are met.
C. THE TRIBUNAL HAS JURISDICTION RATIONE VOLUNTATIS.

28. The Contracting States have consented to resolve the disputes concerning investments through international arbitration at the option of the investor. The States further consented to submit to the jurisdiction of the tribunal constituted as per the provisions of Article 8 (2) (c) of the BIT.

29. As to the requirement of an attempt at amicable settlement (Article 8(1)), the question before the Tribunal in the present case is to whether and to which extent it sets forth binding obligations. It is only appropriate to point that a number of recent decisions by arbitral tribunals have dealt with this question. Before examining these decisions, it is useful to look at a judgment of the International Court of Justice (further referred to as “ICJ”) that addressed a similar issue in a dispute between States.

“In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compulsory clause in that treaty ... It would make no sense to require Nicaragua (the Claimant, a.n.) not to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned.”

30. Application of abovementioned judgment is further appropriate due to the fact that, as in the present case, the clause in both cases does not specify a period of time during which a settlement is to be attempted. Negotiations that are prior to the dispute therefore amount to no more than a formality and should not be insisted upon as a prerequisite for jurisdiction but merely provide for procedural prerequisites which do not need to be strictly followed.

31. Whilst a provision calling for negotiations, either over a prescribed period of time or without it, is procedural, it should not be rendered a dead letter by condoning a dispute resolution strategy that leaves no room for an amicable settlement. If proceedings are instituted by the claimant investor before the expiry of the prescribed period (if such is required to begin with), then the onus is on the claimant to demonstrate with clear evidence that any further negotiations with the respondent host state would be futile.

32. Dagobah-Correlia BIT states the requirement that any dispute relating to investments falling into its scope of application “shall be, as far as possible, be settled amicably through
negotiations”, wording commonly found in international investment treaties. In Claimants opinion, the language of the provision clearly suggests that it creates a duty for the Parties to enter into consultations. The concern should be pointed at to which extent is it just to demand that the Claimant fulfill this duty.

33. The tribunal in Ambiente case characterizes the addition of the wording “insofar as possible” or “as far as possible” as a certain type of binding provision, namely an “obligation of means” or of “best efforts”. In the tribunal’s opinion, the language indicates that if the Claimants can show that consultations were not possible, they cannot be held to have breached the duty incumbent upon them.

34. The Claimant therefore submits a conclusion reached by both tribunals in Ambiente and Abaclat case stating that that consultation “is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the likelihood, of a positive result” and that “it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. Willingness to settle is the sine qua non condition for the success of any amicable settlement talk.”.

35. Applying these conclusions to the present case, no consultations between the parties have taken place. In 2012, during the time which the government offered to exchange bonds was open for acceptance by Correlia’s creditors, Dagobah adopted the Sovereign Debt Restructuring Act No. 45/12 (further referred to as “SRA”) which prevails over any contrary legislation of general or special provisions or regulations issued by the administration or agreements. In fact, this law prevented the Correlian investors from even entering into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition.

36. In its impact, the SRA made any negotiations not only meaningful, but also possible at the cost of violating the legal order of the Respondent, specifically the SRA. Hence, at least since the adoption of this law it was clear that no realistic possibility of meaningful consultations to settle the dispute with the Respondent existed.

37. The Tribunal should therefore clearly decide on why the Claimants would have fallen short of complying with Art. 8(1) of the BIT by not having had initiated consultations.
ISSUE 2: The PCA arbitral tribunal award is binding for the tribunal in the present case

2 GROUNDS FOR STATE-TO-STATE DISPUTE

38. As a result of the debt restructuring on 7 May 2001, reducing bond's face value by 43%, and IMF recommendations addressing the implementation of the debt restructuring process in Dagobah, concerned Corellia nationals pointed to the need to clarify the language of the BIT with respect to regarding sovereign bonds as investments worthy of protection.

39. The following diplomatic negotiations initiated by Corellian representatives were unsuccessful in revealing the scope of the protection in relation to sovereign bonds fulfilling the requirement of dispute between the parties as laid down in Article 7 of the BIT.

40. For the purpose of achieving authentic interpretation of the BIT, in case of possible ambiguity between the parties, Article 7 of the BIT allows the Permanent Court of Arbitration (further referred to as "PCA") to substitute one or both parties will and decide on the interpretation issue that had arisen. The final award is to be acknowledged as an authentic interpretation and by its nature detects the boundaries of the will expressed by the parties in the prime wording of the BIT.

41. On 23 April 2003, the PCA Arbitral Tribunal unveiled that sovereign bonds were investment within the definition of the Corellia-Dagobah BIT and that the bondholders of both countries were entitled to resort to the investor-state dispute settlement as laid down in the Article 8 of the BIT.

3 SHARED INTERPRETIVE AUTHORITY

42. Investment treaties are usually signed between developed (capital-exporting) and developing (capital-importing) states and most of the cases have been brought by investors from capital-exporting states against capital-importing states. This separation of roles has often deprived treaty parties of a commonality of interest, which hinders their ability to reach common interpretive agreements and practices. Therefore the independent mechanism providing binding abstract interpretation of the BIT enhances predictability and consistency and meets the object and purpose of the treaty.

43. States, and only states, make international law, however by consenting to arbitrate treaty parties delegated some interpretive power (and hence some level of creation) to them. It is
noteworthy that the Corellia-Dagobah BIT divides the dispute resolution mechanism between state to state arbitration in Article 7 and investor state arbitration in Article 8 of the BIT.

44. The treaty parties keeps a certain level of interpretation power because “[t]he existence of directly enforceable non-state actor rights does not translate into a complete abdication of the treaty parties’ interpretive rights.”

45. Interpretive authority is therefore shared between the treaty parties, investor-state tribunals, and state-to-state tribunals. Dispute resolution mechanisms provided by Articles 7 and 8 hence do not stand independently from each other but in fact stand as one in order to provide “effective means of asserting claims and rights enforcement”. The goals of investor protection and the depoliticization of investor-state disputes are not absolute.

46. Article 9 para. 1 of the BIT reads as follows: *If one Party or its designated Agency makes a payment under an indemnity given in respect of an investment in the territory of the other Party, the latter Party shall recognize the assignment to the former Party or its designated Agency by law or by legal transaction of all the rights and claims of the Party indemnified and that the former Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the investor indemnified.*

47. This provision allows a treaty party to invoke investors rights and clearly demonstrates, that state to state arbitration and investor state arbitration shall not be strictly separated.

4  **RESPONDENT OBJECTIONS**

48. In its Answer to the Request for Arbitration from 4 October 2013 the Respondent stated, that the effects of the above mentioned decision were restricted to the context it was rendered (economic crises and following debt restructuring in 2001) and that interpretative decision is not of an nature to amend the BIT.

49. To the first objection the Claimant states that the PCA Tribunal decision provides abstract interpretation of the Article 1 of the Corellia - Dagobah BIT and as such is not connected to any particular context.

50. The BIT involves a low level of precision, the commitments are broad and vague, therefore it is nearly impossible to provide a clear distinction between interpretation and amendment, since they are situated on a spectrum.
51. Therefore, the Claimant states that such scrutiny whether the Award tends to be interpretative or amending would in fact lead to a review of such Award and can easily degrade the Tribunal conclusions and subsequently the will of the contracting Parties. A similar statement was made in the ADF Group Inc v United States of America case where the Tribunal stated that such scrutiny would "tend to degrade and set at naught the binding and overriding character of FTC interpretations”

52. The question whether the Award is rather interpretative than amending the BIT is marginal unless the PCA Tribunal manifestly exceeds its powers and the Award obviously goes beyond the scope of the BIT. In such a case the investor-state dispute Tribunal may have the power to differ from previous decision providing a proper justification. However, according to Claimant’s legal opinion, this is not the case since the sovereign bonds are capable of meeting the investment conditions defined in the Article 1 of the BIT.

5 IMPLICIT CONSENT

53. The Respondent had not challenged the PCA Tribunal Award and had taken no further legal actions against the Award. Moreover the “Article 12 – Duration and Termination of the BIT” is entitling either Party to send a written notice of BIT termination after a period of ten years. It is noteworthy that Respondent had never sent such notification and never revealed such intention.

54. In the light of the above mentioned the Claimant states that the Respondent had had enough appropriate legal and diplomatic instruments to challenge the PCA Tribunal Award however he had not taken advantage of any of them. Article 7 of the BIT, establishing the jurisdiction of the interpretational PCA Tribunal, is therefore applicable. The Claimant is therefore convinced that the Respondent had implicitly consented to the PCA Tribunal Award.

6 BINDING CHARACTER OF THE AWARD

55. The Claimant states that in the Article 7 of the BIT the Parties reserved themselves the power to invoke the arbitral interstate mechanism in order to clarify the meaning of disputed treaty rules.

56. By consenting to arbitrate disputes concerning the interpretation or application of the BIT, the Parties ceded interpretive authority to the PCA Arbitral Tribunal. Following this line the Tribunal award constitutes the agreed basis for interpretation of the BIT.
57. A typical model defining subjects in public international law says that “treaties, as contracts between or among nations, bestow legally enforceable rights only on states, and not directly on individuals”, i.e., states are considered as the only proper subjects of international law and therefore investors derive their rights defined in BIT through states, since they are not direct subjects of the BIT, but only its beneficiaries.

58. The PCA Tribunal award is interpretative decision necessarily connected with the BIT and as such becomes a legal obligation between the Parties. The Claimant therefore, as well, is entitled to invoke derivative rights from the BIT, and shall be entitled to invoke binding interpretation of the Article 1 of the BIT defined in the Award.

59. To support this reasoning the former general counsel of the World Bank Aron Broches stated, that in such a case “it would seem clear that the ICSID Tribunal will be bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration”. Same reasoning may be applied to a non-ICSID arbitration.

60. The concept of binding interpretative decision is well established in the field of international investment law. The Article 1131(2) of the NAFTA lays down that the Commission may issue an interpretation of the provision of the NAFTA, which shall be binding upon a Chapter 11 investor-state tribunal, i.e., the Commission provides binding interpretative decision for the Tribunal arbitrating investor-state dispute under NAFTA.

61. On these grounds, due to the aforementioned arguments, the Claimant claims to be entitled to invoke the interpretation of the Article 1 of the BIT stated in the PCA Arbitral Tribunal Award. This interpretation provides legal basis for jurisdiction and hence the SCC Tribunal is should apply the PCA Tribunal Award to the present dispute.

7 JOINT AGREEMENT

62. Alternatively, since the Parties delegated their powers to PCA Arbitral Tribunal, and since there is no other authentic and authoritative source of what Parties of the BIT intended, its award should have the same legal effect as a joint agreement by the Parties concerning the interpretation of the BIT.

63. The ICJ has in this context noted that, “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”. The same conclusion shall be applied to PCA Arbitral Tribunal interpretative award.
64. Additionally the Article 31(3) of the Vienna Convention, to which both the Dagobah and the Correlia are parties, provides that there shall be taken into account within the context: “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” Next, the Article 31(4) further provides that a “special meaning shall be given to a term if it is established that the parties so intended”. The quoted provision allows, according to the Claimant opinion the Award, to provide a subsequent agreement defining the term investment laid down in the Article 1 of the BIT.

65. Some authors go even further and proclaim that “where the State parties make unanimous submissions about how the treaty should be interpreted, tribunals should adopt their view as a matter of course”. For example Richard K. Gardiner states “that the agreement of the parties on an interpretation trumps other possible meaning seems obvious enough, given the nature of a treaty as an international agreement between its parties”.

8 Conclusion

66. In the light of the aforementioned arguments the Claimant claims that the Award of the PCA Arbitral Tribunal plays a key role in the question of jurisdiction of the Tribunal in the present case and the provided interpretation of the term investment defined in Article 1 of the BIT shall be binding to the extent applicable in the present case.

67. Alternatively if the above mentioned Award cannot be considered as binding, such Award provides agreed authentic source of interpretation (joint agreement) of the BIT and therefore the Tribunal in the present must read the BIT in the context of the Award.
ISSUE 3: The Tribunal disregard forum selection clause contained in the bonds

68. The Claimant sees as crucial to stress out that the dispute before the present Tribunal consists exclusively of treaty claims, specifically violation of Respondent’s obligations under Art. 2 of the Correlia-Dagobah BIT. No violation of contract concerned with bonds is neither claimed nor suggested by the Claimant.

69. Since in the event of claims characterized as contractual, the Tribunal may stay proceedings pending a decision of the competent court, even if the BIT offers arbitration for contract claims, the Claimant will provide the Tribunal with a distinct differentiation between contractual and treaty claims as were seen by previous tribunals.

70. In the present case, it must be stressed that Article 8 does not relate directly to the breach of a municipal contract. Rather it sets an independent standard. As was contested by the Vivendi tribunal "a state may breach a treaty without breaching a contract, and vice versa," and this is certainly true of Article 8 of the BIT. The same point is made clear in Article 3 of the ILC Articles according to which “the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.” In accordance with this general principle, whether there has been a breach of BIT and whether there was a breach of contract are different questions, both of which are determined by a reference to its own proper or applicable law.

71. For the purpose of differentiation we submit three characteristics distinguishing treaty claims from contractual claims. Firstly, breach of the Article 2 of the BIT stands by itself, independent on the contract. Secondly, breach of the concerned BIT is due to an act, specifically the SRA Act, in the exercise of Dagobahs sovereign authority rather than merely as a commercial party. And lastly, characterisation of the Dagobahs government’s actions as sovereign acts is fulfilled.

72. Under the burden of aforementioned differentiations the Claimant respectfully requests the Tribunal to decide it has jurisdiction and should rule on the claims asserted disregarding the forum selection clause contained in the sovereign bonds.

73. If the tribunal, against the aforementioned argumentation, would reach a conclusion that the disputed forum selection clause is applicable, the Claimant submits that in accordance with the SGS v Philippines tribunal the investor is generally unable to give up his rights under international law, since they are of a public interest character, at least a merely conflicting a
forum selection clause is insufficient. The sole existence of FSC contained in bonds can not be interpreted as waiving the right to arbitration stated in the BIT.
ARGUMENTS ON THE MERITS

ISSUE 4: The Respondent breached the fair and equitable treatment standard

The Claimant states that the Respondent through the process of restructuring breached the fair and equitable treatment standard defined in the article 2 of the Corellia-Dagobah BIT.

9 FAIR AND EQUITABLE TREATMENT

DEFINITION OF THE FET UNDER BIT

74. Article 2 of the BIT, entitled “Promotion and Protection of Investments” 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”. This standard of protection is in the theory commonly called “fair and equitable treatment” or FET.

75. FET is a broad standard open to interpretation however as the Tribunal in ADF Group pointed out, the requirement to accord fair and equitable treatment does not allow a tribunal to adopt its own idiosyncratic standard but “must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law”.¹

76. Therefore the standard is to be applied to the specific facts of the case in respect to the relevant external sources. In this view, certain elements can be discerned in the reasoning of the arbitral tribunals when dealing with FET. These elements are (1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality.

LEGITIMATE EXPECTATION

¹ ADF Group v. USA, para. 184
77. The tribunals in the cases TECMED vs. Mexico and MTD vs. Chile stated that FET shall 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.”

78. Legitimate expectation is considered as a key aspect of the FET standard. As was mentioned, the protected investments are usually long term projects involving significant financial means. During the last decades the FDI has been becoming more and more important for the state economy. Especially in the field of state budget financing, a significant shift from public sector financing to private sector financing can be seen which has become crucial in recent times. Emerging countries, such as with the case of Dagobah, rely on its financing largely in the private sector. Recent studies show that approximately 50% of the sovereign debts in the emerging countries are formed by the private sector financial instruments (FAD Debt Dataset 2003 and WEO September 2003). According to the Global Financial Herald the majority of Dagobah’s debt is in the form of bonds owned by private entities all over the world. It has to be noted that investors before investing, many times the immense amount of capital which cannot be generated internally, require certain guarantees. The Respondent in order to attract the investors willingly entered into the BIT relation which establishes such guarantees and provided the below-mentioned commitments. In this light it becomes clear that legitimate expectation is essential for the FDI concept since it protects the long term character of investments and secures the investors against misuse of sovereign regulatory power. It is hard to imagine that any investment would be made when the sovereign powers are considered absolute.

79. At the time of the investment the Claimant’s expectations were legitimately grounded on the Preamble of the BIT whose object is to provide “stable framework for investment” as well as Respondent’s representation to “commit to a more stable economy and financial sector”. Moreover the Treaty parties obliged themselves to “encourage and create favorable conditions for investors of the other party”.

80. In order to properly address the legitimate expectation issue, it is necessary to describe the circumstances under which the investment was made and the circumstances of first economic crisis which hit Dagobah in 2001. It is therefore necessary to distinguish specific attributes of legitimate expectation in this particular case, (1) the expectation of a crisis, (2) expectation of a debt restructuring and finally (3) expectation of measures to be taken in order to deal with such crisis.

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2Tecmed v. Mexico, para. 154.
THE RESTRUCTURING MEASURES ESSENTIALLY CHANGED THE EXISTING LEGAL FRAMEWORK

Retroactive domestic legislation breaches the FET

81. A breach of legitimate expectations will come into play if there is conduct “in breach of representations made by the host State which were reasonably relied on by the [investor]”. Such representations may result from opinions and statements released by administrative agencies.

82. As mentioned, the Claimant’s legitimate expectation was grounded on the Preamble of the BIT whose object is to provide “stable framework for investment”. The stable framework for investment is not created only by the contract itself, but it is also determined by the regulatory framework in which the investment is to be made. The Tribunal in CMS v. Argentina found that “there can be no doubt [...] that a stable legal and business environment is an essential element of fair and equitable treatment”. Likewise, the Tribunal in OEPC v. Ecuador held that “[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment”.

83. Investments, bonds particularly, are long term contracts which essentially rely on this environmental stability. The Respondent by agreeing to the BIT obliged himself not to change the investment regulatory framework in a way which could have not been reasonably expected by the investor and which dramatically changes the essential investment elements.

84. Protection of the foreign investor’s legitimate expectation therefore limits the leeway granted to legislator under domestic law because FET is an independent standard against which the domestic legal order is measured.

85. The Claimant did not expect the legal framework to remain totally unchanged in time however the retroactive SRA changed the very basics of the contract. It is not the retroactivity itself what breaches the FET standard it is the effect which the retroactive legislation has on the future treatment of the investor and his investment. "Planning stability at the time the investment is made, in terms of legal environment during the investment period, is major prerequisite for every investment decision and at the same time determines

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3 Waste management v. Mexico para. 98
4 International Thunderbird v. Mexico
5 CMS v. Argentina, para. 274.
6 Occidental v. Ecuador para. 183
the expectations that the investor may legitimately have regarding the future treatment of his investment.”

86. It has to be pointed out that SRA is not an output of general sovereign regulatory power which shall have prospective effect. It is in fact an ad hoc act dealing with one particular issue: debt restructuring. It won’t be applied in the future and its aim is to hit the several specific debt instrument. After the restructuring is finished the act will be consumed and perish. The Claimant argues that such approach lack consistency and breaches the principle of legal certainty.

87. The Respondent is likely to argue that retroactive legislative change, as stated in the SRA itself, was done in order to protect public interest. Assuming that the successful debt restructuring is the aim, the Claimant calls for proper balancing of creditors’ rights against the public interest. To compare those conflicting interest, it has to be answered what the attributes of successful debt restructuring are.

88. New bonds differ from old ones among others in these important terms, (1) they have different nominal value since the old bonds were subjects to 30% haircuts; (2) they contain acceleration clauses; (3) they contain collective action clauses, which were not present in the old bonds; and finally (4) they are governed by different law, by the law of Kingdom of Yavin.

89. The Claimant states that certain haircut and acceleration clauses may serve the public interest in successful debt restructuring however there is no reason to add collective action clauses and to change the governing law for the present debt restructuring process. Both changes have indisputable influence on the investment and its future. Particularly the change of the governing law might have a decisive impact on the investment. According to the Abaclat decision on jurisdiction, the governing law plays an important role in assessing whether territorial link is present in the investment or not. The change of the governing law could therefore in fact terminate the investment and investor protection under the BIT.

90. Such change is direct consequence of the SRA and could have not been reasonably foreseen by the investor in the time when the investment had been made. Therefore the debt restructuring process in the above mentioned sense breaches FET standard.

91. The Respondent did not balance any of the conflicting interests in the restructuring process as is shown by Article 2 para. 6 of the SRA which reads as follows:

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7 Stephan W. Schill, International Investment Law and Comparative Public Law, p. 584
The provisions of this Article aim to protect the supreme (overriding) public interest, are mandatory rules effective immediately, and prevail over any contrary legislation of general or special provisions or regulations issued by the administration or agreements. Their application does not generate or activate any contractual or statutory right in favor of the bondholders or the investors, nor does it activate any contractual or statutory obligation against the issuer or guarantor of the titles (securities), except for those that are explicitly referred to in the provisions of this Article.

92. It becomes clear that the aim of SRA is to protect the public interest and to suppress the creditors’ rights to possible extent. The Respondent therefore failed to apply balancing of conflicting interests on exceptional legislation and breached FET standard.

Collective action clauses as applied by the Respondent are unfair and inequitable

93. CACs may be considered a suitable instrument for helping effective debt restructuring however the fact itself does not mean that they cannot be misused and that they all fulfill the FET standard. The Claimant here submits that CACs, as used by the Respondent, are unprecedented and shall be stated as unfair and inequitable.

94. In order to protect minority against abuse of majority power, high quorums and majorities are required for fundamental matters (they are usually called reserved matters). Some CAC also distinguish matters requiring unanimity of votes, typically the change of governing law.\(^8\)

95. Typical English majorities and quorums in case of reserved matters for sovereign bonds are: a quorum of one or more persons holding not less than two-thirds (sometimes 75 per cent) of the bonds is required. A resolution affecting entrenched provisions normally requires a 75 per cent vote of those voting.

96. In case when minimum quorum is presented, at least 50% of all aggregate capital may bind all non-participating bondholders. Similar quorums and majorities contain EU model CACs. SRA defines in article 2 para. 3 a quorum “of at least half of the aggregate outstanding capital” and majority “of at least 75% of the participating capital”. In the other words, when minimum of aggregate capital is presented in the quorum only 37,5% of all participating capital may bind all eligible titles.

\(^8\) E.g. previous model of EU CAC
97. The Claimant states that this stands contrary to the democratic principles where a majority may rule upon a minority and not to the contrary. CACs defined in SRA hence cannot be held fair and equitable.

98. Moreover, when dealing with multiple issues, CACs contain so called aggregation or cross-series clauses which protect holders of a particular issue against abuses of CACs. Typically 75% or two thirds of bondholders representing particular issue at a quorate meeting shall bind the particular issue.

99. Therefore debt restructuring providing insufficient protection to bondholders of a particular issue against the abuses from holders of other issues, possibly issued by Respondent in order to control the rest of the bonds, cannot be considered fair and equitable.

100. Lastly, the CACs containing lower quorums and majorities, like EU model CAC, contain protection against disenfranchisement. Disenfranchisement provisions specify that notes owned or controlled by the sovereign-issuer do not count among the relevant voting body necessary to change payment terms. The intent is to bar sovereign-issuers from CAC participation, rendering the sovereigns unable to alter their own bonds.  

GOOD FAITH

101. In order to assess whether the good faith requirement has been followed in the debt restructuring actions taken by Dagobah it is necessary to analyze the specific characteristics of debt restructuring. Even though there is no codified process of debt restructuring or state bankruptcy, both the International Monetary Fund (IMF) and the Institute of International Finance (IIF) have developed general guidelines for how this process should take place.

102. The IIF Principles for Stable Capital Flows and Fair Debt Restructurings (the “Principles”) proclaim “a voluntary approach to debtor-creditor relations, designed to promote stable capital flows to emerging-market and other debtor countries through enhanced transparency, dialogue, good-faith negotiations, and equal treatment of creditors.”

103. The IMF policy, known as lending into arrears (LIA), establishes the conditions under which the IMF would be willing to lend to a sovereign debtor. This policy requires a state to make “a good faith effort to reach a collaborative agreement with its private creditors (the

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9 Keegan S. Drake, Disenfranchisement in sovereign bonds, p. 5
policy sets expectations on the form of the dialogue between the debtor and its creditors consistent with the good-faith effort)."\textsuperscript{11}

104. Next, the IIF Principles suggests that “debtors and creditors should engage in a restructuring process that is voluntary and based on good faith”, adding that “timely good faith negotiations are the preferred course of action toward these goals, potentially limiting litigation risk.”\textsuperscript{12}

105. It is clear that both policy documents recommend voluntary, good faith collaborative negotiation process which stands in straight contrast to the measures applied by Dagobah. Collaborative process presumes working creditors and debtor together to provide suitable solution for the alleged unsustainable debt situation.

106. Even though the Respondent consulted a committee representing the owners of approximately 50% of the aggregate nominal value of the bonds it does not mean the offer was negotiated. To the Argentinean debt restructuring negotiations the IMF stated that “Although Argentina met repeatedly with creditors, it had become clear by mid-2004 that these meetings were "largely procedural" and that the government did not intend to engage in substantive negotiations with creditors regarding the terms of the potential debt exchange offer.”\textsuperscript{13}

107. As mentioned above, sovereign debt in emerging countries is composed approximately of 50% by domestic creditors and these are often under the direct or indirect influence of the issuer, the Respondent.

108. The right to a fair hearing and participation in administrative proceedings played a role in the Metaclad v. Mexico case. The tribunal here found a breach of fair and equitable treatment because the investor was not properly involved. According to the Tribunal the investor should have been given the chance to participate in a meeting of a local town council that discussed whether a construction permit was to be given for the investor's waste landfill.\textsuperscript{14}

109. It has to be noted that the invitation to participate in the restructuring process contains a serious flaw regarding due process, when requiring the bondholders to declare their intent to do so within three working days from the date of publication, in order to be mentioned as

\textsuperscript{11} IMF, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework, at 11 (Apr. 2013).
\textsuperscript{13} IMF, “Argentina – Selected Issues,” at 70 (June 3, 2005).
\textsuperscript{14} Metalclad v. Mexico, para. 91
an eligible member of the consultative committee. The Claimant states that such condition is unfair and breaches the due process standard since it is practically impossible for foreign bondholders, especially hedge funds, to react in such short time period. Hedge funds have their internal decision making processes which need to be respected.

**Transparency**

110. Transparency is also considered as an important element of the FET and was applied by tribunals in several cases. For example the tribunal in the Tecmed case stated that “[t]he 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.” The Claimant states that the restructuring process lack transparency.

111. The IMF’s LIA policy requires sovereign debtors to “disclose the information needed to enable creditors to make informed decisions on the terms of a restructuring.” Similarly, the IIF’s Principles expect “disclosure of relevant information so that creditors are in a position to make informed assessments of their economic and financial situation, including overall levels of indebtedness.”

112. Even though the SRA was drafted pursuant to IMF recommendations, bondholders in fact were not provided necessary information about the Respondent financial situation, particularly about its capacity to pay. The Claimant was therefore unable to make informed decision about the restructuring offer.

113. In connection to the Argentinean crisis in 2005 the IMF stated that Argentina may have deliberately understated its economic forecasts in order to enhance its leverage with creditors:

> „The low official 2004 growth projection may, however, in part have reflected a strategic decision by the authorities to understate growth prospects to strengthen their bargaining position in debt exchange negotiations. Throughout late 2003 and 2004 there were pressures..."

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15 Metalclad v Mexico (Merits), paras. 76 and 89 (affirming a violation of fair and equitable treatment on this ground); Maffezini v Spain, para. 83; CME v Czech Republic, para. 611; Tecmed v Mexico (Merits), para. 152.
16 Tecmed v Mexico (Merits), para. 154.
on the Fund from the authorities to underestimate growth prospects for this same reason.”

114. The sovereign debtors, in a similar situation, may be easily economically motivated to misuse its power and “to renge whenever the expectation of further loans no longer exceeds in amount the interest payable on old ones.”

115. History shows that these thoughts are not empty, since some sovereign debtors have chosen to “default with some regularity, and when they do, often pay back a fraction of what they have borrowed.” Argentina is prominent example, having defaulted on its external debt eight times in 1827, 1890, 1951, 1956, 1982, 1989, 2001 and 2014. Another example is Ecuador, the record oil prices and two previous defaults in 1995 and 2000 had left the Ecuador with “an enviably manageable external debt profile.” Surprisingly the country defaulted in 2008 again. The motivation for the default was “domestic politics, not financial necessity.” Buchheit and Gulati complain that “the system designed to protect bondholders against such [an opportunistic] default [had] failed.”

116. In the light of the aforementioned the Claimant submits that the disclosure of relevant information is a key feature of transparent debt restructuring process. In any stage of the restructuring procedure the Dagobah did not provide bondholders more detailed information necessary to make decisions of key importance. The debt restructuring procedure applied by Dagobah therefore lacks transparency and cannot be held as being in conformity with the fair and equitable treatment standard.

19 IMF Staff Team from the European, Fiscal Affairs, and Policy Development and Review Departments, Ex Post Assessment of Longer-Term Program Engagement and Ex Post Evaluation of Exceptional Access, at 16 (Jul 11, 2006).
23 Id.
24 Id. at 22.
ISSUE 5: The Respondent’s actions cannot be exempt from breaching the Corellia-Dagobah BIT

10 DEFENSE OF NECESSITY

INVOCATION OF NECESSITY UNDER ARTICLE 6 OF THE CORELLIA-DAGOBAH BIT

117. Even in situation where the measures taken are considered “necessary to safeguard the Respondent’s essential security interests” the invocation of Article 6 of the Corellia-Dagobah BIT has its outer limits. These limits are found in the general principle of performance of treaty obligation as required by Article 26 of the VCLT.25

118. In the dissenting opinion to the Nicaragua judgment which dealt with the interpretation of the essential security clause in the FCN treaty between the US and Nicaragua, it was held that it would still be up to a tribunal to determine whether a party had invoked that clause in good faith.26

119. Furthermore, in the commentary to the VCLT it can be found that: “When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing. Good faith requires that the parties to a treaty act honestly, fairly and reasonably, and to refrain from taking unfair advantage. Legitimate expectations raised in other parties shall be honored. The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligation and from exercising its rights in such a way to cause injury to the other party ”27

120. On these grounds where the measures taken are not in conformity with the good faith the State cannot successfully invoke the NPM provision and must bear the costs of its actions.

GOOD FAITH REVIEW

121. The tribunal in Continental v. Argentina stated that invocation of the NPM “may justify setting aside or suspending an obligation, or preventing liability from its breach”28 and “the consequence could be that, under Art. XI, such measures would lie outside the scope of

25 “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention, art. 26
26 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 15 (June 27), at 311
28 Continental v. Argentina, para. 168
the Treaty so that the party taking it would not be in breach of the relevant BIT provision.

122. The CMS ad hoc Annulment Committee stated that: "[t]he consequence [of taking measures necessary for essential security interest] would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. ... Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met." In other words when invoking NPM the substantive provisions of the BIT are suspended and does not apply, hence no breach of the BIT may occur.

123. In case Article 6 of the BIT may be interpreted in a manner where successful invocation of the NPM clause regarding the measures having been adopted for the specified permissible objectives precludes the existence of a violation of the BIT with respect to any and all substantive treaty provisions, the Claimant states that such provision permits suspension of the operation of the BIT.

124. The Article 57 of the VCLT states that a treaty may be suspended in conformity with the provision of the treaty or at any time by the consent of all the parties after consultation with other contracting states. The above mentioned interpretation would in fact create a legal ground for suspension of all substantive provisions of the BIT with respect to the particular measures taken.

125. The suspension of the treaty must follow a procedure laid down in the Article 65. This Article provides that the party invoking suspension of the treaty’s operation has a duty to “notify the other parties of its claim”.

126. A notification is a communication by one State Party to another State Party or to other parties of an intention to suspend its operation. According to Article 67 para 1, the notification must be made in writing. Besides formal requirements of Article 78 the notification must fulfill three prerequisites in order to fulfill its function to inform the other parties.

- it must explain the parties claim
- it shall indicate the measures proposed to be taken

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29 Continental v. Argentina, para. 164
30 Cont'l Cas. Co. v. Argentina, Award, ICSID Case No. ARB/03/9, Sept. 5, 2008, para. 164
31 Vienna Convention, art. 6
32 Vienna convention commentary, p. 1144 para. 30
127. The only act made by the Respondent which might be considered as a notification in the sense of Article 65 is the Preamble of the SRA. The Claimant however states that this “notification” fails to fulfill the previously defined requirements in several points.

128. First, the notification is according to Article 65 para. 2 meant to be sent prior the measures proposed being taken. It is clear that “notification” contained in the Preamble of the SRA was issued together with proposed measures, i.e. SRA.

129. Second, the Respondent fails to provide satisfactory explanation of the proposed measure. Since the claim of a breach of treaty or a defect in consent deviates from the principle of *pacta sunt servanda*, the State Party that invokes these grounds must state the reasons for its claim. Especially the Respondent provided no analysis of proportionality of such a measure. The Preamble also does not contain any claim regarding suspension of treaty operation.

130. Third and lastly, the “notification” did not meet the formal condition in Article 78. Generally, notification may be understood as a formal, unilateral act in international law, by a State informing other States or organizations of legally relevant facts and has to be transmitted directly to the State Party or the depositary, respectively.

131. ICJ in the Gabčíkovo-Nagymaros Project Case stated noted that Articles 65-67 VCLT, “if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.”

132. On these grounds the invocation of Article 6 of the BIT to the measures taken by Respondent was made contrary to the general principle of good faith and therefore Respondent actions cannot be exempted from breaching BIT.

133. Textual nexus between Article XX of GATT 1947 and Article XI appears more imagined than real.

**INTERPRETATION OF ARTICLE 6 CORELLIA-DAGOBAH BIT**

134. Article 6 “Essential security” of the Corellia-Dagobah BIT reads as follows:

Nothing in this Treaty shall be construed:

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33 Vienna convention commentary, p. 1144 para. 32
1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that are necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

135. The interpretation of any treaty instrument must be guided by Articles 31 and 32 of VCLT. Article 31 of VCLT instructs interpreters to look to the “ordinary meaning” of the text, in light of its “context” and the treaty’s “object and purpose.”

Article 6 para. 2 of the BIT is not meant to be self-judging

136. Article 31 of VCLT recognizes that states may assign special meanings to treaty terms if those special meanings are clearly established. It has to be highlighted that there is nothing in the text of the Treaty which indicates Article 6 to have a self-judging nature. Moreover, it is a common practice that, in case treaty parties intend a certain provision to have a self-judging nature, they expressly state such intent in the provision itself, typically by adding the phrase “it considers”. The Parties to the Corellia-Dagobah BIT obviously left the provision without this explicit intent.

137. The Respondent is likely to mention US model BIT, particularly in the context of the Argentinean crisis. However, as stated by ICJ in the Nicaragua case, “even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.”

138. The Treaty provision therefore needs to be interpreted in the specific context to the particular case. Moreover, the Article IX of the US-Argentina BIT was declared to have a self-judging nature because of evidences concerning travaux préparatoires and Protocols relating to the treaty conclusion. It has to be pointed out that there is no evidence suggesting the Article 6 is having a self-judging nature and therefore it cannot be given such special meaning.

139. On this ground the Claimant states that the Tribunal is allowed to substantially review the application of the Article 6.

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34 Vienna Convention, art. 31(4)
35 Nicaragua Judgment, at 95.
Article 6 shall not be interpreted in the light of the article XX of the GATT 1947

140. The Tribunal in the Continental v. Argentina case justified its reference to GATT and WTO case law on the claim that "the text of Article XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947."36

141. The Tribunal next interprets the term necessary in the light of the Korea-Beef case which according to the Claimant significantly lowers the threshold of necessity under Article IX of the US-Argentina BIT.

142. The Claimant argues that the textual nexus to between Article XX of GATT 1947 and Article 6 of the BIT is limited and not relevant in the meaning of Article 31(3)(c) VCLT. The Claimant does not dispute that GATT 1947 may provide a mean of interpretation, however it is not Article XX of GATT 1947 to be used for purposes of interpretation but Article XXI of 1947.

143. Article XX is denoted as "General Exception" and reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

144. In comparison Article XXI denoted as "Security Exceptions" reads as follows:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

36 Continental v. Argentina para 192
(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

145. According to Claimant Article XXI contains an obviously greater textual nexus to Article 6 of the BIT. First, the Article XXI is called Security Exceptions which obviously correlates with Article 6’s “Essential Security”. Second, Article XX of the GATT 1947 contains additional limits to its application which are not presented in Article 6, as well as in Article XXI of the GATT 1947. And most importantly, third, both Article 6 of the BIT and Article XXI of the GATT 1947 protect essential security interest.

146. On these grounds the Claimant states that interpretation guidance provide by the Tribunal in the Continental v. Argentina case is not applicable to the present dispute.

**Interpretation of the term “necessary”**

147. To the interpretation issue, the Claimant refers to decisions of ICSID tribunals in the cases Enron v. Argentina and Sempra v. Argentina related to the Argentinean economic crises between 2001 and 2002. Both tribunals came to the same result that the possibility of necessity defense cannot be interpreted independently from international customary law. Even though the decisions were later annulled, the annulments were based on the reason that the tribunals did not apply applicable law.

148. The above mentioned Tribunals stated that since the BIT does not provide a further explanation of the term essential security, “it is necessary to rely on the requirements of state of necessity under customary international law”\(^\text{37}\), as outlined in Article 25 of the Draft articles on Responsibility of States for internationally wrongful acts, and thus the BIT

\(^{37}\) Enron v. Argentina para. 333
“becomes inseparable from the customary international law standards insofar as the conditions for the operation of the state of necessity.”

149. Commentary to the VCLT provides that “the general rules of customary international law may serve to set the background of a treaty provision and, thus, contain important guidance as to its interpretation.” This is what ICJ did in the Oil Platforms (Merits) Iran v. United States case when it interpreted a clause contained in the bilateral treaty of friendship between Iran and the United States, which allowed for measures “necessary to protect the essential security interests” of either party, in the light of the general rules of international law on the use of force and the right to self-defense. The ICJ stated that “the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defense under international law.”

150. Since both necessity defense under customary international law and defense under BIT preclude liability for internationally wrongful act, the Claimant argues that customary international law defense of necessity provides “relevant” source for interpretation.

151. In the meaning of CIL defense of necessity the measures must be the “only way” and According to the Thirty-second Session of the ILC, “the adoption by that state of a conduct not in conformity with an international obligation binding it to another state must definitely have been its only mean of warding off the extremely grave and imminent peril which is apprehended; in the other word, the peril must not have been escappable by any other means, even a more costly one, that could be adopted in compliance with international obligation.”

152. The term “necessary” implies that measures taken were the only means to safeguard the essential security interest. It seems that term “only means” and “necessary” are interchangeable. According to the uncontested facts, the IMF recommended to the Respondent several more measures to deal with the crisis and therefore the measures cannot be considered necessary.

**Interpretation of the phrase “essential security interest”**

153. The measures taken have to be necessary and have to safeguard essential security interest. Giving the words ordinary meaning, the word security refers to safety. It was already mentioned that Article XXI “Security Exceptions” of the GATT 1947 provides relevant guideline for interpretation. This article further develops the phrase essential

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38 Enron v. Argentina para. 334
39 Vienna convention commentary, p. 562 para 95
40 NPM provision of Iran – US FCN Treaty
41 Iran v. US Oil Platforms, para. 40
security interest when stating that actions safeguarding essential security interest are to be taken in time of war or other emergency in international relations.

154. The Tribunal in the Enron v. Argentina case dealing with necessity under CIL said that it did not find convincing the argument that the economic crisis “compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State.”\textsuperscript{42} It has to be highlighted that Argentina was facing real present threat, riots, demonstrations etc.

155. The Claimant therefore states that the phrase “essential security interest” may cover financial crises, however the threat to the essential security interest must endanger the very existence of the State and its independence.

156. In the time of the debt restructuring, the Respondent’s debts were proclaimed unsustainable by IMF. According to the IMF Debt Sustainability Analysis unsustainable debt refers to situation, when a debtor’s incoming revenues are no longer able servicing its debt without debt restructuring or other suitable economic means.

157. According to IMF only inevitable consequence of debt unsustainability is the default, however default itself does not imply a threat to the essential security interest. The Respondent therefore has to prove inevitable link between default and severe economic crisis endangering essential security interest.

158. On this ground the Claimant states that the measures taken by respondent cannot be exempted from breaching Corellia-Dagobah BIT.

\textsuperscript{42} Enron v. Argentina, para. 306